Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

BOOK OF AUTHORITIES OF THE PLAINTIFFS
(Motion for Class Counsel Fee Approval, returnable October 27, 2023)

October 6, 2023

SOTOS LLP
180 Dundas Street West Suite 1200 Toronto ON M5G 1Z8

David Sterns/ Mohsen Seddigh
dsterns@sotosllp.com/mseddigh@sotosllp.com

Tel: 416-977-0007
Fax: 416-977-0717

KUGLER KANDESTIN
1 Place Ville-Marie
Suite 1170, Montréal QC H3B 2A7

Robert Kugler/Pierre Boivin/Alexandre Paquette-Dénommé
rkugler@kklex.com/pboivin@kklex.com/adenomme@kklex.com

Tel: 514-878-2861
Fax: 514-875-8424

MILLER TITERLE + CO.
300 - 638 Smithe Street
Vancouver BC V6B 1E3

Joelle Walker
joelle@millertiterle.com

Tel: 604-681-4112
Fax: 604-681-4113

Lawyers for the plaintiffs Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

NAHWEGAHBOW, CORBIERE
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

Dianne G. Corbiere
dgcorbiere@nncfirm.ca

Tel: 705-325-0520
Fax: 705-325-7204

FASKEN MARTINEAU DUMOULIN
55 Metcalfe St., Suite 1300
Ottawa, ON K1P 6L5

D. Geoffrey Cowper, K.C./Nathan Surkan
gcowper@fasken.com/nsurkan@fasken.com

Tel: 604-631-3185
Fax: 613-230-6423

Lawyers for the plaintiffs Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson

TO: **DEPARTMENT OF JUSTICE CANADA**
3 Forsyth Lane
Ottawa ON K2H 9H1

Paul B. Vickery
paul.vickery@justice.gc.ca

Sarah-Dawn Norris
sarah-dawn.norris@justice.gc.ca

Tel: 343-961-5625
Fax: 514-283-9690

Lawyers for the Defendant

Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

INDEX

16.	*Merlo v. Canada*, 2017 FC 533
17.	*Moushoom v. Canada (Attorney General)*, 2022 FC 1212
18.	*Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386 (Ont Sup Ct)
19.	*Riddle v. Canada,* 2018 FC 641
20.	*Smith Estate v. National Money Mart Co*, 2011 ONCA 233
21.	*Tataskweyak Cree Nation v. Canada (Attorney General)*, 2021 FC 1442
22.	*Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 153
23.	*Tk'emlúps te Secwépemc First Nation v. Canada*, 2023 FC 357
24.	*Lin v Airbnb*, 2021 FC 1260
25.	*Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415

TAB 1

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-030160-220
(500-06-000890-174)

DATE : 24 avril 2023

FORMATION : LES HONORABLES MARK SCHRAGER, J.C.A.
PATRICK HEALY, J.C.A.
CHRISTINE BAUDOUIN, J.C.A.

B… F…
APPELANT – demandeur/représentant
c.

LES CLERCS DE SAINT-VIATEUR DU CANADA
INTIMÉ – défendeur/demandeur en garantie
et
COLLÈGE BOURGET
FONDS D'ENTRAIDE DE L'ANCIEN SÉMINAIRE DE JOLIETTE
CENTRE INTÉGRÉ UNIVERSITAIRE DE SANTÉ ET DE SERVICES SOCIAUX DE LA CAPITALE-NATIONALE
INTIMÉS – défendeurs
et
LES MISSIONS SAINT-VIATEUR
FONDS LOUIS-QUERBES
INTIMÉS – mis en cause
et
INTACT COMPAGNIE D'ASSURANCE
INTIMÉE – tierce intervenante/défenderesse en garantie
et
TRAVELERS CANADA
ROYAL AND SUN ALLIANCE
MISES EN CAUSE – défenderesses en garantie
et

FONDS D'AIDE AUX ACTIONS COLLECTIVES
MIS EN CAUSE – mis en cause
et
JEAN-PHILIPPE GROLEAU
AMICUS CURIAE

ARRÊT

MISE EN GARDE : Une ordonnance limitant la publication a été prononcée le 25 août 2022 par l'honorable Robert Mainville, afin d'interdire la publication ou diffusion de quelque façon que ce soit de tout renseignement qui permettrait d'établir l'identité du membre dissident.

[1] L'appelant se pourvoit, avec l'autorisation d'un juge de la Cour, contre un jugement rendu le 4 juillet 2022 par la Cour supérieure, district de Montréal (l'honorable Thomas M. Davis), lequel rejette sa demande d'approbation d'une entente de règlement et d'honoraires professionnels intervenue dans le cadre d'une action collective intentée au nom de certaines victimes d'agressions sexuelles qui, depuis 1935, auraient été commises au Québec par des membres de la communauté religieuse de l'intimé ou par des employés de divers établissements relevant de celle-ci.

[2] Pour les motifs du juge Schrager auxquels souscrivent les juges Healy et Baudouin, **LA COUR** :

[3] **ACCUEILLE** l'appel;

[4] **INFIRME** le jugement de première instance;

[5] **ACCUEILLE** la demande d'approbation de l'entente de règlement, transaction et quittance signée les 26 et 28 janvier 2022 entre les parties (« l'Entente »);

[6] **APPROUVE** l'Entente, incluant les annexes dans leur intégralité, sauf quant aux honoraires d'avocats déterminés sur la base de 25 % du fonds du règlement à l'article 8 de l'Entente;

[7] **PREND ACTE** de l'offre des avocats des membres de réduire leurs honoraires à 20 % du montant du fonds du règlement;

[8] **FIXE** le montant les honoraires à 5 600 000 $ (plus les débours de 8 661,10 $ et les taxes applicables);

[9] **PREND ACTE** de l'engagement desdits avocats de rembourser 99 136,09 $ au mis en cause Fonds d'aide aux actions collectives;

[10] **ACCUEILLE** la demande de directives de l'*amicus curiae* et **DÉCLARE** que les honoraires et débours de l'*amicus curiae* sont payables par les membres à même le fonds du règlement;

[11] **DÉCLARE** que la Cour supérieure conserve compétence sur tous les autres aspects du dossier à venir;

[12] **LE TOUT** sans frais de justice.

MARK SCHRAGER, J.C.A.

PATRICK HEALY, J.C.A.

CHRISTINE BAUDOUIN, J.C.A.

Me Justin Wee
Me Alain Arsenault
Me Virginie Dufresne-Lemire
ARSENAULT DUFRESNE WEE AVOCATS
Me Robert Kugler
Me Pierre Boivin
Me Jérémie Longpré
KUGLER KANDESTIN
Pour l'appelant B… F…

Me Jean-Philippe Groleau
Me Guillaume Xavier Charlebois
DAVIES WARD PHILIPPS & VINEBERG
Amicus curiae

Me François-David Paré
Me Dominic Dupoy
NORTON ROSE FULBRIGHT CANADA
Me Francesco Calandriello
Me Michael Malka
CUCCINIELLO CALANDRIELLO AVOCATS
Pour l'intimé Les Clercs de Saint-Viateur du Canada

Me Camille Lefebvre
Me Emmanuel Laurin-Légaré
DE GRANDPRÉ CHAIT
Pour l'intimé Collège Bourget

Me François-David Paré
NORTON ROSE FULBRIGHT CANADA
Pour les intimés Fonds d'entraide de l'ancien séminaire de Joliette, Les missions Saint-Viateur et Fonds Louis-Querbes

Me Marie-Nancy Paquet
LAVERY DE BILLY
Pour l'intimé Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale

Me Elisabeth Neelin
LANGLOIS AVOCATS
Pour l'intimée Intact compagnie d'assurance

Me Gabriel Archambault
CLYDE & CIE CANADA
Avocats de la mise en cause Travelers Canada

Me Jean-Pierre Casavant, Ad. E.
Me Guillaume Carrier
CASAVANT BÉDARD
Pour la mise en cause Royal and Sun Alliance

Me Nathalie Guilbert
Me Frikia Belogbi
FONDS D'AIDE AUX ACTIONS COLLECTIVES
Pour la mise en cause Fonds d'aide aux actions collectives

Date d'audience : 7 mars 2023

MOTIFS DU JUGE SCHRAGER

[13] L'appelant se pourvoit, avec l'autorisation d'un juge de la Cour[1], contre un jugement[2] rendu le 4 juillet 2022 par la Cour supérieure, district de Montréal (l'honorable Thomas M. Davis), lequel rejette sa demande d'approbation d'une entente de règlement et d'honoraires professionnels intervenue dans le cadre d'une action collective intentée au nom de certaines victimes d'agressions sexuelles qui, depuis 1935, auraient été commises au Québec par des membres de la communauté religieuse des Clercs de Saint-Viateur du Canada (« **CSV** ») ou par des employés de divers établissements relevant de celle-ci.

[14] Dans le cadre du pourvoi, la Cour est appelée à décider si le juge a erré en refusant d'approuver l'entente au motif que les honoraires (8 048 250 $) y prévus pour les avocats des membres, représentant 25 % du fonds de règlement (28 000 000 $) plus les taxes, sont déraisonnables. La Cour doit aussi déterminer quelle partie doit supporter les honoraires de l'*amicus curiae* nommé en appel.

[15] En 2017, l'appelant dépose une demande d'autorisation d'exercer une action collective contre CSV. Cette demande est accueillie le 25 avril 2019 par une juge de la Cour supérieure[3]. Dans ce contexte, l'appelant mandate M^e^ Virginie Dufresne-Lemire du cabinet Dufresne Wee avocats, devenu depuis Arsenault Dufresne Wee avocats (« **ADW** »), pour agir en son nom et en celui des membres. La convention d'honoraires signée par l'appelant prévoit entre autres que :

- L'appelant consent à ce qu'il soit retenu sur les sommes perçues par M^e^ Dufresne-Lemire pour lui et pour les membres du groupe, s'il y a lieu, « 25 % des sommes totales reçues soit par règlement ou suivant un jugement ».

- Advenant une révocation de mandat avant la fin des procédures, l'appelant s'engage à indemniser M^e^ Dufresne-Lemire « pour le temps investi dans le dossier […] au taux horaire de 250 $ pour le temps de chacun des avocats, plus tous les déboursés encourus et les taxes applicables ».

[16] À l'époque, M^e^ Dufresne-Lemire et son associé, M^e^ Justin Wee, n'ont respectivement que trois ans et un an d'expérience. Cela les incitera à s'adjoindre d'autres avocats, dont M^es^ Alain Arsenault et Julie Plante, pour les accompagner dans le dossier.

---

1 *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1224 (Mainville, j.c.a.).
2 *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCS 2484 [jugement entrepris].
3 *A.B. c. Clercs de Saint-Viateur du Canada*, 2019 QCCS 1521.

[17] Après quatre ans de litige, plusieurs séances de CRA et de multiples journées de négociations, les parties parviennent à une entente de règlement, transaction et quittance (ci-après « **l'Entente** »), laquelle sera signée les 26 et 28 janvier 2022.

[18] Après publication de l'avis aux membres (art. 590 *C.p.c.*) approuvé par le juge de la Cour supérieure, l'appelant produit une demande d'approbation de l'Entente le 11 février 2022.

[19] L'Entente prévoit notamment les modalités suivantes :

- Un fonds de règlement à titre de recouvrement collectif sera constitué à partir (1) d'un montant de 28 000 000$ « en capital, intérêts, indemnité additionnelle, frais et toutes taxes applicables » à être versé par CSV et les « parties impliquées » (Collège Bourget, CIUSSS de la Capitale-Nationale[4], Fonds d'entraide de l'ancien Séminaire de Joliette, Les Missions Saint-Viateur, Fonds Louis-Querbes, Travelers et Royal and Sun Alliance), ainsi que (2) du montant que CSV recevra des autorités fiscales, le cas échéant, à titre de remboursement de la TPS et de la TVQ relatives au compte d'honoraires des avocats des membres.

- Le fonds de règlement servira : (1) à indemniser les membres dont la réclamation sera acceptée à l'issue de la clôture du processus d'adjudication; (2) à payer les honoraires extrajudiciaires et judiciaires des avocats des membres; et (3) à payer et/ou rembourser les débours, frais et autres dépens encourus dans le cadre de l'action collective, ainsi que « tout montant découlant d'un recours subrogatoire aux droits des membres », s'il en est.

- Un compte pour les honoraires des avocats des membres, adressé à CSV, au montant de 8 048 250 $ (représentant 25 % du montant de 28 000 000 $, plus les taxes), couvrant les honoraires, ou « tout autre montant autorisé par la Cour », sera transmis dans les 10 jours après que le jugement approuvant l'Entente ait acquis force de chose jugée, « sous réserve de l'approbation du tribunal ».

- L'appelant donne aux parties défenderesses, « personnellement et au nom des membres du Groupe […] ainsi que de leurs successeurs, héritiers et ayants-droits [sic], une quittance complète, finale et définitive […] ».

- Les avocats des membres seront les seuls responsables de l'élaboration et de la détermination des modalités du processus d'adjudication, sous réserve des modalités prévues à l'Annexe 3 de l'Entente. Le processus d'adjudication sera présidé par l'honorable Claude Champagne, juge à la retraite de la Cour supérieure. Seul un nombre limité de personnes aura accès aux noms des réclamants, si nécessaire. Les parties défenderesses n'ont aucun droit de participer au processus de fixation des indemnisations individuelles par l'adjudicateur ni de le contester.

[4] La part du CIUSSS de la Capitale-Nationale est limitée au montant prévu à l'Annexe 4 de l'Entente.

- L'adjudicateur attribuera aux membres dont la réclamation est acceptée l'une des trois catégories suivantes d'indemnisation, prévues à l'Annexe 8 de l'Entente :

    - Catégorie A : Indemnisation de base équivalant à X $ et servant de base de calcul pour établir les catégories d'indemnisation extraordinaires;

    - Catégorie B : Indemnisation extraordinaire 1 équivalant à 1,5X $, soit une compensation supérieure de 50 % à la compensation de base.

    - Catégorie C : Indemnisation extraordinaire 2 équivalant à 2X $, soit une compensation équivalant au double de la compensation de base, pour un maximum de 200 000 $.

[20] L'Entente prévoit aussi la modification de la définition du groupe et des sous-groupes.

[21] Avisé de l'Entente, un membre (le « **membre dissident** ») communique avec les avocats des membres pour connaître la justification des honoraires réclamés, jugeant ceux-ci trop élevés. Les avocats lui fournissent une réponse, mais il demeure insatisfait de leurs explications et décide de contester la demande d'approbation de l'Entente. De son côté, le Fonds d'aide aux actions collectives (« **FAAC** ») ne conteste pas l'Entente et s'en remet au tribunal quant aux honoraires des avocats des membres.

[22] L'audition relative à la demande d'approbation de l'Entente se tient le 17 février 2022 devant le juge Davis. À cette date, plus de 378 membres ont demandé à s'inscrire à l'action collective. Un seul d'entre eux, le membre dissident, s'oppose à la demande d'approbation de l'Entente. Au cours de l'audience, il témoigne des raisons pour lesquelles il conteste les honoraires réclamés et demande au juge de suspendre son délibéré « afin d'obtenir d'autres informations quant au travail que les avocats […] ont effectué dans le dossier ». Le juge rejette cette demande et met l'affaire en délibéré.

[23] Le juge rend jugement le 4 juillet 2022. Il rejette la demande d'approbation de l'Entente, au motif que les honoraires des avocats des membres sont déraisonnables.

[24] La permission d'appeler est accordée par un juge de la Cour le 25 août 2022[5].

[25] Notant que les intimés n'ont pas l'intention de participer à un débat sur le quantum des honoraires et que le membre dissident ne pourra « participer de façon efficace au débat en appel sans les services d'un avocat », le juge de la Cour conclut à la nécessité de mettre en place un processus pour la nomination d'un *amicus curiae* pour faire contrepoids aux prétentions des parties. Il était impossible d'obtenir l'aval du membre dissident sur le choix d'un avocat pour agir à titre d'*amicus curiae* puisque le membre dissident croyait que la quasi-totalité des membres du Barreau était en conflits d'intérêts puisqu'il s'agit d'une question d'honoraires. Alors, le juge de la Cour a autorisé l'appelant

---

[5] *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1224.

à choisir, parmi une liste de trois avocats dont les noms avaient été préalablement communiqués à la Cour[6].

I. JUGEMENT ENTREPRIS

[26] Le juge passe en revue les critères développés par les tribunaux pour évaluer si une transaction intervenue dans le cadre d'une action collective devrait être approuvée. Il retient que, dans l'ensemble, ces facteurs (durée du litige; nature inclusive et avantages de l'Entente; expérience des avocats; témoignage des membres, à l'exception du membre dissident; dévouement des avocats envers les membres; et absence de collusion entre les parties) militent en faveur de l'approbation de l'Entente.

[27] Le juge se penche ensuite sur la demande d'approbation des honoraires des avocats des membres. En ce qui concerne l'opposition du membre dissident, il constate que son insatisfaction semble résulter, du moins en partie, de sa perception erronée que les avocats n'ont pas été à l'écoute de ses questions et préoccupations. De plus, le membre dissident « ne comprend pas qu'il est de pratique courante, en matière d'action collective, de signer des conventions d'honoraires qui devront ultimement être soumises au Tribunal »[7]. Or, l'insatisfaction du membre dissident ne saurait primer sur l'intérêt collectif des membres[8].

[28] Le juge rappelle que la convention d'honoraires est présumée valide et ne peut être écartée que s'il est démontré qu'elle n'est pas juste et raisonnable. En s'appuyant sur l'affaire *Servites de Marie*[9], dans laquelle la Cour supérieure a approuvé des honoraires représentant 30 % du fonds de règlement, le juge reconnaît que lorsqu'un cabinet d'avocats entreprend une action collective visant à indemniser des victimes d'agressions sexuelles, « il se lance dans un voyage plein d'incertitude »[10]. Le juge note que le cas d'espèce est d'ailleurs comparable en certains points avec cette affaire, notamment en ce qui concerne le nombre d'heures de travail consacré au dossier par les avocats. Il conclut toutefois que lorsque l'on considère la valeur des heures travaillées en relation avec la somme réclamée en vertu de la convention d'honoraires, les deux affaires doivent être distinguées[11]. En l'occurrence, les avocats ont consacré 3 479 heures au dossier et estiment qu'il reste encore au moins 800 heures de travail à faire. Selon les estimations du juge, ce travail correspond à des honoraires d'environ 1 509 686 $ selon la formule du taux horaire (si l'on retient les taux horaires divulgués par les avocats)[12]. Le juge s'avoue cependant préoccupé quant à la manière dont ces taux lui ont été communiqués :

---

6 *A.B. c. Clercs de Saint-Viateur du Canada*, 2022 QCCA 1300.
7 Jugement entrepris, *supra*, note 2, paragr. 40.
8 *Id.*, paragr. 42.
9 *Y. c. Servites de Marie de Québec*, 2021 QCCS 2712 [*Servites de Marie*].
10 Jugement entrepris, *supra*, note 2, paragr. 46.
11 Jugement entrepris, *supra*, note 2, paragr. 49.
12 *Id.*, paragr. 51.

> [53] Le 12 avril, [le Tribunal] reçoit un fichier Excel présentant les heures de chacun des avocats et le descriptif des tâches effectuées. Le Tribunal ne remet ni le temps ni le descriptif en question. Cependant, ce fichier n'indique pas le taux horaire de chaque avocat. Les avocats du groupe confirment qu'ils ont oublié de les inclure après une demande du Tribunal et les fournissent par la suite.
>
> [54] Cette nouvelle information amène le Tribunal à écrire de nouveau aux avocats, compte tenu des observations écrites du membre dissident au sujet du taux horaire que maître Dufresne-Lemire lui avait annoncé :
>
> > Maitre Dufresne-Lemire
> >
> > J'aimerais vous donner l'occasion de commenter le document joint. En particulier, je suis perplexe face à l'affirmation [du membre dissident] que vous lui avez dit que votre taux horaire est de 200 $, alors que Me Wee me dit ce matin qu'il est de 400 $? Est-ce que les taux qu'on m'a fournis sont en vigueur depuis le début du dossier? […]
>
> [55] L'avocate explique que pour des dossiers individuels son tarif horaire peut être de 200 $ l'heure, mais qu'il peut être plus élevé dans les dossiers à pourcentage.
>
> [56] Son courriel ne parle pas des taux de ses collègues.
>
> [57] La manière dont les taux horaires lui ont été communiqués et le courriel de l'avocate laissent le Tribunal songeur. […]

Selon le juge, « [o]n peut avoir l'impression que les taux communiqués [ont été] établis en fonction du présent dossier »[13], d'autant que l'appelant n'a fourni aucune information « sur la discussion qu'il a pu avoir avec les avocats sur les honoraires anticipés ou sur les taux horaires »[14]. Dans les circonstances, il est donc impossible de savoir quels étaient les honoraires envisagés quand le dossier a débuté. Le juge constate cependant que le taux horaire (250 $) prévu dans la convention d'honoraires advenant la révocation du mandat est loin de ceux qui lui ont été communiqués[15]. Or, les art. 99 et 100 du *Code de déontologie des avocats*[16] (« ***Code de déontologie*** ») imposent à l'avocat un devoir de renseignement quant au montant de ses honoraires. Ce devoir demeure important même dans un cas où il y a une convention d'honoraires à pourcentage, ajoute le juge.

[29] Quoi qu'il en soit, le juge considère que même en utilisant les taux horaires qui lui ont été communiqués, le multiplicateur (environ 4,64) entre les honoraires estimés selon la formule du taux horaire (1 509 686 $) et les honoraires réclamés (7 000 000 $) est très

---

13 *Id.*, paragr. 57.
14 *Id.*, paragr. 58.
15 *Id.*, paragr. 60.
16 *Code de déontologie des avocats*, RLRQ, c. B-1, r. 3.1.

élevé et se situe nettement au-dessus de la norme, soit un multiplicateur se situant entre 2 et 3. Le juge évalue la raisonnabilité des honoraires réclamés au regard des facteurs énoncés à l'art. 102 du *Code de déontologie*. Il retient que leurs principaux avocats au dossier, M^es^ Dufresne-Lemire et Wee, n'avaient pas une très grande expérience. De plus, une bonne partie de leur travail consistait à discuter avec les victimes, un travail certes difficile sur le plan émotionnel, mais non sur le plan juridique. La principale difficulté au plan juridique concernait la question de la prescription, car au moment où la demande d'autorisation d'exercer l'action collective a été déposée, la Cour suprême n'avait pas encore rendu l'arrêt *J.J.*[17]. Cependant, la Cour d'appel avait déjà statué que l'action collective était le véhicule approprié pour ce type de dossier. Le juge reconnaît malgré tout qu'il « pouvait y avoir des défis au niveau de l'administration de la preuve et des dommages subis »[18]. Il concède également que les avocats ont assumé un énorme risque en prenant le dossier, au regard, notamment, de la capacité des intimés à payer une éventuelle condamnation et de l'incertitude du droit applicable avant l'arrêt *J.J*. En définitive, le juge considère toutefois que le dossier « représentait une difficulté et un risque global moyens lorsque la demande d'autorisation fut produite »[19]. Or, les honoraires réclamés contiennent « une prime prévisible lorsque le risque est très élevé »[20]. En effet, « [à] un taux horaire de 250 $, leur investissement dans le dossier représenterait 869 772 $ jusqu'à maintenant et 1 069 772 $ avec les 800 heures additionnelles et leur demande se traduirait par une prime de presque 6 000 000 $ »[21]. Même en retenant les taux horaires proposés par les avocats, la prime serait de plus de 5 000 000 $. Le juge conclut que ces honoraires sont excessifs et, surtout, contraires à l'intérêt des membres.

[30] Le juge détermine que cette conclusion constitue un obstacle dirimant à la demande d'approbation de l'Entente, dont l'art. 28 prévoit que si le tribunal refuse d'approuver l'Entente dans son intégralité, celle-ci « sera dès lors considérée comme nulle et sans effet »[22]. Il se dit cependant confiant « que les parties se réuniront afin de convenir des honoraires raisonnables et de les soumettre au Tribunal, permettant ainsi aux membres de recevoir les sommes qui leur reviennent »[23].

II. QUESTIONS EN LITIGE

[31] Les questions en litige peuvent être formulées ainsi :

a) Le juge a-t-il erré en concluant qu'il ne pouvait approuver l'Entente?

b) Le juge a-t-il erré en concluant que les honoraires réclamés pour les

---

17 *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35 [*J.J.*].
18 Jugement entrepris, *supra*, note 2, paragr. 72.
19 *Id.*, paragr. 75.
20 *Id.*, paragr. 76.
21 *Id.*, paragr. 78.
22 *Id.*, paragr. 80.
23 Jugement entrepris, *supra*, note 2, paragr. 81.

avocats des membres sont déraisonnables? La Cour devrait-elle fixer elle-même les honoraires?

c) Qui doit assumer les honoraires de l'*amicus curiae*?

III. DISCUSSION

a) Le juge a-t-il erré en concluant qu'il ne pouvait approuver l'Entente?

[32] Dans l'ensemble, les parties s'entendent pour dire que le juge a commis une erreur révisable en concluant qu'il devait rejeter l'Entente parce qu'il considérait que les honoraires des avocats des membres étaient déraisonnables.

[33] Une transaction conclue dans le contexte d'une action collective n'est valable que si elle est approuvée par le tribunal, conformément à l'article 590 *C.p.c.*

[34] Avant d'approuver une transaction, le juge doit être convaincu que celle-ci est « juste, équitable et qu'elle répond aux meilleurs intérêts des membres »[24]. Dans le cadre de son analyse, il doit « garder à l'esprit les grands principes et objectifs sous-jacents aux actions collectives, soupeser les avantages et inconvénients du règlement, de même que les concessions réciproques, les risques d'un procès et les coûts à encourir »[25]. En pratique, l'évaluation du caractère juste et raisonnable de la transaction s'articule souvent autour des critères suivants, importés du droit américain :

- Les probabilités de succès du recours;
- L'importance et la nature de la preuve administrée;
- Les modalités, termes et conditions de la transaction;
- La recommandation des avocats et leur expérience;
- Le coût anticipé et la durée probable du litige;
- Le cas échéant, la recommandation d'une tierce personne neutre;
- La nature et le nombre d'objections à la transaction;
- La bonne foi des parties et l'absence de collusion.[26]

---

[24] *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305, paragr. 83 [*Banque Amex*].

[25] *Association québécoise de lutte contre la pollution atmosphérique c. Groupe Volkswagen du Canada inc.*, 2022 QCCS 2186, paragr. 43, requête *de bene esse* pour permission d'appeler rejetée, 11 octobre 2022, 2022 QCCA 1305 [*Volkswagen*].

[26] *Option Consommateurs c. Banque Amex du Canada*, 2017 QCCS 200, paragr. 43, conf. par *Banque Amex, supra*, note 24; *Pellemans c. Lacroix,* 2011 QCCS 1345 [*Pellemans*], paragr. 20.

[35] En principe, le juge doit approuver l'entente telle que proposée ou alors refuser de l'entériner. La transaction étant indivisible, il ne peut l'approuver de façon partielle ni la modifier[27]. Qu'en est-il lorsque l'entente dont les parties demandent l'approbation à titre de transaction comporte une clause fixant les honoraires des avocats des membres?

[36] L'article 593 *C.p.c.* prévoit ce qui suit :

593. Le tribunal peut accorder une indemnité au représentant pour le paiement de ses débours de même qu'un montant pour le paiement des frais de justice et des honoraires de son avocat, le tout payable à même le montant du recouvrement collectif ou avant le paiement des réclamations individuelles.	**593.** The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.
Il s'assure, en tenant compte de l'intérêt des membres du groupe, que les honoraires de l'avocat du représentant sont raisonnables; autrement, il peut les fixer au montant qu'il indique.	In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.
Il entend, avant de se prononcer sur les frais de justice et les honoraires, le Fonds d'aide aux actions collectives que celui-ci ait ou non attribué une aide au représentant. Le tribunal prend en compte le fait que le Fonds ait garanti le paiement de tout ou partie des frais de justice ou des honoraires.	Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee.

[Soulignement ajouté]

[37] Il est ainsi établi qu'en vertu de l'art. 593 *C.p.c.*, « aucune convention d'honoraires intervenue entre le représentant et son avocat ni aucune entente d'honoraires conclue entre le représentant, son avocat et les parties adverses dans le cadre d'une transaction présentée pour approbation ne lient le juge »[28]. Dans la mesure où les parties prévoient que l'approbation de l'entente dépend de l'approbation des honoraires convenus, c'est-

[27] *Banque Amex, supra,* note 24, paragr. 76; *Options Consommateurs c. Merck Frosst Canada ltée*, 2016 QCCS 5075, paragr. 30; *Option Consommateurs c. Infineon Technologie, a.g.*, 2014 QCCS 4949, paragr. 48; *Johnson c. Bayer inc*., 2008 QCCS 4957, paragr. 5.

[28] *Banque Amex*, *supra*, note 24, paragr. 61.

à-dire que ceux-ci constituent une « partie non détachable » de l'entente, le refus d'approuver les honoraires entraîne donc nécessairement le rejet de l'entente dans son entier[29]. En revanche, lorsque l'approbation de l'entente n'est pas conditionnelle à l'approbation du montant d'honoraires réclamé, le juge peut approuver l'entente[30] tout en modifiant le quantum des honoraires s'il considère que celui réclamé est déraisonnable[31].

[38] En l'espèce, le juge conclut que son refus d'approuver les honoraires réclamés entraîne inéluctablement le rejet de l'Entente, compte tenu de l'article 28 de l'Entente. Cette conclusion est erronée et doit être révisée en appel. À l'instar de l'appelant, des intimés et de l'*amicus curiae*, je suis d'avis que l'Entente, correctement interprétée, permettait au juge d'approuver la transaction tout en modifiant le montant des honoraires.

[39] L'art. 28 de l'Entente énonce que :

> Si le tribunal refuse d'approuver l'intégralité de la présente Entente de règlement, les parties conviennent que celle-ci sera dès lors considérée nulle et sans effet dans son entièreté, et que les parties seront remises dans la même situation juridique que celle prévalant antérieurement à sa conclusion; elles ne pourront aucunement invoquer l'Entente de règlement dans la poursuite du litige qui continuera alors à les opposer.

Cette disposition est complétée par l'art. 31, qui stipule que « l'Entente de règlement, incluant son préambule et ses annexes, est indivisible et constitue une transaction au sens des articles 2631 et suivants du *Code civil du Québec* ». Ensemble, les art. 28 et 31 confirment en termes non équivoques que l'Entente est un « tout » qui ne peut être modifié ou approuvé en partie. À la seule lecture des art. 28 et 31, il peut donc être tentant de conclure, comme l'a fait le juge, que l'approbation du montant des honoraires fixé par les parties est nécessaire à l'approbation de l'Entente. Les art. 28 et 31 doivent toutefois être lus en conjonction avec les autres dispositions de l'Entente (*cf.* art. 1427 *C.c.Q.*).

[40] En l'occurrence, une lecture attentive des autres dispositions de l'Entente fait obstacle à la conclusion du juge. L'art. 8 de l'Entente prévoit en effet *expressément* que le juge peut modifier le montant des honoraires réclamé :

> Un compte pour les Honoraires des avocats du Demandeur et des membres adressé à la Défenderesse CSV au montant de 8 048 250 $, représentant 25 % du montant de 28 000 000 $ prévu au paragraphe 3 de la présente Entente de règlement, plus les taxes applicables, le tout tel que prévu à la Convention

---

29 *Id.*, paragr. 74.

30 La pratique consistant à prévoir les honoraires des avocats dans l'entente visant à régler le litige suscite en outre des enjeux éthiques. Cette pratique est donc à éviter. Voir à ce sujet les commentaires de la juge St-Pierre, pour une Cour unanime, dans *Banque Amex*, *supra*, note 24, paragr. 74.

31 Voir par exemple : *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, 2018 QCCS 5313, paragr. 116-118. Voir aussi : *Abicidan c. Ikea Canada*, 2021 QCCS 3258, paragr. 23, 56 et 66 (le juge diffère sa décision sur les honoraires tout en accueillant l'entente).

> d'honoraires signée par le Demandeur, couvrant les Honoraires ou tout autre montant autorisé par la Cour, sera transmis par les avocats du Demandeur et des membres dans les dix (10) jours après que le jugement approuvant l'Entente de règlement ait acquis force de chose jugée, sous réserve de l'approbation du tribunal.[…]
>
> [Soulignements ajoutés]

[41] Dans le même ordre d'idées, l'art. 9 édicte que :

> Dans les dix (10) jours ouvrables de la réception de la somme prévue aux paragraphes 3 et 6 de la présente Entente de règlement, les avocats du Demandeur et des membres retireront de leur compte en *fidéicommis* le montant des Honoraires qui aura été approuvé par le tribunal, comme prévu au paragraphe 8 de la présente Entente de règlement.
>
> [Soulignement ajouté]

[42] Ces dispositions reconnaissent ainsi en toutes lettres le pouvoir du juge de fixer le montant des honoraires. En l'espèce, le juge pouvait donc modifier le montant des honoraires prévu par les parties tout en respectant l'Entente « dans son intégralité ». Il n'avait pas à rejeter l'Entente s'il jugeait que les honoraires réclamés étaient excessifs. Dans la mesure où le juge a déterminé que l'Entente était par ailleurs juste et dans l'intérêt des membres, ce que personne — pas même le membre dissident — ne remet en cause, il aurait dû l'approuver tout en révisant le montant des honoraires. En concluant comme il l'a fait, il a commis une erreur qui doit être corrigée par la Cour.

[43] Vu l'interprétation de l'Entente que je propose, il n'est pas nécessaire de répondre aux représentations du FAAC voulant que, dans la mesure où l'article 28 de l'Entente empêche l'homologation du règlement sans l'approbation des honoraires des avocats, il est contre l'ordre public.

b) Le juge a-t-il erré en concluant que les honoraires réclamés sont déraisonnables? La Cour devrait-elle fixer elle-même les honoraires?

Prétentions des parties

[44] Je résume en détail les prétentions des parties puisqu'elles évoquent de façon exhaustive les éléments à considérer en évaluant le montant des honoraires à payer.

[45] L'appelant soutient que le juge a erré en droit et a commis des erreurs manifestes et déterminantes en concluant que les honoraires réclamés étaient déraisonnables. Il rappelle que la convention d'honoraires est présumée valide. De plus, une convention d'honoraires prévoyant un pourcentage entre 15-33 % est généralement jugée juste et raisonnable. Selon lui, une preuve convaincante « que la convention d'honoraires n'a pas

été conclue dans l'intérêt des membres » est requise pour renverser ces présomptions. Or, l'intérêt de chaque membre consiste à s'assurer que les procureurs travaillent diligemment pour obtenir le meilleur résultat. Ce qui l'intéresse, c'est le résultat obtenu *pour lui* et que le pourcentage des honoraires applicable à *son indemnité* soit raisonnable et conforme au pourcentage appliqué aux indemnités des autres membres. Ainsi, dès que le pourcentage prévu dans la convention d'honoraires se situe entre 15-33 % et que les avocats ont travaillé diligemment pour générer le résultat obtenu, les honoraires devraient être approuvés. En l'occurrence, les honoraires réclamés auraient donc dû être approuvés. En effet, le pourcentage (25 %) prévu dans la convention d'honoraires se situe à l'intérieur de la fourchette établie et reçoit l'aval de l'appelant et de plusieurs autres membres. Le FAAC ne s'y oppose pas non plus. De plus, le juge a reconnu que les avocats ont accepté un risque énorme, travaillé fort, fait preuve d'un dévouement exemplaire envers les membres et négocié pour eux une excellente entente qui leur permettra de recevoir des indemnités significatives. Il aurait par conséquent dû conclure que les honoraires réclamés étaient raisonnables. Malgré tout, dans un geste de bonne foi, les avocats des membres offrent de réduire leurs honoraires de 25 % à 20 % du recouvrement plus débours et taxes.

[46] L'appelant reproche au juge d'avoir erré en appliquant le modèle du facteur multiplicateur (ou « approche-multiplicateur ») pour conclure que les honoraires réclamés étaient excessifs puisqu'ils étaient 4,64 fois plus élevés que ceux qui auraient été dus selon une convention à taux horaire. Selon l'appelant, le raisonnement du juge, qui repose sur une application rigide de cette approche, remet en doute la validité même d'une convention à pourcentage. Or, il s'agit du mode de rémunération le plus approprié en matière d'action collective. Qui plus est, en statuant que les honoraires ne devraient pas excéder le montant obtenu en multipliant le nombre d'heures travaillées aux taux horaires réguliers par un facteur arbitraire de 3, le juge a *de facto* légiféré un plafond des honoraires des avocats. L'appelant insiste sur les dangers d'un tel précédent. À son avis, le jugement entrepris « dénature à tel point les Conventions à pourcentage qu'il risque de décourager les cabinets en demande d'entreprendre des actions collectives, ce qui, ultimement, portera atteinte aux objectifs sociaux de ce véhicule procédural ». L'appelant fait par ailleurs valoir que l'application systématique de l'approche-multiplicateur n'est pas dans l'intérêt des membres, puisque celle-ci favorise l'inefficacité, voire l'incompétence, au lieu d'encourager un travail stratégique et efficace des avocats. L'application systématique de cette approche fausse en outre l'évaluation du caractère juste et raisonnable des honoraires en élevant le temps consacré au dossier par les avocats au rang de « super-facteur ». L'art. 102 du *Code de déontologie* précise pourtant que les honoraires sont justes et raisonnables s'ils sont justifiés *par les circonstances*. L'approche-multiplicateur n'est en fait que d'une utilité limitée, surtout lorsque comparée à la responsabilité assumée par les avocats et au résultat obtenu. Pour ces motifs, l'appelant demande à la Cour de déclarer les honoraires réclamés raisonnables, mais de prendre acte que les avocats acceptent de réduire ceux-ci à 20 % du fonds de règlement.

[47] Les intimés et le FAAC ne se prononcent pas sur la raisonnabilité des honoraires réclamés. Les intimés soutiennent toutefois que la Cour possède le pouvoir de fixer elle-

même les honoraires sans qu'il soit nécessaire de renvoyer le dossier devant la Cour supérieure. Ils soulignent qu'il est dans l'intérêt des membres que l'Entente soit approuvée le plus rapidement possible et qu'une décision de la Cour « permettrait d'éviter l'incertitude reliée à une possible obligation pour les parties de transmettre un nouvel avis aux membres en vertu de l'article 590 *C.p.c.* ». Le FAAC, pour sa part, argue que la Cour devrait approuver les honoraires tels que réduits volontairement par les avocats des membres, sous réserve de l'engagement de ces derniers de lui rembourser 99 136,09 $, engagement « dont il doit être pris acte ».

[48] L'*amicus curiae* reconnaît que les avocats agissant en demande dans le cadre d'une action collective assument généralement un risque important qui justifie une prime conséquente. Il rappelle en outre que le pouvoir du tribunal de fixer les honoraires est assujetti à une condition préalable importante, soit la conclusion que les honoraires réclamés ne sont pas raisonnables, c'est-à-dire que leur quantum n'appartient pas aux « issues possibles acceptables ». À cet égard, les conventions d'honoraires qui ont typiquement été reconnues par les tribunaux peuvent servir de guide. La Cour devrait se garder de renverser la jurisprudence « ayant reconnu la validité des conventions d'honoraires à pourcentage, et ce, même lorsqu'elles donnent lieu à une compensation qui pourrait être jugée excessive par certains membres du public ». Quant à l'application de l'approche-multiplicateur à titre de mesure de contrôle, il ne s'agit pas d'une panacée. Celle-ci peut cependant s'avérer utile pour déterminer si les honoraires sont excessifs dans un cas donné, à la condition de ne pas « se transformer en plafond ». L'instauration d'un « multiplicateur plafond » aurait pour effet d'invalider les conventions d'honoraires à pourcentage et de les remplacer par des ententes à facteur multiplicateur. Cela dit, l'*amicus curiae* estime qu'un multiplicateur égal ou inférieur à 2 devrait être réservé aux dossiers assurés d'un succès rapide, ou encore à ceux où les honoraires sont inutiles, exagérés ou disproportionnés au regard de ce que les membres obtiennent du recours. En revanche, un multiplicateur supérieur à 2 sera généralement nécessaire pour créer un véritable incitatif à entreprendre des actions collectives. Un facteur multiplicateur de 2,5 ou 3 devrait ainsi se rapprocher de la norme ou même d'un plancher dans plusieurs dossiers. L'*amicus curiae* note par ailleurs qu'une convention d'honoraires prévoyant un pourcentage de 25 % n'est pas en soi déraisonnable, ce taux correspondant au contraire à une norme bien établie. Il rejette toutefois la thèse de l'appelant suggérant que la raisonnabilité des honoraires s'évalue en fonction du montant d'honoraires que chaque membre doit payer à même son indemnité. Ce qui importe selon lui est plutôt la raisonnabilité des honoraires qui seront collectivement payés.

[49] En l'espèce, l'*amicus curiae* estime que le juge s'est bien dirigé en utilisant l'approche-multiplicateur pour contrôler la raisonnabilité des honoraires. À son avis, le juge a cependant erré en laissant entendre qu'un multiplicateur de 4,64 est en soi excessif. Un tel multiplicateur n'est pas déraisonnable en lui-même, surtout dans le contexte d'une action collective comme celle en l'espèce, où les victimes bénéficieront d'une procédure de réclamation avantageuse et où les avocats ont assumé un énorme risque, ont fait preuve d'un grand dévouement et ont effectué un travail remarquable. L'*amicus curiae* juge toutefois que le multiplicateur applicable dans le présent dossier

n'est pas réellement de 4,64. Comme l'a noté le juge, les taux horaires communiqués par les avocats des membres semblent avoir été établis en fonction du dossier. Il en va notamment ainsi de M^e^ Dufresne-Lemire, qui revendique un taux de 400 $/heure dans le présent dossier, alors que son tarif horaire usuel est de 200 $, et alors que la convention d'honoraires prévoit un taux de 250 $/heure en cas de révocation du mandat. L'*amicus curiae* partage les préoccupations du juge à ce sujet et considère que l'appelant fait fausse route en affirmant que les taux horaires facturés à d'autres clients dans d'autres dossiers sont sans pertinence. Selon lui, le taux horaire appliqué selon le modèle du facteur multiplicateur ne devrait pas être exclusif aux dossiers d'actions collectives, sans quoi le calcul et la notion même de multiplicateur seraient faussés. En effet, cela reviendrait à prendre le risque en compte deux fois (une fois dans le taux horaire et une fois dans le multiplicateur). Le taux horaire « ordinaire » de l'avocat devrait servir de base au calcul, celui-ci permettant de tenir compte du véritable coût d'opportunité de l'avocat et étant déterminé par une logique de marché. En l'occurrence, l'application d'un multiplicateur de 4,64 à un taux horaire de 400 $ pour M^e^ Dufresne-Lemire équivaut à un facteur de 7,4 pour un taux horaire de 250 $ et de 9,3 pour un taux horaire de 200 $. Si la Cour présume que les taux horaires des autres avocats ont eux aussi été ajustés à la hausse en fonction du dossier, « elle pourrait conclure que les honoraires réclamés en appel (20 % plutôt que 25 %) donnent un facteur multiplicateur entre 5,9 et 7,4 ». La Cour pourrait tirer cette présomption puisque les avocats des membres n'ont pas indiqué si le taux horaire de M^e^ Dufresne-Lemire était le seul à avoir été ajusté à la hausse, alors qu'il leur incombait « de donner l'heure juste à ce sujet ». Dans les circonstances, l'*amicus curiae* suggère à la Cour d'appliquer un multiplicateur de 4,64 à des honoraires de 754 843 $, pour une somme totale de 3 502 472 $. Une autre alternative serait d'appliquer ce multiplicateur à un taux horaire de 250 $ pour le temps de chacun des avocats (889 991,50 $) et un taux horaire de 75 $ pour les autres employés (77 049 $), pour un total de 4 129 560,56 $.

Analyse

[50] La convention d'honoraires conclue par le représentant lie les membres de l'action collective. Son exécution demeure néanmoins sujette à l'approbation du tribunal[32]. En vertu de l'art. 593 al. 2 *C.p.c.*, le juge se voit en effet confier le rôle de s'assurer que les honoraires réclamés sont raisonnables et, en cas contraire, il l'autorise à les fixer « au montant qu'il indique ».

[51] La convention d'honoraires bénéficie d'une présomption de validité et ne peut être écartée que si son application n'est pas juste et raisonnable pour les membres « dans les circonstances de la transaction examinée »[33]. Cependant, aux termes de l'art. 593 *C.p.c.*, aucune convention d'honoraires ne lie le juge. Ainsi, s'il est vrai que le juge doit accorder un certain poids à l'expression de la volonté des parties, il doit néanmoins s'assurer que les honoraires réclamés sont *effectivement* justes et

[32] *Pellemans*, *supra*, note 26, paragr. 48.
[33] *Banque Amex*, *supra*, note 24, paragr. 66.

raisonnables[34]. Le juge ne doit pas hésiter, en cas de besoin, « à réviser ces honoraires en fonction de leur valeur réelle, à les arbitrer et à les réduire s'ils sont inutiles, exagérés, ou hors de proportion » au regard de ce que les membres retirent de l'action collective[35]. La tâche du juge est complexe, car il « recherche un équilibre idéal dans la rémunération : octroyer [aux] avocat[s] une somme nécessaire et suffisante pour [les] inciter à entreprendre le prochain dossier, tout en gardant en tête que les membres doivent être les premiers bénéficiaires des sommes payées par les défenderesses »[36].

[52] Le *Code de procédure civile* n'identifie pas les critères permettant de juger de la justesse et de la raisonnabilité des honoraires. L'art. 102 du *Code de déontologie* fournit toutefois des indications utiles à cet égard, en précisant que[37] :

102. Les honoraires sont justes et raisonnables s'ils sont justifiés par les circonstances et proportionnés aux services professionnels rendus. L'avocat tient notamment compte des facteurs suivants pour la fixation de ses honoraires:	**102.** The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:
1° l'expérience;	(1) experience;
2° le temps et l'effort requis et consacrés à l'affaire;	(2) the time and effort required and devoted to the matter;
3° la difficulté de l'affaire;	(3) the difficulty of the matter;
4° l'importance de l'affaire pour le client;	(4) the importance of the matter to the client;
5° la responsabilité assumée;	(5) the responsibility assumed;
6° la prestation de services professionnels inhabituels ou exigeant une compétence particulière ou une célérité exceptionnelle;	(6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;
7° le résultat obtenu;	(7) the result obtained;

[34] *Id.*, paragr. 67, référant à : *Skarstedt c. Corporation Nortel Networks*, 2011 QCCA 767 [*Skarstedt*].
[35] *Id.*, paragr. 62, citant : *Apple Canada Inc. c. St-Germain*, 2010 QCCA 1376, paragr. 36.
[36] Catherine Piché, *L'action collective : ses succès et ses défis*, Montréal, Thémis, 2019, p. 227 [C. Piché, *L'action collective*…].
[37] Voir aussi : art. 2134 *C.c.Q.*; *Loi sur le Barreau*, RLRQ, c. B-1, art. 126.

8° les honoraires prévus par la loi ou les règlements;	(8) the fees prescribed by statute or regulation; and
9° les débours, honoraires, commissions, ristournes, frais ou autres avantages qui sont ou seront payés par un tiers relativement au mandat que lui a confié le client.	(9) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.

[53] La jurisprudence de la Cour confirme que ces facteurs sont pertinents à l'analyse que commande l'art. 593 *C.p.c.*[38]. Évidemment, le poids respectif à leur accorder pourra varier selon les circonstances. Il est par ailleurs entendu que ces facteurs ne sont pas exhaustifs, comme l'indique l'emploi du terme « notamment » (« *in particular* ») à l'art. 102 du *Code de déontologie*.

[54] Il est ainsi généralement admis que pour apprécier le caractère juste et raisonnable des honoraires, le juge doit aussi considérer le risque couru par les avocats. Dans le contexte d'une convention d'honoraires à pourcentage, la Cour supérieure a reconnu que ce facteur pourrait même primer sur le temps consacré au dossier par les avocats[39]. Dans tous les cas, le risque doit s'apprécier au moment où les avocats ont reçu le mandat du représentant, et non au moment de la demande d'approbation[40].

[55] Le juge saisi d'une demande d'approbation d'honoraires doit également considérer l'effet de l'entente sur l'image de la profession. Il doit en effet s'assurer que l'entente n'est pas « susceptible de donner à la profession un caractère de lucre et de commercialité »[41] (*Code de déontologie*, art. 7). De même, les finalités de l'action collective doivent être prises en compte. Comme le note le professeur Pierre-Claude Lafond, « [l]a contribution à l'accès à la justice et à la dissuasion de comportements répréhensibles peut justifier des honoraires substantiels dans la mesure où ce type d'action génère des bénéfices aux citoyens qui ne seraient pas atteignables autrement »[42]. Cela dit, le juge doit :

> « se préoccuper de préserver l'intégrité et la crédibilité du régime des recours collectifs, tant aux yeux des membres qu'aux yeux d'observateurs du public ». […] Les actions collectives ne doivent pas devenir « qu'une source d'enrichissement pour les avocats en demande […] »[43].
>
> [Renvois omis]

---

38 *Banque Amex*, *supra*, note 24, paragr. 66.
39 *Pellemans*, *supra*, note 26, paragr. 76.
40 *Skarstedt*, *supra,* note 34, paragr. 16; *Pellemans*, *supra*, note 26, paragr. 52.
41 *Francoeur c. Belzil*, 2004 CanLII 76585, paragr. 33 (C.A.).
42 Pierre-Claude Lafond, *Libres propos sur la pratique de l'action collective,* Montréal, Yvon Blais, 2020, p. 274 [P.-C. Lafond, *Libres propros* …].
43 *Option Consommateurs c. Meubles Léon ltée*, 2022 QCCS 193, paragr. 88 [*Meubles Léon*].

[56] J'ajouterais toutefois que les juges devraient résister à la tentation de toujours chercher à réduire les montants des honoraires prévus dans les conventions d'honoraires, au risque de provoquer une pratique parmi les avocats de demander plus, sachant que le montant convenu sera assurément réduit par le tribunal.

[57] Les conventions d'honoraires à pourcentage sont très répandues en matière d'action collective. Ce type de conventions présente des avantages considérables, notamment en ce qu'il favorise « l'accès à la justice pour des citoyens qui autrement n'en auraient pas les moyens »[44]. Il ne saurait être question ici de remettre en cause la validité et l'utilité de ce modèle de rémunération. Les avocats devraient être encouragés à accepter des mandats en matière d'action collective en sachant que le risque accepté sera compensé, le cas échéant. À cet égard, les avocats sont en droit de s'attendre que l'entente concernant leurs honoraires soit respectée.

[58] L'appelant et l'*amicus curiae* ont par ailleurs raison d'affirmer que la « fourchette » des pourcentages jugés raisonnables par les tribunaux se situe normalement entre 15 % à 33 % (ou même de 20 % à 33,33 %) du fonds de règlement[45]. Il ne s'agit toutefois pas d'un automatisme. Comme le mentionne la Cour dans l'arrêt *Skarstedt*, « c'est à la lumière de chaque réclamation qu'un juge doit déterminer le caractère raisonnable des honoraires en vue de leur approbation »[46]. C'est ainsi que les juges ont révisé à la baisse le pourcentage établi par les parties lorsque celui-ci paraissait exagéré par rapport au travail effectué par les avocats, au règlement relativement modeste du litige et aux honoraires professionnels qui auraient été facturés selon le modèle du taux horaire[47]. La possibilité prévoit des pourcentages progressifs qui augmentent avec l'avancement du dossier peut être équitable en fonction du travail consacré au dossier. Par contre, une telle formule peut dissuader les avocats à régler tôt dans le processus, même lorsqu'un règlement rapide est dans le meilleur intérêt des membres. Des pourcentages peuvent aussi être dégressifs à partir de l'obtention d'un certain montant à titre de règlement, mais cela aussi peut aussi avoir une influence dissuasive sur les efforts des avocats. Bref, chaque cas en est un d'espèce. Il n'y a pas de formule magique qui peut en tout temps et en toute situation garantir que les honoraires seront raisonnables au final. Surtout, l'analyse ne peut se borner à vérifier si la convention d'honoraires prévoit un pourcentage se situant à l'intérieur d'une fourchette généralement appliquée[48].

---

44 *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, paragr. 5.

45 Voir par exemple : *Normandin c. Bureau en Gros (Staples Canada)*, 2022 QCCS 3367, paragr. 35; *Association des jeunes victimes de l'église c. Harvey*, 2022 QCCS 1956, paragr. 56; *Meubles Léon*, *supra*, note 43, paragr. 93; *Bouchard c. Audi Canada inc.*, 2021 QCCS 10, paragr. 44; *Salazar Pasaje c. BMW Canada inc.*, 2021 QCCS 2512, paragr. 58, requête pour permission d'appeler rejetée, 8 juillet 2021, 2021 QCCA 1107; *Pellemans*, *supra*, note 26, paragr. 53 et 57.

46 *Skarstedt*, *supra*, note 34, paragr. 31.

47 *Volkswagen*, *supra*, note 25, paragr. 95-101.

48 *Rahmani c. Groupe Adonis inc.*, 2021 QCCS 2616, paragr. 60-61.

[59] Le modèle du facteur multiplicateur, ou approche-multiplicateur (« *lodestar method* » ou « *multiplier method* »), consiste à calculer le nombre d'heures travaillées, multiplié par le taux horaire et un multiplicateur prenant en compte le risque encouru par les avocats[49]. Il s'agit d'un modèle de rémunération, mais aussi d'une méthode de contrôle de la raisonnabilité des honoraires souvent appliquée en matière d'action collective.

[60] Le modèle du facteur multiplicateur présente certains inconvénients et compte son lot de détracteurs. Dans *Pellemans*, le juge Prévost de la Cour supérieure souligne notamment que celui-ci :

> encourage peu l'efficacité du travail des avocats puisque le facteur multiplicateur ne vient qu'augmenter la valeur du temps inscrit par l'avocat au dossier. De plus, comme l'évaluation du facteur multiplicateur applicable à un dossier s'effectue au moment du règlement ou du jugement, il est plus susceptible de sous-évaluer le «risque» assumé par l'avocat au moment où le mandat est reçu.[50]

C'est également ce que soutient l'appelant dans son argumentation.

[61] Au sujet du facteur multiplicateur, la Cour a dit ceci :

> [66] Les principes généraux et les méthodes d'évaluation pertinentes à l'analyse du caractère juste et raisonnable des honoraires résultent de la prise en compte de ces facteurs. Dans ce contexte, les conventions d'honoraires bénéficient d'une présomption de validité et ne sont écartées que si leur application n'est pas juste et raisonnable pour les membres dans les circonstances de la transaction examinée; quant au modèle du facteur multiplicateur, il constitue un outil de mesure ou de contrôle du caractère raisonnable des honoraires.[51]
>
> [Références omises et soulignement ajouté]

[62] L'utilisation de la méthode du facteur multiplicateur pour évaluer le caractère raisonnable des honoraires semble d'ailleurs bien ancrée dans la jurisprudence de la Cour supérieure. Cependant, je souscris aux prétentions de l'appelant et de l'*amicus curiae* voulant que l'application mécanique de cette méthode et l'instauration de « plafonds » rigides soient à proscrire. L'appréciation de la raisonnabilité des honoraires ne devrait pas être réduite à une simple opération mathématique. Ainsi, s'il est vrai que la norme adoptée en Cour supérieure en matière de facteur multiplicateur oscille entre 2 et 3, cela ne signifie pas qu'un multiplicateur supérieur à cette norme justifie *nécessairement* une réduction des honoraires. C'est ainsi, par exemple, que le juge

---

49 C. Piché, *L'action collective*…, *supra*, note 36, p. 236.

50 *Pellemans*, *supra*, note 26, paragr. 65. Voir aussi : P.-C. Lafond, *Libres propos*…, *supra*, note 42, p. 288-289.

51 *Banque Amex*, *supra*, note 24, paragr. 66.

Prévost a approuvé une convention d'honoraires à pourcentage correspondant à un multiplicateur de 4,58 dans l'affaire *Pellemans*[52].

[63] La manière d'appliquer le facteur multiplicateur devra être scrutée. En l'espèce, je m'interroge sur la manière dont le juge applique cette méthode puisqu'il semble accorder une importance démesurée au temps consacré au dossier par les avocats, en dépit des autres facteurs qui entrent en ligne de compte en évaluant la raisonnabilité des honoraires. La valeur des services rendus n'équivaut pas au temps consacré au dossier.

[64] Comme mentionné ci-avant, une convention d'honoraires bénéficie d'une présomption de validité. Devant une telle présomption, l'analyse de la raisonnabilité des honoraires fixés par une convention à pourcentage devrait commencer avec l'application des critères autres que le temps consacré à l'affaire par les avocats. L'expérience nous enseigne que le montant d'honoraires payable en vertu d'une convention à pourcentage va souvent, sinon presque toujours, excéder le montant d'honoraires calculé sur la base du temps consacré à l'affaire multiplié par le ou les taux horaires applicables. Par conséquent, si l'analyse est axée sur les heures travaillées, le montant d'honoraires à payer risque toujours d'apparaître comme excessif ou déraisonnable. Ainsi, débuter l'analyse en prenant en compte les facteurs du temps et du taux horaire relève d'un raisonnement circulaire ou tautologique. En mettant de côté l'entente qui prévoit que les honoraires sont calculés sur la base d'un pourcentage et non en fonction du temps consacré au dossier, la conclusion que les honoraires sont déraisonnables est presque inévitable. Pour éviter cet écueil, le processus d'analyse devrait débuter par l'évaluation de tous les autres critères prévus dans le *Code de déontologie* et la prise en compte du risque assumé par les avocats. Si on en arrive à la conclusion que le montant (pas le pourcentage) d'honoraires payable est raisonnable, l'analyse peut s'arrêter dans l'exercice de la discrétion du juge. Par contre, si le montant d'honoraires semble déraisonnable, il convient dès lors de prendre en compte les heures consacrées au dossier et d'appliquer un facteur multiplicateur pour ajuster le montant des honoraires pour que celui-ci devienne raisonnable.

[65] De simplement compter le nombre d'heures consacrées au dossier multiplié par les taux horaires applicables et d'appliquer un facteur multiplicateur de 2, 3, 4 ou même 5 est, dans mon opinion arbitraire, du moins à un certain degré. Le risque assumé au début du dossier n'est pas habilement traduit en chiffre, à savoir le facteur multiplicateur. Les facteurs ne tiennent pas compte des taux d'intérêt qu'un avocat peut être obligé d'assumer pendant qu'il finance l'action collective. Même si la méthode mesure le coût d'opportunité, elle ne sert pas à évaluer le risque dans les autres actions collectives payables à pourcentage que l'avocat accepte. Autrement dit, une saine gestion du risque implique l'acceptation de plusieurs mandats sachant qu'un certain nombre de causes seront probablement perdues et qu'ainsi, l'avocat se retrouvera sans aucune rémunération. D'ailleurs, le temps consacré au dossier dans ce type d'affaire est souvent

[52] *Pellemans*, *supra*, note 26 (honoraires de 11 000 000 $ approuvés VS honoraires de 2 400 000 $ selon la formule du taux horaire).

secondaire dans l'analyse de la raisonnabilité des honoraires[53]. Le risque assumé et le résultat obtenu devront normalement avoir préséance sachant que le poids à accorder à chaque facteur peut varier d'un cas à l'autre, selon les circonstances.

[66] Mon opinion ne devrait pas être interprétée pour cautionner le paiement des honoraires considérables résultant d'une entente d'honoraires à pourcentage où le travail de l'avocat était principalement de faire un copier-coller d'un recours intenté dans une autre juridiction, de déposer une demande d'autorisation et de simplement attendre le sort du litige dans l'autre juridiction. Devant un tel scénario, l'application des facteurs du *Code de déontologie* devrait indiquer qu'une note d'honoraires d'envergure n'est pas raisonnable. L'application du facteur multiplicateur par la suite pour indiquer ce qui peut être raisonnable en l'espèce serait appropriée dans l'exercice de la discrétion du tribunal.

[67] D'ailleurs, l'analyse en fonction du facteur multiplicateur favorise des avocats qui ont un taux horaire relativement élevé et défavorise un avocat qui aide des démunis en chargeant un taux horaire plus bas, ce qui semble être le cas des avocats de l'appelant. Comme le mentionne l'appelant et comme certains juges l'ont reconnu :

> [163] L'évaluation des honoraires par la voie du multiplicateur a toutefois ses limites.
>
> […]
>
> [168] Comme le Tribunal n'a déjà mentionné dans Servites de Marie, appliquée sans discernement, l'analyse par facteur multiplicatif peut mener à récompenser l'inefficacité, l'inexpérience ou, pire encore, l'incompétence. Des procédures mal rédigées, des inefficacités administratives ou une méconnaissance du droit peuvent mener en soi à des contestations par des parties défenderesses. En l'instance, on n'a qu'à penser quels retards et coûts auraient été causés si les actions en garantie des centres de service scolaires et du PGQ dans le dossier F. n'avaient pas été disjointes, si tous les membres B à G ou #1 à #5 auraient dû fournir tous les dossiers médicaux requis ou si plus de membres avaient été interrogés au préalable. Or, plus le nombre d'heures est élevé, plus le facteur multiplicatif est réduit.
>
> [169] Par ailleurs, le règlement rapide d'un dossier sera au bénéfice des membres, mais amplifiera nécessairement le facteur multiplicatif. Dans un dossier comme celui-ci, où nombre de membres sont sexagénaires, tout report du règlement est dévastateur.[54]
>
> [Transcrit tel quel]

---

53 *Pellemans*, *supra*, note 26, paragr. 76.

54 *F. c. Frères du Sacré-Coeur*, 2021 QCCS 3621, paragr. 163, 168 et 169; voir aussi *Pellemans*, *supra*, note 26, paragr. 65.

[68] L'approche que je préconise ne contredit pas les propos de la Cour au sujet du facteur multiplicateur. Dans *Skarstedt*[55], la Cour décrit le multiplicateur comme une manière de « corroborer » la conclusion obtenue par la considération des autres critères. Dans l'arrêt *Banque Amex*, précité, la Cour indique que le facteur multiplicateur « constitue un outil de mesure ou de contrôle du caractère raisonnable des honoraires ». Je propose simplement une manière saine et logique d'utiliser cet outil.

[69] En l'espèce, l'Entente prévoit des honoraires de 7 000 000 $ (plus débours et taxes applicables), représentant 25 % du fonds de règlement de 28 000 000 $. Le juge a conclu que ces honoraires étaient déraisonnables. Jugeant qu'il s'agissait d'un obstacle insurmontable à l'approbation de l'Entente, il a refusé d'approuver celle-ci et omis de fixer le montant des honoraires.

[70] L'exercice de la fonction de contrôle des honoraires relève du pouvoir discrétionnaire du juge de première instance et, en conséquence, mérite une grande déférence en appel[56]. L'intervention de la Cour n'est permise que si les parties démontrent que le juge a exercé ce pouvoir discrétionnaire de manière abusive ou déraisonnable[57].

[71] Comme expliqué ci-avant, le juge a erré de manière manifeste et déterminante en refusant d'approuver l'Entente et de fixer le montant des honoraires vu, notamment, la rédaction de l'article 8 de l'Entente et de l'article 593 *C.p.c.* Même si je m'interroge quant à la manière dont le juge a appliqué le modèle du facteur multiplicateur, et donc sur l'exercice de sa discrétion en concluant que le montant des honoraires est déraisonnable, il n'est pas nécessaire d'infirmer sa conclusion à cet égard vu la disposition que je propose ci-dessous. Le juge n'a pas déclaré ce qui serait un montant raisonnable pour les honoraires; il n'a pas fait de détermination à cet égard. Donc, il n'y a pas de déférence due au juge pour la détermination par la Cour du montant des honoraires inférieur à 7 000 000 $ qui devra être payé aux avocats de l'appelant. La Cour a toute la latitude pour fixer elle-même le montant des honoraires raisonnable inférieur à 7 000 000 $.

[72] Le juge a reconnu l'expertise des avocats (en partie acquise durant l'action)[58] dans la représentation de victimes d'agressions sexuelles. Il a également reconnu qu'ils ont fait preuve d'un « grand engagement » envers les membres[59], ont effectué un « travail remarquable »[60] et ont obtenu un règlement avantageux pour les membres. Il a par ailleurs retenu que les avocats ont consacré un temps considérable au dossier, soit 3 479 heures, et qu'ils devront y dédier encore au moins 800 heures[61]. Il a tenu compte

---

55 *Skarstedt*, *supra*, note 34, paragr. 35.
56 *BGA inc. c. Banque de Montréal*, 2022 QCCA 140, paragr. 4-5; *Banque Amex*, *supra*, note 24, paragr. 8-9 et 63; *Skarstedt*, *supra*, note 34, paragr. 34.
57 *Banque Amex*, *supra*, note 24, paragr. 86.
58 Jugement entrepris, *supra*, note 2, paragr. 36 et 77.
59 *Id.*, paragr. 36.
60 *Id.*, paragr. 77.
61 *Id.*, paragr. 50-51.

du risque assumé par les avocats, mais il a conclu que les honoraires réclamés comportaient une « prime au risque » trop élevée pour le niveau de responsabilité et de risque applicable en l'espèce, soit « une difficulté et un risque global moyens »[62]. La détermination du juge selon laquelle le niveau de risque assumé était moyen a de quoi surprendre, dans la mesure où il écrit, au paragr. 73 de son jugement, que « les avocats ont assumé un énorme risque en prenant ce dossier »[63].

[73] Vu les constatations du juge afférentes aux critères d'évaluation des honoraires autres que le temps consacré au dossier par les avocats, la Cour est en mesure de conclure que le montant des honoraires maintenant réclamé par les avocats des membres, soit 20 % du fonds de règlement, est raisonnable.

[74] En première instance, toutes les parties étaient d'accord avec le montant des honoraires prévu par la convention, ou ne l'ont pas contesté, soit 7 000 000 $ (25 % du fonds de règlement). Seul le membre dissident s'opposait aux honoraires réclamés. Or, le juge écrit à son sujet :

> [40] Avec respect, le membre dissident ne comprend pas qu'il est de pratique courante, en matière d'action collective, de signer des conventions d'honoraires qui devront ultimement être soumises au Tribunal.[64]

Comme les membres étaient majoritairement d'accord en première instance avec des honoraires représentant 25 % du fonds de règlement, on peut présumer de leur accord avec des honoraires correspondant à 20 % du fonds de règlement.

[75] Étant donné que le juge n'a pas fixé le montant des honoraires, la Cour n'a d'autre choix que de le faire. Retourner le dossier en Cour supérieure pour qu'il soit statué sur cette question alors que la Cour est munie de la preuve nécessaire pour la trancher serait contraire au meilleur intérêt de la justice[65]. Les justiciables ont droit à ce que les tribunaux fassent le nécessaire pour permettre la résolution efficace des litiges. D'ailleurs, les parties sont d'accord pour que la Cour détermine le montant des honoraires.

[76] Les honoraires résultant d'un pourcentage de 20 % (5 600 000 $ (plus taxes)) sont raisonnables d'après tous les facteurs constatés par le juge lui-même et énumérés ci-dessus.

[77] L'application du modèle du facteur multiplicateur confirme la raisonnabilité des honoraires désormais réclamés par les avocats des membres. En appliquant un taux horaire de 250 $ (qui était le taux indiqué dans la convention d'honoraires en cas de révocation du mandat) aux heures de travail effectuées (3 479) et à venir (800), le montant des honoraires serait de 1 069 750 $. La prime de 4 530 250 $ que représente

---

62 *Id.*, paragr. 75.
63 *Id.*, paragr. 73.
64 Jugement entrepris, *supra*, note 2, paragr. 40.
65 Art. 9 *C.p.c.*

le quantum des honoraires réclamés (5 600 000 $) en appel est moindre que les 5 ou 6 millions de dollars que le juge considère excessifs. Les honoraires réclamés (5 600 000 $) correspondent à un multiplicateur de 5,23 des honoraires estimés (1 069 750 $) selon la formule précédemment énoncée. En appliquant plutôt un multiplicateur de 4,5 aux honoraires estimés – un tel multiplicateur ayant été jugé valable dans *Pellemans*[66] – , le montant des honoraires serait de 4 813 875 $. Si on applique le multiplicateur de 4,64 suggéré par l'appelant et par l'*amicus curiae*, les honoraires se chiffreraient à 4 963 640 $.

[78] Par contre, en prenant un taux horaire de 400 $ qui est le taux horaire des avocats de l'appelant applicable en 2022 retenu par le juge[67], les 4279 heures valent 1 711 600 $. Le facteur multiplicateur serait donc de 3,27 pour des honoraires de 5 600 000 $. Ceci confirme leur raisonnabilité pour les adhérents à cette méthode.

[79] Je propose donc que la Cour prenne acte de l'offre des avocats de l'appelant de réduire le montant de leurs honoraires à 20 % du fonds de règlement. En conséquence, le montant des honoraires accordé sera de 5 600 000 $ plus taxes et débours.

[80] Les avocats de l'appelant seront toutefois tenus de payer 99 136,09 $ au mis en cause FAAC à même ces honoraires.

c) Les honoraires de l'amicus curiae

[81] Je propose que les honoraires de l'*amicus curiae* soient payés par les membres, et donc déduits du montant du fonds de règlement.

[82] L'Entente délimite strictement l'étendue de la responsabilité financière des intimés. Elle prévoit en effet que les intimés ne peuvent être tenus responsables du paiement *d'aucune autre somme* que du montant de 28 000 000 $ et du montant du remboursement des taxes relatives au compte d'honoraires des avocats des membres (le cas échéant). Selon les termes mêmes de l'Entente, il n'est pas question que les honoraires de l'*amicus curiae* soient payés par les intimés. D'ailleurs, puisque les intimés n'ont pas pris position sur le quantum des honoraires, ils ne bénéficient pas des services rendus par l'*amicus curiae*.

[83] Il serait par ailleurs illusoire de condamner le membre dissident au paiement des honoraires de l'*amicus curiae*, et il n'y a aucune raison pour laquelle le FAAC devrait assumer ces frais.

[84] De plus, les frais de justice n'incluent pas les honoraires (art. 339 *C.p.c.*). La prétention de l'*amicus curiae* à cet égard ne peut donc pas être retenue.

---

66 *Pellemans*, *supra*, note 26, paragr. 121.

67 Jugement entrepris, *supra*, note 2, paragr. 77.

[85] En première instance, les membres (à l'exception du membre dissident) étaient d'accord avec le montant des honoraires fixé à 25 % du fonds de règlement prévu dans l'Entente. En appel, les avocats des membres ont accepté de réduire leurs honoraires à 20 % du fonds du règlement. Je propose d'approuver le quantum révisé des honoraires. La réduction du pourcentage des honoraires de 25 % à 20 % du fonds de règlement représente une économie de 1 400 000 $ pour les membres. Dans les circonstances de l'espèce, il est équitable que les membres assument les honoraires de l'*amicus curiae*[68]. De toute manière et en principe, les comptes d'avocats sont payés à même le fonds de règlement, mais je ne propose aucune règle rigide afin qu'un *amicus curiae* soit toujours payé par le fonds, car on peut imaginer des cas où il serait approprié que ces frais soient partagés par toutes les parties impliquées.

* * *

[86] Dans les circonstances exceptionnelles de l'affaire, notamment qu'aucune des parties ne conteste les honoraires des avocats de l'appelant, chaque partie devra supporter ses frais, sauf l'*amicus curiae*. Ses débours seront payés par les membres, tout comme ses honoraires.

[87] Pour tous ces motifs, je propose d'infirmer le jugement de première instance et d'accueillir l'appel avec les conclusions suivantes : accueille la demande d'approbation de l'Entente et approuve l'Entente, incluant les annexes dans leur intégralité, sauf quant aux honoraires d'avocats déterminés sur la base de 25 % du fonds du règlement à l'article 8 de l'Entente; prend acte de l'offre des avocats des membres de réduire leurs honoraires à 20 % du montant du fonds du règlement et conformément à l'article 593 al. 2 *C.p.c.* et à l'article 8 de l'Entente fixe le montant les honoraires à 5 600 000 $ (plus les débours de 8 661,10 $ et les taxes applicables); prend acte de l'engagement desdits avocats de rembourser 99 136,09 $ au mis en cause FAAC; déclare que les honoraires et débours de l'*amicus curiae* sont payables par les membres à même le fonds du règlement; déclare que la Cour supérieure conserve compétence sur tous les autres aspects du dossier à venir; le tout sans frais de justice.

MARK SCHRAGER, J.C.A.

[68] À l'audience, l'*amicus curiae* informe la Cour qu'au 28 février 2023, le temps consacré au dossier indique une facture de 60 000 $ approximativement.

TAB 2

Federal Court  Cour fédérale

vDate: 20210929

Dockets: T-1559-20
T-1621-19

Citation: 2021 FC 969

Ottawa, Ontario, September 29, 2021

PRESENT: The Honourable Mr. Justice Favel

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

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Nature of the Matter

[1] This is a judicial review brought by the Applicant, the Attorney General of Canada representing the Minister of Indigenous Services Canada [Canada]. The Applicant requests that various decisions of the Canadian Human Rights Tribunal [Tribunal], all of which are listed below, be set aside and remitted to a different panel. The applications for judicial review, as amended, relate to the following Tribunal decisions:

(1) The September 6, 2019 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 39 [Compensation Decision]. This is the decision at issue in the Federal Court File T-1621-19. The following Tribunal Decisions modified the Compensation Decision:

(i) The April 16, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 7 [Additional Compensation Decision];

(ii) The May 28, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 15 [Definitions Decision];

(iii) The February 11, 2021 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2021 CHRT 6 [Trust Decision]; and

(iv) The February 12, 2021 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2021 CHRT 7 [Framework Decision].

(2) The July 17, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 20 [Eligibility Decision]. This is the decision at issue in the Federal Court File T-1559-20. The following Tribunal decisions modified and confirmed the Eligibility Decision:

(i) The November 25, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 36 [2020 CHRT 36], as incorporated into the Framework Decision.

[2] The Compensation and Eligibility Decisions originate from a January 26, 2016 Tribunal decision (*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2 [Merit Decision]). The Merit Decision dealt with a February 23, 2007 human rights complaint [Complaint] made by the First Nations Child and Family Caring Society of Canada [Caring Society] and the Assembly of First Nations [AFN]. The Tribunal found sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*]. In the Merit Decision, the Caring Society and the AFN established that First Nations children and families living on reserve and in the Yukon were denied equal child and family services under section 5(a) of the *CHRA* and/or were adversely differentiated under section 5(b) of the *CHRA*. The Tribunal's finding of discrimination pertains to Canada's funding of the First Nations Child and Family Services Program [FNCFS Program] and the funding of Jordan's Principle for related health services to First Nations children.

[3] Section 5 of the *CHRA* states that "it is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

[4] The application for review of the Compensation Decision is dismissed.

[5] The application for judicial review of the Eligibility Decision is dismissed.

II. Background and Context

[6] The background context and procedural history leading to these applications for judicial review is complex to say the least. The underlying matters in this application have been ongoing for over a decade. The submissions and the record in these applications were extensive. While only two sets of decisions are the subject of this judicial review, it is useful to provide an overview of some key concepts and related Tribunal decisions to establish the proper context.

A. *The Complaint*

[7] In 2007, the Caring Society and the AFN filed the Complaint with the Canadian Human Rights Commission [Commission]. They alleged that Canada was violating the *CHRA* by discriminating against First Nations children and families who live on reserve by underfunding the delivery of child and family services. They argued that this discrimination was based on race and national or ethic origin. The Complaint noted the dramatic overrepresentation of First Nations children in foster care, the need for the proper implementation of Jordan's Principle (discussed in more detail below), and the systemic and ongoing nature of the discrimination. The Complaint also described past efforts by the Caring Society, AFN, and others to advocate for program reform and additional funding. The Commission exercised its discretion and referred the Complaint to the Tribunal for a hearing.

[8] Canada filed a judicial review application requesting that this Court quash the Commission's referral decision and prohibit the Tribunal from hearing the Complaint. In November 2009, the application was stayed (*Canada (AG) v First Nations Child and Family Caring Society of Canada* (24 Nov 2009), Ottawa T-1753-08 (FC)). Canada sought judicial review of the stay decision and this Court dismissed the application (*Canada (AG) v First Nations Child and Family Caring Society of Canada*, 2010 FC 343).

B. *FNCFS Program*

[9] In Canada, each province and territory has its own legislation that governs the delivery of services to children and families in need. However, First Nations children living on reserve and in the Yukon receive child and family services from the federal government through the FNCFS Program. This is because the federal government has "legislative authority" over "Indians, and lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. The separation of powers are the driving force behind the types of jurisdictional disputes discussed in this decision.

[10] At the time the Complaint was filed, FNCFS agencies were funded by Canada according to a funding formula known as Directive 20-1 or as the Enhanced Prevention Focused Approach. In Ontario, funding is provided to FNCFS agencies under the 1965 Child Welfare Agreement. Where there are no FNCFS agencies within a province, provinces provide the service and may be reimbursed by Canada.

[11] The purpose of the FNCFS Program is to ensure that on reserve and Yukon-based First Nations children and families receive culturally appropriate assistance or benefits that are reasonably comparable to services provided to residents in other provinces. On reserve and Yukon-based First Nations children and families also receive other kinds of social services and products from the federal government.

C. *Jordan's Principle*

[12] Jordan's Principle is named after Jordan River Anderson, who was from Norway House Cree Nation in Manitoba. Jordan had complex medical needs. His parents surrendered him to provincial care so that he could receive the necessary treatment. Jordan could have gone to a specialized foster home but Canada and Manitoba disagreed over who should pay the foster care costs. Jordan died at age five having never lived outside the hospital. Based on these circumstances, Jordan's Principle was established. Jordan's Principle is described in the Merit Decision as follows:

> Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them (at para 351).
>
> [Emphasis in original.]

[13] The House of Commons unanimously passed Jordan's Principle on December 12, 2007 in House of Commons Motion 296:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[14] A Memorandum of Understanding on Jordan's Principle [MOU] was signed between Aboriginal Affairs and Northern Development Canada [AANDC] and Health Canada in 2009. The MOU indicated that AANDC's role in responding to Jordan's Principle was by virtue of the range of social programs it provides to First Nations people, including: special education, assisted living, income assistance, and the FNCFS Program. The MOU was renewed in 2013.

D. *Parties before the Tribunal*

[15] The Caring Society and the AFN were co-complainants before the Tribunal. The Caring Society is a non-profit organization committed to research, policy development, and advocacy on behalf of First Nations agencies serving the well-being of children, youth, and families. The AFN is a national advocacy organization working on behalf of over 600 First Nations. The Commission represented the public interest. Canada was the Respondent. After the Tribunal requested an inquiry into the Complaint, the Tribunal granted interested party status to the Chiefs of Ontario [COO], who advocates on behalf of 133 First Nations in Ontario, and Amnesty International [Amnesty], an international non-governmental organization committed to the advancement of human rights across the globe. Nishnawbe Aski Nation [NAN], representing 49 First Nations' interests in Northern Ontario, and the Congress of the Aboriginal Peoples [CAP], representing off-reserve First Nations, Métis, and Inuit, were added after the Merit Decision.

III. Procedural History

[16] While it is not possible to summarize every legal argument or submission relied on by the parties in every proceeding, I will summarize the Tribunal's main decisions or rulings and the main submissions that are relevant to disposing of the applications before this Court.

A. *Canada's motion to strike the Complaint*

[17] In December 2009, the Applicant brought a preliminary motion at the Tribunal to strike the Complaint. It argued that its responsibility to fund the FNCFS Program and Jordan's Principle did not constitute a "service" within the meaning of the *CHRA*. It also characterized the Complaint as a cross-jurisdictional comparison of services and argued that such comparisons cannot establish discrimination.

[18] In March 2011, the Tribunal granted the Applicant's motion to strike based on the comparison issue. However, in April 2012, this Court quashed that decision and reinstated the Complaint (*Canadian Human Rights Commission v Canada (AG)*, 2012 FC 445). In March 2013, the Federal Court of Appeal dismissed the Applicant's appeal of that decision (*Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75).

B. *Retaliation*

[19] In 2013, the Tribunal held a hearing into the allegations that the Applicant had retaliated against the Caring Society's executive director, Dr. Blackstock. The Tribunal found that the Applicant had retaliated against Dr. Blackstock by prohibiting her participation in a COO meeting held at the Minister's Office. The Tribunal ordered the Applicant to pay $10,000 for

retaliation and $10,000 for pain and suffering (*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2). The Applicant did not seek judicial review of that decision.

C. *The Merit Decision*

[20] The Complaint hearing took approximately 70 days from February to October 2013. There were 25 witnesses and 500 documentary exhibits. Partway through the hearing, there was a three-month delay when the Caring Society discovered that the Applicant had knowingly failed to disclose 100,000 documents (Merit Decision at paras 14-16). Many of these documents were later held to be "prejudicial to Canada's case and highly relevant" *(First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 1 at para 13 [2019 CHRT 1]). The Tribunal issued a consent order, requiring the Applicant to compensate the Caring Society, the AFN, and the COO for "lack of transparency and blatant disregard" for the Tribunal process and because of "the serious impacts it had on the proceedings" (2019 CHRT 1 at para 30).

[21] The Applicant's submissions before the Tribunal included an overview of its commitment to the funding of the FNCFS Program, Jordan's Principle, and other programs. It submitted that there was insufficient evidence to substantiate the Complaint and that the documentary evidence should be given little, if any weight. The documentary evidence included Auditor General Reports, provincial Children's Advocates reports, the Blue Hills Report, and the Wen:De Reports. It also submitted that the Tribunal lacked jurisdiction to assess violations of international law or to provide remedies for any such alleged breaches. The Tribunal was also

exceeding its jurisdiction by intruding into the role of the Executive branch of the government and formulating policy and funding decisions.

[22] The Applicant also submitted that Jordan's Principle was not a child welfare concept. Therefore, it was beyond the scope of the Complaint. Canada's response to Jordan's Principle did not demonstrate a *prima facie* case of discrimination.

[23] The Applicant did not argue that the Tribunal lacked jurisdiction to grant financial awards. Rather, Canada argued that there was insufficient evidence brought by the Complainants to support the requested monetary award for "victims" or "[children] being removed from their home."

[24] The Tribunal found that the Applicant had violated section 5 of the *CHRA* in two ways. First, the FNCFS Program discriminated against First Nations children and families on reserve and in the Yukon. The FNCFS Program resulted in inadequate fixed funding that hindered the delivery of culturally appropriate child welfare services, created incentives for its agencies to take First Nations children into care, and failed to consider the unique needs of First Nations children and families.

[25] Second, the Applicant discriminated by taking an overly narrow approach to Jordan's Principle. This resulted in service gaps, delays, and denials. The Tribunal stated the following about the connection between the FNCFS Program and Jordan's Principle:

> In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the

> provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan's Principle on the following basis, at page 16:
>
> > Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources (at para 362).
> >
> > [Emphasis in original.]

[26] The Tribunal found that the Applicant was aware that the FNCFS Program was creating inequalities and disparities for First Nations children trying to access essential services. It also noted that there were evidence-based solutions, as referenced in the National Policy Review reports of 2000 and the three Wen:De Reports, which Canada participated in. Despite having awareness of the problem and potential solutions, the Applicant had failed to make any substantive changes to address the issues (Merit Decision at paras 150-185). This decision also referred to the 2008 Auditor General Report, the 2008 and 2010 Report on the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General, and various other reports and testimonies (Merit Decision at paras 186-216).

[27] The Merit Decision recognized that the Applicant's discriminatory funding practices caused First Nations children and families living on reserves and in the Yukon to suffer. It found that "these adverse impacts perpetuate the historical disadvantage and trauma suffered by

Aboriginal people, in particular as a result of the Residential Schools system" (Merit Decision at para 459). The Tribunal ordered that the Applicant immediately cease its discriminatory practices and engage in any reforms needed to bring itself into compliance with the Merit Decision. It also ordered the immediate implementation of Jordan's Principle's full meaning and scope. Finally, the Tribunal sought submissions on remedies.

[28] The Tribunal remained seized of the Complaint in order to oversee the Applicant's efforts to bring itself into compliance with the Merit Decision. It also remained seized to resolve outstanding issues related to victims' financial compensation. The Applicant did not seek judicial review of the Merit Decision.

D. *Decisions following the Merit Decision*

[29] After the Merit Decision, the Tribunal held several times that it retained jurisdiction to monitor matters to ensure discrimination ceased. The complexity of this proceeding is reflected in the summaries of certain other decisions, the most pertinent of which are below.

(1) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 10 [2016 CHRT 10]

[30] In April 2016, the Tribunal ordered the Applicant to take immediate action on certain findings in the Merit Decision and to provide a comprehensive report on actions taken. While it acknowledged that the Applicant was taking immediate steps to consult on ways to remedy the discrimination, it reminded the Applicant that it had ordered the immediate cessation of the

discrimination. The Tribunal also explained that there is an increased need to retain jurisdiction because remedial orders responding to systemic discrimination can be difficult to implement.

[31] The Tribunal advised that it would address the outstanding questions of remedies in three steps:

> First, the panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.
>
> Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA* (2016 CHRT 10 at paras 4-5).

[32] The Applicant did not seek judicial review of this decision.

(2) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 16 [2016 CHRT 16]

[33] In September 2016, the Tribunal found that the Applicant was restricting the application of Jordan's Principle to First Nations children on reserve, as opposed to all First Nations children. The Tribunal also found that the Applicant was similarly restricting its application to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (2016 CHRT 16 at para 119). The Tribunal clarified that Jordan's Principle extends to all First Nations children, whether they live on or off reserve (2016 CHRT 16 at paras 118-119).

[34] The Tribunal requested that the Applicant provide further information on its consultations regarding Jordan's Principle and the process for dealing with claims. It ordered Canada to provide the names and contact information of all Jordan's Principle focal points to each FNCFS agency. The Tribunal noted that the Applicant's new formulation of Jordan's Principle once again appeared to be more restrictive than that created by the unanimous House of Commons motion and ordered Canada to address this (2016 CHRT 16 at paras 118-119, 160). Canada did not seek judicial review of this ruling.

(3) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 14 [2017 CHRT 14]

[35] In May 2017, the Tribunal found that the Applicant had still not brought itself into compliance with the prior rulings on Jordan's Principle. This decision also addressed NAN's submissions concerning a tragic situation in Wapekeka First Nation [Wapekeka], located in northern Ontario.

[36] In July 2016, Wapekeka made a proposal to Health Canada seeking funding for an in-community mental health team. In the proposal, Wapekeka alerted Health Canada to concerns about a suicide pact amongst a group of young girls. In January 2017, two twelve-year-old children tragically took their own lives.

[37] NAN amended its notice of motion seeking remedies with respect to the loss of these children. NAN filed two affidavits to support its amended motion. One affidavit was from Dr. Michael Kirlew, a community and family physician for Wapekeka, and an Investigating Coroner

for Ontario's northwest region. Dr. Kirlew's evidence was that a Health Canada official had told him that Health Canada delayed responding to the Wapekeka proposal because it came at an "awkward time" in the federal funding cycle.

[38] The Applicant filed an affidavit of Robin Buckland, then Executive Director of the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch [FNIHB] and national lead for Jordan's Principle. In cross-examination, Ms. Buckland agreed that the Wapekeka proposal identified an example of a 'service gap' for children. She could not explain why Canada was not meeting the needs identified in the proposal.

[39] NAN submitted that there is a need to define what constitutes a 'service gap' under Jordan's Principle. Doing so will help ensure First Nations children properly receive sufficient government services. NAN also argued that a claimant should not automatically be denied compensation eligibility if they are unable to demonstrate a specific request for a service or support. NAN's submissions informed the definition of 'service gap' included in the Tribunal's ordered compensation framework [Compensation Framework].

[40] The Tribunal gave precise directions on how to process Jordan's Principle claims, reiterating two of its key purposes. First, an important goal of Jordan's Principle is to ensure that First Nations children do not experience gaps in services due to jurisdictional disputes. Second, because First Nations children may have additional needs, the delivery of services can go beyond what is otherwise not available to other persons. The Tribunal noted that a key concept of

Jordan's Principle is that it is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

(4) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 35 [2017 CHRT 35]

[41] The Applicant sought judicial review of 2017 CHRT 14 with respect to certain details about case conferences and timelines but discontinued this application after the Tribunal issued a consent order in November 2017. The Tribunal found that the Applicant was in substantial compliance with its directions regarding Jordan's Principle.

[42] The Tribunal set out key points to inform the Applicant's definition and application of Jordan's Principle. First, the Applicant must eliminate service gaps and engage a child-first approach that applies equally to all First Nations children, whether on or off reserve. Additionally, if a government service is available to all other children, the department of first contact must pay for the service without first engaging in any administrative procedure for funding and approval. Further, the Applicant should only engage in clinical case conferencing with professionals who have the relevant competencies and training. These consultations are only required as reasonably necessary to determine the requestor's clinical needs. The department of first contact can seek reimbursement after the recommended service is approved and funding is provided.

[43] The Tribunal further stated that where a government service is not necessarily available to all other children or is beyond the normative standard of care, the department of first contact

must still evaluate whether a requested service should be provided. The department of first contact must pay for the service the First Nations child requests, without engaging in any administrative procedure before the recommended service is approved and funding is provided. The Applicant may also consult with the family, First Nation community, or service providers to fund services within set timeframes.

[44] Lastly, while Jordan's Principle can apply to jurisdictional disputes between governments and within the same government, such disputes are not a requirement for the application of Jordan's Principle.

(5) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2018 CHRT 4 [2018 CHRT 4]

[45] In February 2018, the Tribunal again dealt with issues of noncompliance by the Applicant. It found that discrimination was continuing to occur on a national scale and the lack of prevention programs was leading to a disproportionate apprehension of First Nations children. The Applicant was ordered to pay FNCFS agencies' actual costs for certain matters and create a consultation committee where all the parties would meet to discuss the implementation of the Tribunal's orders.

[46] The Applicant raised concerns about the fairness of the Tribunal's approach to remedial jurisdiction. However, the Tribunal found no unfairness and stated that it would remain seized to ensure discrimination is eliminated. Specifically, the Tribunal found that "any potential procedural fairness to Canada is outweighed by the prejudice borne by the First Nations children

and their families who suffered and, continue to suffer, unfairness and discrimination" (2018 CHRT 4 at para 389).

[47] The Tribunal reiterated its intent to move forward to the issue of compensation (2018 CHRT 4 at para 385). The Applicant did not seek judicial review of this ruling.

[48] While not part of the ruling, I pause to note that on March 2, 2018 the parties signed a Consultation Protocol that covered significant principles governing the parties' discussions. It also acknowledged the Tribunal's three-stage approach to remedies.

(6) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 7 [Interim Eligibility Decision]

[49] The Caring Society brought a motion for relief to ensure that the definition of "First Nations child" as articulated in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, and 2017 CHRT 14 was defined. The proposed motion read:

> An order that, pending adjudication of the compliance with the Tribunal's orders of Canada's definition of "First Nations Child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle (Interim Eligibility Decision at para 27).

[50] The Caring Society brought this motion because the Caring Society had recently paid for the medical services of a First Nations child [SJ]. SJ did not have status under the *Indian Act*, RCS, 1985, c I-5 [*Indian Act*] but had one parent with section 6(2) *Indian Act* status. In other

words, SJ lacked status because of the second generation cut-off rule. For this reason, and because of SJ's off-reserve residence, Canada refused to pay for the medical expenses (Interim Eligibility Decision at para 80).

[51] The Tribunal ordered the following:

> The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant to section 53(2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life threatening service needs, pursuant to Jordan's Principle (Interim Eligibility Decision at para 87).

E. *Compensation Decisions*

(1) The Compensation Decision: T-1621-19

[52] On March 15, 2019, prior to the hearing on compensation, the Tribunal sent the parties written questions about their respective positions on the topic. In short, the combined submissions of the Caring Society and AFN were that Canada should pay compensation for every child affected by the FNCFS Program that was taken into out-of-home care and that the compensation should be paid to First Nations children and their parents or grandparents. Further, the compensation should be retroactive to 2006 until such time that the Tribunal deemed the Applicant compliant with the Merit Decision. The other respondents echoed these submissions. In response, the Applicant opposed the claims made for individual financial compensation on the

basis that the Tribunal lacked jurisdiction to grant such awards in cases about systemic discrimination.

[53] The Tribunal found that there are victims of Canada's discriminatory practices who are entitled to compensation. At paragraph 11 of the Framework Decision, the Tribunal provided a succinct summary of the Tribunal's ruling in the Compensation Decision:

> In the *Compensation Decision*, the Tribunal ordered compensation for children who were apprehended from their homes to start as of January 1, 2006. In this decision, the Tribunal determined that children who were apprehended from their home prior to January 1, 2006 but remained in care as of January 1, 2006 were within the scope of the *Compensation Decision* and eligible for compensation (paras. 37-76). Finally, the Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (paras. 77-151).

[54] The Tribunal found that Canada's approach to funding was based on financial considerations. Further, Canada's practices resulted in First Nations children being removed from their homes, families, and communities, which led to "trauma and harm to the highest degree causing pain and suffering" (Compensation Decision at para 193). According to the Tribunal, Canada acted with little to no regard for the consequences of removal of First Nations children from their families. As a result, the Tribunal awarded First Nations children, parents, or grandparents $40,000 each. Pursuant to section 53(2)(e) of the *CHRA*, the first $20,000 was for pain and suffering. Pursuant to section 53(3) of the *CHRA*, the remaining $20,000 was awarded as special compensation for the discriminatory practices under the FNCFS Program and Jordan's Principle.

[55] The Tribunal did not order that Canada immediately pay compensation. Instead, the Tribunal ordered Canada to define eligibility for victims, create an appropriate methodology to govern distribution, and consult with the other parties who could provide comments and suggestions about the orders. The Tribunal directed that the consultations should generate procedures that would allow, but not obligate, First Nations to identify children for the purposes of Jordan's Principle. This interim ruling would remain in effect until a final order. The Tribunal retained jurisdiction.

[56] The Applicant judicially reviewed the Compensation Decision and requested a stay pending a decision on the Merit. In response, the Caring Society sought to stay the application for judicial review. Both motions were dismissed (*Canada (AG) v First Nations Child and Family Caring Society of Canada*, 2019 FC 1529).

(2) Additional Compensation Decision

[57] Notwithstanding the Applicant's pending judicial review application, in February 2020 the Applicant, the AFN, and the Caring Society provided the Tribunal with a draft Compensation Framework. The parties also asked the Tribunal for guidance and clarification regarding compensation. In April 2020, the Tribunal clarified that:

(a) Child beneficiaries should gain unrestricted access to their compensation upon reaching their province's age of majority;

(b) Compensation should be paid to eligible First Nations children (and to the parents or grandparents) who entered into care before and remained in care until at least January 1, 2006; and

(c) Compensation should be paid to the estates of deceased individuals who otherwise would have been eligible for compensation (Additional Compensation Decision at paras 36, 75, 76, 152).

[58] There remained some elements of the draft Compensation Framework that were not agreed upon.

(3) The Definitions Decision

[59] On May 28, 2020, the Tribunal clarified the terms used in the Compensation Decision including ‘essential service’, ‘service gap’, and ‘unreasonable delay’. The decision also affirmed that eligible family caregivers did not extend beyond parents or grandparents. The Tribunal directed the parties to adopt three definitions to reflect its reasons in the finalization of the draft Compensation Framework.

(4) The Trusts Decision

[60] The Tribunal held that compensation payable to minors and individuals lacking capacity is to be paid into a trust. The Tribunal again retained jurisdiction and was empowered to resolve any individual disputes over compensation entitlements.

(5) The Framework Decision

[61] In this decision, the Tribunal addressed the process for compensation to First Nations children and beneficiaries as well as their parents or grandparents. The Tribunal approved the parties’ revised Compensation Framework and its accompanying schedules. The Compensation

Framework was consistent with, and subordinate to, the Tribunal's orders. One of the features of this decision was that victims could opt out of the compensation process. Within the present judicial review, this decision is being challenged under the Eligibility Decision.

F. *Jordan's Principle Eligibility Decisions*

[62] The rulings from 2016 to 2018, including the Merit Decision, did not expressly define the term 'all First Nations children' in connection with eligibility under Jordan's Principle. In February 2017, one of Canada's witnesses said that status under the *Indian Act* was not a mandatory requirement for receipt of services under Jordan's Principle. The following decisions contemplated whether non-status First Nations children are eligible for Jordan's Principle.

(1) Interim Eligibility Decision

[63] In February 2019, the Tribunal issued an interim ruling. The Applicant was ordered to provide non-status First Nations children living off reserve who had urgent and/or life threatening needs with the services required to meet those needs, pursuant to Jordan's Principle. The Tribunal ordered that this interim relief applied to (1) First Nations children without *Indian Act* status who live off reserve but are recognized as members by their Nation, and (2) those who have urgent and/or life-threatening needs. This interim relief order applied until a full hearing decided the definition of a 'First Nations child' under Jordan's Principle.

(2) Eligibility Decision: T-1559-20

[64] In May 2019, contrary to what was stated by one of Canada's officials in February 2017 (see paragraph 62 above), the then Associate Deputy Minister Mr. Perron said that "since the beginning" Canada understood the Tribunal's orders as applying only to children registered under the *Indian Act*. Canada ultimately broadened its approach to include non-status First Nations children who ordinarily reside on reserve. However, the Caring Society remained concerned that this approach was still too narrow and did not comply with 2017 CHRT 14, as it excludes children living off reserve. Accordingly, the Caring Society brought a motion for clarification and interim relief.

[65] At the Eligibility Decision hearing the Caring Society noted that there were three categories of children that Canada agreed were within the scope of the 2017 CHRT 14 Order:

> (a) A child, whether resident on or off reserve, with *Indian Act* status;
>
> (b) A child, whether resident on or off reserve, who is eligible for *Indian Act* status; and
>
> (c) A child, residing on or off reserve, covered by a First Nations self-government agreement or arrangement (Eligibility Decision at para 25).

[66] The Caring Society also argued that Canada was improperly excluding the following categories:

> (a) Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;

(b) First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and

(c) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status (Eligibility Decision at para 26).

[67] The Applicant argued that it was not appropriate to expand the scope of Jordan's Principle as requested by the Caring Society. The Caring Society's request extended beyond the Complaint, the particulars, the evidence, and the Tribunal's jurisdiction, as evidenced by the lack of consensus amongst the complainants. It also submitted that it was complying with the orders by providing Jordan's Principle eligibility to: registered First Nations children on or off reserve; First Nations children who are entitled to be registered; and Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve (Eligibility Decision at para 73).

[68] After reviewing submissions on self-government and self-determination, treaties, international obligations, and constitutional principles, the Tribunal found that it was not determining citizenship or membership of First Nations but only eligibility for Jordan's Principle. In so doing, it confirmed that the categories currently used by Canada were appropriate for the purposes of Jordan's Principle. The Tribunal did find, however, that two new categories proposed by the Caring Society were within the scope of the Complaint and the evidence and thus eligible for Jordan's Principle:

(a) First Nations children, without Indian status, who are recognized as citizens or members of their respective First Nations; and

(b) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for *Indian Act* status.

[69] The Tribunal refused to admit the third category (those who lost their connection to their First Nations communities due to the Indian Residential Schools System, the Sixties Scoop, discrimination within the FNCFS Program, or other reasons). The Tribunal further stated that the Applicant should let the admitted categories of First Nations children "through the door" (including those who were already being admitted by virtue of Canada's expanded definition) and then assess case-by-case whether the actual provision of services would be consistent with substantive equality principles (Eligibility Decision at para 215). At this point, Canada sought judicial review of this decision.

(3) 2020 CHRT 36

[70] The parties made joint submissions on a proposed eligibility process for Jordan's Principle and asked the Tribunal to approve the eligibility criteria. Accordingly, the Tribunal ordered that cases meeting any one of four following criteria are eligible for consideration under Jordan's Principle:

(a) The child is registered or eligible to be registered under the *Indian Act*, as amended from time to time;

(b) The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

(c) The child is recognized by their Nation for the purposes of Jordan's Principle; or

(d) The child is ordinarily resident on reserve.

[71] The Tribunal reconfirmed it would retain jurisdiction for the time being. The Tribunal committed that it would cede its jurisdiction once the parties confirm eligibility criteria and a mechanism for implementation is developed and effective.

(4) The Framework Decision

[72] On February 12, 2021, the Tribunal approved the parties' revised Compensation Framework and its accompanying schedules. This Compensation Framework is consistent with, and subordinate to, the Tribunal's Orders. Under the Compensation Framework, an Administrator will oversee the compensation process and victims can opt out.

IV. Issues and Standard of Review

[73] Having reviewed the parties' submissions and arguments, the issues in this matter are:

(1) Was the Compensation Decision reasonable?

(2) Was the Eligibility Decision reasonable?

(3) Was Canada denied procedural fairness?

[74] The parties agree that the appropriate standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]), save for any submissions on procedural fairness.

[75] The Applicant submits that a reasonableness review is a "robust exercise" where both the reasoning process and the outcome must bear the hallmarks of reasonableness (*Vavilov* at paras 12-13, 67, 72, 86, 99-100, 104). It submits that a failure to respect the statutory context or binding jurisprudence renders a decision unreasonable as does the failure to follow a logical line of reasoning or to properly consider the evidence (*Vavilov* at paras 102, 122-124).

[76] The Caring Society submits that the Applicant is actually proposing a correctness review. It submits that the Tribunal's findings of fact are not open to review in the absence of special circumstances. The Caring Society submits that the "robust exercise" referred to by the Applicant finds "its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers." The Caring Society cites *Vavilov* at paragraphs 5 and 74 in support of this position. Accordingly, this Court should take a position of restraint and pay attention to the Tribunal's expertise in light of a lengthy, complex case comprised of mostly uncontested rulings (*O'Grady v Bell Canada*, 2020 FC 535 at para 31).

[77] The AFN states that the Court should accord respectful deference to the factual and legal determinations of the Tribunal given the lengthy process and numerous rulings and orders. The AFN also asks this Court to accept the Tribunal's interpretation of the broad remedial provisions of the *CHRA*. It submits that an administrative decision-maker has a large permissible space for

acceptable decision-making where: the evidence before that decision-maker permits a number of outcomes; the decision-maker relies on its expertise and knowledge; and where there is little in the way of constraining legislative language (*Vavilov* at paras 31, 111-114, 125-126; *Canada (Attorney General) v Zalys*, 2020 FCA 81 at para 79).

[78] The Commission also submits that a reasonableness review starts from a position of judicial restraint. Accordingly, this Court must show respect for the distinct role of an administrative decision-maker such as the Tribunal. It submits that a reviewing Court is not to ask itself what decision it would have made, but only whether the party challenging the decision has met its burden of showing that an impugned decision was unreasonable (*Vavilov* at paras 83, 100).

[79] The remaining Respondents generally accept the positions of the Caring Society, the AFN, and the Commission concerning the standard of review.

[80] In light of *Vavilov*, I agree with the parties that reasonableness is the applicable standard for both the first and second issue. This means that a Court should not ask itself what decision it would have made if seized of the matter. Instead, a Court should only consider whether the moving party has met the burden of showing that the impugned decision was unreasonable in its rationale and outcome (*Vavilov* at paras 15, 75).

[81] I also agree that, absent exceptional circumstances, a reviewing Court is to leave a decision-maker's factual findings undisturbed. If a decision is internally coherent and based on a

rational chain of analysis, a Court should defer to it (*Vavilov* at paras 125, 85). When reviewing for reasonableness, a Court does not assess the decision-maker's written reasons against a standard of perfection (*Vavilov* at paras 91-92). Minor flaws or missteps in a decision-maker's decision will not be sufficient to establish a reversible lack of justification, intelligibility and transparency – "sufficiently serious shortcomings" are required (*Vavilov* at para 100).

[82] On the issue of procedural fairness, no deference is owed to the Tribunal. The Federal Court of Appeal recently stated in *Canada (AG) v Ennis*, 2021 FCA 95:

> In this regard, it is well settled that administrative decision-makers are not afforded deference in respect of procedural fairness issues: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 34-56; *Wong v. Canada (Public Works and Government Services)*, 2018 FCA 101, 2018 C.L.L.C. 230-038 at para. 19 [*Wong*]; *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin. L.R. (6th) 177 at para. 16 [*Ritchie*] (at para 45).

[83] As such, the issue of procedural fairness is reviewable on the correctness standard.

V. Parties' Positions

[84] As stated above, the parties' submissions and the record is extensive. Below is a brief overview of the parties' respective positions in the matters before this Court.

A. *Compensation Decision*

(1) Applicant's Position

[85] The Applicant does not dispute that the FNCFS Program was broken and needed fixing. The Applicant also recognizes a need to compensate the children affected. The essence of the Applicant's submissions are that the Tribunal exceeded its authority under the *CHRA* in making the Orders in question. It submits that a reasonable exercise of remedial jurisdiction must be consistent with the nature of the Complaint, the evidence, and the statutory framework. It submits that both decisions fail on these points.

[86] It also submits that the Tribunal did not have jurisdiction to provide compensation similar to a class action, particularly when the Complaint dealt with systemic discrimination. The Applicant notes that no individuals entitled to compensation were party to the proceeding or provided evidence before the Tribunal.

[87] The Applicant's specific challenges to the reasonableness of the Compensation Decision can be summarized as follows:

(a) It was inconsistent with the nature of the Complaint;

(b) It turned the case into a class action;

(c) It failed to respect the principles of damage law;

(d) The reasons are inadequate;

(e) It erred in providing compensation under Jordan's Principle;

(f) The definitions in the Definitions Decision are unreasonable;

(g) It erred in finding that Canada's conduct was wilful and reckless; and

(h) It erred in giving compensation to caregivers.

[88] The Applicant submits that the Compensation Decision, in whole or in part, is unreasonable and that it should be remitted to a newly constituted panel of the Tribunal.

(2) Caring Society's Position

[89] The Caring Society submits that the Compensation Decision is reasonable and the Court should not set it aside for the following reasons:

(a) Victims of systemic discrimination are entitled to individual remedies;

(b) Canada's arguments about class actions are a red herring;

(c) Principles of tort law have no application to human rights remedies;

(d) The estates and trusts orders are reasonable;

(e) The evidence was clear that First Nations children have endured pain and suffering;

(f) Canada's knowledge of the harms being caused warrants a finding of wilful and reckless discrimination; and

(g) The finding of ongoing discrimination under the FNCFS Program is reasonable and supported by the evidence.

[90] The Caring Society also states that the Applicant raises arguments about several decisions that are not at issue in this judicial review. Accordingly, the Applicant is making an improper collateral attack on them and on the Merit Decision. Alternatively, if the Court finds any part of the Compensation Decision unreasonable, then it should only remit that part of the decision to the same panel of the Tribunal.

(3) The AFN's Position

[91] The AFN echoes the Caring Society's position. The AFN submits that the Tribunal has broad remedial discretion to make victims of discrimination whole again. Further, the Tribunal may address the perpetrator's wilful or reckless conduct. It submits that the Applicant mischaracterizes the individual compensation award as a class action by comparing it with the type of damages one may obtain in that type of court proceeding.

[92] Additionally, the AFN argues that the Tribunal properly assessed the evidence. Namely, there was evidence that children suffered harm because they were removed from their families due to the Applicant's underfunding of the FNCFS Program. The AFN points out that witnesses testified at the Tribunal about the harms families face when a child is removed from the family unit. Additionally, Canada was aware that underfunding caused harm because Canada has been party to various reports on the topic for the past 20 years. The Tribunal reasonably found that this constitutes wilful and reckless discrimination.

(4) The Commission's Position

[93] The Commission adopts the same position on reasonableness as the Caring Society and the AFN. The Commission states that the Court should approach the Compensation Decision from a position of judicial restraint. It points to the fact that the Tribunal has been seized with this matter for nine years, it has heard from many witnesses, and has received voluminous documentary evidence substantiating both systemic and individual discrimination due to the underfunding of the FNCFS Program. It also points to the many rulings, including the Merit Decision, which Canada has not challenged.

[94] The Commission notes that while aspects of the Compensation Decision may be bold, extraordinary violations of the *CHRA* appropriately call for extraordinary remedies. The Commission focuses on general principles of the *CHRA* and leaves the issues of victims and compensation to the Respondents.

(5) The COO's Position

[95] The COO focuses on the Eligibility Decision. As such, its submissions are set out below.

(6) NAN's Position

[96] NAN adopts the same position as the Caring Society, the AFN, and the Commission. The focus of NAN's submissions relate to the definition of certain terms found in the Definitions Decision, particularly the term 'service gap'. It drew the Court's attention, as it did before the Tribunal, to the tragic events in Wapekeka. These events illustrate that systemic and individual

discrimination exists, contrary to what Canada claims. It submits that Canada's conduct was wilful and reckless and the financial awards are reasonable.

(7) Amnesty's Position

[97] Amnesty's interest in these proceedings is to ensure that the Compensation Decision and the Eligibility Decision are reviewed in light of Canada's international legal obligations. It submits that the Tribunal properly addressed Canada's international legal obligations.

(1) CAP's Position

[98] The Court granted CAP intervener status with the parties' consent but only with respect to the Eligibility Decision. Therefore, CAP's submissions are set out below.

B. *Eligibility Decision*

[99] The Applicant referred to this Decision as the 'First Nations child Definition decision' and the other parties referred to it as the 'Eligibility Decision'. In looking at the context, I have chosen to refer to it as the Eligibility Decision. As the Compensation Decision and the Eligibility Decision are connected, many of the parties' submissions about these two decisions overlap. Below I summarize the submissions directly related to the Eligibility Decision.

(1) The Applicant's Position

[100] The Applicant submits that the Eligibility Decision is unreasonable because the Tribunal exceeded its jurisdiction under the *CHRA*.

[101] The Applicant submits that the Complaint dealt with discrimination on reserve and in the Yukon. Further, there was no evidence related to the two additional classes of First Nations children which the Tribunal ruled were eligible for consideration:

> (a) Non-status children who are recognized by a First Nation as being a member of their community; and
>
> (b) Non-status children of parents who are eligible for *Indian Act* status.

[102] The Applicant submits that the first additional category imposes a burden to determine who is eligible within First Nations when these First Nations were not parties to the litigation and not consulted. The second category decides a complex question of identity that was not before the Tribunal and on which there is no consensus among First Nations.

(2) The Caring Society's Position

[103] The Caring Society submits that 'all First Nations children' does not mean 'children with *Indian Act* status'. The Tribunal modified the definition of 'First Nations child' to ensure that its Jordan's Principle Orders did not create further discrimination or result in additional complaints.

[104] The Caring Society disagrees with the Applicant's characterization of the Eligibility Decision. First, the definition adopted by the Tribunal is limited to the threshold question of

whose service requests the Applicant must *consider*. Second, there is no obligation on First Nations to render any determinations on recognition of the children. Third, no First Nation has intervened to support Canada's position that consultation should have occurred or that this definition is too expansive or creates any obligations on them.

[105] It states that the Tribunal properly considered issues of First Nations identity, self-determination, international legal obligations, federal legislation, section 35 rights, and the scope of the Complaint. Alternatively, if any part of the Eligibility Decision is found to be unreasonable then only that part should be remitted to the same panel of the Tribunal.

(3) The AFN's Position

[106] The AFN submits that the Tribunal properly considered the colonial aspect of the *Indian Act's* status provisions and assimilationist policies within the context of Treaties and inherent rights. It states that the Tribunal reasonably found that the status provisions in the *Indian Act* did not meet human rights standards. In so doing, the Tribunal was not challenging the *Indian Act* status provisions. Rather, the Tribunal recognized that certain members of First Nations continued to experience discrimination when trying to access health services because of Canada's reliance on the *Indian Act*'s definition of 'Indian'.

[107] In light of this entrenched systemic discrimination, it was open to the Tribunal to take a purposive approach in interpreting the *CHRA*. The Tribunal acted reasonably in extending eligibility for Jordan's Principle to individuals without Indian status who are recognized by their First Nations as citizens and members.

[108] The AFN requests that if the Court finds any part of the decision to be unreasonable, the Court should remit only that part for re-determination to the same panel of the Tribunal.

(4) The Commission's Position

[109] The Commission echoes the Caring Society and AFN's submissions. The Commission also submits that its interest was to urge the Tribunal to apply a human rights framework while taking into account principles of self-governance and self-determination. It notes that the Tribunal was not delving into First Nations' jurisdiction over citizenship or membership but was merely looking at eligibility under Jordan's Principle. The Tribunal, looking at the context of the *Indian Act's* history, properly noted that the *Indian Act* does not correspond with First Nations' own traditions and that it continues to have a discriminatory impact.

(5) The COO's Position

[110] The COO adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. The COO focuses on the Tribunal's respect for First Nations' rights to self-determination. It also rejects the Applicant's submission that consultation and consensus with First Nations was required before the Eligibility Decision could be rendered. Canada cites no authority for its position that consultation with Frist Nations is required prior to the decision being rendered on this issue. It submits that the Court should endorse the approach taken by the Tribunal in constructing a remedy that accounts for the jurisdiction of First Nations.

(6) NAN's Position

[111] NAN adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. It states that the overarching objective was to prevent further discrimination by exercising its remedial jurisdiction while also recognizing First Nations' jurisdiction over citizenship and membership. It states that the Tribunal properly considered eligibility under Jordan's Principle within the context of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP].

(7) Amnesty's Position

[112] Amnesty's interest in these proceedings is to ensure that the Court reviews the Eligibility Decision in light of the Applicant's international legal obligations.

(8) CAP's Position

[113] CAP notes that the Applicant accepts the eligibility of non-status children who are ordinarily resident on reserve for Jordan's Principle. CAP submits that the additional two classes of eligibility added by the Tribunal were reasonable in light of the evidence and prior proceedings.

C. *Procedural Fairness*

(1) Applicant's Position

[114] The Applicant submits that the Tribunal denied it procedural fairness by:

(a) changing the nature of the Complaint in the remedial phase;

(b) failing to provide notice that it was assessing the ongoing nature of the discrimination;

(c) failing to provide sufficient reasons concerning the individual remedies;

(d) requiring the parties to create a new process to identify beneficiaries of the compensation order; and

(e) inviting the parties to request new beneficiaries in the same decision that it determined who qualifies for compensation.

(2) Position of the Respondents and Intervener

[115] The Respondents and Intervener generally submit that the Applicant was not denied procedural fairness. The Tribunal had not yet completed the remedies stage. Therefore, it was reasonable for the Tribunal to find that discrimination had not ceased. They also submit that the Tribunal provided notice of the issues it was considering to all parties. In particular, the Merit Decision identified various issues that the Tribunal would consider in the future. Further, the Applicant did not seek judicial review of that decision.

VI. Analysis

A. *Preliminary Matter – Motion*

[116] The Applicant's written submissions included a reference to two Parliamentary Budget Office Reports [PBO Reports] dated March 10, 2021 and February 23, 2021. Prior to finalizing

the submissions, the Applicant sought agreement from the parties for their inclusion by way of email with a request of three days for reply. The parties did not respond to the Applicant's request and its written submissions included references to the two PBO Reports.

[117] The AFN objected to the inclusion of the PBO Reports and stated that their non-response was not an agreement for their acceptance. The AFN states that the Applicant did not bring forward a motion seeking to adduce fresh evidence on the matter. Therefore, the inclusion of the reports is improper and the Court should exclude them.

[118] The Applicant and the AFN agreed that the Court could dispense with this matter on the materials filed rather than devoting any time to this issue at the judicial review hearing. The Court agreed with this approach.

[119] Generally, an application for judicial review proceeds on the evidence before the decision-maker (*Assn of Architects (Ontario) v Assn of Architectural Technologists (Ontario)*, 2002 FCA 218). The scenarios where the Court can consider new evidence are limited and include such issues as procedural fairness and jurisdiction *(Gitxsan Treaty Society v HEU* (1999), [2000] 1 FC 135; *Reid v Canada (Citizenship and Immigration)*, 2020 FC 222 at para 33). The Applicant has raised the issue of the Tribunal rendering a decision without proper jurisdiction. In certain circumstances, this position can only succeed by bringing new evidence before the Court (*Gitxsan Treaty Society v Hospital Employees' Union* (1999), 177 DLR (4th) 687 at para 13 citing *R v Nat Bell Liquors Ltd* (1922), 65 DLR 1). I do not find that these circumstances arise here.

[120] I find that the inclusion of the PBO Reports has no bearing on the issues before this Court. The AFN is correct that the PBO Reports were not before the Tribunal in either of the applications for judicial review. As such, to the extent that they are relevant, I will rely on them solely for background purposes.

B. *The Compensation Decision*

(1) Reasonableness

[121] After considering the parties' submissions and the record before me, I find that the Tribunal has exercised its broad discretion in accordance with the *CHRA* and the jurisprudence. As a result, the Court defers to the Tribunal's approach and methodology concerning the Compensation Decision, which, when read as a whole, meets the *Vavilov* standard of reasonableness.

[122] The broad, remedial discretion of the *CHRA* must be considered in light of the context of this extraordinary proceeding, which involves a vulnerable segment of our society impacted by funding decisions within a complex jurisdictional scheme. It is not in dispute that First Nations occupy a unique position within Canada's constitutional legal structure. Further, no one can seriously doubt that First Nations people are amongst the most disadvantaged and marginalized members of Canadian society (*Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 332, 334). The Tribunal was aware of this and reasonably attempted to remedy the discrimination while being attentive to the very different positions of the parties. The Tribunal's overview of the parties' respective positions at every stage of the proceedings highlighted the

fundamentally different perspectives of the Applicant and the Respondents. These differences were once again illustrated in the submissions on these judicial reviews.

[123] On one hand, the Applicant sought clarification and made submissions to focus on the requirement for individualistic proof of harms and the fact that it was attempting to remedy any shortcoming in funding with more funding. On the other hand, the Respondents and Interveners submit that the Tribunal was taking a holistic view of this matter. According to the Respondents, the Tribunal focused on the collective harms to children, families, and communities, from the residential school era through to the impacts caused by the funding of the FNCFS Program and Jordan's Principle.

[124] My reasons concerning the Tribunal's jurisdiction generally, as well as the eight specific challenges submitted by the Applicant, are set forth below.

(a) *The Scope of the Tribunal's Jurisdiction*

[125] There is no dispute amongst the parties concerning the principles governing human rights law and, in particular, the scope of the Tribunal's jurisdiction pursuant to the *CHRA*. However, the parties do disagree on whether the Tribunal exercised its powers within the parameters of the *CHRA*.

[126] The Supreme Court of Canada has previously held that the *CHRA* provides the Tribunal with broad statutory discretion to fashion appropriate remedies. These remedies attempt to make victims whole and prevent the recurrence of the same or similar discriminatory practices

(*Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at paras 13-15; *Canada (Human Rights Commission) v Canada (AG)*, 2011 SCC 53 at para 62 [*Mowat*]).

[127] Similarly, the Federal Court of Appeal has held that the appropriate remedies in any given case is a question of mixed fact and law that is squarely within the Tribunal's expertise (*Canada (Social Development) v Canada (Human Rights Commission)*, 2011 FCA 202 at para 17 [*Walden 2011*]; *Collins v Attorney General of Canada*, 2013 FCA 105 at para 4).

[128] It is also clear that human rights legislation is fundamental or quasi-constitutional and should be interpreted in a broad and purposive manner (*Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 18). In other words, human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect (*Jane Doe v Attorney General of Canada*, 2018 FCA 183 at para 23 [*Jane Doe*]).

[129] The Applicant argues that the Tribunal only had authority to deal with the Complaint, which was in relation to an allegation of systemic underfunding. It also submits that there was insufficient evidence of individual harms before the Tribunal. The Applicant made similar arguments before the Tribunal as set out in the Compensation Decision at paragraphs 49-58. A brief summary of the Merit Decision, highlighted above at paragraphs 20-28, also set out some of the Applicant's arguments.

[130] The Respondents state that the Tribunal canvassed the nature of its jurisdiction at paragraph 94 of the Compensation Decision. The Tribunal wrote, "[t]he Tribunal's authority to

award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation." In that same paragraph the Tribunal also referenced passages it wrote on its authority to grant remedies in 2018 CHRT 4, which was unchallenged. 2018 CHRT 4 states:

> [30] It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered, rather than through the lens of the Treasury board authorities and/or the *Financial Administration Act*, R.S.C., 1985, c. F-11. The separation of powers argument is usually brought up in the context of remedies ordered under section 24 of the *Charter (see for example Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, which distracts from the proper interpretation of the *CHRA*. Moreover, the AGC did not demonstrate that the separation of powers is part of the *CHRA* interpretation analysis. None of the case law put forward by Canada and considered by the Panel changes the Panel's views on remedies under the *CHRA*.

[131] The Applicant also argues that the Tribunal improperly exercised its authority by retaining jurisdiction over its subsequent rulings. According to the Applicant, the Tribunal effectively abdicated its adjudicative responsibilities by directing the parties to try to reach agreements and by remaining seized to oversee implementation.

[132] I disagree with the Applicant. I am persuaded by the Respondents' submissions that the Tribunal's approach to the retention of jurisdiction has precedent. In *Hughes v Elections Canada*, 2010 CHRT 4 [*Hughes 2010*], Elections Canada was deemed to have engaged in discriminatory practice by failing to provide a barrier-free polling location. In that case, the Tribunal awarded broad public interest remedies and remained seized until the order in question and any subsequent implementation orders were carried out. The Tribunal also ordered the parties to

consult with one another about various aspects of the Order, including their implementation (*Hughes 2010* at para 100).

[133] Tribunals have also adopted this approach in various cases involving financial remedies for a single victim and large groups of victims (*Grant v Manitoba Telecom Services Inc*, 2012 CHRT 20 at paras 15, 23; *Public Service Alliance of Canada v Canada (Treasury Board)*, 32 CHRR 349 at para 507, Order #9). The Tribunal also referenced that there was precedent for remaining seized with a case for up to ten years to ensure discrimination was remedied, mindsets had the opportunity to change, and settlement discussions occurred (Compensation Decision at para 10. See also 2018 CHRT 4 at para 388; *McKinnon v Ontario (Ministry of Correctional Services)*, 1998 CarswellOnt 5895).

[134] Additionally, the Tribunal pointed out that there is nothing in the language of the *CHRA* that prevents awards of multiple remedies (Compensation Decision at para 130). I agree. The large, liberal approach to human rights legislation permits this method.

[135] The fact that the Tribunal has remained seized of this matter has allowed the Tribunal to foster dialogue between the parties. The Commission states that the leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government respondents (Gwen Brodsky, Shelagh Day & Frances M Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies”, (2017) 6:1 Can J of Human Rights 1). The Commission described this approach as bold considering the nature of the Complaint and the complexity of the proceedings.

[136] The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with the decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.

[137] The Commission states that the dialogic approach was first adopted in this proceeding in 2016 and has been repeatedly affirmed since then. It submits that the application of the dialogic approach is relevant to the reasonableness considerations in that Canada has not sought judicial review of these prior rulings.

[138] I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 24 CHRR 390 [*Grover*] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal…" (2016 CHRT 10 at para 15). Furthermore, I agree that "the [*CHRA*] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

[139] Finally, given that Parliament tasked the Tribunal with the primary responsibility for remedying discrimination, I agree that the Court should show deference to the Tribunal in light of its statutory jurisdiction outlined above.

(b) *Scope of the Complaint*

[140] I am not persuaded by the Applicant's argument that the Tribunal transformed the Complaint from systemic discrimination to individual discrimination and, therefore, unreasonably awarded damages to individuals. The Applicant is correct that the Complaint was brought by two organizations rather than individuals. However, when one reviews the proceedings and rulings in their entirety, it is evident that from the outset, First Nations children and their families were identified as the subject matter of the Complaint or, alternatively, as victims.

[141] More importantly, the Merit Decision addressed all of the Applicant's submissions on this as well as the remaining issues. The Applicant did not challenge the Merit Decision. It cannot do so now. Nevertheless, I will review each of its submissions.

[142] The opening sentence of the Complaint reads as follows:

> On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula…
>
> [Emphasis added.]

[143] The Applicant states that the Tribunal's Rules of Procedure require that the nature of a complaint be spelled out in the Statement of Particulars, to allow the Respondent awareness of the case to be met. It states that in this case there were no victims identified at the outset. The Applicant relies on *Re CNR and Canadian Human Rights Commission* (1985), 20 DLR (4th) 668 (FCA), which states:

> [10] This is not to say that such restitution is in every case impossible. On the contrary, paras. (*b*), (*c*) and (*d*) provide specifically for compensation, in kind or in money. Such compensation is limited to "the victim" of the discriminatory practice, which makes 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.

[144] The Applicant also cites *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] where the Supreme Court of Canada emphasized that remedies must flow from the claim as framed by the complainants. The Applicant also cites *Moore* for the proposition that the Tribunal is not, in the words of the Applicant, a "roving commission of inquiry" (*Moore* at paras 64, 68-70).

[145] I agree with the principle that remedies must flow from the Complaint. However, I also note that the Court in *Moore* was still cognizant of the need for evidence in order to consider whether an individual or systemic claim of discrimination was established:

> [64] …the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine

> if *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

[146] Clearly, the Court in *Moore* focused on the absence of evidence related to systemic discrimination and noted that the evidence related to individual discrimination. In the present matter, there was evidence of both systemic and individual discrimination and evidence of harms entitling the Tribunal to award remedies for both.

[147] It is also important to note that at paragraph 58 of *Moore* the Court stated that discrimination is not to be understood in a binary way, or to be an "either or" proposition:

> It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systematically on several.

[148] Regarding the statement of particulars, the Commission clearly identified who the Complaint sought to benefit. At paragraph 16 of its updated/amended statement of particulars, the Commission stated numerous times that the Complaint concerned "First Nations children and families normally resident on reserve." Similarly, at paragraph 17 of its updated/amended statement of particulars, the Commission described the issue as follows:

> Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children and families, or adversely affected them, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin?
>
> [Emphasis added.]

[149] The Commission also clarified that that the Caring Society and the AFN were seeking compensation for those removed from their communities and the full and proper implementation of Jordan's Principle, pursuant to House of Commons Motion 296.

[150] In the Eligibility Decision, the Tribunal also noted at paragraph 200 that it had "already addressed the scope of the claim (complaint, Statement of Particulars, evidence, argument etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras 99-102)." The Tribunal went further at paragraph 201 to state that "[t]his question was already asked and answered. The only other question to be answered on the Tribunal's jurisdiction here is if this motion goes beyond the claim or not. The Panel's response is that for issues I and II of this ruling it does not." The reference to "issues I and II" relate to the two additional categories of First Nations children.

[151] The Applicant, having been provided with the statements of particulars, responded with its own particulars. The Respondent also provided an updated statement of particulars in February 2013, which responded to the same issues it is now raising in this application.

[152] In addition, paragraphs 486, 487 and 489 of the Merit Decision set forth the positions of the Caring Society, the AFN, and the Applicant concerning compensation. There is no question that compensation was being sought for First Nations children and their families.

[153] I find that the Tribunal properly assessed the inter-relationship between the Complaint and the parties' statements of particulars. The Tribunal stated that the complaint form is just one

aspect of the Complaint and that it is does not serve the purposes of a pleading (*Polhill v Keeseekoowenin*, 2017 CHRT 34 at para 13 [*Polhill CHRT*]). This would appear to be consistent with the overall objective of the *CHRA*, where proceedings before the Tribunal are "intended to be as expeditious and informal as possible" (*Polhill CHRT* at para 19).

[154] The Applicant's argument that the Respondents did not identify the victim in the Complaint is technical in nature. It is inappropriate to read quasi-constitutional legislation in a way that denies victims resolution of their complaint because of a technicality. Furthermore, a complaint form only provides a synopsis of the complaint, which will become clearer during the course of the process, and as the conditions for the hearing are defined in the statement of particulars (*Polhill CHRT* at para 36). If the Applicant is suggesting it was prejudiced by this alleged transformation of the Complaint, I do not see it on the face of the record before me.

[155] I agree with the Respondents that the Applicant's arguments concerning individual versus systemic remedies could have been made earlier. For example, this argument could have been raised when the Merit Decision was released. At paragraphs 383-394, the Merit Decision includes various findings made in relation to First Nations children and their families. These findings are in reference to the First Nations children and families identified in the Complaint and the statements of particulars filed by the parties themselves. The Merit Decision's 'summary of findings' section analyzes, in detail, the findings in relation to the FNCFS Program and Jordan's Principle and it gave advance warning that damages would be addressed in the future. All of the Tribunal's findings in the Merit Decision are tied to First Nations children and their

families. These findings are reflected in virtually every subsequent decision, whether challenged or not.

[156] I agree with the Caring Society and the AFN that the Applicant cannot contest the compensatory consequences of systemic harm when the Applicant appears to accept the Tribunal's finding that widespread discrimination occurred. I note that, although the Applicant disagrees with the Tribunal's reasoning process and outcome, it recognized "a need to compensate the children affected" in its opening statement at the hearing for this judicial review. I also agree that the quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victim, which does not require medical or other type of evidence to be proven.

[157] The Tribunal reviewed the Complaint and Statement of Particulars and noted that the Caring Society and AFN requested compensation for pain and suffering and special compensation remedies. At paragraphs 6-10 of the Compensation Decision the Tribunal reproduced its three-stage approach to remedies from 2016 CHRT 10 and its prior rulings to indicate that compensation was going to be addressed. Prior to the Compensation Decision, the Tribunal sent all the parties written questions concerning compensation and it invited submissions. That document also indicated the positions of the Caring Society and the AFN on damages. The Applicant's memorandum of law at paragraph 54 acknowledges that the Caring Society's request for a trust fund was to provide some compensation to removed children. The Applicant went on to suggest that the Caring Society did not request compensation be paid

directly to individuals. Both of these statements indicate awareness that individual remedies were being contemplated.

[158] Compensation awarded pursuant to section 53(2)(a) of the *CHRA* is, of course, to compensate individuals for the loss of their right to be free from discrimination and the experience of victimization (*Panacci v Attorney General of Canada*, 2014 FC 368 at para 34). It is also intended to compensate for harm to dignity (*Jane Doe* at paras 13, 28). At paragraph 467 of the Merit Decision, the Tribunal acknowledged that the harm in question is the removal of First Nations children on the children and their families. At paragraphs 485-490 of the Merit Decision, the Tribunal summarized the parties' positions on compensation. It was clearly set forth that individual compensation was being sought. The Tribunal concluded by indicating it would send the parties some questions prior to determining compensation.

[159] Canada did not challenge the rulings prior to the Compensation Decision. Rather, Canada responded to the questions posed by the Tribunal on March 15, 2019. It is particularly important to note the third question posed by the Tribunal and its associated issues:

> 3. The Panel notices the co-complainants have requested different ways to award remedies in regards to compensation of victims under the *CHRA*.
>
> The Caring Society requested the compensation amounts awarded should be placed into an independent trust that will fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services. The Caring Society submits that an in-trust remedy that will lead to the establishment of a program of healing measures directed at persons who have been subjected to substandard child and family services is better suited to offering the children who have been taken into care since 2006 a meaningful remedy than awards of individual compensation could ever be. In this regard, the Caring Society specified that an analogy may be drawn to the

> component of the Indian Residential Schools Settlement that provided for the payment of amounts to a healing foundation for the purpose of setting up healing programs for the benefit of survivors.
>
> The Panel is aware of the IAP process for residential schools' survivors and also knows there were both a healing foundation established and a fund for individual compensations for people that attended residential schools and then, there was an adjudication process for victims of abuse in the residential schools.
>
> The AFN requested the financial compensation be awarded to the victims and their families directly with its assistance to distribute the funds rather than placed in a healing fund.
>
> Why not do both instead of one or the other?
>
> The Panel would not want to adopt a paternalistic approach to awarding remedies in deciding what to do with the compensation funds in the event a compensation is awarded to the victims.
>
> Some children are now adults and may prefer financial compensation to healing activities. Some may want to start a business or do something else with their compensation. This raises the question of who should decide for the victims? The victims' rights belong to the victims do they not?
>
> [Emphasis added.]

[160] At the Tribunal, the Applicant asserted that individual compensation must be predicated on individual victims being a party to the Complaint. The Tribunal addressed this argument by pointing out that section 40(1) of the *CHRA* allows a group to advance a complaint. The Tribunal also noted that pursuant to AFN resolution 85/201 the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada. This was a reasonable finding.

[161] The above passage indicates that the Tribunal considered systemic reforms and individual compensation at the heart of the Complaint. Further, over the course of many hearings the Applicant never adduced evidence in response to this proposition. The Applicant only ever stated that they disagreed with it or that the evidence was lacking. The Tribunal gave abundant consideration to the evidence before awarding relief, and was entitled to receive and accept any evidence it saw fit pursuant to section 50(3)(c) of the *CHRA*.

[162] I disagree with the Applicant's characterization of the decisions following the Merit Decision as an "open-ended series of proceedings." Rather, the subsequent proceedings reflect the Tribunal's management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implementing its order and to give full recognition of human rights. As well, significant portions of the proceedings following the Merit Decision were a result of motions to ensure Canada's compliance with the various Tribunal orders and rulings.

[163] Additionally, I find that the Tribunal properly analyzed the *CHRA* and understood that victims and complainants can be different people (Compensation Decision at paras 112-115). The Tribunal has awarded non-complainant victims compensation before, in a pay equity case (*Public Service Alliance of Canada v Canada Post Corporation*, 2005 CHRT 39 at para 1023, Order #1 [*PSAC CHRT*]). It is also true that, in that same case, the Tribunal declined to award compensation for pain and suffering where no victims testified (*PSAC CHRT* at paras 991-992). However, these paragraphs emphasize that other evidence substantiating the claim of discrimination was lacking. As discussed below, this is unlike the present case because here, the

Tribunal relied on extensive evidence. This evidence was referred to throughout the various decisions.

[164] Section 50(3)(c) of the *CHRA* gives the Tribunal broad discretion to accept any evidence it sees fit, even if that evidence would not be available in a court of law, including hearsay. In *Canadian Human Rights Commission v Canada (Attorney General)*, 2010 FC 1135 aff'd *Walden 2011* [*Walden FC*], this Court held that the Tribunal does not necessarily need to hear from all the alleged victims of discrimination in order to compensate all of them for pain and suffering (at para 73). There is nothing in the *CHRA* that requires testimony from a small group of representative victims either. The Tribunal has the discretion to rely on whatever evidence it wishes so long as its decision-making process is intelligible and reasonable.

[165] It is also important to clarify what pain and suffering the Tribunal was considering. The Applicant argues that individual complainants were required to provide evidence to particularize their harms. However, the Tribunal's overview of the evidence makes it clear that the harm in question includes harms to dignity stemming from the removal of children from their families (Compensation Decision at paras 13, 82-83, 86, 147-148, 161-162, 180, 182, 188, 223, 239A). As such, there was no need to particularize the specific harms flowing from the removal. It is the removal itself and the harm to dignity that the Tribunal was considering. The testimony of children and other victims was therefore unnecessary.

[166] I also find that the Tribunal did not err in finding that it had extensive evidence of both individual and systemic discrimination. At paragraphs 406-427 of the Merit Decision the

Tribunal discussed the impact that removal of a child has on families through the lens of the residential school system. The Tribunal referred to the evidence of Dr. John Milloy, Elder Robert Joseph, and Dr. Amy Bombay.

[167] In the Compensation Decision, the Tribunal referred to the evidence it was relying on, which it fulsomely canvassed at paragraphs 156-197. I find that this treatment of the evidence is consistent with the principles regarding the sufficiency of evidence as found in *Moore*. In short, the Tribunal had a basis upon which to decide the way it did.

[168] I note that the Tribunal rejected Canada's individual versus systemic dichotomy as did the Court in *Moore* (Compensation Decision at para 146; *Moore* at para 58). The Applicant's argument that it is necessary to have proof of individual harm and the effect of removal of children from families and communities highlights this dichotomy. Clearly, the parties' different perspectives toward the nature of this dispute and the perspective of whether discrimination was being remedied resulted in the multiplicity of proceedings.

[169] I find that individual and systemic discrimination are not mutually exclusive for the purposes of such a compensation order. Furthermore, the idea that victims should be barred from individual remedies because of the systemic nature of the harm is unsupported by the language in the *CHRA* (*Moore* at para 58; *Hughes 2010* at paras 64-74).

[170] The Commission submits that the Applicant relies heavily on a statement made by the Federal Court of Appeal that it would be impossible to award individual compensation to groups

as they are not always readily available (*Re CNR Co and Canadian Human Rights Commission* (1985), 20 DLR (4th) 668 (FCA) at para 10). The Respondents note that the Supreme Court of Canada reversed this judgment (*CN v Canada (Human Rights Commission),* [1987] 1 SCR 1114). Therefore, they request that this Court disregard the Applicant's submission. Notwithstanding the Supreme Court's decision, I agree with the Commission that the statement relied on by the Applicant is distinguishable because, as already pointed out above, it is not necessary for individuals to be present and provide evidence.

[171] The Commission states that the Tribunal reasonably concluded that the *CHRA* allows it to compensate non-complainant victims of discrimination. The Commission submits that the Tribunal properly distinguished *Menghani v Canada (Employment & Immigration Commission)* (1993), 110 DLR (4th) 700 (FCTD) [*Menghani*]. The Applicant submits *Menghani* as an authority for not granting a remedy to a non-complainant. Having reviewed *Menghani* and the Tribunal's reasons, I find that the Tribunal properly distinguished the case in light of its review of the Applicant's argument that child victims testify. The issue in *Menghani* was the lack of standing under the *CHRA* for the non-complainant, which is not the case in the present matters.

[172] Further, in the Compensation Decision, the Tribunal's response to the Applicant's submission was as follows:

> [108] It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is

> a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.
>
> [109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.
>
> …
>
> [144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case.
>
> [Emphasis added.]

[173] The Applicant also submits that the categories of people entitled to compensation as set out in paragraphs 245-251 of the Compensation Decision is quite different from what the Caring Society and AFN asked for. In those paragraphs, the Tribunal refers to the terms “necessarily removed” children, “unnecessarily removed” children, children affected by Jordan’s Principle as well as parents and caregiving grandparents. In my view, the Tribunal reasonably considered the various ways that underfunding of the FNCFS Program and Jordan’s Principle led to the removal of children from families and communities for the complex and multi-faceted reasons that the Applicant pointed out. It was reasonable to make finer distinctions between the reasons for

removal, but regardless of the reason, the affected children were removed and were denied culturally appropriate services in their own communities. Again, this was the basis of the Complaint and the Orders are not so different than what the Caring Society and the AFN were asking for.

[174] For all of the above reasons, I find that the Tribunal did not go beyond the scope of the Complaint in arriving at its decision.

(c) *Class Action*

[175] The Applicant submits that the Order the Tribunal made was equivalent to a class action settlement without the proper representation of class members. As such, the Tribunal improperly extended its powers beyond what the legislation intended, which rendered the decision unreasonable (*Vavilov* at para 68). I disagree.

[176] The Applicant mischaracterizes the compensation award. Canada compares the award to the type of damages that one may obtain in a court proceeding. However, awards for pain and suffering under section 53 of the *CHRA* are compensation for the loss of one's right to be free from discrimination, from the experience of victimization, and the harm to their dignity. A victim is not required to prove loss (*Lemire v Canada (Human Rights Commission)*, 2014 FCA 18 at para 85).

[177] It is clear that the Tribunal did not order compensation for tort-like damages or personal harm as is required in a class action proceeding. Rather, the Tribunal, as highlighted above, had a

staged approach to remedies and specifically afforded the parties with an opportunity to present their positions on compensation. Once the submissions were received, the Tribunal considered the arguments and ordered compensation under section 53 of the *CHRA*.

[178] As seen above, the Tribunal can award both individual and systemic remedies, subject to the sufficiency of the evidence before it. A class action, however, focuses on the individual compensation award and there is no certainty that any systemic remedies will be awarded. The *CHRA* afforded the Caring Society and AFN with a process where both systemic and individual remedies can be sought and the Tribunal did not err when awarding both. The development of a Compensation Framework was consistent with the goals of determining the process for compensation to individuals.

[179] I also note that there is nothing in the *CHRA* that prohibits individuals from seeking remedies by way of class actions or separate legal actions. Other court processes can be pursued by the victims should they opt out of the Compensation Framework. As the Applicant pointed out, the AFN has commenced a class action for a class of people affected by removals. However, I find that the class action proceeding does not have a bearing on the issues at hand for the reasons just stated. The development of the Compensation Framework also does not suggest that a class action was the preferred way or the only way to proceed. I agree with the Caring Society that the option of a class action does not negate the Compensation Orders. Both remedies can be pursued simultaneously.

(d) *Principles of Damages Law*

[180] The Applicant also submits that the Compensation Decision breaches the principles of damages law. The Applicant argues that the Compensation Decision fails to distinguish between children removed for a short time versus children removed for a longer time and between children who experienced different circumstances. The Applicant cites many cases related to civil claims, which stand for the proposition that causation and proportionality must be considered when awarding damages (See e.g. *Whiten v Pilot Insurance*, 2002 SCC 118). However, I find that these cases are distinguishable due to the statutory framework at play in this case. The *CHRA* enables the Tribunal to award compensation for one's loss of dignity from discriminatory actions. As stated previously, no actual physical harm is required.

[181] Once again, the Applicant submits that the Tribunal should have required at least one individual to provide evidence about the harms they suffered (*Walden FC* at para 72). It states that it is unreasonable to assume that all removed children, regardless of their unique circumstances, meet the statutory criteria for compensation without evidence thereof.

[182] I disagree. Paragraph 73 of *Walden FC* is a direct answer to the Applicant's submission:

> The tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine suffering of a group.

[183] The Respondents' position has consistently been that they seek to remedy the harms arising from the removal of First Nations children from their families and their communities.

They were not seeking individual tort-like loss suffered by each child or their families. The Tribunal reviewed the evidence related to harm in the Merit Decision, the Compensation Decision, and throughout numerous other rulings.

[184] The Applicant also cites *Hughes v Canada (AG),* 2019 FC 1026 at paras 42, 64 [*Hughes 2019*], stating that there must be a causal link between the discriminatory practice and the loss claimed. It submits that the Tribunal did not engage in an analysis of the effects that underfunding had on any of the recipients of compensation or the harms they suffered. The Applicant also states that the Tribunal did not differentiate between the circumstances of the recipients. The Applicant also refers to *Youmbi Eken v Netrium Networks Inc*, 2019 CHRT 44 [*Netrium*] for the proposition that the statutory maximum is awarded only in the most egregious of circumstances (at para 70).

[185] I agree with the principles of *Hughes 2019* as pointed out by the Applicant. However, unlike the present case, the damages in that case were lost wages and the issue was the cut-off date for the damages. This matter involves an award of compensation for pain and suffering caused by discriminatory conduct resulting in the removal of children from their homes and communities. This is clearly distinguishable from a wage loss complaint. In *Hughes 2019* the Court also noted that causation findings are intensive fact-finding inquiries which attract a high degree of deference (*Hughes 2019* at para 72). I agree.

[186] The circumstances in *Netrium* are also unlike the circumstances of this matter. The complainant was an adult who suffered a job loss and she was awarded $7,000. In this matter, we

are dealing with the harmful effects of removal on children over a considerable period of time. The awarding of the statutory maximum is within the discretion of the Tribunal to award based on the facts before it.

[187] The Applicant states that where the jurisdiction to consider group claims exists in human rights legislation, it is because legislatures have clearly provided it, such as the jurisdiction for Tribunals to deal with costs (*Mowat* at paras 57, 60). In *Mowat* the appellant argued that the broad, liberal, and purposive approach could lead to a finding that costs or expenses are compensable. That is not the case here. Neither the Caring Society nor the AFN are seeking anything more than what is contained in the *CHRA* and within the scope of the Tribunal's jurisdiction under the *CHRA*.

[188] I agree with the Respondents that tort law principles do not apply. The harm in this case, as determined by the Tribunal, was the removal of First Nations children from their families because of Canada's discriminatory funding model. As stated above, awards of compensation for pain and suffering are intended to compensate for an infringement of a person's dignity. The loss of dignity resulting from removal is a different harm that is not measured in the same manner as a tort or personal injury.

[189] The *CHRA* is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim's loss of freedom from discrimination, experience of victimization, and harm to dignity. This falls squarely within the jurisdiction of the Tribunal.

[190] The quantum of compensation awards for harm to an individual's dignity is limited but is tied to the seriousness of psychological impacts upon the victim. The Tribunal considered the approach taken in the Residential Schools Settlement Agreement Common Experience Payment. However, the Tribunal only considered this for a Compensation Framework, not for the application of class action principles. The very purpose of the compensation award is to compensate a biological parent or grandparent for the loss of their child to a system that discriminated against them because they are First Nations.

[191] I agree with the Commission that it was open for the Tribunal to find that financial awards under the *CHRA* serve particular purposes that are unique to the human rights context. Namely, compensation for pain and suffering and special compensation for wilful and reckless discrimination, which are permitted within the quasi-constitutional *CHRA.*

[192] In this case, sections 53(2)(a), 53(2)(e), and 53(3) of the *CHRA* are relevant. They relate to a victim's dignity interests and the seriousness of psychological impacts. Vulnerability of the victim is relevant to the quantum of award, and the Commission submits that this is especially true when the victims are young (*Opheim v Gill,* 2016 CHRT 12 at para 43).

[193] The Caring Society submits that the quantum of damages awarded in the Compensation Decision is more than reasonable considering that Dr. Blackstock herself received two awards of $10,000. When this amount is viewed in relation to the category of victims and the harms they experienced, the Caring Society submits that the maximum award is reasonable. I agree with this submission.

[194] Ultimately, the unique context of the harms that were found in this case limits the application of damages law, contrary to the Applicant's submissions. In the unchallenged Merit Decision, it was clear that the harm was related to the removal of children from their families and the harm to the children's dignity as opposed to individualized tort-like harms that they suffered from the removal. The Tribunal has already determined what the harms were, who suffered those harms, and that the harms were caused by Canada's discriminatory funding regime (Merit Decision at para 349).

(e) *Wilful and Reckless*

[195] The Applicant submits that the Tribunal's finding of wilful and reckless discrimination was unreasonable and unprecedented because it had no regard to proportionality or the evidence. I disagree.

[196] Once again, the Applicant states that this cannot be determined without an inquiry 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 and award compensation proportional to individual experiences. The Applicant states that the Tribunal did not do this. These arguments were already addressed in the previous section of this decision.

[197] The Applicant states that Canada did not discriminate wilfully and recklessly but rather made significant investments and changes to policies. For example, Canada commenced the funding of prevention activities. Furthermore, even if underfunding was a contributing factor to adverse outcomes for First Nations children, it was not the only factor in a complex situation.

The Applicant cites *Canada (AG) v Johnstone*, 2013 FC 113 [*Johnstone*] (aff'd 2014 FCA 110) where the Court set out the purpose of section 53(3) and defined "wilful and reckless" (*Johnstone* at para 155). Section 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" (*Johnstone* at para 155).

[198] In this proceeding, the Applicant pointed to changes it was making when the Tribunal ruled. It also pointed out additional changes it made to specifically address matters identified by the Tribunal. The Applicant states that there was no deliberate attempt to ignore the needs of First Nations children.

[199] The Caring Society and AFN submit that extensive evidence was before the Tribunal showing that the Applicant was aware of the ongoing harm to First Nations children. Despite this, the Applicant chose not to take corrective action. The Tribunal pointed to the various Wen:De Reports, the National Policy Review reports, and the Auditor General Reports which were accepted by the parties in the Merit Decision (See paras 257-305). The Tribunal also heard evidence from many witnesses, all of which was canvassed in the Merit Decision (See paras 149-216) and the Compensation Decision (see paras 33, 90, 144-145, 152, 155-157, 162, 172, 174, 184).

[200] Based on its review of various internal, external, and parliamentary reports over the course of twenty years, the Tribunal had ample evidence to determine that Canada was aware of

these issues. Therefore, it had a basis to award additional compensation up to $20,000 based on what it considered to be Canada's wilful and reckless discriminatory behaviour.

[201] When there is evidence that discriminatory practices caused pain and suffering, compensation should follow and be neither in excess of the $20,000 cap nor too low so as to trivialize the social importance of the *CHRA*. Special compensation for wilful and reckless conduct is a punitive provision intended to deter discrimination (*Johnstone* at para 155).

[202] As stated above, proof of loss by a victim is not required. The Commission submits that 'punitive' ought to be read in light of *Lemire*. In *Lemire*, the Federal Court of Appeal held that wilful and reckless conduct damages under *CHRA* are not penal in nature, but are to ensure compliance with statutory objectives of the *CHRA* (at para 90).

[203] The Tribunal properly considered the factual record in determining whether to award damages for wilful and reckless conduct. There was more than enough evidence in the form of reports, which Canada participated in, and which were independent, to ground this finding. The process and outcome of the Tribunal's decision amply reflects an internally coherent and rational chain of analysis.

(f) *Definitions in the Definitions Decision*

[204] The Applicant submits that the Compensation Decision and the subsequent decisions, particularly the Definitions Decision, produce unreasonable results. This is true even if the Court finds that some compensation to some children is appropriate for Jordan's Principle. More

specifically, the Applicant submits that the combined effect of these decisions is that children and their caregivers are entitled to the maximum compensation even where no request is made; where the failure or delay to provide the service caused no harm; or the delay was not greater than what was experienced by a non-First Nations child. It again points to the lack of proportionality and a lack of evidence of individual harm. It submits that the Tribunal determined that every case is the worst case, which is the wrong way to consider the issue.

[205] As noted above, the Definitions Decision considered three terms 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 these terms.

[206] The Applicant submits that the term ‘essential services’ was used multiple times in the Compensation Decision without being defined. Additionally, the Tribunal unreasonably rejected the Applicant’s submission that an ‘essential service’ was one that was necessary for the safety and security of the child. The Applicant takes issue with the Tribunal’s finding that any conduct that widens the gap between First Nations children and the rest of society is compensable, not only when it has an adverse impact on the health and safety of a First Nations child (Definitions Decision at para 147).

[207] The Caring Society submits that this Court should show deference to the Tribunal’s approach in developing a Compensation Framework for victims, which ultimately referenced these terms. The orders, read together, clearly define the class of victims who will receive compensation. I agree with the Caring Society’s submissions that the Tribunal also logically

defined ‘essential services’ in its assessment of compensation, limiting compensation to situations “that widened the gap between First Nations children and the rest of Canadian society.” The Tribunal stated numerous times that the goal of the exercise of its remedial discretion was to remedy discrimination. Its findings in relation to ‘essential services’ are consistent with the goal of remedying discrimination against First Nation children.

[208] In comparison, the Applicant submits that the Tribunal’s definition of the term ‘service gap’ is unreasonable. It submits that the Tribunal unreasonably rejected Canada’s proposed criteria that would have given meaning to this term: the service should be requested; there should be a dispute between jurisdictions regarding who should pay; and the service should normally be publicly funded for any child in Canada (Definitions Decisions at para 107).

[209] NAN notes that Canada appears to take issue with the fact that the Compensation Framework permits compensation for unmet services absent a “request” being communicated to Canada. NAN agrees with the Caring Society’s position on the issue of ‘service gaps’ and submits that the Tribunal made a reasonable decision in accordance with the evidence and submissions before it. NAN made submissions before the Tribunal on the definition of ‘service gaps’ from the perspective of northern First Nations who routinely face systemic service gaps in essential services. NAN submits that it is clear from the Compensation Framework that the Tribunal carefully considered NAN’s perspective and incorporated its submissions in the ‘service gap’ definition. I find that the Tribunal had evidence and submissions before it to make this finding within the overarching jurisdiction of remedying discrimination.

[210] Regarding the term ‘unreasonable delay’, the Applicant submits that the Tribunal acknowledged that the Applicant 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 those standards. However, it did not impose any reasonable limits (Definitions Decision at para 171, 174). In short, the Applicant submits that it is unreasonable to compensate everyone who experiences delay for any service at the levels ordered in the Compensation Decision.

[211] The Caring Society disagrees with the Applicant that compensation for any delay is inappropriate, as it is only *unreasonable* delay that factors into compensation. I agree with the Caring Society’s characterization of the Tribunal’s concept of delay. It is clear that not every delay is a factor. Further, the Caring Society takes issue with the Applicant’s characterization of the trust orders. Although the Applicant is not challenging them, the Caring Society argues that the Applicant is attempting to rely on them to raise doubts about the Tribunal’s overall analysis. The Caring Society states that these orders are reasonable and “anchored in sound legal principles.” I agree for the reasons stated above.

[212] The Commission submits that the Tribunal’s decision to compensate estates is justified and reasonable. The *CHRA* has broad remedial purposes and does not bar compensation to estates, as discussed in *Stevenson v Canada (Human Rights Commission)* (1983), 150 DLR (3d) 385. Canada has not actually pointed to any contrary decisions by a federal court interpreting the *CHRA.*

[213] The Applicant does rely on *Canada (AG) v Hislop*, 2007 SCC 10 [*Hislop*], but this case dealt with individuals who were deceased *before* the allegedly discriminatory laws were passed. Further, *Hislop* did not create a general rule that claims under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] always end upon death. The Tribunal also addressed *Gregoire,* wherein the British Columbia Court of Appeal found that an estate was not a "person" capable of making a claim under British Columbia's *Human Rights Code* (*British Columbia v Gregoire,* 2005 BCCA 585 [*Gregoire*] at para 14). The Tribunal distinguished the present matter from *Gregoire* and found that the claims for First Nations children and families were being pursued on behalf of "victims" – a term not used in British Columbia's *Human Rights Code.* As stated above, the Applicant was not necessarily challenging the finding with respect to estates, but argued it was yet another example of an unreasonable reasoning process.

[214] With respect to compelling public interest considerations, the Tribunal held that compensating estates would serve a dual purpose. It would compensate victims for pain and suffering caused by discrimination and would deter Canada from discriminating again. I agree with the Commission's submission that recent Tribunal rulings, which accept that financial remedies may be awarded to estates, suggests that the panel in this case was not rogue, but rather, reasonable.

[215] As stated throughout this judgment and reasons, the Applicant's insistence on individual harms misinterprets the nature of the Complaint advanced by the Caring Society and the AFN. Both were seeking remedies caused by the mass removal of children. As also noted above, the

scope of the findings of the Tribunal were all an attempt to remedy discrimination, which it has jurisdiction to do. This is common as a proceeding moves through the process, but even more so considering the scope of the Complaint and the unprecedented nature of the claims and proceedings. The evolution of this case is not a departure from the essence of the Complaint. It is but a refinement due to the unique nature of this very complex and precedent-setting process.

[216] After considering the parties' submissions, I find that the Tribunal reasonably determined definitions for the terms 'essential services', 'service gaps', and 'unreasonable delay'. The Tribunal based its determinations on the Compensation Decision and with the overall goal of remedying and preventing discrimination. It reasonably exercised its jurisdiction as permitted under the *CHRA*.

(g) *Inadequate Reasons*

[217] The Applicant submits that the Tribunal's reasons were inadequate because they failed to explain its departure from the *Menghani*, *Moore*, and *CNR* decisions. Furthermore, the reasons were unresponsive to Canada's arguments. For example, the Applicant states that the Tribunal 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 (Additional Compensation Decision at paras 133-134 distinguishing *Gregoire* at paras 7, 11-12). The Applicant submits that the Tribunal did not explain the significance of this difference.

[218] While the Applicant is not challenging the Tribunal's findings on compensation for estates, it nevertheless points out the Tribunal's failure to apply the rule in *Hislop. Hislop* stands

for the proposition that an estate is not an individual and therefore it has no dignity than can be infringed. The Tribunal simply stated that the rule in that case is context-specific, and the human rights context justifies departing from the rule. The Applicant states that the Tribunal failed to explain why and that this is an example of lack of reasoning.

[219] The Applicant submits that the Tribunal also ignores relevant statutory authority, including sections 52 and 52.3 of the *Indian Act*. Section 52 of the *Indian Act* gives the Minister the authority to deal with the property of beneficiaries lacking competence. Section 52.3 contemplates the Minister working with Band Councils and parents to manage the property of minors within the relevant provincial schemes. Since the complainants did not challenge the constitutionality of the *Indian Act* the Tribunal was obliged to follow it.

[220] All of the above passages throughout this section of my reasons actually illustrate the scope of the Tribunal's analysis as well as the rationale for its findings. I find that the reasons are sufficient to show why it made its findings. The Applicant simply disagrees with those findings.

(h) *Jordan's Principle Compensation*

[221] The Applicant states that through a series of decisions the Tribunal has created a new government policy and awarded compensation for a failure to implement that policy. The Applicant states that by adopting Jordan's Principle, 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.

[222] The Applicant submits that Jordan's Principle received only passing reference in the Complaint. Over the course of the litigation, the Tribunal transformed Jordan's Principle from a resolution aimed at addressing jurisdictional wrangling, to a "legal rule" that ensures substantive equality to a far greater group than First Nations children on reserve and in the Yukon. The Applicant says it "accepted" these rulings because they reflected progressive policy choices and that the results have been impressive.

[223] The Caring Society disagrees with the Applicant's assertion that Jordan's Principle never formed part of the Complaint. Rather, they submit that the Tribunal had previously addressed this claim and ruled that Jordan's Principle was intertwined with the FNCFS Program (see paragraph 25 above). Because the Applicant previously accepted these findings, they state that Canada cannot argue that they are unreasonable on judicial review. I agree. The Applicant has forgone its right to challenge the Merit Decision. Also, as pointed out in paragraph 14 above, the MOU between AANDC and Health Canada also referenced the link between the FNCFS Program and Jordan's Principle.

[224] I agree with the Commission that the issues pleaded are broad enough to encompass matters relating to Jordan's Principle. The Tribunal made rulings in 2016 and 2017 that expressly rejected the Applicant's argument that Jordan's Principle was beyond the scope of the Tribunal's inquiry. I agree with the Commission that if the Applicant truly believed that Jordan's Principle is beyond the Tribunal's scope, then it should have applied for judicial review of those earlier rulings.

(i) *Compensation to Caregivers*

[225] The Applicant states that there was no basis for awarding compensation to caregivers as there was no evidence of the impact of funding policies on that group. Additionally, family members must advance claims themselves and provide evidence of the harm they suffered, which they have not (*Menghani* at 29).

[226] The Applicant submits that the Complaint was silent regarding compensation. Furthermore, prior to the AFN's submissions that family members should be compensated, the Caring Society had only submitted that any compensation should be paid into a trust. Since there were no caregiver complainants and no evidence of the harms they suffered, the decision is unreasonable.

[227] In my view, the Tribunal reasonably found that the AFN is empowered via the mandate of the Chiefs-in-Assembly to speak on behalf of First Nations parents and caregiving grandparents as victims of Canada's discrimination. The Tribunal also interpreted the *CHRA* and found that complaints on behalf of victims made by representatives can occur. The Commission has the discretion to refuse to deal with a complaint if the victim does not consent.

[228] The record also confirms that the Tribunal always used the terms 'First Nations children and families' from the Merit Decision onwards. The Complaint, statement of particulars, and numerous passages of the Merit Decision confirm this. In fact, all parties' submissions referred to the victims in this manner.

[229] There was extensive evidence before the Tribunal at the hearing of the Compensation Decision. This evidence particularized the alleged harms and the impact of removal on children, families, and communities. There was extensive evidence from several experts as well as reports that Canada had endorsed, including the Royal Commission on Aboriginal Peoples, which explained the significance of family in First Nations culture. The Tribunal therefore had evidence before it to inform its ruling concerning families.

[230] The Tribunal received and accepted evidence it saw fit pursuant to section 50(3)(c) *CHRA*. It accepted evidence in relation to harms suffered by these victims, which was ample and sufficient to make its finding that each parent or grandparent who had a child unnecessarily removed has suffered. The evidence of the various reports showed that communities and extended families also suffered by the removal of children but the Tribunal did not extend the compensation to all family members. In my view, the Tribunal was sensitive to the kinship systems in First Nations communities (See e.g. Compensation Decision at para 255). At the same time, it was also cognisant of the limits to its jurisdiction and the evidence in restricting the compensation only to parents or caregivers despite the general submissions related to ‘families’. Ultimately, the Tribunal’s reasons were clearly alive to the issue of not only children, but families and caregivers as well (Compensation Decision at paras 11, 13, 32, 141, 153-155, 162, 166-167, 171, 187, 193, 255). The Tribunal’s finding with respect to compensating parents or caregiving grandparents is transparent, intelligible, and justified.

(2) Compensation Decision Conclusion

[231] Ultimately, the Compensation Decision is reasonable because the *CHRA* provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify to establish individual harm. The Tribunal already had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada's knowledge of that harm. Further, the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. From the outset, First Nations children and families were the subject matter of the complaint and Canada always knew that the Respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding.

C. *The Eligibility Decision*

[232] Before delving into the analysis of this issue, there are several things to note about the Eligibility Decision. First, in describing the context, the Tribunal pointed out that the Merit Decision confirmed that "the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services and/or differentiated adversely in the provision of services, pursuant to section 5 of the *CHRA*" (Eligibility Decision at para 2). Next, the Tribunal described the steps Canada would take to implement the Tribunal's order and additional findings in 2017 CHRT 14 regarding Canada's narrow interpretation of Jordan's Principle. This led to amended orders in 2017 CHRT 35 which were not challenged.

[233] Second, and more importantly, at paragraph 17 of the Eligibility Decision, the Tribunal noted that neither the Tribunal nor the parties had provided a definition for ‘First Nations child’ until the Caring Society brought the motion leading to the Eligibility Decision. The Tribunal did note that the parties had been discussing this issue outside of the Tribunal process but had not reached a consensus on this issue. In the Interim Eligibility Decision the Tribunal concluded that this issue was best determined at a full hearing and it sought submissions on a wide spectrum of issues such as international law and the UNDRIP, discrimination cases under the *Indian Act*, Aboriginal law, human rights law, and constitutional law.

[234] Third, it is helpful to recall the parties’ positions with respect to eligibility and what the Eligibility Decision actually decided. Prior to the Eligibility Decision, the Applicant wished to restrict eligibility for Jordan’s Principle to “First Nations children living on reserve” and “First Nations children with ‘disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports’” (Interim Eligibility Decision at para 12). At the time of the Eligibility Decision the Applicant willingly expanded eligibility to (a) Registered First Nations children, living on or off reserve; (b) First Nations children who are entitled to be registered; and (c) Indigenous children, including non-status Indigenous children who ordinarily reside on reserve. In comparison, the Caring Society wanted Jordan’s Principle to apply to First Nations children beyond children with status that live on reserves. The Caring Society proposed three additional categories to the Tribunal. For the sake of simplicity, I will refer to the Caring Society’s additional three categories as the first, second, and third categories in the order that they were addressed by the Tribunal in the Eligibility Decision. The Tribunal made the following ruling regarding the first category:

> [211] The question is two-fold. The first part is the following:
>
> > Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?
>
> [212] The Panel, in light of the reasons outlined above, answers yes to this question…
>
> [213] The second part is the following:
>
> > If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?
>
> [214] The Panel believes that it is the latter…

[235] The following excerpts highlight the Tribunal's ruling on the second category:

> [272] The Panel pursuant to section 53 (2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.
>
> [273] Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

[236] The following passages highlight the Tribunal's ruling on the third category, which the Tribunal split into two categories:

> [274] This last section will deal with two additional categories:

> First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.
>
> First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons.

…

> [280] This being said, the Panel finds that First Nations children residing off reserve who have lost connection to their First Nations communities for other reasons than the discrimination found in this case fall outside of the claim before it. The claim was not focused on this at all until the 2019 motion and sufficient evidence has not been presented to support such a finding. As the Panel previously said, the Supreme Court of Canada stated in *Moore* that the remedy must flow from the claim.

…

> [283] However, the Panel did not make findings in regards to the services First Nations children of Residential School and of Sixties Scoop survivors receive off-reserve who are not recognized as part of a First Nation community given that it was not advanced by the parties in their claim or arguments before this motion and insufficient evidence was presented.

…

> [285] Given the lack of evidence in this motion, the Panel is not in a position to make findings let alone remedial orders for the two above categories at this time.

[237] In the end, the Tribunal only added the first and second categories of First Nations children who could be eligible for services under Jordan's Principle. The Tribunal also ordered the parties consult to generate potential eligibility criteria for Jordan's Principle. The parties were

to consider the Tribunal's rulings and establish a mechanism to identify citizens/members of First Nations as well as funding sources.

[238] The Applicant's arguments regarding the Eligibility Decision, which I address below, relate to one another and necessarily overlap. Ultimately, I find that the Tribunal's definition of the term 'First Nations child' falls within a range of possible outcomes which are defensible in respect of the facts and the law.

(1) Reasonableness

(a) *The Scope of the Tribunal's Jurisdiction & the Scope of the Complaint*

[239] The Applicant submits that the Tribunal exceeded its jurisdiction in making the Orders. Specifically, the decision falls outside the scope of the Complaint and the evidence by adding categories that the Caring Society and the AFN did not even ask for. The Applicant also submits that the Caring Society and AFN essentially challenged the provisions of the *Indian Act* and that the Tribunal had no jurisdiction to entertain such submissions.

[240] On the whole, the Respondents submit that creating additional categories and defining 'First Nations child' beyond the scope of the *Indian Act* is consistent with international law principles; complies with a human rights framework; respects First Nations' rights to self-government and self-determination; and ensures substantive equality.

[241] In my view, the inclusion of two additional categories of children is not beyond the Tribunal's jurisdiction or the scope of the Complaint. With respect to the Tribunal's jurisdiction under the *CHRA*, I adopt the same reasoning set out above in the section addressing the Compensation Decision. The Tribunal found that a definition of 'First Nations child' predicated on the *Indian Act* would perpetuate discrimination. In making this finding, it was not ruling on the validity of the *Indian Act*. It was within the general and remedial jurisdiction of the Tribunal to prevent further discrimination by adding additional categories for eligibility that extend beyond the *Indian Act*. As for the scope of the Complaint, there is a clear nexus between the Eligibility Decision and the original Complaint. The Complaint involved Jordan's Principle and the Tribunal addressed this aspect of the Complaint by creating two additional categories of children who are eligible for Jordan's Principle. Additionally, it was a live issue for the Tribunal to define the meaning of 'First Nations child' because the parties had not yet determined the scope of this term.

[242] Although not always stated, at their core, the parties' submissions and the Tribunal's decision centre on the *Indian Act*. This does not mean that that the Tribunal acted outside of its jurisdiction when creating new categories of eligibility, however. There is a difference between legally challenging the status provisions of the *Indian Act* and defining 'First Nations child' for the purposes of eligibility under Jordan's Principle. Just because the Tribunal extended eligibility for Jordan's Principle beyond the confines of the *Indian Act*, does not mean that the Tribunal acted outside its jurisdiction or that it determined that the status provisions were invalid.

[243] There are numerous examples within the record to support the position that the *Indian Act* was central to the underlying proceedings. The Complaint explicitly referred to discrimination of First Nations children ‘on reserve’. Likewise, both parties’ submissions and the Tribunal’s decisions about eligibility discussed children living on ‘reserve’ and children with ‘status’. These concepts are creatures of the *Indian Act*. There simply is no ‘reserve’ or ‘status’ system without the *Indian Act*.

[244] Additionally, at the Federal Court hearing, the Applicant discussed the affidavit of Dr. Gideon. Of course, Dr. Gideon’s affidavit was also before the Tribunal. With this affidavit, the Respondent wanted to demonstrate that Canada was taking a liberal view of the definition of ‘First Nations child’ for the purposes of Jordan’s Principle. Dr. Gideon’s affidavit makes numerous references to the *Indian Act* and the concepts of ‘reserve’ and ‘status’. Indeed, it is difficult, if not impossible, to not consider the terms ‘reserve’ and ’status’ without also considering the *Indian Act*.

[245] Another example of the Applicant’s awareness of the *Indian Act’s* effect on the Eligibility Decision can be found in its submissions. The Applicant submits that the definition it was employing at the time of the Eligibility Decision was not discriminatory. It included children registered or entitled to be registered under the *Indian Act* who had a connection to a reserve, even if not always resident on it, and children ordinarily resident on reserve even if they did not have *Indian Act* status (2020 CHRT 36 at paras 17-18). The Applicant also led evidence from Mr. Perron that First Nations children with *Indian Act* status living off reserve suffered due to

jurisdictional disputes. Conversely, there was no evidence related to non-status, off reserve children suffering discriminatory treatment.

[246] Canada's expanded categories are clearly informed by the *Indian Act* as they focus on status and residency on reserves. I acknowledge that these categories are more inclusive than Canada's original positions regarding eligibility and reflect a significant move forward. I recognize Canada's attempt in trying to eliminate discrimination within the context of not only the Complaint, the evidence, and the various decisions and rulings, but also within the existing legislative and constitutional constraints in which the parties operate.

[247] I am not persuaded, however, by the Applicant's submissions that the two additional categories are outside the scope of the Tribunal's jurisdiction, the Complaint, or the evidence before the Tribunal. It is true that there was evidence on the relationship between the *Indian Act* (including the status and reserve systems) and Canada's funding decisions. However, as I discuss below, there was also evidence that First Nations children, regardless of status or residency on reserves, suffer because of Canada's funding regime, which is predicated on and influenced by the *Indian Act*. I make this finding notwithstanding Canada's steps to expand eligibility**.**

[248] The Tribunal clearly contemplated the difficulties that arise when relying on concepts that originate from the *Indian Act*, such as 'status' and 'reserves':

> …The Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring (at para 177).

In this passage, the Tribunal implicitly acknowledges that a definition of 'First Nations child' that relies on the *Indian Act* will perpetuate the discrimination the Tribunal seeks to remedy.

[249] The Caring Society submitted, and the Respondents and intervener agreed, that the Tribunal reasonably concluded that 'all First Nations children' includes certain groups not recognized by the *Indian Act*. In expanding the definition to include the additional two categories, it prevented further discrimination. It was therefore reasonable not to exclude children solely due to the *Indian Act's* second generation cut-off rule.

[250] I agree with the Respondents. The Eligibility Decision prevented future discrimination, which is consistent with the purpose of the Tribunal's jurisdiction as previously referred to in paragraphs 125 to 128, above. There is no dispute that the Tribunal enjoys a large remedial jurisdiction and that this jurisdiction should be interpreted liberally in light of the quasi-constitutional nature of the *CHRA*. I also find that this purposive approach is consistent with jurisprudence outlining Canada's relationship with First Nations peoples, most recently articulated in *R v Desautel*, 2021 SCC 17 [*Desautel*].

[251] Although the facts of *Desautel* are quite different from the present case, I am still mindful of the guidance the Supreme Court provided at paragraph 33 regarding the context of proceedings involving Indigenous people:

> …an interpretation of "aboriginal peoples of Canada" in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of

Aboriginal peoples as a result of colonization is well acknowledged:

> Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.
>
> (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 139-40)

By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (*R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at para. 53).

[252] The Tribunal's Eligibility Decision was clearly attempting to remedy past and future discrimination while being mindful not to "perpetuate historical injustice." This is evident when considering the scope of the evidence the Tribunal considered relating to the history of Indigenous-Crown relations.

[253] The first category acknowledges that there is a distinction between Indian status and First Nations citizenship. Presently, a First Nations child or person may not have *Indian Act* status, but they may be a member or citizen of their First Nation if that First Nation has control over its

membership and has enacted such a provision. At present, this is possible through section 10 of the *Indian Act*, which allows for First Nations control over membership. Indian status, however, remains within the purview of Canada. The Tribunal did not act outside its jurisdiction by extending Jordan's Principle eligibility to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members. I agree with the AFN that it was open to the Tribunal to take a purposive approach in interpreting its home legislation and to accordingly award extended eligibility of Jordan's Principle to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members.

[254] The respondents and intervener generally echo the submissions of the AFN and the COO that the *Indian Act* is a form of apartheid law that gives the government unilateral authority to determine who is legally an Indian. They submit that First Nation signatories to the Treaties never agreed that treaty benefits and remunerations would cease when a descendant lost their *Indian Act* status. These submissions are duly noted. However, I need not make specific pronouncements on these submissions as, in my view, the findings of the Tribunal are reasonable without regard to these submissions.

[255] The COO points to the *Act respecting First Nations Inuit and Métis children youth and families*, SC 2019 c 24 [*FNIMCYF Act*] which acknowledges Canada's commitment to respecting the UNDRIP and First Nations' right to self-government or self-determination in relation to child and family services (See *FNIMCYF Act* at preamble, s 8). The *FNIMCYF Act* similarly does not define 'Indigenous Child', 'First Nation', or 'First Nations child'. Rather, the statute creates space for First Nations to do it themselves. In Ontario, the *Child Youth and Family*

Services Act, 2017, SO 2017 c 14, Sched 1 [*Ont CYFS Act*] acknowledges the UNDRIP in its preamble and recognizes that a First Nations child's "band" or "community" is a band or community of which the child is a member or with which the child identifies (at s 2(4)). 'First Nations child' is not defined nor confined to the *Indian Act* definition. As the Tribunal recognized at paragraphs 224-226 of the Eligibility Decision, the *Ont CYFS Act* also has a mechanism to notify First Nations in the same manner as the *FNIMCYF Act*. As such, the Tribunal's reasoning is not without precedent.

[256] In addition, when viewed through the lens of the Complaint, the Merit Decision, and the Compensation Decision, the second category is not so remote as to not be part of the Complaint. The second category factors in that some First Nations children may become eligible for *Indian Act* status based on their parents' present or future eligibility or because of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25 [Bill S-3]. Bill S-3 amended the *Indian Act* to address sex-based discrimination and will temporarily increase the number status Indians in Canada.

[257] I also find the Eligibility decision reasonable because, in considering the third category, the Tribunal acknowledged that this category strayed beyond the Complaint. The Tribunal, citing *Moore*, was aware of the parameters of its jurisdiction and determined that the third category had no nexus to the Complaint.

[258] Overall, the Complaint was framed in terms of discrimination in relation to the *Indian Act*, reserves, and the status system. In arriving at its findings in the Eligibility Decision, the

Tribunal was cognizant of the scope of the Complaint and its broad remedial jurisdiction. The Eligibility Decision sought to prevent future discrimination, which is consistent with the purpose of the Tribunal's enabling statute. As such, the Tribunal's decision was reasonable.

(b) *Implications for Compensation Decision*

[259] At the hearing for these judicial review applications, the parties noted that the additional two categories affect the Compensation Decision. Canada submitted that these two categories now expand the eligibility of those entitled to compensation. On its face, they do, but I find that the Tribunal reasonably delved into the delicate issue of *Indian Act* status when it sought to cease discrimination. It was a bold approach but one that was within the jurisdiction of the Tribunal based on the Complaint and the evidence in the record.

[260] I am not convinced that the first category will automatically expand the eligibility of those entitled to compensation. It certainly has the potential to do so, but Canada would need to coordinate with First Nations, as set out in the Compensation Framework. First Nations will determine whether children are citizens or members. For various reasons, First Nations may recognize children as members or citizens or they may not. At this stage, it is premature for anyone to ascertain how First Nations will approach this category or determine how many children this will affect.

[261] Similarly, there is also no way to ascertain how many children will fit into the second category. This is particularly true given that it is difficult to know the impact of Bill S-3. However, the second category is still attempting to address the effect of the *Indian Act's* status

and reserve provisions on Canada's funding decisions. The Tribunal determined that these provisions still have the potential to discriminate against certain individuals. The two additional categories attempt to soften the effects that these provisions have on certain children and to give the parties some flexibility in how to work together to assess these complexities.

[262] I also note that the Compensation Framework itself contains provisions that place some limitations on whether certain categories are entitled to compensation for pain and suffering or for special compensation for wilful and reckless discrimination (see for example Articles 4.2.5.2 and 4.2.5.3). Again, this illustrates some restraint on the part of the Tribunal.

(c) *Alleged Lack of Evidence*

[263] The Applicant submits that there was no evidence for the Tribunal to make its order concerning the additional two categories. This is not accurate.

[264] In the Interim Eligibility Decision, the Tribunal had evidence of the continuing impact of the narrow interpretation of Jordan's Principle through the circumstances of SJ. That ruling clearly set forth that there was a denial of Jordan's Principle services simply because of the second generation cut-off rule (see paras 56-86). SJ did not have *Indian Act* status because one of her parents was registered under section 6(2) of the *Indian Act*.

[265] It is also important to note that SJ was not resident on reserve. As such, Canada's expanded categories at the time of the Eligibility Decision would not have captured SJ. The Applicant submits that there was no evidence before the Tribunal that children other than those

accounted for in its expanded categories experienced discrimination. SJ's story indicates otherwise. There is no reason to believe that SJ's circumstances are unique.

(d) *Non-Party First Nations*

[266] The Applicant also submits that the community recognition concept under the first category is unreasonable because it imposes obligations on non-party First Nations to determine which children are eligible within 48 hours of being made aware of a potential claim (2017 CHRT 35 at para 10). Additionally, the Tribunal avoided addressing the problems it created regarding community recognition and the *Indian Act's* second generation cut-off rule by instructing the parties to devise a system themselves. Finally, the Tribunal ignored the potential spillover effects of recent legislative efforts to address child and family services issues such as the *FNIMCYF Act*. I disagree with all of these submissions for the following reasons.

[267] First, the order only required the parties to consult with one another. There was no declaration that it was declaring the *Indian Act's* citizenship or membership requirements to be improper or unconstitutional. In accordance with its dialogic approach and the difficult role it has within the *CHRA*, the Tribunal sought to endorse the good faith discussions that the parties had embarked upon outside of the Tribunal's process.

[268] Second, in no way did the order affect the second generation cut-off rule in the *Indian Act*. There was simply an order for the parties to look at two additional categories of First Nations children who would be eligible for consideration under Jordan's Principle. Eligibility and challenges to the cut-off rule cannot be dealt with where there is no *Charter* challenge to

section 6(2) of the *Indian Act*. The Tribunal was aware of this (Eligibility Decision at para 176). The second generation cut-off rule, as questionable as it may be in light of First Nations' general opposition to the *Indian Act's* determination of status, remains unchallenged and in force.

[269] I also agree with CAP's submission that the Eligibility Decision required Canada to consult with the parties to develop eligibility criteria for First Nations children under Jordan's Principle, which led to a consent order. If Canada considered the consultation inadequate, it could have sought broader participation earlier. There is no evidence that it did or that any First Nation community is objecting to the purported burden of identification for categories of First Nations children.

(e) *Determining Complex Questions of Identity*

[270] Finally, the Applicant submits that the second category decides a complex question of identity that was not before the Tribunal and that Indigenous Peoples themselves do not agree on.

[271] In *Desautel*, the Supreme Court of Canada dealt with a section 35(1) Aboriginal rights claim of a non-citizen of Canada. The Court stated the following: "[w]hether a group is an Aboriginal people of Canada is a threshold question, in the sense that if a group is *not* an Aboriginal people, there is no need to proceed to the *Van der Peet* test… The threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada" (*Desautel* at para 20). The Court also found that no previous decision of the Supreme Court had interpreted the scope of the words "aboriginal peoples of Canada" in section

35(1) of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11 (*Desautel* at para 21).

[272] Similar to the Supreme Court's approach in *Desautel*, I also find that the legal issue of the definition of who is a First Nations child and how that determination is made is ultimately left for another day (*Desautel* at para 32). The Eligibility Decision was not determining the legal effect of who is a First Nations child. Rather, it determined certain parameters to assist the parties in deciding who is eligible for Jordan's Principle and, consequently, compensation.

[273] I agree with Commission's submissions that the Eligibility Decision clarified the benefit at issue as being able to apply for services and have those requests considered on a case-by-case basis. In other words, First Nations children living off reserve will now have the opportunity *apply* for services pursuant to Jordan's Principle. This does not guarantee that all applications will be fulfilled and services will be provided. The Eligibility Decision only instructs Canada to let First Nations children "through the door" for the purposes of eligibility. Determining who may *apply* for services does not determine a complex question of identity that has legal consequences beyond the scope of eligibility for Jordan's Principle.

[274] Contrary to what the Applicant submits, the Eligibility Decision clearly left determinations of identity and citizenship to First Nations communities. I agree with the COO that it was appropriate for the Tribunal to make a decision that would allow First Nations to retain control over identity, membership, and citizenship, as the principles in *Desautel* provide. The COO points to Annex A of 2020 CHRT 36 which does not dictate anything to a First

Nation. Rather, that annex provides a funding mechanism for a First Nation that chooses to participate in the community recognition process. Furthermore, it leaves space for the First Nation to determine how it will do so.

[275] For all of these reasons, I disagree with the Applicant that the Eligibility Decision is unreasonable because it determined complex questions of identity.

(2) Eligibility Decision Conclusion

[276] Ultimately, the Eligibility Decision contains no reviewable error to permit the intervention of this Court. It is intelligible and rationale and the Tribunal worked within its jurisdiction to make the findings it did, taking into consideration the entire process that has developed since the Complaint was filed in 2007.

[277] The Eligibility Decision highlights the tension between nationhood, the *Indian Act*, and eligibility for program funding provided by the Applicant. Frankly, the parties are talking to each other about different issues. The Respondents properly highlight the colonial legislation's adverse impact on Indigenous peoples historically and today. They also highlight that Indigenous people possess inherent Aboriginal and Treaty Rights including the right to self-determination. These rights include the right to govern their citizens, including children and families. It is a holistic approach.

[278] On the other hand, the Applicant adopts a more limited and legalistic approach. It is fine to approach matters this way, but this approach, as a starting point, is fundamentally at odds with

how Indigenous parties may approach matters. It is also not conducive to early resolution of issues arising with First Nations. The multitude of rulings and orders confirms this.

[279] With that being said, Canada is to be commended for moving beyond its initial definition on eligibility. The Tribunal's remedial and dialogic approach can be credited for this improvement. Ultimately, however, the success rests upon true dialogue and discussion between Canada and the respondents. I encourage those discussions to continue for the benefit of future generations of First Nations children.

D. *Procedural Fairness*

[280] I am not persuaded that the Applicant was denied procedural fairness.

[281] As noted above, I have determined that the Tribunal did not change the nature of the Complaint in the remedial phase. The Tribunal, exercising extensive remedial jurisdiction under the quasi-constitutional *CHRA*, provided a detailed explanation of what had transpired previously and what would happen next in each ruling/decision (See e.g. 2016 CHRT 16 at para 161). In so doing, it was relying on a dialogic approach. Such an approach was necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination. Most importantly, the Tribunal was relying on established legal principles articulated in *Chopra v Canada (AG)*, 2007 FCA 268 at para 37 and *Hughes 2010* at para 50 (Merit Decision at paras 468, 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined.

[282] I also find that the Tribunal did not err in finding that discrimination is ongoing. The Tribunal retained jurisdiction to deal specifically with this issue from the Merit Decision onward. For example, in 2017 CHRT 14 at paragraphs 80 and 133, the Tribunal made the finding that discrimination is ongoing based on Canada's narrow interpretation of Jordan's Principle eligibility. The Tribunal made a similar finding in 2018 CHRT 4 at paragraph 389. These rulings were not challenged.

[283] I disagree that the Tribunal ought to have included the issue of whether the discrimination had ceased and given Canada a chance to make submissions on this point. As the parties moved along with the reporting requirements, the Tribunal did note that it was encouraged by Canada's compliance with some of its orders and findings, including the provision of increased funding. However, funding alone was not going to remedy discrimination (2018 CHRT 4 at paras 13, 105-107, 132-134, 222).

[284] I am persuaded by the Caring Society's submission that the Tribunal's finding of harm is supported by the "robust evidentiary record", which I have referenced throughout this decision. As a result, it was reasonable for the Tribunal to find that discrimination is ongoing, particularly in light of the fact that Canada never challenged this finding in previous Orders.

[285] The Applicant also submits that the Tribunal disregarded its right to procedural fairness by inviting the parties to make suggestions about "new categories" of victims for compensation. I find that the additional categories are not new, but are related to the issues presented by the *Indian Act*. The record shows that Canada had been relying on the *Indian Act* for its Jordan's

Principle eligibility determinations for some time. The *Indian Act's* concepts on 'status' and 'reserve' were squarely before the Tribunal and these terms necessarily affected the eligibility for Jordan's Principle in one way or another.

[286] With respect, the Applicant never raised any objections with the Tribunal's approach. A party alleging a breach of procedural fairness has an obligation to raise it before the Tribunal at the earliest opportunity. The Applicant, being a sophisticated litigant, should be aware of their obligation. For example, at paragraph 11 of the Compensation Decision, the Tribunal reiterated its earlier finding in 2018 CHRT 4 at paragraph 389, that First Nations children and families continue to suffer. The Applicant did not challenge this finding.

[287] The Applicant also submits that the Tribunal did not explain itself or provide reasons when it stated that any procedural unfairness to Canada is outweighed by the prejudice borne by First Nations children and their families who suffered and continue to suffer unfairness and discrimination. I disagree. From the Merit Decision onward there were findings made on the harm suffered by children and their families. The fact that the Tribunal did not directly state how that weighing occurred does not render the decision procedurally unfair. It can be inferred from the record and, specifically, the evidence related to the harms suffered by children as referenced in the Tribunal's numerous decisions and rulings.

[288] All parties received notice of issues that were under consideration. Where outstanding issues were before the Tribunal and further questions remained, it notified all parties in writing and provided them with an opportunity to provide written and/or oral submission. The

evidentiary record considered by the Tribunal and section 50(3)(e) of the *CHRA* empowers the Tribunal to decide procedural issues related to the inquiry. The Tribunal managed its remedial jurisdiction to ensure discrimination ceased and would not occur in the future.

[289] Since the Merit Decision, the issues of compensation and definitions related to Jordan's Principle were reserved by the Tribunal. I agree with the Caring Society and the AFN that Canada had every opportunity to seek a judicial review of that decision but chose not to. Nothing in the record suggests that the Tribunal limited the type or amount of evidence that the Applicant or any of the parties could adduce. Accordingly, I find that the Applicant was not treated unfairly.

[290] I also agree with the COO that the Tribunal appropriately considered the context, the rights, and interests of the parties when it crafted the decisions and its procedure. For example, in the Eligibility Decision, the Tribunal asked the parties to negotiate a mechanism that would implement the community eligibility decision on the ground. In 2020 CHRT 36 the Tribunal's order stemmed from the Tribunal's request that the parties negotiate an implementation plan for the Eligibility Decision.

[291] The Tribunal previously rejected the Applicant's suggestion that more or any negotiation has to occur before a remedy can be awarded (2018 CHRT 4 at paras 395-400).

[292] I also find that the Tribunal dealt fully and reasonably with the Applicant's claim of surprise with respect to the Compensation Decision. The AFN submits that it and the Caring

Society clearly demonstrated their intention from the date of their initial filing to pursue individual compensation. The AFN points to paragraph 21(3) of the statement of particulars submitted prior to the Merit Decision. The Tribunal also recognized this at paragraph 108 of the Compensation Decision.

[293] As set out above, the Tribunal provided advance notice of the questions it wished the parties to respond to prior to the Compensation Decision. If the Applicant thought that the process was unfair, this would have been the opportune time to raise those concerns. It did not.

[294] At paragraph 490 of the Merit Decision, the Tribunal provided advance notice that it was seeking input from the parties on the outstanding question of remedies. In addition, the Tribunal dealt directly with the Applicant's arguments about unfairness of the process (2018 CHRT 4 at paras 376-389). The Tribunal reminded the Applicant that there were three phases identified in the Merit Decision and that the ruling closed the immediate relief phase (2018 CHRT 4 at paras 385-388). This ruling was not challenged by the Applicant.

[295] In 2017 CHRT 14 the Tribunal also pointed out the process it employed to address the remedies ordered in the Merit Decision, which required additional information from the parties (at para 32).

[296] For all of these reasons I find that the Applicant was not denied procedural fairness. The Tribunal afforded all parties with a full picture of what was to be determined at each stage of the proceedings and sought submissions from the parties. There were no surprises.

VII. Some Thoughts on Reconciliation

[297] While noting that these applications for judicial review did not involve constitutional issues or section 35 Aboriginal rights, the parties and the Tribunal have discussed the concept of reconciliation throughout these proceedings. Prior to concluding, I find it necessary to pause and reflect on this concept and consider but a few of the many lessons that have arisen during these proceedings.

[298] In *Desautel*, the Supreme Court stated the following on reconciliation and negotiation:

> [30] In this Court's recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in *Manitoba Metis*, at para. 67:
>
> > The honour of the Crown [. . .] recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice…
>
> While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship"... The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues... It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples. [Citations omitted.]
>
> …

> [87] Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:
>
> > Negotiation . . . has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. . . . The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.
> >
> > (S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)
>
> Negotiation also provides certainty for both parties... As the Court said in *Clyde River*… at para. 24, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms". [Citations omitted.]
>
> [Emphasis in Original.]

[299] In my view, the concept of reconciliation is, in essence, a continuation of the nation-building exercise of this young country in the sense that the foundational relationships between Indigenous people and the Crown continue to evolve. Reconciliation, as nation-building, can also result in the re-establishment, on a proper foundation, of broken or damaged relationships between Indigenous people and Canada in the manner suggested by the Supreme Court in its numerous judgments.

[300] Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those

negotiations. As Pitikwahanapiwin (Chief Poundmaker), a nation-builder in his own right, so aptly said:

> We all know the story about the man who sat by the trail too long, and then it grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail.

[301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.

VIII. Conclusion

[302] I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the *CHRA*.

[303] I also find that the Applicant has not succeeded in establishing that the Eligibility Decision is unreasonable. The Tribunal was aware of its jurisdiction when the Caring Society asked the Tribunal to create three new categories for Jordan's Principle. The Caring Society claimed that the third category would prevent further discrimination based on *Indian Act* status.

The Tribunal reasonably noted the issues with Indian status within the scope of the proceedings. It concluded that only two of the proposed categories were tied to the scope of the Complaint and the proceedings. I find no error in this conclusion.

[304] Finally, the Applicant has not succeeded in establishing that it was denied procedural fairness. The record indicates that the Applicant was afforded numerous opportunities to challenge the various decisions but did not. The record also shows that the Applicant, as well as each party before the Tribunal, was afforded an opportunity to make submissions on any issues that the Tribunal requested. All of this was in accordance with the broad authority the Tribunal has under the *CHRA*. No one was taken by surprise.

[305] The Applicant has not sought costs in either of these two applications for judicial review and neither has CAP. All of the Respondents, aside from the Commission and Amnesty, seek their costs. In light of this, the Respondents, aside from the Commission and Amnesty, will file their respective written submissions on costs within 45 days of the Order below and the Applicant will file its written reply within 90 days of the Order below. The parties, of course, are encouraged to discuss this and to file a joint submission. In the event a joint submission is not filed, the matter of costs will be disposed of based on written submissions.

JUDGMENT in T-1559-20 and T-1621-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review concerning the Compensation Decision in T-1621-19 is dismissed.
2. The application for judicial review concerning the Eligibility Decision in T-1559-20 is dismissed.
3. The Respondents, aside from the Commission and Amnesty, will provide their submissions on costs within 45 days of the date of this Order. The Applicant will provide its submissions on costs within 90 days of this Order. The matter of costs will be dealt with in writing.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1559-20 AND T-1621-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v 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 AND CONGRESS OF ABORIGINAL PEOPLES
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14-18, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	SEPTEMBER 29, 2021

APPEARANCES:

Robert Frater, Q.C. Max Binnie Meg Jones	FOR THE APPLICANT
David Taylor Sarah Clarke	FOR THE RESPONDENTS (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
David C. Nahwegahbow	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Stuart Wuttke Adam Williamson	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Brian Smith Jessica Walsh	FOR THE RESPONDENTS (CANADIAN HUMAN RIGHTS COMMISSION)
Maggie Wente Joel Morales	FOR THE RESPONDENTS (CHIEFS OF ONTARIO)

Stephen Aylward Justin Safayeni	FOR THE RESPONDENTS (AMNESTY INTERNATIONAL)
Akosua Matthews	FOR THE RESPONDENTS (NISHNAWBE ASKI NATION)
Andrew Lokan	FOR THE INTERVENER (CONGRESS OF ABORIGINAL PEOPLES)

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Conway Baxter Wilson LLP Ottawa, Ontario	FOR THE RESPONDENTS (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
Clarke Child & Family Law Ottawa, Ontario	FOR THE RESPONDENTS (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
Nahwegahbow Corbiere Barristers and Solicitors Rama, Ontario	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENTS (CANADIAN HUMAN RIGHTS COMMISSION)
Olthuis Kleer Townsend LLP Toronto, Ontario	FOR THE RESPONDENTS (CHIEFS OF ONTARIO)
Stockwoods LLP Toronto, Ontario	FOR THE RESPONDENTS (AMNESTY INTERNATIONAL)
Falconers LLP Toronto, Ontario	FOR THE RESPONDENTS (NISHNAWBE ASKI NATION)
Paliare Roland Rosenberg Rothstein LLP Toronto, Ontario	FOR THE INTERVENER (CONGRESS OF ABORIGINAL PEOPLES)

TAB 3

Federal Court Cour fédérale

Date: 20180518

Docket: T-132-13

Citation: 2018 FC 522

Ottawa, Ontario, May 18, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

GAELEN PATRICK CONDON
REBECCA WALKER
ANGELA PIGGOTT

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a motion brought on consent under Rule 334.29 of the *Federal Courts Rules*, SOR/98-106, for orders approving the Settlement Agreement, appointing the administrator and arbitrators, fixing the cost of administration, fixing the amount of an honorarium for the representative plaintiffs and fixing class counsel's fees.

[2] For the reasons that follow, I approve the Settlement Agreement, the representative plaintiffs' honoraria and class counsel's fees.

I. Backgrond

[3] On January 11, 2013, Human Resources and Skills Development Canada [HRSDC] issued a press release stating that an external portable hard drive containing the personal information of approximately 583,000 National Loan Services borrowers from 2000 to 2006 had been lost. The lost drive contained the names, social insurance numbers, contact information, and loan balances [Personal Information] of the affected borrowers.

[4] In order to assist individuals with determining whether they were personally affected by the data loss, HRSDC established a call center hotline where concerned individuals could obtain information about the data loss, and could confirm whether their Personal Information was believed to be on the lost drive.

[5] HRSDC also wrote to the affected individuals directly, using the last known contact information on file, to advise them that the data loss had occurred, and that the defendant had purchased customized credit protection service packages from Equifax. Additional credit protection packages were later purchased from TransUnion and both packages were offered to all affected individuals for six-year terms, beginning on the date that they provided consent. The class members were given until March 31, 2018 to apply for these credit protection packages.

[6] In January 2013, two counsel groups commenced putative class actions against the defendant over the data loss:

i. Bob Buckingham Law;

ii. Branch McMaster LLP, together with the firms now known as Strosberg Sasso Sutts LLP and Charney Lawyers PC.

[7] The four firms involved chose to work together to prosecute this class action and in April 2013, they issued a Consolidated Statement of Claim asserting causes of action in breach of contract, breach of warranty, breach of confidence, intrusion upon seclusion and negligence.

[8] This action was certified as a class action by this Court on all advanced causes of action but for the claims of negligence and breach of confidence (*Condon v Canada*, 2014 FC 250). The Federal Court of Appeal granted the plaintiffs' appeal from that decision, referring the matter back to this Court to include the claims for negligence and breach of confidence (*Condon v Canada*, 2015 FCA 159). The certification order, dated June 20, 2016, defines the Class as follows:

> All persons whose personal information was contained in an external hard drive in the control of Human Resources and Skills Development Canada (now known as Employment and Social Development Canada) or the National Student Loan Services Center which was lost or disclosed to others on or about November 5, 2012, but not including senior management of Human Resources and Skills Development Canada, the Canada Student Loans Program, or Ministers and Deputy Ministers of the Ministry of Human Resources and Skills Development.

[9] On December 5, 2017, the parties entered into a Settlement Agreement pursuant to which the defendant will pay $17.5 million [Fixed Settlement Fund] as compensation for class

members' lost time and inconvenience in responding to the data loss. The Fixed Settlement Fund will be distributed to class members who complete a claim form, in payments fixed at $60 each [the Payments], net of all legal fees, taxes, disbursements, and the costs of administration.

[10] In addition, the defendant will fund the cost of an arbitration system so that class members can recover their Actual Losses (as defined below), over and above the compensation for loss of time and inconvenience [the Actual Loss Fund]. The Actual Loss Fund is uncapped and unlimited.

[11] To claim against the Fixed Settlement Fund, class members will not be required to demonstrate how much time they actually spent responding to the data loss. Instead, they will only be required to submit a brief claim form identifying themselves as class members, in which case they will be eligible for a $60 Payment.

[12] With respect to the Actual Loss Fund, "Actual Losses" are proven losses suffered by class members, excluding exemplary and punitive damages, as determined by an arbitrator, caused by the data loss, for which the class member has not been otherwise compensated.

[13] Class counsel are seeking a contingency fee of 30 percent on the $17.5 million Fixed Settlement Fund. They are not seeking fees on any awards made from the Actual Loss Fund.

[14] Class counsel have entered into contingency fee agreements [the Fee Agreements] with each of the three representative plaintiffs, which provide for a contingency fee of 30 percent upon the commencement of discovery.

II. Issues

[15] The following issues arise on this motion:

A. *Is the Settlement Agreement fair, reasonable and in the best interests of the Class, and should the Court approve it?*

B. *Should the Fee Agreements be approved, and are the fees and disbursements proposed by class counsel reasonable?*

C. *Should the Court approve the proposed honoraria of $5,000 to each of the representative plaintiffs?*

III. Analysis

A. *Is the Settlement Agreement fair, reasonable and in the best interests of the Class, and should the Court approve it?*

(1) The law relating to the approval of a settlement

[16] Pursuant to Rule 334.29 of the *Federal Courts Rules*, a class action may only be settled with the approval of a judge.

[17] The test for approving a class action settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the Class as a whole, taking into account

the claims and defences in the litigation and any objections to the settlement by class members. However, the test is not whether the settlement meets the demands of a particular class member.

[18] A settlement need not be perfect (*Châteauneuf v Canada,* 2006 FC 286 at para 7). It need only fall "within a zone or range of reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Company* (1999), 46 OR (3d) 130 (Ont Sup Ct J) at para 89).

[19] In determining whether to approve a settlement, the Court may take into account factors such as:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Terms and conditions of the proposed settlement;

d. The future expense and likely duration of litigation;

e. The recommendation of neutral parties, if any;

f. The number of objectors and nature of objections;

g. The presence of arm's length bargaining and the absence of collusion;

h. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

j. The recommendation and experience of counsel.

(See *Ford v F Hoffmann-La Roche Ltd* (2005), 74 OR 3d 758 (Ont Sup Ct J) (QL) at para 117.)

[20] The factors listed above are merely guidelines. In a particular case, some criteria may be given more weight than others, some criteria may not be satisfied, and other criteria may be

irrelevant (*Parsons v Canadian Red Cross S*ociety, [1999] OJ No 3572 (Ont Sup Ct J) (QL) at para 73 [*Parsons 1999*]).

(2) Factors that are relevant to this settlement approval motion

(a) *The likelihood of recovery or success / Rationale for the settlement*

[21] It has been five years since the lost hard drive went missing. To date, class counsel have not been able to identify any evidence that the Personal Information on the lost drive has been compromised in any way. It remains unclear whether the drive was stolen, merely lost or destroyed, and there is no evidence that a third party has even accessed the Personal Information, much less that the Personal Information has been used for unlawful or improper purposes.

[22] If this matter were to proceed to trial, the onus would be on the plaintiffs to establish that a privacy breach has actually occurred. Based on the evidentiary record developed over the last five years of litigation, including a number of investigations and expert reports, there are significant hurdles to the plaintiffs' ability to meet their onus of establishing that the Personal Information on the lost drive has been compromised or improperly disclosed in any way.

[23] I agree with the plaintiffs that their case at trial would likely turn on establishing nominal damages for breach of contract based on wasted time and inconvenience. The Fixed Settlement Fund of $17.5 million is designed to compensate class members for an average of four hours of wasted time and inconvenience in responding to the data loss, at average industrial hourly wage rates, net of legal fees.

[24] In my Reasons for Judgment delivered on the certification motion (2014 FC 250), I commented on the unique challenges facing the plaintiffs in litigating this action to a successful conclusion, including the problems related to proving the damages of the class members:

> [68] In addition, a summary review of the evidence adduced by both parties leads the Court to the conclusion that the Plaintiffs have not suffered any compensable damages. The Plaintiffs have not been victims of fraud or identity theft, they have spent at most some four hours over the phone seeking status updates from the Minister, they have not availed themselves of any credit monitoring services offered by the credit reporting agencies nor have they availed themselves of the Credit Flag service offered by the Defendant.
>
> [69] Nor does the evidence adduced support a claim for increased risk of identity theft in the future. Since the Data Loss, Equifax has produced reports pertaining to the credit files of the 88,548 individuals who availed themselves of the Credit Flag service. These reports show that there had been no increase in the relevant indicia that would be consistent with an increase in criminal activities involving those individuals' Personal Information. The rate of criminal activities registered was not higher than the 3% of the population generally victim of identity theft. Moreover, the Plaintiffs submitted a CBC news article concerning a Class Member who had been a victim of identity theft yet the article noted no proven causal link between the Data Loss and that theft.

[25] There is considerable uncertainty in the law as to whether a trial judge would award aggregate nominal damages in the context of a class action. There is little to no jurisprudence on the issue. The British Columbia Supreme Court in *Tucci v Peoples Trust Co*, 2017 BCSC 1525 (QL), recently recognized that wasted time spent responding to a privacy breach could form the basis for awarding compensable aggregate nominal damages (see paras 247, 257).

[26] Even if I were to accept that aggregate damages for nominal damages are available, the award per class member is also very much an uncertain factor. What is nominal in an individual

action brought by one person may not be nominal when aggregated across a class of 583,000 individuals.

[27] I certified the plaintiffs' claim for nominal damages, but only on the basis that they were novel in the context of a class action. I further noted specifically that the defendant had advanced an "interesting and strong argument" that nominal damages should not be awarded in a class action (at para 51).

[28] With respect to the tort of intrusion upon seclusion, damages are presumed and therefore a nominal amount of damages can be awarded for the tort absent proof of actual harm (*Jones v Tsige*, 2012 ONCA 32 (QL) at para 60). Before there can be an award of damages, however, the onus remains on the plaintiffs to establish first that an intrusion actually occurred.

[29] In the summer of 2017, the plaintiffs retained the services of Cytelligence Inc. [Cytelligence], a cybersecurity and digital forensics company, to conduct an in-depth investigation to determine whether the Personal Information had been disclosed or sold on the deep/dark web. That investigation concluded that, "[b]ased on the age of the information, and given that Cytelligence could not uncover any such evidence, it is unlikely that the contents [of the lost hard drive] are in circulation on the dark web."

[30] Finally, class counsel's review of the defendant's extensive documentary production did not uncover any evidence that the Personal Information on the lost drive had been improperly accessed or generally disclosed anywhere.

[31] In sum, there is no evidence in the case at bar that would establish, on a balance of probabilities, that the Personal Information has been compromised. There is thus no evidence of an intrusion upon the class members' privacy.

[32] When this action commenced, it was questionable whether the action could be prosecuted successfully, given the state of the law on privacy breaches. Most of those factors are still relevant today.

[33] There have been approximately half a dozen privacy breach class actions settled to date in Canada where funds have been established to compensate class members for wasted time and inconvenience and/or actual losses. In most of these settlements, there was only one fund established to satisfy both sets of damages, and that fund was capped. Class members were also required to provide documented evidence to support their claims, even for wasted time and/or inconvenience (*Lozanski v The Home Depot Inc*, 2016 ONSC 5447 at paras 45, 51; *Drew v Walmart Canada Inc*, 2017 ONSC 3308 at para 10(b)).

[34] *Rowlands v Durham Region Health et al*, a class action about health information contained on a lost hard drive with no evidence of the information being compromised, was settled on the basis that each of the 83,524 class members had to come forward to prove their individual damages (*Rowlands v Durham Region Health, et al*, 2011 ONSC 719; *Rowlands v Durham Region Health, et al*, 2012 ONSC 3948). No money was available to the class members unless they proved their actual losses.

[35] In *Lozanski*, the Court approved a settlement of a class action in which a credit payment system was hacked by a third party. For the approximately 500,000 class members, a settlement fund of $250,000 was set up. Each class member with documented losses, including time spent remedying the issues relating to the data breach, could apply for reimbursement up to $5,000 on the following basis:

> [45] … The time remedying issues claim is: (a) for up to five hours at $15 per hour; or (b) for a Settlement Class Member with reasonable documentation of substantiated losses for out-of-pocket losses or unreimbursed charges who cannot separately document their time remedying those losses or charges may self-certify for up to two hours at $15 per hour.

[36] In *Drew*, the Court approved a similar settlement providing a fund of $400,000 for roughly 640,000 class members whose photo centre account information was hacked by a third party (above at para 10). Only class members who had documented actual losses were eligible to be reimbursed for two hours of their wasted time at $15/hour without proof. In all other circumstances, wasted time claims were required to be supported with documentary evidence. Including actual losses, the total an individual class member could claim was $5,000.

[37] By contrast, in the case at bar, the Actual Loss Fund is uncapped, meaning that class members who can prove that they have sustained an Actual Loss can be compensated in full, on top of compensation for their wasted time and inconvenience.

(b) *The amount and nature of discovery, evidence or investigation*

[38] I am satisfied that I was presented with sufficient evidence to allow me to make an objective, impartial and independent assessment of the fairness of the proposed Settlement

Agreement (*Dabbs v Sun Life Assurance Co of Canada,* [1998] OJ No 1598 (Ont Sup Ct J) (QL) at para 15).

[39] I am also satisfied that over the five years since this action commenced, the parties have done what could reasonably have been done to inform themselves of the facts relevant to liability and damages, including reviewing the multiple investigations into the loss of the hard drive.

[40] Two main investigations were conducted into the loss of the hard drive. HRSDC's Special Investigations Unit conducted an internal investigation, including interviews of numerous employees who worked in proximity to the last person in possession of the hard drive, and a forensic technical analysis. Their investigation could not determine the cause of the data loss, but did rule out the possibility that "someone would have taken the hard drive with the intent to make off with the information."

[41] As mentioned above, Cytelligence conducted another investigation. The report produced by Cytelligence concludes that:

> a. There is no evidence that the Personal Information contained on the lost drive was disclosed to others or was sold to a third party; and
>
> b. There is no evidence that the Personal Information contained on the hard drive was accessible or sold on the dark web, which contains websites that are not accessible via traditional web browsers (and therefore is where illegal transactions such as the sale of personal information tend to take place online).

[42] Class counsel have provided evidence that in addition to the many volumes of evidence adduced at the certification motion, they reviewed and analyzed approximately 68,377 documents produced by the defendant.

[43] Given the scope of the information available to class counsel, they were well situated to negotiate, and ultimately agree, subject to court approval, to the resolution of this action for the benefit of the class members.

(c) *The terms and conditions of the proposed settlement*

[44] The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and to afford the parties an opportunity to answer those concerns with changes to the settlement. The Court's power to approve or reject settlements, however, does not permit it to modify the terms of a negotiated settlement (*Dabbs,* above at para 10).

[45] The proposed settlement contemplates two separate funds for the benefit of the class members: the Fixed Settlement Fund and the unlimited Actual Loss Fund.

[46] The Fixed Settlement Fund in the amount of $17.5 million will be allocated as follows:

a. Payments to compensate the class members for their wasted time and inconveniences associated with the data loss, claimed by filling out a brief form, without having to provide evidence of the time spent;

b. Proposed honoraria to the representative plaintiffs;

c. Class counsel fees, disbursements and taxes thereon; and

d. Costs of administrating the settlement, including the costs of giving notice of the proposed settlement in accordance with my Order of December 20, 2017.

[47] After payment of the expenses set out in subparagraphs (c) and (d) above, the balance will be used to fund the proposed honoraria to the representative plaintiffs (more on this below) and the $60 Payments to compensate class members for their wasted time and inconvenience. If there is a shortfall, the class member Payments will be made *pro rata*. If there is a surplus in the Fixed Settlement Fund after all of the class members are paid, the surplus will be used to pay for Actual Losses. Thereafter, if there remains a surplus from the Fixed Settlement Fund, even after all Actual Losses are paid, the parties will seek the direction of the Court before further distribution.

[48] This Court should consider the expected take-up rate in determining whether a settlement is fair, reasonable, and in the best interests of the class members, particularly where there is a fixed settlement fund (*Smith v Vancouver City Savings Credit Union*, 2012 BCSC 990 (QL) at paras 21-26).

[49] Class counsel submit that it is reasonable to estimate that approximately 30 percent of the class members will apply for compensation from the Fixed Settlement Fund. The $17.5 million amount of the Fixed Settlement Fund was accordingly derived from class counsel's estimate that approximately 30 percent of class members will participate in the claims process.

[50] In *Smith*, a case about the interest rate charged on overdraft fees, Justice Gray of the British Columbia Supreme Court found that a $2.5 million settlement fund was fair, reasonable, and in the best interest of the class, in part because it was likely that the class members who participated in the settlement would achieve full recovery:

> [24] In light of these administrative costs, and the low likelihood of "take-up" by claimants, it appears likely that under the proposed settlement, all those who present a claim will get full recovery, and that some funds will be paid to the VanCity Community Foundation.

[51] To support that finding, Justice Gray considered that the take-up rate in similar class actions was low (between 16-30 percent), and would likely be even lower because of the years that had passed since the events giving rise to the class members' claims. As such, Justice Gray concluded that the value of the fixed settlement fund would likely be sufficient to compensate all class members who file a claim (*Smith*, above at para 24).

[52] In the present case, I agree with class counsel that 30 percent is a reasonable estimation of the proportion of class members who will file a claim to the Fixed Settlement Fund. Class counsel considered several factors in estimating the expected take-up rate, including that:

a. There are an estimated 585,236 class members after subtracting the opt outs (there were a total of 564 opt outs);

b. Only 91,351 class members asked for and received credit protection services funded by the defendant (approximately 15.61 percent of the class), despite receiving a direct mailing from the defendant with this offer;

c. Only approximately 58,000 class members registered with the online system set up by class counsel for this class action (approximately 9.91 percent of the class);

d. It has been five years since the data loss was publicly disclosed;

e. Some of the Personal Information on the lost drive dates back to 2000 and is therefore almost two decades old; and

f. The maximum amount recoverable from the Fixed Settlement Fund is $60.

[53] While it is difficult to predict take-up rates, class counsel submit that take-up rates in Canadian class actions demonstrate that the take-up rate is below 50 percent in most Canadian class actions and often well below 50 percent, particularly where the size of the claim a class member can make is smaller.

[54] By contrast, the Actual Loss Fund is an unlimited and uncapped fund for each class member who applies for arbitration, without regard to the issue of take-up. Class members who claim that they incurred an Actual Loss must file an arbitration form and request an arbitration.

[55] Ivan Whitehall and Reva Devins are the proposed arbitrators and their costs will be paid entirely by the defendant.

[56] The protocol for the arbitrations has been provided to the Court. The proposed process is user-friendly, does not require the assistance of a lawyer, and requires the arbitrator to decide on a balance of probabilities whether the class member suffered an Actual Loss.

[57] The defendant will fund the cost of direct mailing to the Class to publicize the settlement, a cost estimated to be approximately $600,000. This amount is separate and apart and in addition to the Fixed Settlement Fund and the Actual Loss Fund.

(d) *Future expense and likely duration of litigation*

[58] Courts have recognized that a payment to class members now is a factor in support of a settlement. If there is no settlement now, counsel for the parties anticipate that at least a further three years will be needed for a trial and a potential appeal.

[59] After taking these probable three further years of litigation into consideration, including what is projected to be an eight-week trial with numerous expert witnesses to be called by each party, coupled with the factors outlined above, I am satisfied that the proposed settlement is fair and reasonable and in the best interests of the Class.

(e) *The number of objections and nature of the objections*

[60] As of the court-ordered deadline on February 12, 2018, at 5:00 p.m. EST, 294 objections to the settlement were received. These objections make up approximately 0.00050188 percent of the Class (1/20 of 1 percent).

[61] Four of the 294 objectors attended the proposed settlement hearing via videoconference from Fredericton, Toronto and Winnipeg and had the opportunity to voice their objections to the Court. A fifth objector sought to participate in the proposed settlement hearing via

videoconference from Halifax. However, this objector was not able to participate, as notice that the Halifax local office would be open for videoconferencing was only given shortly before the hearing. Nevertheless, this objector's written objection was duly considered, along with all of the other written objections.

[62] 72 objectors submitted what appears to be an identical form letter. These 72 objectors, as well as many others, assert that the class members' outstanding student loan debt should be forgiven or discounted as part of this settlement. The objector who attended the proposed settlement hearing via videoconference from Fredericton expressed an objection of this nature. However, this proposition is untenable at law, particularly so since the Supreme Court of Canada laid to rest the doctrine of a fundamental breach in Canadian contract law (*Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4). The parties did not negotiate, and could not have negotiated, the Settlement Agreement on the basis that debt forgiveness could form part of the compensation for class members.

[63] A large number of the objections refer to financial losses allegedly incurred as a result of the data loss as having value greater than $60, including the objector who attended the proposed settlement hearing via videoconference from Toronto. These objections are premised on a misunderstanding of the structure of the Settlement Agreement, since such losses can be claimed against the Actual Loss Fund.

[64] A large number of the objections also reference paying out-of-pocket for credit monitoring, despite the government's blanket offer to pay for six years of credit monitoring

through TransUnion and Equifax. Both objectors who attended the proposed settlement hearing via videoconference from Winnipeg expressed this type of objection, seeking compensation for lifetime credit protection. In my view, lifetime protection is an unreasonable request.

[65] One of the objectors who attended the proposed settlement hearing from Winnipeg also expressed a desire to be given a new SIN number. However, the evidence shows that replacing an individual SIN number presents numerous challenges for both the individual and the government. Additionally, the government is actively monitoring class members' SIN numbers and will continue doing so until 2023.

[66] Finally, a large number of the objections reference the amount of class counsel's fee request. Another one of the objectors who attended the proposed settlement hearing via videoconference from Winnipeg also expressed this type of objection. However, it was publicized in the Notice of Certification that class counsel would be requesting up to one-third of any recovery in the action as legal fees and it was possible for class members to opt out on the basis of any objection to the proposed terms.

[67] As for the class member who requested to attend via videoconference from Halifax, she argues that her case is unique because she is transgender and has transitioned since the hard drive was lost. She states that she should be awarded $40,000 in damages.

[68] First, if she considered her claim to be distinct from that of the rest of the Class, she could have opted out of this class action, retained counsel and filed her own individual action against

the defendant. In addition, if she has suffered actual compensable damages, in excess of lost time and inconvenience, she can file her claim against the Actual Loss Fund.

[69] Having considered all of the objections received, I am of the view that the settlement ought to be approved. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Parsons 1999*, above at para 79).

[70] In this case, as in *Manuge v Canada*, 2013 FC 341, it would not serve the interests of the vast majority of the Class who did not object to the settlement to send the parties back into further discussions to address the concerns of a "handful" of objectors (at para 25).

(f) *The presence of arm's length bargaining*

[71] The negotiations that transpired leading to a settlement among the parties were arm's length and adversarial in nature, spanning several months.

(g) *The degree and nature of communications with class members*

[72] Given the size of the Class, class counsel organized and maintained a website located at www.studentloansclassaction.com [the website], a Strosberg Sasso Sutts LLP toll-free phone line, and a Facebook page maintained by Buckingham Law.

[73] The website hosts class counsel's secure, interactive web-based registration system. The registration system went live shortly after the commencement of the action, at which time and

thereafter, class members were encouraged to register on the registration system. To date, approximately 58,000 class members have registered and provided their information to class counsel.

[74] The notice of proposed settlement was sent by email to all of the class members who registered with class counsel and provided valid e-mail addresses. Class counsel also posted the notice of the proposed settlement and Settlement Agreement on the website for class members to review and they organized an online marketing campaign.

[75] During these proceedings, class counsel updated the website fourteen times since January 22, 2013, and posted all key documents. In only the last year, the website has been viewed by over 50,000 unique users. As well, class counsel received in excess of 5,000 phone calls through their dedicated toll-free lines.

(h) *The recommendation of experienced counsel*

[76] Class counsel suggest that the proposed settlement is fair, reasonable and in the best interests of the class members. Class counsel are experienced class actions litigators and their tactics, analysis and processes have been disclosed to the Court. I am satisfied that their decision to settle this case reflects their best exercise of judgment. Class counsel's recommendations are significant and are given substantial weight in the approval process.

(i) *The recommendation of the representative plaintiffs*

[77] I was provided evidence that all of the representative plaintiffs were briefed regularly throughout the five years of this litigation. They were involved in making the major decisions, including instructing class counsel to sign the Settlement Agreement and unanimously recommending approval of this settlement to the Court.

(j) *Conclusion*

[78] There are ranges of acceptable settlements. This principle recognizes the reality of the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

[79] This action was ably prosecuted and the litigation risks and the risks relating to damage issues were adequately canvassed by class counsel. This Court concludes that the Settlement Agreement is fair, reasonable and in the best interests of the Class and ought to be approved, including the appointment of the administrator and arbitrators.

B. *Should the Fee Agreements be approved, and are the fees and disbursements proposed by class counsel reasonable?*

(1) The law relating to the approval of class counsel fees

[80] Rule 334.4 of the *Federal Courts Rules* provides that no payments may be made to a lawyer from the proceeds recovered in a class action unless those payments are approved by a judge. Class counsel accordingly seeks this Court's approval of the Fee Agreements and class counsel's legal fees, disbursements, and applicable taxes.

(a) *Counsel fees must be fair and reasonable*

[81] Class counsel's fees are to be fixed and approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Manuge,* above at para 28; *Parsons v Canadian Red Cross Society* (2000), 49 OR (3d) 281 (Ont Sup Ct J) at paras 13, 56 [*Parsons 2000*]).

[82] In *Manuge*, this Court held that, in determining what is fair and reasonable, the Court must look at a number of factors, including the results achieved by class counsel, the extent of the risk assumed by class counsel, the amount of professional time actually incurred by class counsel, the causal link between the legal effort and the result achieved, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by class members, the existence of a fee agreement, and the fees approved in comparable cases (*Manuge,* above at para 28; *Merlo v Her Majesty the Queen,* 2017 FC 533 (QL) at paras 77-98).

[83] In particular, courts have focused on two main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved (*Parsons 2000*, above at para 13; *Sayers v Shaw Cablesystems Limited*, 2011 ONSC 962 at para 35). Risk in this context is measured from the commencement of the action (*Gagne v Silcorp Ltd* (1998), 49 OR (3d) 417 (Ont CA) at para 16). These risks include all of the risks facing class counsel, such as the liability

risk, recovery risk, and the risk that the action will not be certified as a class action (*Gagne,* above at para 17; *Endean v Canadian Red Cross Society*, 2000 BCSC 971 (QL) at paras 28, 35).

(b) *Percentage-based counsel fees are preferable to alternatives, such as applying a multiplier to counsel's time*

[84] Over the years, courts have expressed a preference for utilizing percentage-based fees in class actions (*Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para 52). A percentage-based fee should be paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel.

[85] The percentage-based fee set out in a contingency fee retainer agreement is presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 8). Examples of where a court may rebut the presumption that a percentage-based fee is fair include where:

a. There is a lack of full understanding or true acceptance on the part of the representative plaintiff;

b. The agreed-to contingency amount is excessive; or

c. The presumptively valid contingency fee would result in a fee award so large as to be unseemly.

(*Cannon,* above at para 9.)

[86] The main alternative to a percentage-based fee is applying a multiplier to class counsel's time. This multiplier approach has been criticized for, *inter alia*, encouraging inefficiency and

duplication and discouraging early settlement (*Cassano v Toronto-Dominion Bank* (2009), 98 OR (3d) 543 (Ont Sup Ct J) (QL) at para 60). Courts have indicated that "the application of a multiplier … is unacceptably subjective if not completely arbitrary" (*Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 at para 22).

[87] Percentage-based fees, on the other hand, encourage a results-based approach to rewarding counsel. As noted by the British Columbia Supreme Court in *Endean*, percentage-based fees are common in class actions and properly reward class counsel for their effectiveness, rather than being based solely on the time incurred to achieve success (above at paras 74, 75).

[88] In *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105, Justice Strathy explained that compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client" (at para 64). A percentage-based fee encourages the lawyer to maximize recovery for the client efficiently; it is fair to the client since there is no payment without success (*Baker*, above at para 64).

(c) *Percentage-based fees provide necessary incentives to class counsel for a class action regime to be viable*

[89] Effective class actions would not be possible without contingency fees that pay counsel on a percentage basis.

[90] Contingency fees help to promote access to justice in that they allow counsel, rather than the client, to finance the litigation. Contingency fees also promote judicial economy, encourage

efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyer's fee based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21).

[91] This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Manuge*, above at para 49; *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 26; *Griffin v Dell Canada Inc*, 2011 ONSC 3292 at para 53). Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well" (*Sayers*, above at para 37).

(d) *Class counsel's requested 30 percent fee is comparable to other percentage-based fees in settled class actions*

[92] In *Baker*, Justice Strathy stated that fees in the range of up to 30 percent are "very common" in class actions (above at para 63). In *Cannon*, Justice Belobaba approved a contingency fee of 33 percent (above at para 3).

(2) Factors supporting the fee request

[93] Class counsel argue and I agree that the following factors support the requested fee as being fair and reasonable.

(a) *Risks undertaken by class counsel*

[94] From the outset, class counsel agreed to pursue this action on a contingency fee basis pursuant to the Fee Agreements, accepting responsibility for all expenses and costs and seeking court approval for a fee if successful, in accordance with the Fee Agreements.

[95] In *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, the Ontario Superior Court of Justice recognized the risks assumed by class counsel in pursuing class actions on a contingency fee basis and the need to incentivize counsel to take on these risks: “The risks are – quite simply … the risk of receiving no compensation for the time and disbursements invested in the case” (at para 14).

[96] The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation.

[97] When assessing these risks involved in pursuing class action litigation, the risks must be assessed as they existed when the litigation commenced and as the litigation continued. They should not be assessed with the benefit of hindsight (*Ford,* above at para 71).

[98] In this case, class counsel were cognizant of the procedural and litigation risks involved with these claims, being that liability was, and is, difficult to prove, and that individual damage assessments would likely be necessary at the end of a common issues trial, if successful. By any

measure, this is a complex case, both in terms of the subject matter, the number of class members, and damages.

(b) *Results achieved*

[99] As reviewed in detail above, class counsel achieved good results for the class members.

[100] In weighing the results achieved by class counsel's work, it is also appropriate for the Court to consider to what extent the three objectives of class actions – namely, access to justice, behaviour modification, and judicial efficiency – have been met by the proposed settlement (*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 at para 49).

[101] This class action provided access to justice for hundreds of thousands of class members where, absent the class action, the scope of the individual claims would not justify litigation despite what appeared to be, at the time that litigation was commenced, a fairly serious privacy breach.

[102] The class action regime in the *Federal Courts Rules* was designed to encourage class counsel to advance actions like this, where the individual claims are relatively modest because, on an aggregate basis, entrepreneurial class counsel can earn a fee that justifies the risks associated with advancing the class action and the time invested.

[103] This settlement will serve as a benchmark for future privacy breach class actions and encourage organizations throughout Canada to take privacy seriously, for fear of facing serious litigation consequences for a privacy breach.

[104] With respect to the defendant, this action has directly encouraged the Government of Canada to take a substantial number of steps to improve their privacy security, which benefits not only the class members but all Canadians, as the Government is the single largest depository of Canadians' personal information.

(c) *The counsel fee request is within the reasonable expectations of the representative plaintiffs and other class members*

[105] The representative plaintiffs entered into Fee Agreements that contemplated the payment of 30 percent of the recovery, plus applicable taxes and disbursements, at the commencement of discovery. Since discovery was well underway by the time that settlement negotiations commenced and ultimately resulted in the proposed settlement, class counsel are now requesting that their fees be fixed at 30 percent of the recovery, in accordance with the Fee Agreements.

[106] All of the representative plaintiffs support class counsel's request for fees and the Notice of Certification, which was published and distributed in mid-2016, explicitly stated that class counsel would seek a fee of up to one-third of the recovery.

[107] Therefore, class members could fairly weigh this issue when deciding whether to opt out or to participate in the lawsuit going forward.

(d) *Experience of class counsel*

[108] Evidence was provided that class counsel have practised in class actions for many years. They have a breadth of experience in prosecuting class actions, and have collectively negotiated settlements of over a hundred class actions.

(e) *Time and expenses incurred by class counsel*

[109] Class counsel have done extensive work over the past five years to reach the Settlement Agreement, including litigating certification through two hearings, reviewing almost 70,000 documentary productions, and devising an innovative two-pronged approach to the settlement (the Fixed Settlement Fund and the unlimited Actual Loss Fund) in order to maximize compensation for the class members.

(f) *Work that must be done if the settlement is approved*

[110] If the Settlement Agreement is approved, class counsel must, *inter alia*: oversee the publication and distribution of the notice of settlement approval; continue to implement and oversee the administration of this class action for at least an additional eight months until the settlement distribution is complete; and liaise with the thousands of class members who may have questions about the judgment. Class counsel's job will not be complete until the settlement administration is complete.

(g) *Conclusion*

[111] In sum, the legal fees sought by class counsel are consistent with the Fee Agreements, and they are fair and reasonable when considered in light of the procedural and substantive risks assumed by class counsel. The legal fees are also fair and reasonable when considered in light of the evolution of the evidentiary record, five years after the data loss occurred.

(3) Class counsel incurred significant disbursements

[112] A list of class counsel's disbursements was presented to the Court at the motion hearing.

[113] There were significant disbursements paid and accrued, which have been completely funded by class counsel, including $250,292 plus taxes for the registration system, which permitted class counsel to communicate with, and provide notice to, approximately 58,000 class members. There will be no interest charges on the disbursements.

C. *Should the Court approve the proposed honoraria of $5,000 to each of the representative plaintiffs?*

[114] Class counsel request that the Court award a $5,000 honorarium to each representative plaintiff, to be paid from the Fixed Settlement Fund, for a total of $15,000, in recognition of their respective contributions to this action.

[115] This Court has the discretion to award honoraria to representative plaintiffs and has done so numerous times previously. An honorarium is "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice" (*Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528 at para 43).

[116] The affidavits filed by each representative plaintiff show that they expended a significant amount of time carrying out their duties as representative plaintiffs. They were not simply figureheads for this litigation – they carried out real work and functions such as:

a. Preparing the affidavits for certification;

b. Preparing for and attending cross-examinations on the affidavit in support of certification;

c. Assisting in the preparation of the list of documents in their possession for the documentary discovery phase and the lawsuit;

d. Strategizing with class counsel from time to time over the years;

e. Expressing their opinions to class counsel on the proposed Settlement Agreement and instructing class counsel to sign the Settlement Agreement; and

f. Assisting in the preparation and execution of the affidavits in support of this settlement approval motion.

[117] In addition, each of the representative plaintiffs had their name widely publicized in the media.

[118] The representative plaintiffs did not request these honoraria, nor were any honoraria promised to them by class counsel at any time. Indeed, the Fee Agreements each state:

> 16. The Client acknowledges that [the Client] is not entitled to receive any payment or fee out of the Recovery for acting as representative plaintiff in the Action unless ordered by the Court.
>
> (Condon Affidavit at para 32; Walker Affidavit at paras 13, 33; Piggott Affidavit at paras 13, 33.)

[119] Courts across the country, including this Court, have permitted stipends to representative plaintiffs in varying amounts (*Manuge*, above at para 53; *Hislop v Canada (Attorney General)*, 2004 CanLII 11203 (Ont Sup Ct J) at para 22).

[120] In this case, class counsel submitted, and I agree, that $5,000 is appropriate for each representative plaintiff.

ORDER in T-132-13

THIS COURT ORDERS that:

1. Plaintiffs' motion is granted;
2. The Settlement Agreement is approved;
3. The parties will provide the Court, within seven working days from this Order and Reasons, with a draft order confirming the Settlement Agreement approval, the appointment of the administrator and arbitrators, the fixation of the administration costs, the fixation of the honoraria for the representative plaintiffs and the fixation of class counsel's fees, the whole in accordance with the present reasons;
4. There are no costs on this motion.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-132-13
STYLE OF CAUSE:	GAELEN PATRICK CONDON ET AL v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 22, 2018 (IN PERSON AND BY VIDEOCONFERENCE)
ORDER AND REASONS:	GAGNÉ J.
DATED:	MAY 18, 2018

APPEARANCES:

Ted Charney Tina Yang	FOR THE PLAINTIFFS
Harvey Strosberg Sharon Strosberg	
Chelsea D. Hermanson	
Bob Buckingham	
Catharine Moore Travis Henderson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Charney Lawyers PC Toronto, Ontario	FOR THE PLAINTIFFS
Strosberg Sasso Sutts LLP Windsor, Ontario	FOR THE PLAINTIFFS
Branch MacMaster LLP Vancouver, British Columbia	FOR THE PLAINTIFFS

Bob Buckingham Law St. John's, Newfoundland	FOR THE PLAINTIFFS
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT

TAB 4

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 2
Date: January 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon and Edward Lustig

Table of Contents

À la douce mémoire de Réjean Bélanger

In loving memory of Réjean Bélanger

I. Acknowledgement

[1] This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.

[2] These proceedings included extensive evidence on the history of Indian Residential Schools and the experiences of those who attended or were affected by them. The Tribunal also heard heartfelt testimony from someone who attended and was directly impacted by attending a residential school. At the outset of these reasons, the Panel Members (the Panel) believe it important to acknowledge the suffering of all residential school survivors, their families and communities. We recognize the courage of those who have spoken about their experiences over the years and before this Tribunal. We also wish to honour the memory and lives of the many children who died, and all who were harmed, while attending these schools, along with their families and communities. We wish healing and recognition for all Aboriginal peoples across Canada for the individual and collective trauma endured as a result of the Indian Residential Schools system.

II. Complaint and background

[3] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect (see Annex, ex. 1 *s.v.* “child welfare”). Hence the **best interest of the child** is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children.

[4] Each province and territory has its own child and family services legislation and standards and provides those services within its jurisdiction. However, the provision of child and family services to First Nations on reserves and in the Yukon is unique and is the subject of this decision.

[5] At issue are the activities of Indian and Northern Affairs Canada (INAC), known at the time of the hearing as Aboriginal Affairs and Northern Development Canada (AANDC), in managing the First Nations Child and Family Services Program (the FNCFS Program), its corresponding funding formulas and a handful of other related provincial and territorial agreements that provide for child and family services to First Nations living on reserve and in the Yukon Territory. Pursuant to the FNCFS Program and other agreements, child and family services are provided to First Nations on-reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. AANDC funds the child and family services provided to First Nations by FNCFS Agencies or the province/territory.

[6] Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN), allege AANDC discriminates in providing child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint). On October 14, 2008, the Canadian Human Rights Commission (the Commission) referred the Complaint to this Tribunal for an inquiry.

[7] In a decision dated March 14, 2011 (2011 CHRT 4), the Tribunal granted a motion brought by AANDC for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[8] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*Caring Society FC*), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal

Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (*Caring Society FCA*).

[9] A new panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[10] The Complaint was subsequently amended to add allegations of retaliation (see 2012 CHRT 24). In early June 2015, the Panel found the allegations of retaliation to be substantiated in part (see 2015 CHRT 14).

[11] The present decision deals with the merits of the Complaint. During deliberations our friend and colleague, Tribunal Member Réjean Bélanger, passed away. Despite his valued contributions to the hearing and consideration of this matter, he sadly was not able to see the final result of his work. While this decision is signed on behalf of the remaining Members of the Panel, **we dedicate it in his honour and memory**.

III. Parties

[12] The Caring Society is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families. The AFN is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development. The Commission, in appearing before the Tribunal at a hearing, represents the public interest (see section 51 of the *CHRA*). AANDC is the federal government department primarily responsible for meeting the Government of Canada's obligations and commitments to Aboriginal peoples.

[13] Additionally, two organizations were granted "Interested Party" status for these proceedings: Amnesty International and the Chiefs of Ontario (COO). Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status to

assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. The COO is a non-profit organization representing the 133 First Nations in the Province of Ontario. It was granted interested party status to speak to the particularities of on-reserve child welfare services in Ontario.

IV. The hearing, disclosure and admissibility of documents

[14] The hearing of the Complaint spanned 72 days from February 2013 to October 2014. Throughout the hearing, documentary disclosure and the admissibility of certain documents as evidence became an issue.

[15] All arguably relevant documents were not disclosed prior to the commencement of the hearing. Despite agreeing to complete its disclosure prior to the start of the hearing, and subsequently confirming that it had, AANDC knew of the existence of a number of arguably relevant documents in the summer of 2012 and yet failed to disclose them prior to the hearing. Only after the completion of an *Access to Information Act* request made by the Caring Society, and shortly before the third week of hearings, did AANDC inform the parties and the Tribunal of the existence of over 50,000 additional documents and an unspecified number of emails, which were potentially relevant to the Complaint, but had yet to be disclosed. As a result, the Tribunal vacated hearing dates in June 2013, re-arranged the proceedings to hear the allegations of retaliation in July and August 2013, and, following a deadline for AANDC to complete its disclosure by August 31, 2013, resumed the hearing on the merits on dates from August 2013 to January 2014 (see 2013 CHRT 16).

[16] Following the disclosure of over 100,000 additional documents by AANDC, the hearing resumed. However, AANDC did not complete the disclosure of all arguably relevant documents until August 2014 due to an objection under section 37(1) of the *Canada Evidence Act*. Specifically, certain documents were characterized as being subject to Cabinet confidence privilege. All the parties agreed to have the Clerk of the Privy Council review the documents to determine if the privilege applied. This review process was completed fairly quickly once the Clerk was provided with the documents.

[17] An issue arose as to how the 100,000 additional documents could be admitted into evidence. The Caring Society requested an order that any additionally disclosed documents upon which it wished to rely be admitted as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document was called as a witness, and whether or not they were put to any other witness. For reasons outlined in 2014 CHRT 2, the Panel ruled as follows:

> a. Rule 9(4) of the Tribunal's Rules of Procedure will continue to apply. As such, documents will continue to be admitted into evidence, on a case-by case basis, once they are introduced during the hearing and accepted by the Panel;
>
> b. There will be no need to call witnesses for the sole purpose of authenticating documentary evidence. Any issues raised relating to authentication will be considered by the Panel at the weighing stage;
>
> c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
>
> i. which portions of the document are being relied upon; and
>
> ii. how these portions of the document relate to an issue in the case.
>
> d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

[18] Following the completion of the hearing, further issues arose as to which documents ought to form part of the record before the Tribunal. AANDC raised concerns regarding the admissibility of documents relied on by counsel for the Complainants and Commission, but not referred to orally during the hearing. In 2015 CHRT 1, the Panel ordered:

> Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions

> (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

[19] In response to the Panel's order, AANDC provided written representations with respect to the documents at issue. According to AANDC, the Panel should place little, if any, weight on those documents in determining the merits of the Complaint. It also provided a chart summarizing its position on each of the documents.

[20] AANDC's submissions on the documents subject to the Panel's order in 2015 CHRT 1, along with its other submissions regarding the weight to ascribe to the evidence in this matter, have been taken into consideration by the Panel, together with the submissions of the other parties, in making the findings that follow.

V. Analysis

[21] As mentioned above, the present Complaint alleges the provision of child and family services in on-reserve First Nations communities and in the Yukon is discriminatory. Namely that there is inequitable and insufficient funding for those services by AANDC. In this regard, the Complainants have the burden of proof of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (see *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para. 28).

[22] In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or

characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[23] The first element is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics.

[24] The second element requires the Complainants to establish that AANDC is actually involved in the provision of a "service" as contemplated by section 5 of the *CHRA*; and, if so, to demonstrate that First Nations are denied services or adversely impacted by AANDC's involvement in the provision of those services.

[25] For the third element, the Complainants have to establish a connection between elements one and two. A "causal connection" is not required as there may be many different reasons for a respondent's acts. That is, it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue (see *Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 44-52 [*Bombardier*]).

[26] In this regard, it should be kept in mind that discrimination is not usually practiced overtly or even intentionally. Consequently, direct evidence of discrimination or proof of intent is not required to establish a discriminatory practice under the *CHRA* (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT); and; *Bombardier* at paras. 40-41).

[27] In response to the Complaint, AANDC led its own evidence and arguments to refute the Complainants' claim of discrimination. It did not raise a statutory exception under sections 15 or 16 of the *CHRA*. Therefore, the Tribunal's task is to consider all the evidence and argument presented by the parties to determine if the Complainants have proven the three elements of a discriminatory practice on a balance of probabilities (see *Bombardier* at paras. 56 and 64; see also *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 80-90).

[28] It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

A. AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon

i. Meaning of "service" under section 5 of the *CHRA*

[29] Section 5 of the *CHRA* provides:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> > (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
> >
> > (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[30] Pursuant to the wording of this section, the Complainants must establish that the actions complained of are "…in the provision of…services…customarily available to the general public". The first part of this analysis involves determining what constitutes the "service" based on the facts before the Tribunal (see *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) per La Forest J. at para. 68 [*Gould*]). In other words, what is the "benefit" or "assistance" being held out (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 31 [*Watkin*]; and, *Gould* per La Forest J. at para. 55). In making this determination, "[r]egard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (see *Watkin* at para. 33). In this respect, it may be useful to inquire whether the benefit or assistance is the

essential nature of the activity (see *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 42).

[31] The next step requires a determination of whether the service creates a public relationship between the service provider and the service user. The fact that actions are undertaken by a public body for the public good is not determinative. In fact, no one factor is determinative. Rather, in ascertaining whether a service creates a public relationship, the Tribunal must examine all relevant factors in a contextual manner (see *Gould* per La Forest J. at para. 68; and, *Watkin* at paras. 32-33). As part of this determination, the Tribunal must decide what constitutes the "public" to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the "public" (see *University of British Columbia v. Berg*, [1993] 2 SCR 353 at pp. 374-388; and, *Gould* per La Forest J. at para. 68). A public relationship is created where this "public" is extended a "service" by the service provider (see *Gould* per La Forest J. at para. 55).

ii. Evidence indicating AANDC provides a "service"

[32] Both the Commission and the Caring Society characterize the FNCFS Program, its corresponding funding formulas and the related provincial/territorial agreements as a service provided by AANDC to First Nations children and families on reserves and in the Yukon.

[33] On the other hand, AANDC submits that its role in the provision of child and family services to First Nations is strictly limited to funding and being accountable for the spending of those funds. According to AANDC, funding does not constitute a "service". Furthermore, AANDC argues the funding it provides is not "customarily available to the general public". Rather, it is provided on a government to government; or, government to agency basis.

[34] In AANDC's view, the benefit held out as a service is the provincially mandated child welfare services provided to First Nations by the FNCFS Agencies or the

provinces/territory. AANDC does not exert control over the services and programs provided. Rather, decisions as to which services to provide, how they will be provided and whether the delivery is in compliance with statutory and regulatory requirements rests with the agencies and the provinces/territory. In this regard, AANDC relies on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), to argue that child welfare services are a matter within provincial jurisdiction and that it only became involved in First Nations child and family services as a matter of social policy under its spending power. According to AANDC, its funding does not change the provincial/territorial nature of child and family services.

[35] As explained in the following pages, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves across Canada and in the Yukon. Specifically, AANDC offers the benefit or assistance of funding to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserves and in the Yukon. With specific regard to the FNCFS Program, the objective is to ensure the delivery of culturally appropriate child and family services, in the best interest of the child, in accordance with the legislation and standards of the reference province/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and within FNCFS Program authorities. This benefit or assistance is held out as a service by AANDC and provided to First Nations in the context of a public relationship.

a. Jurisdiction of the *CHRA* over the activities of AANDC

[36] With regard to the *NIL/TU,O* decision, the question in that case was whether the labour relations of a FNCFS Agency should be regulated under provincial or federal jurisdiction. Labour relations are presumptively a provincial matter. In this regard, the Supreme Court found the NIL/TU,O Agency was a child welfare agency regulated by the province in all aspects. Neither the fact that it received federal funding, the Aboriginal identity of its clients and employees, nor its mandate to provide culturally appropriate services to Aboriginal clients, displaced the operating presumption that labour relations are provincially regulated.

[37] The present case raises human rights issues in the context of AANDC's activities. As opposed to labour relations matters, human rights matters are not presumptively provincial. The *CHRA* applies to "…matters coming within the legislative authority of Parliament" (see *CHRA* at s. 2). While the activities of FNCFS Agencies and provincial governments may well be within provincial jurisdiction for labour relations purposes, this does not have any bearing on the Tribunal's jurisdiction over AANDC's activities in this case.

[38] The Complaint is filed against, and is focused upon, the activities of AANDC. AANDC is a federal government department created by Parliament through the *Department of Indian Affairs and Northern Development Act*. Its mandate is derived from a number of federal statutes, including the *Indian Act*. Therefore, any actions taken by AANDC come within the legislative authority of Parliament and could be subject to the *CHRA*.

[39] The issue in this case is not whether AANDC's activities fall outside the jurisdiction of the *CHRA* because they do not come within the legislative authority of Parliament. Rather, it is whether the *CHRA* applies to AANDC's activities because its actions are in the provision of a service. The fact that other actors, including provincial actors, may be involved in the provision of the service is not determinative and does not necessarily shield AANDC from human rights scrutiny (see for example *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*]). As mentioned above, it is for the Tribunal to consider all relevant factors to determine the nature and extent of AANDC's involvement and whether that involvement rises to the status of a "service" under section 5 of the *CHRA*.

b. Funding can constitute a service

[40] Similarly, even if AANDC's role in the child and family welfare of First Nations is limited to funding, there is nothing in the *CHRA* that excludes funding from the purview of section 5. That is, funding can constitute a service if the facts and evidence of the case

indicate that the funding is a benefit or assistance offered to the public pursuant to the criteria outlined above.

[41] A similar argument to the one advanced by AANDC was rejected by the British Columbia Human Rights Tribunal in *Bitonti et al. v. College of Physicians & Surgeons of British Columbia et al.*, (1999) 36 CHRR D/263 (BCHRT) (*Bitonti*). Among other things, the complainants in that case argued that the allocation of funding provided by the Ministry of Health did not provide foreign medical school graduates with a real opportunity to obtain internships. The Ministry of Health responded that the expenditure of funds by the provincial government was a legislative act that was immune from the Tribunal's review. While the BCHRT ultimately found there was no service relationship between the Ministry of Health and the complainants, at paragraph 315 it was not prepared to accept the Ministry's argument regarding immunity for funding:

> Carried to its extreme, that position would mean, for example, that if the Ministry of Health provided funding for internships but stipulated that it would only pay male interns, that conduct would be immune from review. I am not prepared to go that far.

[42] Similarly, in *Kelso v. The Queen*, [1981] 1 SCR 199 at page 207 (*Kelso*), the Supreme Court stated (**emphasis added**):

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. **The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act***.

[43] Indeed, the Supreme Court has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 (*Robichaud*); *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81 (*Vaid*); and, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). It expresses fundamental values and pursues fundamental goals for our society, such as the fundamental Canadian value of equality (see s. 2 of the *CHRA*; see also *Mowat* at para. 33; and, *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 at p. 615, per Justice L'Heureux-Dubé).

Therefore, the *CHRA* is to be interpreted in a broad, liberal, and purposive manner befitting of this special status (see *Mowat* at para. 62).

[44] Conversely, any exemption from its provisions must be clearly stated (see *Vaid* at para. 81). Again, there is no indication in the *CHRA* or otherwise that Parliament intended to exclude funding from scrutiny under the *Act*, subject of course to the funding being determined to be a service. In line with *Kelso*, where the Government of Canada is involved in the provision of a service, including where the service involves the allocation of funding, that service and the way resources are allocated pursuant to that service must respect human rights principles.

[45] Therefore, the Panel dismisses the argument that funding cannot constitute a "service" within the meaning of section 5 of the *CHRA*. In any event, as will be examined in the following pages, the evidence in this case indicates the essential nature of the "assistance" or "benefit" offered by AANDC for the provision of child and family services on First Nations reserves is something more than funding.

c. The "assistance" or "benefit" provided by AANDC

[46] AANDC's FNCFS Program applies to FNCFS Agencies in all provinces and the Yukon Territory, except Ontario. In Ontario, AANDC has a cost-sharing agreement with the province for the provision of child and family services on First Nations reserves. AANDC also has agreements with the provinces of Alberta and British Columbia to provide child and family services to certain First Nations reserves. A similar agreement is also in place with the Yukon Territory. The provision of child and family services to First Nations in the Northwest Territories and Nunavut were not the subject of this Complaint.

[47] The FNCFS Program were developed to address concerns over the lack of child and family services provided by the provinces to First Nations reserves. Traditionally, assistance to First Nations children and their families was provided informally, by custom, within the network of their extended family. However, over time, this informal assistance became insufficient to meet the needs of children and families living on First Nations reserves.

[48] The Joint Committees of the Senate and the House of Commons in 1946-1948 and again in 1959-1961 urged provinces to increase their involvement in providing services to First Nations people in order to fill in the gaps resulting from disruptions to traditional patterns of community care. However, provincial governments were reluctant to provide those services for financial concerns and given federal jurisdiction over "Indians, and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. This led to disparity in the quantity and quality of services provided to First Nations children and families on reserve from province to province, where some provinces only provided services if they were compensated by the federal government or only in life-and-death situations (see Annex, ex. 2 at p. 39 [the *NPR*]).

[49] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve. Other provinces entered into bilateral agreements whereby AANDC would reimburse them for the delivery of child and family services (see Annex, ex. 3 at ss. 1.1.2 - 1.1.3 [*2005 FNCFS National Program Manual*]).

[50] In the 1970's and early 1980's, concerns began being raised over the child and family services being provided to First Nations by the provinces. Namely, the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities. This started a move towards the creation of community-specific FNCFS Agencies. AANDC funded these agencies through *ad hoc* arrangements, but authorities for doing so were unclear and funding was inconsistent (see the *NPR* at p. 24).

[51] In 1986, AANDC put a moratorium on the *ad hoc* arrangements for the development of FNCFS Agencies. This moratorium remained in place until 1990 when AANDC implemented the FNCFS Program (see *2005 FNCFS National Program Manual* at s. 1.1.6; and, the *NPR* at p. 24).

[52] At section 1.3 of the *2005 FNCFS National Program Manual*, the objective and principles of the FNCFS Program are outlined and include:

> 1.3.2 The primary objective of the FNCFS program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.
>
> […]
>
> 1.3.4 FNCFS will be managed and operated by provincially mandated First Nations organizations (Recipients), which provide services to First Nations children and families Ordinarily Resident On Reserve. FNCFS Recipients will manage the program in accordance with provincial or territorial legislation and standards. INAC will provide funding in accordance with its authorities.
>
> 1.3.5 The child and family services offered by FNCFS on reserve are to be culturally relevant and comparable, but not necessarily identical, to those offered by the reference province or territory to residents living off reserve in similar circumstances.
>
> 1.3.6 Protecting children from neglect and abuse is the main objective of child and family services. FNCFS also provide services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.
>
> 1.3.7 First Nation agencies and other Recipients will ensure that all persons Ordinarily Resident On Reserve and within their Catchment Area receive a full range of child and family services reasonably comparable to those provided off reserve by the reference province or territory. Funding will be provided in accordance with INAC authorities.

[53] In 2012, following the filing of the Complaint, the wording of the objective of the FNCFS Program was modified, but is still similarly described as follows:

> 1.1 Objective
>
> The FNCFS program provides funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.
>
> These services are to be provided in accordance with the legislation and standards of the province or territory of residence and in a manner that is

> reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities.
>
> (see Annex, ex. 4 at p. 30 [*2012 National Social Programs Manual*])

[54] The other provincial and territorial agreements for the provision of child and family services in First Nations communities have a similar purpose to the FNCFS Program. In Ontario, the *Memorandum of Agreement Respecting Welfare Programs for Indians* (see Annex, ex. 5 [the *1965 Agreement*]), at page 1, provides:

> WHEREAS the 1963 Federal-Provincial Conference, in charting desirable long-range objectives and policies applicable to the Indian people, determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities;
>
> AND WHEREAS Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs;

[55] In Alberta, the *Arrangement for the Funding and Administration of Social Services* (see Annex, ex. 6 [the *Alberta Reform Agreement*]) at page 1 states:

> *WHEREAS:*
>
> *Canada continues to have a special relationship with and interest in the Indian people of Canada arising from history, treaties, statutes and the Constitution;*
>
> *Canada and Alberta recognize and agree that this arrangement will not prejudice the treaty rights of Indian people, nor alter any obligations of Canada to Indian people pursuant to treaties, statutes and the Constitution, including any rights protected by section 35 of the Constitution Act, 1982, nor affect any self-government rights that may be negotiated in future constitutional negotiations;*
>
> *Canada and Alberta recognize that Indians and Indian Families should be provided with Social Services which take into account their cultures, values, languages and experiences;*

> *Canada and Alberta are desirous of developing an arrangement in respect of the funding and administration for Social Services which would be applicable to Indians in the Province of Alberta; and*
>
> *Canada and Alberta acknowledge that Indians have aspirations towards self-government and both therefore wish to support the establishment, management, and delivery by Indians and Indian organizations of child and family services and other community-based Social Services for Indians in Alberta.*

[56] At section 3 of the *Alberta Reform Agreement*, Canada's role is described as:

> 3. Canada will by this arrangement and in accordance with Appendix II:
>
> (a) arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a Reserve; and
>
> (b) fund Social Services for Indians and Indian Families ordinarily residing on a Reserve comparable to those provided by Alberta to other residents of the Province; and in particular, reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve.

[57] In British Columbia, the *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve* (see Annex, ex. 7 [the *BC Service Agreement*]), which in 2012 replaced a previous memorandum of understanding between the two parties (see Annex, ex. 8 [the *BC MOU*]), provides:

> **1.0 Vision**
>
> Governments working together in British Columbia to ensure that First Nation children, youth and their families live in strong, healthy families and sustainable communities where they are connected to their culture, language and traditions.
>
> DIAND and MCFD will contribute to this vision through a strong focus on providing funding and effective services respectively, to achieve meaningful outcomes for vulnerable First Nations children, youth and their families ordinarily resident on reserve.

[58] Finally, in the Yukon, there is the *Funding Agreement* (see Annex, ex. 9 [the *Yukon Funding Agreement*]). The *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Pursuant to Schedule "DIAND-3" of the *Yukon Funding Agreement*, "[t]he Territory will administer the First Nation Child and Family Services Program in accordance with DIAND's First Nation Child and Family Services Program – National Manual or any other program documentation issued by DIAND as amended from time to time".

[59] The history and objectives of the FNCFS Program and other related provincial/territorial agreements indicate that the benefit or assistance provided through these activities is to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children and families on reserve and in the Yukon. Without the FNCFS Program, related agreements and the funding provided through those instruments, First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities. The activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon.

[60] Therefore, the essential nature of the FNCFS Program is to ensure First Nations children and families on reserve and in the Yukon receive the "assistance" or "benefit" of culturally appropriate child and family services to that are reasonably comparable to the services provided to other provincial residents in similar circumstances. The other related provincial/territorial agreements provide a similar "assistance" or "benefit". AANDC extends this "assistance" or "benefit" to First Nations children and families on reserves and in the Yukon Territory.

d. First Nations children and families are extended the "assistance" or "benefit" by AANDC

[61] First Nations and, in particular, First Nations on reserve, are a distinct public. AANDC extends the assistance or benefit of the FNCFS Program and other related

provincial/territorial agreements to this public through FNCFS Agencies and/or the provinces/territory.

[62] Section 1.5 of the *2005 FNCFS National Program Manual* defines the roles and responsibilities of AANDC's headquarters and regional offices in ensuring the safety and well-being of First Nations children ordinarily resident on reserve. At section 1.5.2, the role of Headquarters includes: "to provide […] funding on behalf of children and families as authorized by the approved policy and program authorities"; "to lead in the development of FNCFS policy"; and, "to provide oversight on program issues related to the FNCFS policy and to assist regions and First Nations in finding solutions to problems arising in the regions".

[63] The role of AANDC's regional offices is outlined at section 1.5.3 of the *2005 FNCFS National Program Manual* and includes: "to interact with Recipients, Chiefs and Councils, Headquarters, the reference province or territory"; "to manage the program and funding on behalf of Canada and to ensure that authorities are followed"; "to assure Headquarters that the program is operating according to authorities and Canada's financial management requirements"; and, "to establish, in cooperation with Recipients, a process for dealing with disputes over issues relating to the operation of FNCFS".

[64] The role of the FNCFS Agencies is, among other things, "to deliver the FNCFS program in accordance with provincial legislation and standards while adhering to the terms and conditions of their funding agreements" (*2005 FNCFS National Program Manual* at section 1.5.4). The provinces mandate, regulate and oversee the FNCFS Agencies (see *2005 FNCFS National Program Manual* at section 1.5.5).

[65] In a more summary fashion, the *2012 National Social Programs Manual* defines the differing roles of AANDC, the provinces/territory and the FNCFS Agencies as follows, at page 30:

> 1.2 Provincial Delegations
>
> Child welfare is an area of provincial responsibility whereby each province, in accordance with their legislation, delegates authority to FNCFS agencies to manage and deliver child welfare services on reserve.

> The FNCFS agencies, delegated by the province, provide protection services to eligible First Nation children, ordinarily resident on-reserve in accordance with provincial legislation and standards.
>
> The Program funds FNCFS agencies to deliver protection (out of the home) and prevention services (in-home) to First Nation children, youth, and families ordinarily resident on reserve.

[66] AANDC has a "Shared Responsibility for Child Welfare" with the FNCFS Agencies and the provinces/territory (see the *NPR* at p.88). It not only provides funding, but policy and oversight as well. It works as a partner with the FNCFS Agencies and provinces/territory to deliver adequate child and family services to First Nations on reserves. It is not a passive player in this partnership, whereby it only provides funding: it strives to improve outcomes for First Nations children and families. In this regard, Ms. Sheilagh Murphy, Director General of the Social Policy and Programs Branch of AANDC, testified about the goal of AANDC social programs:

> Well, I mean we have this broad objective or goal to make sure that First Nations on Reserve -- men, women, and children -- are safe, that they are healthy and that they have the means to become productive members of their communities and can contribute to those communities and to Canada more generally as citizens.
>
> (StenoTran Services Inc.'s transcript of *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)* (CHRT), Ottawa, Vol. 54 at pp. 17-18 [*Transcript*])

[67] The FNCFS Program is one of the social programs meant to achieve this objective. A "Fact Sheet" developed in October 2006 and previously posted on AANDC's website (see Annex, ex. 10 [*Fact Sheet*]), demonstrates how the department previously held out the FNCFS Program:

> **The First Nations Child and Family Services Program** is one component of a suite of Social Programs that addresses the well-being of children and families. The main objective of the Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to them are comparable to those available to other provincial residents in similar circumstances.

[68] AANDC works directly with its partners, including First Nations, to ensure the objectives of the FNCFS Program and other related provincial/territorial agreements are being met. The *2005 FNCFS Program Manual* provides for consultation among AANDC and First Nations communities with regard to disputes over the program (see ss. 1.5.2-1.5.3). The *Alberta Reform Agreement* specifically provides for consultation with First Nations communities in reviewing the effectiveness of the arrangement (see ss. 13-14). Similarly, the agreements in British Columbia and the Yukon provide for evaluation and review by AANDC of the effectiveness of the programs, services and activities it funds (see ss. 9.2 and 10.1 of the *BC Service Agreement*; and, s. 13.4.1 of the *Yukon Funding Agreement*).

[69] In its previous website *Fact Sheet*, AANDC held out this partnership as follows:

> The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.

[70] Ms. Murphy provided some insight into the nature of AANDC's role and partnership in ensuring adequate child and family services to First Nations reserves:

> I mean, we continue to be a funder, we don't espouse to be experts in the area of child welfare practice. I mean, our role I think has changed in some ways in that when you look at the progression of this program -- we do audits and we do evaluations, the Auditor General looked at this program in 2008 and again in 2011. We do need to have – we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nation Agencies are delivering the program according to the legislation and regulation, that they have the capacity to do that, that we are getting to outcomes.
>
> So we are not a passive player in terms of being interested in how First -- I mean, it's program risk management, it is financial risk management, to make sure that they are delivering the program that is within the authorities, that they are paying for the right things that we have been given the money for.
>
> (*Transcript* Vol. 54 at pp. 51-52)

[71] As the above indicates, AANDC plays a significant role in the effort to improve outcomes for First Nations children and families residing on reserve. While AANDC argues that it does not control services, the manner and extent of AANDC's funding significantly shapes the child and family services provided by the FNCFS Agencies and/or the provinces/territory. This will be further elaborated upon in section B of this Analysis below. For the purposes of this "service" analysis, suffice it to say AANDC's involvement in the FNCFS Program and other related provincial/territorial agreements determines whether and to what extent child and family services are provided to First Nations reserves and in the Yukon.

[72] For example, a document entitled *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* authored by three AANDC employees and signed by the Assistant Deputy Minister at the time, Ms. Christine Cram (see Annex, ex. 11), at page 2, explains the ultimate consequence that AANDC's funding can have on FNCFS Agencies:

> For the majority of these FNCFS agencies, a permanent reduction of unexpended maintenance balances and the absence of additional resources for operations on a go forward basis will render them financially unviable and will likely result in many agency closures.

[73] It is AANDC that created the FNCFS Program and its corresponding funding formulas, and who negotiated and administers the provincial/territorial agreements. While the FNCFS Program is set up to work in a tripartite fashion, and the other agreements in a bilateral fashion, at the end of the day it is AANDC's involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard. Again, this will be elaborated upon in section B of this Analysis. However, by way of example, in a document entitled *Reform of the FNCFS Program in Québec (Information for the Deputy Minister)*, at pages 1-3 (see Annex, ex. 12), two AANDC employees explain the Department's decision not to transition Québec to a new funding methodology:

> INAC has been in discussion with the First Nations of Québec and Labrador Health and Social Services Commission (Commission) and Québec's Ministry of Health and Social Services since June, 2007 regarding

> transitioning the Quebec FNCFS Agencies to an enhanced prevention approach.
>
> The three parties have developed a Partnership for Results Framework that outlines the strategic direction, key outcomes and performance indicators for FNCFS on reserve in Québec. Both the First Nations leadership and the Province have submitted letters of endorsement for this initiative.
>
> In November of 2007, a number of issues were raised by the First Nations of Québec and Labrador Health and Social Services Commission. The issues largely pertain to the overall funding formula that was proposed as a model for the Québec First Nations agencies (See Annex A for detailed list of concerns and our proposed action).
>
> A decision was made in December 2007, to move forward in the transition to the enhanced prevention focused approach without Québec in order to give the Department time to address First Nations' concerns with the transition process.
>
> The Department has not yet informed Québec First Nations and the Province of Québec of the decision to delay the transition to the Enhanced Prevention Focused Approach in Québec.
>
> […]
>
> There is a risk that once the Commission and Québec First Nations are informed of the decision that was made; they will not want to proceed with the transition to the new enhanced prevention-focused approach. It is hoped that the delivery of messaging from a senior official will reassure the First Nations of the Department's commitment and enable the working level to address concerns raised and move the transition forward.

[74] This document is an official position to be adopted by AANDC's Deputy Minister, informed by high level AANDC employees. It illustrates that, despite a tripartite relationship where its partners support a new funding approach, AANDC is the one who controls the process and makes the final decision in determining the approach to be taken.

[75] Furthermore, AANDC has the power to withhold funds if FNCFS Agencies and/or the provinces/territory do not comply with its funding requirements. This could result in agencies closing their doors and, as a consequence, inadequate child and family services being provided to First Nations children and families on reserves and in the Yukon (see

testimony of William McArthur, Manager, Social Programs, British Columbia Regional Office, AANDC, *Transcript* Vol. 64 at pp. 45-47).

[76] All the above indicates a public relationship between AANDC and First Nations children and families in the provision of child and family services. In sum, AANDC extends the FNCFS Program and other related provincial/territorial agreements as a partnership, including with First Nations, to improve outcomes for First Nations children and families on reserve. Ultimately, through the FNCFS Program, its funding formulas and the related provincial/territorial agreements, AANDC has a direct impact on the child and family services provided to First Nations children and families living on reserves and in the Yukon Territory.

[77] This public relationship between AANDC and First Nations on reserves and in the Yukon in the provision of child and family services is reinforced by the federal government's constitutional responsibilities and its special relationship with Aboriginal peoples.

e. Section 91(24) of the *Constitution Act, 1867*

[78] The fact that AANDC does not directly deliver First Nations child and family services on reserve, but funds the delivery of those services through FNCFS Agencies or the provincial/territorial governments, does not exempt it from its public mandate and responsibilities to First Nations people. AANDC argues that child welfare services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, that position does not take into consideration Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*.

[79] In Canada, legislative power is divided between the federal government and the provincial/territorial governments. As stated by the Supreme Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paragraph 22 (*Central Western Bank*):

> …federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[80] The Supreme Court also noted that "the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society" (*Central Western Bank* at para. 23). This is referred to as the "living tree" doctrine.

[81] The legislative powers defined in the *Constitution Act, 1867* are deemed to be exclusive to the extent that, even if Parliament does not legislate in its fields of jurisdiction, the provinces/territories are not allowed to do so (see *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.) at p. 588). However, the Court has indicated clearly that this doctrine of inter-jurisdictional immunity is to be construed narrowly, among other reasons, so as not to allow any legal vacuum. It is used "…to protect that which makes certain works or undertakings, things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction" (*Central Western Bank* at para. 41). As also noted in *Central Western Bank* at paragraph 42:

> Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

[82] Despite the doctrine of inter-jurisdictional immunity, cooperative federalism can exist in situations where federal and provincial authorities connect. In the recent case of *Quebec (A.G.) v. Canada (A.G.)*, 2015 SCC 14 (*Canadian Firearms Registry*), where

Quebec challenged the constitutionality of the federal government's decision to destroy the firearms registry, the Supreme Court found itself divided on the scope of cooperative federalism. Nonetheless, the majority in *Canadian Firearms Registry* held that cooperative federalism cannot override or modify the constitutional division of powers:

> [17] Cooperative federalism is a concept used to describe the "network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process […] From this descriptive concept of cooperative federalism, courts have developed a legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action […] With respect to interjurisdictional immunity, for example, the principle of cooperative federalism has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government: "In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (*Canadian Western Bank*, at para. 37).
>
> [18] However, we must also recognize the limits of the principle of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53. This is especially the case with regard to the division of powers:
>
> > . . . the text of the federal constitution as authoritatively interpreted in the courts remains very important. It tells us who can act in any event. In other words, constitutionally it must always be possible in a federal country to ask and answer the question — What happens if the federal and provincial governments do not agree about a particular measure of co-operative action? Then which government and legislative body has power to do what?
>
> (Emphasis added; footnote omitted)

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for

Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities. In a comparable situation argued under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the Supreme Court stated in *Eldridge* at paragraph 42:

> …the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[84] Similarly, AANDC should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territory. AANDC should not be allowed to escape the scrutiny of the *CHRA* because it does not directly deliver child and family services on reserve.

[85] As explained above, despite not actually delivering the service, AANDC exerts a significant amount of influence over the provision of those services. Ultimately, it is AANDC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit AANDC holds out and intends to provide to First Nations children and families.

[86] Parliament's constitutional responsibility towards Aboriginal peoples, in a situation where a federal department dedicated to Aboriginal affairs oversees a social program and negotiates and administers agreements for the benefit of First Nations children and families, reinforces the public relationship between AANDC and First Nations in the provision of the FNCFS Program and the related provincial/territorial agreements.

f. The Crown's fiduciary relationship with Aboriginal peoples

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a "political trust of the highest obligation":

> The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.
>
> (*St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 219 [per Rand J.])

[91] However, this "political trust" was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to

at the time of the surrender, the Supreme Court qualified the relationship between the Crown and Aboriginal peoples as a fiduciary relationship in *Guerin v. The Queen*, [1984] 2 SCR.335, at page 376 (*Guerin*):

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[92] This special relationship is also rooted in the large degree of discretionary control assumed by the Crown over the lives and interests of Aboriginal peoples in Canada:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
>
> (*Mitchell v. M.N.R.*, 2001 SCC 33, at para. 9)

[93] After the entry into force of section 35 of the *Constitution Act, 1982*, in *R.* v. *Sparrow*, [1990] 1 SCR 1075, at page 1108, the Supreme Court further confirmed and defined the duty of the Crown to act in a fiduciary capacity as the "general guiding principle" for section 35:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial and, contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[94] This general guiding principle is not limited to section 35(1) of the *Constitution Act, 1982*, but has broader application as confirmed by the Supreme Court in *Wewaykum Indian Band* v. *Canada*, 2002 SCC 79, at paragraph 79 (*Wewaykum*).

[95] First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in *Haida Nation*, at paragraph 17:

> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[96] That being said, it is also well established that this fiduciary relationship does not always give rise to fiduciary obligations. While the fiduciary relationship may be described as general in nature, requiring that the Crown act in the best interest of Aboriginal peoples, fiduciary obligations are specific, related to precise aboriginal interests:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically […]
>
> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> (*Wewaykum* at paras. 80-81)

[97] The Supreme Court has relied on private law concepts to define circumstances that can give rise to a fiduciary obligation because, although the Crown's obligation is not a

private law duty, it is nonetheless in the nature of a private duty, susceptible of giving rise to enforceable obligations :

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> (*Guerin* at p. 385)

[98] *Guerin* stands for the principle that a fiduciary obligation on the Crown towards Aboriginal peoples arises from the fact that their interest in land is inalienable except upon surrender to the Crown. In another case where the Supreme Court found that the Crown has a fiduciary obligation to prevent exploitative bargains in the context of a surrender of reserve land, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paragraph 38, it referred to private law criteria to define a situation that could give rise to a fiduciary obligation:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[99] The present case does not raise land related issues. The Panel is aware that fiduciary obligations have yet to be recognized by the Supreme Court in relation to Aboriginal interests other than land outside the framework of section 35(1) of the *Constitution Act, 1982* (see *Wewaykum* at para. 81). However, the Panel is also aware that in *Frame v. Smith*, [1987] 2 SCR 99, at paragraph 60, Wilson J. held that fiduciary duties did not apply only to legal and economic interests but could extend to human and personal interests:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.

[100] In fact, in *Wewaykum* the Supreme Court noted that since the *Guerin* case the existence of a fiduciary obligation has been argued in a number of cases raising a variety of issues (see at para. 82). While it did not comment on these cases, the Court in *Wewaykum*, at paragraph 83, did state that a case by case approach would have to focus on the specific interest at issue and whether or not the Crown had assumed discretionary control giving rise to a fiduciary obligation:

> I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature […], and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[101] Recent case law from the Supreme Court confirms that a fiduciary obligation may also arise from an undertaking. The following conditions are to be met:

> In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in Frame: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36 (*Elder Advocates Society*); see also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 50 [*Manitoba Metis Federation*])

[102] AANDC argues that there must be an undertaking of loyalty by the Crown to the point of forsaking the interests of all others in favour of those of the beneficiaries for a fiduciary obligation to apply (see *Elder Advocates Society* at para. 31; and, *Manitoba Metis Federation* at para. 61).

[103] However, in *Elder Advocates Society*, at paragraph 48, it should be noted that the Supreme Court held that the necessary undertaking was met with respect to Aboriginal peoples:

> In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The FNCFS Program and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the FNCFS Program through policy and other administrative directives. It also exercises discretionary control over the application of the other related provincial/territorial agreements as First Nations are not party to their negotiation. The FNCFS Program and other related provincial/territorial agreements also have a direct impact on a vulnerable category of people: First Nations children and families in need of child and family support services on reserve.

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees with the AFN, Caring Society and the COO that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté*, [1996] 3 SCR 139 at paragraph 56:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.

[107] Similarly, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 26 (*Doucet-Boudreau*), the Supreme Court stated the following with regard to the relation between language and culture:

> This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:
>
> > . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[108] In certifying a class action based on the operation of the child welfare system on reserve in Ontario, Justice Belobaba on the Ontario Superior Court of Justice, in *Brown v. Canada (AG)*, 2013 ONSC 5637 at paragraph 44, expressed his views on the existence of a fiduciary duty based on the discretionary Crown control over Aboriginal interests in culture:

> it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as "specific indigenous interests" which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA*.

[110] Suffice it to say, AANDC's development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current "services" analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

iii. Summary of findings

[111] Overall, the Panel finds the evidence indicates the FNCFS Program and other related provincial/territorial agreements are held out by AANDC as assistance or a benefit

that it provides to First Nations people. The FNCFS Program and other provincial/territorial agreements were created and negotiated on behalf of First Nations by AANDC, a federal government department with the mandate and mission to do so. First Nations are a distinct public, served by AANDC in the context of a unique constitutional and fiduciary relationship. AANDC has undertaken to ensure First Nations living on reserve receive culturally appropriate child and family services that are reasonably comparable to the services provided to other provincial residents in similar circumstances. Therefore, the Panel finds there is a clear public nature and relationship with First Nations in AANDC's provision of the FNCFS Program and other related provincial/territorial agreements.

[112] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

> the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

[113] As a result, and for the reasons above, the Panel finds AANDC provides a service through the FNCFS Program and other related provincial/territorial agreements. In the following pages, the Panel will examine the impacts of AANDC's service and, specifically, how AANDC's method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

B. First Nations are adversely impacted by the services provided by AANDC and, in some cases, denied services as a result of AANDC's involvement

[114] Before dealing with how the FNCFS Program and other related provincial/territorial agreements are funded, it is helpful to have a basic understanding of how child welfare services are provided in Canada. Dr. Cindy Blackstock, Executive Director of the Caring Society, provided helpful testimony in this regard (see *Transcript* Vol. 1 at pp. 110, 112, 124-129, 132-136, 138-142 and 151; see also Annex, ex. 1).

i. General child welfare principles

[115] As indicated earlier, child welfare in Canada includes a range of services designed to protect children from abuse and neglect and to support families so that they can stay together. The main objective of social workers is to do all they can to keep children safely within their homes and communities. There are two major streams of child welfare services: prevention and protection.

[116] Prevention services are divided into three main categories: primary, secondary and tertiary. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education on the healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. As opposed to separating a child from his or her family, tertiary prevention services are designed to be "least disruptive measures" that try and mitigate the risks of separating a child from his or her family. Early interventions to provide family support can be quite successful in keeping children safely within their family environment, and provincial legislation requires that least disruptive measures be exhausted before a child is placed in care.

[117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make

arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child “in care”. The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.

[118] The child welfare system is typically called into action when someone has concerns about the safety or well-being of a child and reports these concerns to a social worker. The first step is for the social worker to do a preliminary assessment of the report in order to decide whether further investigation is called for. If the social worker concludes that an investigation is warranted, he or she can meet with family members and can interview the child. The child is not removed from the home during the investigation unless his or her safety is at risk. The social worker will develop a plan of action for the child and his or her family in coordination with the child’s extended family and professionals such as teachers, early child care workers and cultural workers. A whole range of services may include personal counselling, mentoring by an Elder, access to childhood development programs or to programs designed to enhance the homemaking and parental skills of the caregiver.

[119] There are circumstances, however, when the risk to the child’s safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

[120] The major categories of child maltreatment are: sexual, physical, or emotional abuse, or exposure thereto, and neglect. For First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic

needs. Poverty, poor housing and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services.

ii. The allocation of funding for First Nations child and family services

[121] AANDC funds child and family services on reserves and in the Yukon in various ways. At the time of the complaint, there were 105 FNCFS Agencies in the 10 provinces across Canada (104 at the time of the hearing). The FNCFS Program, applies to most of the FNCFS Agencies in Canada, uses two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach (the EPFA). In Ontario, funding is provided through the *1965 Agreement*. In certain parts of Alberta and British Columbia, funding is provided through the *Alberta Reform Agreement* and the *BC MOU* and, since 2012, the *BC Service Agreement*. Finally, in the Yukon funding is allocated pursuant to the *Yukon Funding Agreement* (see testimony of Ms. Barbara D'Amico, Senior Policy Analyst at the Social and Policy Branch of AANDC, *Transcript* Vol. 50 at p. 141). Each method of funding is addressed in turn.

a. The FNCFS Program

[122] Beginning with the FNCFS Program, AANDC's authorities require that, before entering into a funding arrangement with an FNCFS Agency (or Recipient), an agreement be in place between the province or territory and the agency that meets the requirements of AANDC's national FNCFS Policy (see *2005 FNCFS National Program Manual* at s. 4.1). Thereafter, funding is provided through a comprehensive funding arrangement (CFA), which is "…a program-budgeted funding agreement that [AANDC] enters into with Recipients…" (*2005 FNCFS National Program Manual* at s. 4.4.1). According to the *2005 FNCFS National Program Manual* at section 4.4.1:

> [A CFA] contains components funded by means of a Contribution, which is a reimbursement of eligible expenses and Flexible Transfer Payments, which are formula funded. Surpluses from the Flexible Transfer Payment may be retained by the Recipient provided the terms and conditions of the CFA have

> been fulfilled. The FNCFS program expects that all surplus money will be used for FNCFS. It is also expected that Recipients will absorb any deficits.

[123] Funding for FNCFS Agencies is determined in accordance with AANDC "authorities" (see *2005 FNCFS National Program Manual* at s. 1.4). Those "authorities" are obtained from the federal government through Cabinet and Treasury Board and "…are reflected in the […] Program Directive" (*2005 FNCFS National Program Manual* at s. 1.4.5). The Program Directive, also called Directive 20-1 and found at Appendix A of the *2005 FNCFS National Program Manual*, "…interprets the authorities and places them into a useable context" (*2005 FNCFS National Program Manual* at s. 1.4.5). Directive 20-1 is AANDC's "…national policy statement on FNCFS" (see definition of "Program Directive 20-1 CHAPTER 5 (Program Directive)", *2005 FNCFS National Program Manual* at s. 7, p. 51). It is also:

> …a blueprint on how INAC will administer the FNCFS program from a national perspective, it is also intended to be a teaching document, for new staff at both INAC Headquarters and Regions. The combination of the national manual and the regional manuals should create a clear picture of INAC's role in FNCFS in Canada
>
> (*2005 FNCFS National Program Manual* at Introduction, p. 2)

[124] Prior to 2007, around the time of the Complaint, all provinces and the Yukon, except Ontario, functioned under Directive 20-1. Currently, New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon are subject to the application of Directive 20-1.

[125] In line with the FNCFS Program, the principles of Directive 20-1 include a commitment to "…expanding First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances […] in accordance with the applicable provincial child and family services legislation" (see *2005 FNCFS National Program Manual* at Appendix A, ss. 6.1 and 6.6). Furthermore, Directive 20-1 supports "…the creation of First Nations designed, controlled and managed services" (see *2005 FNCFS National Program Manual* at Appendix A, s. 6.2). Under Directive 20-1, funding for FNCFS agencies is determined through two separate categories: operations and maintenance.

[126] Operational funding is intended to cover operations and administration costs for such items as salaries and benefits for agency staff, travel expenses, staff training, legal services, family support services and agency administration, including rent and office expenditures (see *2005 FNCFS National Program Manual* at s.2.2.2 and at Appendix A, s. 19.1). It is calculated using a formula based on the on-reserve population of children aged 0-18 as reported annually by First Nations bands across Canada. The calculation of the operations funding is done annually by AANDC as of December 31 of each year, based on the population statistics of the preceding year (see *2005 FNCFS National Program Manual* at s. 3.2). FNCFS Agencies are eligible to receive a fixed administrative allocation pursuant to the following formula:

> A fixed amount $143,158.84 per organization + $10,713.59 per member band + $726.91 per child (0-18 years) + $9,235.23 x average remoteness factor + $8,865.90 per member band x average remoteness factor + $73.65 per child x average remoteness factor + actual costs of the per diem rates of foster homes, group homes and institutions established by the province or territory.
>
> (see *2005 FNCFS National Program Manual* at Appendix A, s. 19.1(a); see also *2005 FNCFS National Program Manual* at ss. 3.2.1-3.2.3)

[127] The adjustment factor is multiplied by $9,235.23, the remoteness factor is multiplied by $8,865.90 times the number of bands within the agency's catchment area and the child population (0 to 18 years) is multiplied by $73.65 times the remoteness factor (see *2005 FNCFS National Program Manual* at s. 3.2.3). The remoteness factor takes into account such things as the distance between the First Nation and a service centre, road access, and availability of services. It can range from 0 to 1.9. If multiple communities are served by an FNCFS Agency, the remoteness factors of each of the communities is averaged to come to the 'average remoteness factor' (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 28-29).

[128] The amounts in the operational funding formula are based on certain assumptions emanating from the time it was put in place in the early 1990's:

- On average, 6% of the on reserve child population is in care;

- On average, 20% of families on reserve require child and family services or are classified as multi-problem families;
- One child care worker and one family support worker for every 20 children in care;
- One supervisor and one support staff for every 5 workers;
- Wages based on average salaries in Ontario and Manitoba

(see Annex, ex. 13 at pp. 7-8 [*Wen:De Report One*]).

[129] According to Ms. D'Amico, the 6% assumption regarding children-in-care is based on the 2007 national average and it provides FNCFS Agencies with stability. That is, even if an agency has or later achieves a smaller percentage of children-in-care, their budget is not affected. The 20% of families requiring services is determined using an assumption that there are on-average three children per family. By dividing the total on-reserve child population by three, AANDC arrives at the number of families it believes would normally be served by the applicable FNCFS Agency. It then takes 20% of that population calculation as a variable in determining the FNCFS Agency's budget (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 25-31).

[130] In the first four years of operation of a new FNCFS Agency, the funding formula is gradually implemented at a rate of 75% in the first year, 85% the second year, 95% the third year and 100% in the fourth year [see *2005 FNCFS National Program Manual* at section 3.2.1 and Appendix A, s. 19.1(c)]. Furthermore, for agencies that serve less than 1,000 children, the fixed maximum amount of $143,158.84 is decreased as follows: $71,579.43 (501-800 children); $35,789.10 (251-500); and, regions with a child population of 0 to 250 receive no administrative allocation [see *2005 FNCFS National Program Manual* at Appendix A, s. 19.2(b)]. However, in British Columbia, the full allocation for population begins with at least 801 children (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 23).

[131] Maintenance funding is intended to cover the actual costs of eligible expenditures for maintaining a First Nations child ordinarily resident on reserve in alternate care out of parental home. Children must be taken into care in accordance with provincially or

territorially approved legislation, standards and rates for foster home, group home and institutional care. FNCFS Agencies are required to submit monthly invoices for children in care out of the parental home and are to be reimbursed on the basis of actual expenditures (see *2005 FNCFS National Program Manual* at ss. 3.3.1-3.3.2 and Appendix A, s. 20.1).

[132] Until 2011, FNCFS Agencies in British Columbia were funded on a per diem structure, but have since transitioned to reimbursement for maintenance expenses based on actual costs. However, if funding based on actuals provides for less funding, the previous per diem funding levels are maintained as part of a plan to eventually transition FNCFS Agencies in that province to the EPFA (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 35-36; and, testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 150-151).

[133] FNCFS Agencies also have the option of applying for "flexible" funding for maintenance under Directive 20-1 (see *2005 FNCFS National Program Manual* at Appendix A, s. 20.2). This option allows agencies to receive a payment of their total operational funding allocation, along with a historically based estimate of their maintenance costs. This flexible funding option is meant to provide FNCFS Agencies with increased flexibility to re-profile maintenance funding to provide increased resources for prevention. To access this flexible funding option an FNCFS Agency must undergo an assessment and receive approval from AANDC's regional office, along with approval from AANDC Headquarters. In 2006, only 7 out of 105 FNCFS Agencies utilized the flexible funding option (see Annex, ex. 14 at p. 5 [*2007 Evaluation of the FNCFS Program*]).

[134] The monetary amounts reflected in Directive 20-1 reflect 1995-1996 values and have not been significantly modified since that time, despite the directive providing for them to be increased by 2% every year, subject to the availability of resources (see *2005 FNCFS National Program Manual* at Appendix A, s. 22.00; and, testimony of W. McArthur, *Transcript* Vol. 64 at pp. 3-4). Furthermore, maximum funding by AANDC is 100 percent of eligible costs. FNCFS Agencies may be required to repay funds to AANDC if their total funding from all sources, including from voluntary sector sources, exceeds eligible expenditures and when AANDC's contribution thereto is in excess of $100,000 (see *2012 National Social Programs Manual* at p. 10, s. 11.0 [the stacking provisions]).

[135] Since 2005, an 8.24 percent increase has been applied to each FNCFS Agency's total allocation under Directive 20-1 (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 32; and, testimony of B. D'Amico, *Transcript* Vol. 51 at p. 17). Additional funding is also provided in New Brunswick for the Head Start program and for in-home care as a precursor to the transition to the EPFA (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 169-173).

[136] That is, since 2007, AANDC has transitioned the funding model for certain provinces under the FNCFS Program from Directive 20-1 to the EPFA. An agreement was reached to implement the EPFA in Alberta and Saskatchewan in 2007, Nova Scotia in 2008, Québec in 2009, Prince Edward Island in 2009 and Manitoba in 2010.

[137] Under EPFA, prevention is included as a third funding stream to operations and maintenance. Prevention services are "…designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care or the amount of time a child remains in Alternate Care" (*2012 National Social Programs Manual* at p. 33, s. 2.1.17; see also p. 38, s. 4.4.1). Eligible expenses under this prevention funding stream include: salaries and benefits for prevention and resource workers, travel, paraprofessional services, family support services, mentoring services for children, home management services, and non-medical counselling services not covered by other funding sources (see *2012 National Social Programs Manual* at p. 38, s. 4.4.2).

[138] Implementation of the EPFA begins with tri-partite discussions between the province, First Nation community and AANDC. From the tripartite discussions, a Tripartite Accountability Framework is developed outlining the goals, objectives, performance indicators, and roles and responsibilities of the parties. Using the Tripartite Accountability Framework as a benchmark, the FNCFS Agency prepares an initial 5-year business plan, which is subject to AANDC review and acceptance by the province. The business plan is a pre-requisite in order to receive funding under the EPFA (see *2012 National Social Programs Manual* at p. 37, s. 4.3; see also testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 146-152).

[139] Once the framework and business plan are in place, the costing discussions take place. According to the *2012 National Social Programs Manual*, funding for operations and prevention services are based on a cost-model developed at regional tri-partite tables and are consistent with reasonable comparability to the respective province within AANDC's program authority (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). That is, the EPFA is to be tailored to each jurisdiction using a formula made-up of line-items that are identified at tripartite tables. The determination of staffing numbers and which line items to include in the formula, and the dollar values assigned to each of those line items, is based on variables provided by the province (for example staffing ratios, caseload ratios, and salary grades). Those amounts are then worked into AANDC's operations and prevention cost-model. A cost-model is utilized because the provinces do not always use a funding formula that AANDC can replicate (see testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 56, 150-151; and, Vol. 51 at pp.18-66, 153-154).

[140] Similar to Directive 20-1, the formula for the EPFA is based on the child population served by the FNCFS Agency and the assumptions that a minimum of 20% of families are in need of child and family services and that 6% of children are in care (although in Manitoba an assumption of 7% of children in care is used in the EPFA formula). The prevention focused services component of the EPFA formula is largely based on the salaries needed for service delivery staff, where the amount of staff needed is calculated based on the assumed amount of children in care and families in need of services. The estimated amount of children in care is calculated by multiplying the child population served by the FNCFS Agency by the assumed percentage of children in care. As mentioned above, the number of families in need of services is calculated by taking the total child population served by the FNCFS Agency, dividing it by the average amount of children per First Nation family (3), and then multiplying that number by the assumed percentage of families in need of prevention services (20%) (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 24-31).

[141] The calculated estimates of children in care and families in need of care are then used to determine the amount of service delivery staff needed for the FNCFS Agency. Similar to Directive 20-1, provincial ratios in terms of social workers per children in care or

families in need, supervisors per amount of socials workers, and support staff per amount of workers are used to estimate the staff needed for specific positions. The average salaries for those positions within the province, at the time EPFA is implemented, then make up the bulk of funding provided for the prevention focused services component of the funding formula (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 32-79). As Ms. Murphy explained:

> We are from a funding perspective, so how the provinces fund is what we want to stay comparable with, not the types of services that the province funds -- or provides, excuse me.
>
> […]
>
> And the only way that we could find that, a way to be comparable, was to identify the variables, those calculation variables; so the salary grids, the ratios – the staffing ratios, the caseload ratios. Those were the only funding tools that we could find to be comparable, and that is why we had incorporated that into the EPFA formula.
>
> (*Transcript* Vol. 51 at pp. 178-179)

[142] Eligible expenditures for maintenance and operations under the EPFA are outlined at sections 3.4 and 3.5 of Directive 20-1 (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). AANDC expects FNCFS Agencies to manage their operations and prevention costs within the budgets they have (see testimony of S. Murphy, *Transcript* Vol. 54 at p. 170). However, the EPFA does allow agencies flexibility in moving funding from one stream (operations, maintenance or prevention) to another "…in order to address needs and circumstances facing individual communities" (*2012 National Social Programs Manual* at p. 38, s. 4.4.1).

[143] Under EPFA, funding for prevention and operations is determined at the beginning of a five year period on a fixed cost basis (see testimony of B. D'Amico, *Transcript* Vol. 53 at p.16). EPFA funding is then rolled-out over a 3-4 year period, where the FNCFS Agency receives 40% of funding in year 1, 60% in year 2 and between 80% and 100% in year 3. The full funding amount is provided by year 4 (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 145-146). Once EPFA is fully implemented, the only revision in the funding formula from year to year is to account for the child population served by the FNCFS

Agency. EPFA does not provide additional funding for increases in operations or prevention costs over time, such as for changes to professional services rates or incremental increases in salaries (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 147-150; see also *2012 National Social Programs Manual* at p. 37, s. 4.1)

[144] For example, in Alberta, where the EPFA was first implemented in 2007, the average salaries for service delivery staff from that initial implementation of the EPFA, based on 2006 values, are still being applied eight years later to the calculation of 2014 budgets (see testimony of B. D'Amico, *Transcript* Vol. 52 at p. 153; and, testimony of Ms. Carol Schimanke, Manager of Social Development, Child and Family Services Program, AANDC Alberta Regional Office, *Transcript* Vol. 61 at pp. 115-116). According to Ms. D'Amico, the rationale behind this is as follows:

> Because what the idea of EPFA was that if you placed more money in prevention and did a lot more early intervention work, your maintenance costs would go down. When those maintenance costs go down, that money could be reinvested into operations.
>
> So the idea -- and this is not in practice, but the idea behind this was for it -- for the Agencies to be self-sufficient and be able to move the monies from one stream to another. So that's why there was no escalator included in here.
>
> This is an issue we are now reviewing about what happens after year five if the maintenance isn't supplying the operations anymore, or never did, so, what if that theory doesn't work?
>
> (*Transcript* Vol. 52 at pp. 150-151)

[145] Ms. D`Amico specified that in practice, given that some FNCFS Agencies are doing more intake and investigations as part of their prevention strategies, this has led to more kids in care and no reduction in maintenance costs (see *Transcript* Vol. 51 at pp. 91-92). The EPFA funding formula also does not include funds for intake and investigation.

[146] Maintenance funding under the EPFA is budgeted annually based on actual expenditures from the previous year (see *2012 National Social Programs Manual* at p. 38, section 4.4.1). AANDC "re-bases" an agency's maintenance budget each year. For example, if an agency's maintenance budget is $100 in year one, but its expenditures for

that year total only $80, AANDC will reduce its maintenance budget in the second year to $80. If in the second year that agency's number of children in care increases unexpectedly, the agency must work within its existing budget to manage those costs in the interim.

[147] In other words, if maintenance costs are greater than the set amount of maintenance funding, the FNCFS Agency must recover the deficit from its operations and/or prevention funding streams. If there is still a deficit in maintenance, AANDC has some funds that it holds back centrally at the beginning of each fiscal year to help manage those types of situations. When that fund is depleted, AANDC reallocates money from other programs within AANDC to cover the maintenance costs. If an FNCFS Agency has a surplus from its maintenance budget, the agency can keep it and re-apply it to other eligible expenses (see testimony of C. Schimanke, *Transcript* Vol. 61 at pp. 91, 96-98; testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 174-181; and, testimony of S. Murphy, *Transcript* Vol. 54 at pp. 167-168, 172-174).

[148] AANDC receives a 2% increase in its budget for Social Programs every year. However, for the FNCFS Program, that 2% increase is calculated based on the budget of the FNCFS Program prior to the implementation of the EPFA, at about $450 million. Ms. Murphy estimated the current budget of the FNCFS Program, with the implementation of the EPFA, to be approximately $627 million. In her words:

> So the difference in that, between that 450 million has been made up of some of the two percent -- the portion of growth, some of it's the incremental investments that have come to the Department through the EPFA for those six jurisdictions and the rest of it is resource re-allocations.
>
> (*Transcript* Vol. 54 at pp. 177, 189-191; see also, Vol. 55 at pp. 188-189)

b. Reports on the FNCFS Program

[149] The FNCFS Program has been examined in multiple reports: the First Nations Child and Family Services Joint National Policy Review, referred to above as the *NPR*, in 2000; three related studies from 2004-2005 referred to as the Wen:De reports; and, two

Auditor General of Canada reports in 2008 and 2011, along with follow-up reports thereon by the House of Commons Standing Committee on Public Accounts.

First Nations Child and Family Services Joint National Policy Review Final Report

[150] The *NPR* was published in 2000. It is a collaborative report by AANDC and the Assembly of First Nations. Although the *NPR* pre-dates the complaint by about 8 years, its study of the impacts of Directive 20-1 is still relevant given that the funding formula still applies to many FNCFS Agencies and in the Yukon. The report also outlines a rigorous methodology and consultation in arriving at its conclusions. The Panel finds this early study of Directive 20-1 informative and a useful starting point in understanding the impacts of AANDC's funding formula on First Nations children and families on reserves.

[151] The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:

> First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[152] According to the NPR, "Program Directive 20-1 was developed to provide equity, predictability and flexibility in the funding of first nations child and family services agencies" (at p.10). A principle of Directive 20-1 is that AANDC is committed to the expansion of child and family services on reserve to a level comparable to the services off reserve in similar circumstances (see *NPR* at p. 20). This is AANDC's own standard and it expects FNCFS Agencies to abide by it:

> FNCFS Agencies are expected through their delegation of authority from the provinces, the expectations of their communities and by DIAND, to provide a

> comparable range of services on reserve with the funding they receive through Directive 20-1.
>
> (*NPR* at p. 83, emphasis added)

[153] However, the *NPR* found the funding formula under Directive 20-1 inhibited FNCFS Agencies' ability to meet the expectation of providing a comparable range of child and family services on reserve for a number of reasons:

- The formula provides the same level of funding to agencies regardless of how broad, intense or costly, the range of service is (at p. 83).
- Variance in the definition of maintenance expenses from region to region, resulting in AANDC rejecting maintenance expenses that ought to have been reimbursed in accordance with provincial/territorial legislation and standards (at pp. 13-14, 84).
- Insufficient funding for staff and not enough flexibility in the funding formula for agencies to adjust to changing conditions (increases in number of children coming into care; development of new provincial/territorial programs; or, routine price adjustments for remoteness) (at pp. 13-14, 65, 70, 92-93, 96-97).
- There has not been an increase in cost of living since 1995-1996 (at pp. 18, 26).
- Funding only provided to new FNCFS agencies for 3 year and 6 year evaluations; however, provincial legislation requires on-going evaluations (at p. 11).
- First Nations have to comply with the same administrative burden created by change in provincial legislation but have not received any increased resources to meet those responsibilities, contradicting the principle of Directive 20-1 (at p. 12).
- Unrealistic amount of administration support to smaller agencies, often compounded by remoteness (at pp. 14, 97).
- The maximum annual budgetary increase of 2% did not reflect the average annual increase of 6.2% in the FNCFS Agencies (at p. 14).

- The average per capita per child in care expenditure was 22% lower than the average in the provinces (at p. 14).

- The formula does not provide adequate resources to allow FNCFS Agencies to do legislated/targeted prevention, alternative programs and least disruptive/intrusive measures for children at risk (at p. 120).

[154] The *NPR* made 17 recommendations to address these areas of concern with respect to Directive 20-1, including investigating a new methodology for funding operations. It was recommended that the new funding methodology consider factors such as work-load case analysis, national demographics and the impact on large and small agencies, and economy of scale (see *NPR* at pp. 119-121). A further recommendation was to develop a management information system in order to ensure the establishment of consistent, reliable data collection, analysis and reporting procedures amongst AANDC, FNCFS Agencies and the provinces/territory (see *NPR* at p. 121).

The Wen:De Reports

[155] The *NPR* led to the establishment of the Joint National Policy Review National Advisory Committee (the NAC) in 2001. The NAC involved officials from AANDC, the AFN and FNCFS Agencies. One of the tasks of the NAC was to explore how to change parts of Directive 20-1 in line with the *NPR* recommendations. Funded by AANDC, the NAC commissioned further research in order to establish that revisions of the FNCFS Program and Directive 20-1 were warranted. Three reports were produced on the subject: the Wen:De Reports. Each of the three reports outlines clearly the methodology used to arrive at its findings and explains those findings in great detail. Three important contributing authors of the Wen:De reports, Dr. Cindy Blackstock, Dr. John Loxley, and Dr. Nicolas Trocmé testified at length about the reports at the hearing and confirmed the findings in these reports.

[156] The objective of the first Wen:De report in 2004 was to identify three new options for FNCFS Agency funding and the research agenda needed to inform each of those options (see *Wen:De Report One* at p. 4). The authors explain how they reviewed pertinent literature from Canada and abroad; conducted interviews with informed

observers and participants, including the Operations Formula Funding Design Team; and met with six FNCFS Agencies representing differing agency sizes, service contexts, regions and cultural groups (see *Wen:De Report One* at p. 6).

[157] The authors noted that the concerns and challenges expressed by the FNCFS Agencies that it interviewed were in line with the *NPR* findings and recommendations, such as the lack of funding for prevention services, legal services, capital costs, management information systems, culturally based programs, caregivers, staff salaries and training, and costs adjustments for remote and small agencies (see *Wen:De Report One* at pp. 6, 8).

[158] Notably, the report found FNCFS Agencies "…are not funded on the basis of a determination of need but rather on population levels" resulting in "…significant regional variation in the implementation of Directive 20-1 as funding officials within the department adapted to their local context" (*Wen:De Report One* at p. 5). As a result, it concluded:

> Overall, our findings affirm that the findings and recommendations of the NPR which was completed in June of 2000 continue to be reflective of the concerns that FNCFSA are experiencing today. […] All agencies agreed that immediate redress of inadequate funding was necessary to support good social work practice in their communities.
>
> (*Wen:De Report One* at p. 6)

[159] *Wen:De Report One* presents three options to address this conclusion: (1) redesign the existing funding formula; (2) follow the funding model of the province/territory in which the agency is located; or, (3) a new First Nations based funding formula that funds agencies on the basis of community needs and assets, along with the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve (see *Wen:De Report One* at pp. 7-13).

[160] The second Wen:De report analyzed the three options presented in the first report (see Annex, ex. 15 [*Wen:De Report Two*]). To do so, the various authors of the report conducted literature reviews and key informant interviews with twelve sample FNCFS Agencies. A key method was to conduct detailed case studies of the twelve sample agencies and the provinces using standardized questionnaires administered by regional

researchers. The research approach involved specialized research projects on the incidence and social work response to reports of child maltreatment respecting First Nations children, prevention services, jurisdictional issues, extraordinary circumstances, management information services and small agencies (see *Wen:De Report Two* at pp. 7, 9-11).

[161] *Wen:De Report Two* begins by examining the experience of First Nations children coming into contact with the child welfare system in Canada. It notes that the key drivers of neglect for First Nations children are poverty, poor housing and substance misuse. The report underscores that two of those three factors are arguably outside the control of parents: poverty and poor housing. As such, parents are unlikely to be able to redress these risks and it can mean that their children are more likely to stay in care for prolonged periods of time and, in some cases, permanently (see *Wen:De Report Two* at p. 13). On this issue, *Wen:De Report Two* indicates:

- There are approximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940s (see at p. 8).
- Aboriginal children are more than twice as likely to be investigated compared to non-Aboriginal children (see at p. 15).
- Once investigated, cases involving Aboriginal children are more likely to be substantiated and more likely to require on-going child welfare services (see at p. 15).
- Aboriginal children are more than twice as likely to be placed in out of home care, and more likely to be brought to child welfare court (see at p. 15).
- The profiles of Aboriginal families differ dramatically from the profile of non-Aboriginal families (see at p. 15).
- Aboriginal cases predominantly involve situations of neglect where poverty, inadequate housing and parent substance abuse are a toxic combination of risk factors (see at p. 15).

[162] Overall, with regard to funding under the FNCFS Program, at page 7, *Wen:De Report Two* found that:

> First Nations child and family service agencies are inadequately funded in almost every area of operation ranging from capital costs, prevention programs, standards and evaluation, staff salaries and child in care programs. The disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.

[163] Based on its research findings, the report indicates that Directive 20-1 would need substantial alteration in order to meet the requirements of the FNCFS Program and to ensure equitable child welfare services for First Nations children resident on reserve. There are a number of issues causing an inadequacy in funding. The lack of an adjustment to funding levels for increases in the cost of living is identified as one of the major weaknesses of Directive 20-1. Although Directive 20-1 contains a cost of living adjustment, it has not been implemented since 1995. According to *Wen:De Report Two*, not adjusting funding for increases in cost of living "…leads to both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional (at p. 45). *Wen:De Report Two* calculates prices increased by 21.21% over the ten year period since Directive 20-1 was last adjusted for cost of living (see a p. 45). To restore the loss of purchasing power since 1995, it found $24.8 million would be needed to meet the cost of living requirements for 2005 alone (see *Wen:De Report Two* at p. 51).

[164] Similarly, Directive 20-1 contains no periodic reconciliation for inflation. For example, since Directive 20-1 was introduced in 1990, there has been no adjustment for salary increases. Two thirds of FNCFS Agencies participating in *Wen:De Report Two* reported funding for salaries and benefits was not sufficient (see at pp. 35, 57). *Wen:De Report Two* estimates the loss of funds due to inflation for the operations portion of Directive 20-1 to be $112 million (at p. 57). It adds, any increases in funding only come with increases in the number of children served. Therefore, in the circumstances, "either the quality of services must have declined if child and family needs grew proportionately

with population or, increases in costs of services can have been covered, if at all, only from a reduction in the proportion of children or families receiving services" (at p. 121).

[165] The population thresholds were also found by all agencies to be an inadequate means of benchmarking operations funding levels. Approximately half of the respondents to the study stated funding should be based on community needs not child population. Some added that the entire community population should be taken into account, not just that of children, since it is the entire family that needs support when a child is at risk or is unsafe. In fact, small agencies (those serving child populations of less than 1,000) represent 55% of the total number of FNCFS Agencies. According to 75% of the small agencies who participated in *Wen:De Report Two*, their salary and benefits levels for staff were not comparable to other child welfare organizations (see at pp. 46-48, 213).

[166] In addition, Directive 20-1 provides no adjustment for the different content of provincial/territorial legislation and standards. While the FNCFS Program includes a guiding principle that services should be reasonably comparable to those provided to children in similar circumstances off reserve, it contains no mechanism to ensure this is achieved (see *Wen:De Report Two* at p. 50).

[167] Aside from the above, *Wen:De Report Two* found consensus among FNCFS Agencies it canvassed that Directive 20-1 makes inadequate provision for travel, legal costs, front-line workers, program evaluation, accounting and janitorial staff, staff meetings, Health and Safety Committee meetings, security systems, human resources staff for large agencies, quality assurance specialists and management information systems. Furthermore, *Wen:De Report Two* comments that funding has not reflected the significant technology changes in computer hardware and software over the past decade. Moreover, liability insurance premiums have increased substantially over that same period and are not reflected in Directive 20-1 (see at p. 122). *Wen:De Report Two* also identified management information systems as not meeting minimum standards in the vast majority of cases (see at p. 57).

[168] Of particular note, funds for prevention and least disruptive measures were identified as inadequate, along with 84% of reporting FNCFS Agencies feeling that current

funding levels were insufficient to provide adequate culturally based services (see *Wen:De Report Two* at p. 57). In this regard, the report found that "the present funding formula provides more incentives for taking children into care than it provides support for preventive, early intervention and least intrusive measures" (*Wen:De Report Two* at p. 114). This is because the funding formula provides dollar-for-dollar reimbursement of "maintenance" expenditures and prevention services are often not deemed to fall under "maintenance" (see *Wen:De Report Two* at p. 19-21). As a result, prevention funding was identified as being inadequate, in spite of the fact that such services are mandated under most provincial child welfare legislation (see *Wen:De Report Two* at p. 91). On this basis, the report states:

> This means that agencies in this situation effectively have no money to comply with the statutory requirement to provide families with a meaningful opportunity to redress the risk that resulted in their child being removed. More importantly, the children they serve are denied an equitable chance to stay safely at home due to the structure and amount of funding under the Directive. In this way the Directive really does shape practice – instead of supporting good practice.
>
> (*Wen:De Report Two* at p. 21)

[169] *Wen:De Report Two* concludes option three, a new First Nations based funding formula that funds agencies based on needs and assets, is the most promising way to address these deficiencies because of the "…possibility of re-conceptualizing the pedagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children" (*Wen:De Report Two* at p. 9). In sum, *Wen:De Report Two* recommends: targeted funding for least disruptive measures; funds for adequate culturally based policy and standards development; ensure that human resources funds are sufficient; increased investment in research to inform policy and practice for FNCFS Agencies; and, introduce financial review and adjustment to account for changes to provincial child welfare legislation (see *Wen:De Report Two* at p. 56).

[170] The third Wen:De report involved the development and costing of the recommended changes arising from the second report (see Annex, ex. 16 [*Wen:De Report Three*]). A national survey instrument was developed and sent out to 93 FNCFS

Agencies. Thirty-five surveys were completed, representing 32,575 children, 146 First Nations and $28.6 million in operating funds. This covered 38% of all FNCFS Agencies, 49% of all bands, 31.4% of all children 0-18 and 28.7% of all funding for operations (see *Wen:De Report Three* at pp. 9-10).

[171] *Wen:De Report Three* reiterates the weaknesses in Directive 20-1 as follows at pages11-12:

> 1) uncertainty in what the original rationale was underlying the development of the formula 2) regional interpretations of sometimes vaguely worded guidelines, 3) a failure to implement certain elements of the formula such as the annual inflation adjustment and 4) a failure of the policy to keep pace with advances in social work evidence based practice, child welfare liability law and the evolution of management information systems and 5) the policy appeared to leave out some child welfare expenses altogether or fund them inadequately such as the failure of the policy to support agencies to provide in home interventions to abused and neglected children to keep them safely at home as opposed to bringing them into care.

[172] Despite these weaknesses, *Wen:De Report Three* also indicates Directive 20-1 has some positive features, including that it is national in scope, has undergone two national studies, has enabled the development of FNCFS Agencies throughout Canada, and offers a baseline for judging the impacts of possible changes to the current regime.

[173] These reasons were the principle basis forming the recommendation in *Wen:De Report Three* to implement both options 1 and 3. That is, redesign Directive 20-1 now, with a priority on funding prevention services and providing redress for losses in funding due to inflation, while providing a foundation for the development of a First Nations based formula over time (see *Wen:De Report Three* at pp. 11-12). In also pursuing option 1, the report noted the development of a First Nations funding model would not provide a quick fix to the problems with the existing funding formula (see *Wen:De Report Three* at p. 14).

[174] Option two, tying FNCFS Agency funding to provincial formulae, was found to be the least promising option, notably because in several provinces it is not clear what their formula is and First Nation communities do not have the same degree of infrastructure of programs, services and volunteer agencies. Moreover, provincial funding traditions are not based on the particular needs and conditions faced by First Nation families living on

reserve, including that it costs more to service First Nations children and families due to their high needs levels (see *Wen:De Report Three* at p. 13).

[175] In recommending reforms to Directive 20-1, *Wen:De Report Three* noted that "[a] shift in funding mentality is vital" (at p. 20). That is, as stated at page 20 of *Wen:De Report Three*:

> An approach that invests in the community and engages the community at all levels – children, adolescents, youth, parents and Elders means directing resources at growth and development of the people rather than the breakdowns of the people in the community. This approach demonstrates long term commitment to the growth of a child and family and invests in the future of contributing members to society.

[176] Furthermore, at page 15, *Wen:De Report Three* provides the following caution:

> Although each suggested change element is presented as a separate item, it is important to understand that these elements are interdependent and adoption in a piece meal fashion would undermine the overall efficacy of the proposed changes. For example, providing least disruptive measures funding for at home child maltreatment interventions without providing the cost of living adjustment would result in agencies not having the infrastructure and staffing capacity to maximize outcomes. Similarly, these recommendations assume that there will be no reductions in the First Nations child and family service agency funding envelope. Situations where funds in one area are cut back and redirected to other funding streams in child and family services should be avoided as our research found that under funding was apparent across the current formula components.

[177] *Wen:De Report Three* recommends certain economic reforms to Directive 20-1, along with policy changes to support those reforms. The recommended economic reforms from *Wen:De Report Three*, include: a new funding stream for prevention/least disruptive measures (at pp. 19-21); adjusting the operations budget (at pp. 24-25); reinstating the annual cost of living adjustment on a retroactive basis back to 1995 (at pp. 18-19); providing sufficient funding to cover capital costs (buildings, vehicles and office equipment) (at pp. 28-29); and, funding for the development of culturally based standards by FNCFS Agencies (at p. 30).

[178] Of particular note, *Wen:De Report Three* recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, *Wen:De Report Three* indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

> Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are over represented amongst children in care and Aboriginal children in care they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreaux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.)

[179] For small agencies the report found that the fixed amount per agency or the provision for overhead did not provide realistic administrative support for two reasons. The first is that no agency representing communities with a combined total of 250 or fewer children receives any overhead funding whatsoever. The second problem is that available funding is currently fixed in three large blocks: 251-500 = $ 35,790; 501-800 = $ 71,580; and, 801 and up = $143,158. A slight increase or decrease in child population can result in a huge increase or decrease in overhead funding available to an agency (see *Wen:De Report Three* at p. 23).

[180] Therefore, *Wen:De Report Three* recommends two reforms. First, that overhead funding be extended to agencies serving populations of 125 and above. The report proposes a minimum of $20,000 be made available to the smallest agency representing 125 children. Thereafter, the second proposal is to give agencies additional funding for every 25 children in excess of 125. Under this approach, 6 agencies would still be too small to receive any fixed amount; 8 small agencies which never before received a fixed amount of overhead funding would now do so; 23 agencies of medium size would receive funding increases; and, 56 large agencies would receive no change in their funding. In the future, *Wen:De Report Three* believes a minimum economy of scale for small agencies will be required to provide a basic level of child and family services (see at p. 23-24).

[181] In terms of the remoteness factor in Directive 20-1, *Wen:De Report Three* identified a number of weaknesses, including that the average adjustment is considered by 90% of the agencies canvassed to be too small to compensate for the actual costs of remoteness; and, that the remoteness index is usually based on accessibility to the nearest business centre, which are not necessarily able to offer specialized child welfare services. According to *Wen:De Report Three*, these weakness have led to some communities receiving less than their population warrants and some receiving more. As such, it proposes an across the board increase in remoteness allowances and to adjust the index from the current service centre base to a city centre base (see at pp. 25-26).

[182] Other policy recommendations from *Wen:De Report Three* include: that AANDC clarify that legal costs related to children in care are billable under "maintenance"; that support services related to reunifying children in care with their families be eligible "maintenance" expenses, since they are mandatory services according to provincial child welfare statutes; validation of the need for research and mechanisms to share best practices at a regional and national level; and, that AANDC clarify the "stacking provisions" in Directive 20-1 in order to make it easier for First Nations to access voluntary sector funding sources (at pp. 16-18).

[183] Finally, *Wen:De Report Three* found jurisdictional disputes between federal government departments and between the federal government and provinces over who should fund a particular service took about 50.25 person hours to resolve, resulting in a significant tax on the limited resources of FNCFS Agencies. As a result, it recommends the immediate implementation of Jordan's Principle for jurisdictional dispute resolution and its integration into any funding agreements between AANDC and the provinces. Jordan's Principle asserts that the government (federal or provincial) or department that first receives a request to pay for a service must pay for the service and resolve jurisdictional issues thereafter (see *Wen:De Report Three* at p. 16).

[184] Total costs of implementing all the reforms recommended in *Wen:De Report Three* were estimated at $109.3 million, including $22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment) and insurance premiums; and, $86.4 million for annual funding needs (see at p. 33).

[185] The EPFA was designed in an effort to address some of the shortcomings of Directive 20-1 identified in the *NPR* and the Wen:De reports. However, despite *Wen:De Report Three*'s caution that the recommended changes are interdependent and adoption in a piece meal fashion would undermine the efficacy of those proposed changes, this is in fact the approach AANDC took. This becomes clear in reviewing the Auditor General of Canada's 2008 report on the FNCFS Program and AANDC's corresponding responses, along with the rest of the evidence to follow.

2008 Report of the Auditor General of Canada

[186] Following a written request from the Caring Society, the Auditor General of Canada initiated a review of AANDC's FNCFS Program and reported the findings to the House of Commons in 2008 (see Annex, ex. 17 [*2008 Report of the Auditor General of Canada*]). The purpose of the review was to examine the "…management structure, the processes, and the federal resources used to implement the federal policy…" on reserves (*2008 Report of the Auditor General of Canada* at p.1).

[187] The *2008 Report of the Auditor General of Canada* echoed the findings of the *NPR* and Wen:De reports. Namely, that "[c]urrent funding practices do not lead to equitable funding among Aboriginal and First Nations communities" (*2008 Report of the Auditor General of Canada* at p.2). The findings of the *2008 Report of the Auditor General of Canada* include:

- The funding formula is outdated and does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided (see at p. 20, s. 4.51),
- AANDC has limited assurance that child welfare services delivered on reserves comply with provincial legislation and standards. Funding levels are pre-determined without regard to the services the agency is bound to provide under provincial legislation and standards (see at pp.14-15, ss. 4.30, 4.34).
- There is no definition of what is meant by reasonably comparable services or way of knowing whether the services that the program supports are in fact reasonably

comparable. Furthermore, child welfare may be complicated by other social problems or health issues. Access to social and health services, aside from child welfare services, to help keep a family together differs not only on and off reserves but among First Nations as well. AANDC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services (see at pp. 12-13, ss.4.20, 4.25).

- There are no standards for FNCFS Agencies to provide culturally appropriate child welfare services that meet the requirements of provincial legislation. The number of FNCFS Agencies being funded is the main indicator of cultural appropriateness that AANDC uses. According to AANDC, the fact that 82 First Nations agencies have been created since the current federal policy was adopted means there are more First Nations children receiving culturally appropriate child welfare services. However, the Auditor General found that many agencies provide only a limited portion of the services while provinces continue to provide the rest. Further, AANDC does not know nationally how many of the children placed in care remain in their communities or are in First Nations foster homes or institutions (see at p. 13, ss. 4.24-4.25).

- The formula is based on the assumption that each FNCFS Agency has 6% of on-reserve children placed in care. This assumption leads to funding inequities among FNCFS Agencies because, in practice, the percentage of children that they bring into care varies widely. For example, in the five provinces covered by the report, that percentage ranged from 0 to 28% (see at p. 20, s. 4.52).

- The funding formula is not responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by FNCFS Agencies (see at p. 20, s. 4.52).

- The formula is not adapted to small agencies. It was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. The Auditor General found 55 of the 108 agencies funded by AANDC were small agencies serving a population of less than 1000 children living on reserve who did not always have the funding and capacity to provide the required range of child welfare services (see at p. 21, ss. 4.55-4.56).

- The shortcomings of the funding formula have been known to AANDC for years (see at p. 21, s. 4.57).

[188] As certain provinces were transitioned to the EPFA at the time of the report, the *2008 Report of the Auditor General of Canada* also comments on the new funding formula. It found that while the new funding formula provides more funds for the operations of FNCFS Agencies and offers more flexibility to allocate resources, it does not address the inequities noted under the current formula. It still assumes that a fixed percentage of First Nations children and families need child welfare services and, therefore, does not address differing needs among First Nations (see *2008 Report of the Auditor General of Canada* at p. 23, ss. 4.63-4.64).

[189] Overall, the Auditor General of Canada was of the view that:

> the funding formula needs to become more than a means of distributing the program's budget. As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.
>
> (*2008 Report of the Auditor General of Canada* at p. 23, s. 4.66)

[190] The Auditor General further noted that because the FNCFS Program's expenditures were growing faster than AANDC's overall budget, funds had to be reallocated from other programs, such as community infrastructure and housing. This means spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate. In the Auditor General's view, AANDC's

budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs (see *2008 Report of the Auditor General of Canada* at p. 25, ss. 4.72-4.73).

[191] The Auditor General of Canada made 6 recommendations to address the findings in its report. AANDC agreed with all the recommendations and indicated the actions it has taken or will take to address the recommendations (see *2008 Report of the Auditor General of Canada* at p. 6 and Appendix). AANDC's response to the *2008 Report of the Auditor General of Canada* demonstrates its full awareness of the impacts of its FNCFS Program on First Nations children and families on reserves, including that its funding is not in line with provincial legislation and standards. Furthermore, despite the flaws identified with the new funding formula, AANDC still viewed EPFA as the answer to the problems with the FNCFS Program:

> 4.67 **Recommendation.** Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.
>
> **The Department's response.** Indian and Northern Affairs Canada's current approach to Child and Family Services includes reimbursement of actual costs associated with the needs of maintaining a child in care. The Department agrees that as new partnerships are entered into, based on the enhanced prevention approach, funding will be directly linked to activities that better support the needs of children in care and incorporate provincial legislation and practice standards.
>
> (*2008 Report of the Auditor General of Canada* at pp. 23-24, s. 4.67)

[192] The flaws with Directive 20-1 and the EPFA would subsequently be scrutinized by the Standing Committee on Public Accounts.

2009 Report of the Standing Committee on Public Accounts

[193] In February 2009, the House of Commons Standing Committee on Public Accounts held a hearing on the *2008 Report of the Auditor General of Canada*. This hearing was held with officials from the Office of the Auditor General of Canada and AANDC "[g]iven

the importance of the safety and well-being of all Canadian children and the disturbing findings of the audit" (Annex, ex.18 at p.1 [*2009 Report of the Standing Committee on Public Accounts*]).

[194] The Committee noted the *2008 Report of the Auditor General of Canada* made 6 recommendations and that it fully supports those recommendations. As AANDC agreed with all the recommendations, "the Committee expects that the Department will fully implement them" (*2009 Report of the Standing Committee on Public Accounts* at p. 3).

[195] AANDC's Deputy Minister Michael Wernick acknowledged the flaws in the older funding formula and pointed to the new approach:

> What we had was a system that basically provided funds for kids in care. So what you got was a lot of kids being taken into care. And the service agencies didn't have the full suite of tools, in terms of kinship care, foster care, placement, diversion, prevention services, and so on. The new approach that we're trying to do through the new partnership agreements provides the agencies with a mix of funding for operating and maintenance--which is basically paying for the kids' needs--and for prevention services, and they have greater flexibility to move between those.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 7-8 [footnote omitted])

[196] Assistant Deputy Minister Christine Cram's testimony before the Standing Committee echoed that of the Deputy Minister:

> We currently have two formulas in operation. We have a formula for those provinces where we haven't moved to the new model. Under that formula, we reimburse all charges for kids who are actually in care, and that's why the costs have gone up so dramatically over time. There were comments made about the fact that under the old formula there wasn't funding provided to be able to permit agencies to provide prevention services. That's a fair criticism of the old formula. Under the new formula, as the deputy was mentioning, we have three categories in the funding formula. We have operations, prevention, and maintenance. So those are each determined on a different basis.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 8 [footnote omitted])

[197] With regard to the continued application of Directive 20-1 in many provinces and in the Yukon, the Standing Committee expressed concern:

> The Committee is quite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed. According to the Joint National Policy Review, "The funding formula inherent in Directive 20-1 is not flexible and is outdated." The 2005 Wen:de report, which undertook a comprehensive review of funding formulae to support First Nations child and family service agencies, found that the current funding formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures. The report writes, "The lack of early intervention services contributes to the large numbers of First Nations children entering care and staying in care." An evaluation prepared in 2007 by INAC's Departmental Audit and Evaluation Branch recommended that INAC, "correct the weaknesses in the First Nations Child and Family Service Program's funding formula." The OAG concluded, "As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves."
>
> Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care."
>
> While the Committee appreciates the efforts the Department is making to develop new agreements based on the enhanced prevention model, the Committee completely fails to understand why the old funding formula is still in place. Moving to new agreements should in no way preclude making improvements to the existing formula, especially as it may take years to develop agreements with the provinces. In the meantime, many First Nations children are taken into care when other options are available. This is unacceptable and clearly inequitable.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 9-10 [footnotes omitted])

[198] With regard to the new EPFA funding formula, the Standing Committee agreed with the Auditor General's comments regarding the fact that this new formula does not address

the inequities of Directive 20-1 (i.e. the assumptions built into the formula regarding the percentage of first nations children and families in need of care):

> The Committee could not agree more, especially as the Department has known about this problem in the old formula yet has repeated it in the new formula. The Committee is very disturbed that the Department would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed. The result of this approach is that communities that need funding the most, that is, where more than six percent of the children are in care, will continue to be underfunded and will not be able to provide their children the services they need. The Committee strongly believes that INAC needs to develop a funding formula that is flexible enough to provide funding based on need, rather than a fixed percentage.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 10)

[199] Finally, with regard to the Auditor General's finding that AANDC has not analyzed and compared the child welfare services available on reserves with those in neighbouring communities off reserve, the Standing Committee made the following observations:

> Nonetheless, it should be possible to compare the level of funding provided to First Nations child and family services agencies to similar provincial agencies, and given their unique and challenging circumstances, it would be reasonable to expect First Nations agencies to receive a higher level of funding. Yet, when asked how the funding for First Nations child and family service agencies compares to agencies for non-natives, the Assistant Deputy Minister said, "I'm sorry, but we don't know the answer." The same question was put to the Deputy Minister and he replied, "Our accountability is for the services delivered by those agencies to the extent that we fund them."
>
> The Committee finds these responses quite disappointing. The Deputy Minister's response was unsatisfactory because the issue under discussion is the extent to which the agencies are funded. Also, to not know how the funding compares to provincial agencies makes the Committee wonder how the level of funding is determined, and how the Department can be assured that it is treating First Nations children equitably.
>
> […]
>
> As the policy requires First Nations child welfare services to be comparable with services provided off reserves and the Committee believes that First Nations children should be treated equitably, the Committee

> believes that INAC must have comprehensive information about the funding level provided to provincial child welfare agencies and compare that to the funding of First Nations agencies. This does not mean that INAC should adopt provincial funding formulae for First Nations agencies as the needs for First Nations agencies are unique and often greater. Nonetheless, at the very least, INAC should be able to compare funding.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 5-6 [footnotes omitted])

[200] After hearing from the officials of the Office of the Auditor General of Canada and AANDC, including Sheila Fraser, the Auditor General of Canada, Michael Wernick, Deputy Minister of AANDC, and Christine Cram, Assistant Deputy Minister of AANDC, the Standing Committee on Public Accounts made 7 recommendations of its own. Those recommendations include: that AANDC provide a detailed action plan to the Public Accounts Committee on the implementation of the recommendations arising out the *2008 Report of the Auditor General of Canada*; that AANDC conduct a comprehensive comparison of its funding under the FNCFS Program to provincial funding of similar agencies; that AANDC immediately modify Directive 20-1 to allow for the funding of enhanced prevention services; that AANDC ensure its funding formula is based upon need rather than an assumed fixed percentage of children in care; that AANDC determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements; and, that AANDC develop measures and collect information based on the best interests of children for the results and outcomes of its FNCFS Program (see *2009 Report of the Standing Committee on Public Accounts* at pp. 4-12).

[201] In response to the Standing Committee's report, presented to the House of Commons on August 19, 2009, AANDC generally accepted the recommendations, although with some nuances (see Annex, ex. 19 [*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*]). For example, AANDC generally responded:

> The Standing Committee on Public Accounts' recommendations speak to the link between provincial comparability, revising Directive 20-1, moving to a needs based formula and to determining the full costs of the FNCFS Program nationally. This suggests INAC should undertake a one-time simultaneous reform of the program in all provinces. INAC is in fact

> undertaking similar steps towards reform, however, it is being done province-by-province. Rather than taking a one-size-fits all approach that would overlook community level needs and compromise partnerships and accountability, INAC is addressing provincial comparability, including a needs component in the formula and finalizing the process with a full costing analysis for each jurisdiction. All of this is done at tripartite tables ensuring buy-in by all partners, reasonable comparability with the respective province and sound accountability aimed at achieving positive outcomes for children and their families. As well, INAC is committing to review Directive 20-1.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Introduction)

[202] With regard to the recommendation that AANDC conduct a comprehensive comparison of its funding to provincial funding, AANDC responded:

> INAC agrees with this recommendation on the understanding that a comparative analysis can only be provided with the limited data we have access to and on a phased basis. This review will require a substantial amount of time and work with the provinces and First Nations. The information available in provincial annual reports is general and the funding provided under their children's services often includes programs beyond child and family services. Overall, these provincial reports do not contain the level of detail required to make the kind of comprehensive comparison expected by the Committee. Relationships must be strengthened with provincial partners as they are key in providing INAC with the necessary information concerning the funding of their child welfare programs. This is what INAC is doing as it proceeds with the Enhanced Prevention Focused Approach. Provinces must also agree to allow INAC to make this information available to the public.
>
> It should also be noted that due to the complexity of child welfare service delivery across the country, comparability between FNCFS agencies and provincial child welfare providers on-reserve, is challenging. Specifically, child welfare services in the provinces are delivered in a variety of ways. The services can vary by jurisdiction based on need; be provided directly by the province; or by provincially delegated authorities or regional/districts. A province can also fund agencies to deliver the services and/or contract third parties.
>
> Therefore, INAC cannot commit to conducting such a comprehensive review nor can it be done for all jurisdictions by the timelines required by the Committee. INAC would be able to provide a basic comparison of jurisdictions that are currently under the Enhanced Prevention Focused Approach and where INAC has basic information on salary rates and

> caseload ratios. INAC expects to complete this first phase by or before December 31, 2009.
>
> As INAC moves forward on transitioning other jurisdictions and as relationships are built with each province at the tripartite tables, INAC will be in a better position to conduct a comparison of funding between FNCFS agencies and provincial systems. This phase will consist of the provinces with whom INAC has not yet developed or completed tripartite accountability frameworks. This phase is expected to be completed by 2012.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 2 – Provincial Comparison)

[203] In response to the recommendation that AANDC revise the funding formula to provide funding based on need, AANDC responded:

> It is important to note that the 6% average number of children in care calculation is one of many factors used only to model operations funding which includes the number of protection workers. This is then translated into a portion of the operations funding that agency receives. This 6% number was arrived at through discussions with First Nations Agency Directors and provincial representatives, and was thought to be fairly representative of the overall needs of the communities. Under the Enhanced Prevention Focused Approach, FNCFS agencies have the flexibility to shift funds from one stream to another in order to meet the specific needs of the community. This costing model provides all FNCFS agencies under the new approach with the necessary resources to offer a greater range of child and family services.
>
> Through discussions with provincial and First Nations partners, it is clear that they preferred to create a costing model that would provide recipients stable funding for operations. The majority of partners indicated they would not be supportive of a model that generated more resources for Recipients based upon a higher percentage of children in care. Also, this model ensures that FNCFS agencies supporting communities with lower populations are provided with sufficient funding to operate both prevention and protection programs. Without the fixed percentage formula used to calculate and fund Operations, agencies with a very low percentage of children in care would not have the necessary resources to operate. Moreover, if the operations budget were based upon need rather than a fixed percentage, the agencies could find themselves with widely fluctuating operations budgets year to year which would hamper their ability to plan and provide services. The new costing models provide a stable operating and prevention budget that does not rely on the number of children in care as one of its determinants.

> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 5 – Funding Formula based on Need)

[204] AANDC's response to the recommendations of the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* would be revisited in 2011 by the Auditor General.

2011 Status Report of the Auditor General of Canada

[205] In 2011, the Auditor General of Canada assessed AANDC's progress in implementing the recommendations from the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* (see Annex, ex. 20 [*2011 Status Report of the Auditor General of Canada*]).

[206] With regard to comparability of services, the Auditor General noted that while AANDC had agreed to define what is meant by services that are reasonably comparable, it had not done so. The Auditor General stated that "[u]ntil it does, it is unclear what is the service standard for which the Department is providing funding and what level of services First Nations communities can eventually expect to receive" (see *2011 Status Report of the Auditor General of Canada* at pp. 23-24, s. 4.49). In addition, the Auditor General found AANDC had not conducted a review of social services available in the provinces to assess whether the services provided to children on reserve are the same as what is available to children off reserve (see *2011 Status Report of the Auditor General of Canada* at p. 24, s. 4.49).

[207] Concerning the new EPFA funding formula, the Auditor General reiterated its previous finding that it did not address all of the funding disparities that were noted in the *2008 Report of the Auditor General of Canada*. While the Auditor General acknowledged that the EPFA enables additional services beyond those offered by Directive 20-1, it noted that:

> without having defined what is meant by comparability, the Department has been unable to demonstrate that its new Enhanced Prevention Focused Approach provides services to children and families living on reserves that are reasonably comparable to provincial services.

> (*2011 Status Report of the Auditor General of Canada* at p. 24, ss. 4.50-4.51)

[208] With respect to the recommendation that AANDC determine the full costs of meeting the policy requirements of the FNCFS Program, the Department agreed to regularly update the estimated cost of delivering the program with the new EPFA funding approach on a province-by-province basis and to periodically review the program budget. The Auditor General reported that AANDC had identified the costs it would have to pay for services in each province before transitioning to EPFA. AANDC determined that it needed an increase of between 50 and 100% in its funding for operations and prevention services in each of the provinces that transitioned to EPFA. With all cost components taken into consideration, on average, EPFA led to an increase of over 40% in the cost of the FNCFS Program in the participating provinces (see *2011 Status Report of the Auditor General of Canada* at pp. 24-25, ss. 4.53-4.54). In this regard, the Auditor General noted the FNCFS Program budget has increased by 32% since the 2005-2006 fiscal year, partly reflecting the increased funding levels needed to implement EPFA (see *2011 Status Report of the Auditor General of Canada* at p. 25, s. 4.55).

[209] On the comprehensive comparison of funding to FNCFS Agencies with provincial funding to similar agencies requested by the Standing Committee on Public Accounts, the Auditor General reported that AANDC had compared some elements of child and family services programs on and off reserve, such as social workers' salaries and benefits in preparation for framework negotiations with the provinces. However, AANDC did not provide any information about social workers' caseloads, stating that it is not public information. In addition, AANDC asserted certain services provided by the provinces, such as services related to health issues and youth justice, were not within AANDC's mandate (see *2011 Status Report of the Auditor General of Canada* at p. 25, ss. 4.56- 4.57).

[210] In general, the Auditor General's review of programs for First Nations on reserves, including its follow-up on the status of AANDC's progress in addressing some of the recommendations from the *2008 Report of the Auditor General of Canada*, was as follows:

> Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, we have seen a

> lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. We recognize that the issues are complex and that solutions will require concerted efforts of the federal government and First Nations, in collaboration with provincial governments and other parties.
>
> We believe that there have been structural impediments to improvements in living conditions on First Nations reserves. In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserves will approach those existing elsewhere across Canada. There needs to be stronger emphasis on achieving results.
>
> We recognize that the federal government cannot put all of these structural changes in place by itself since they would fundamentally alter its relationship with First Nations. For this reason, First Nations themselves would have to play an important role in bringing about the changes. They would have to become actively engaged in developing service standards and determining how the standards will be monitored and enforced. They would have to fully participate in the development of legislative reforms. First Nations would also have to co-lead discussions on identifying credible funding mechanisms that are administratively workable and that ensure accountable governance within their communities. First Nations would have to play an active role in the development and administration of new organizations to support the local delivery of services to their communities.
>
> Addressing these structural impediments will be a challenge. The federal government and First Nations will have to work together and decide how they will deal with numerous obstacles that surely lie ahead. Unless they rise to this challenge, however, living conditions may continue to be poorer on First Nations reserves than elsewhere in Canada for generations to come.
>
> (*2011 Status Report of the Auditor General of Canada* at pp. 5-6)

2012 Report of the Standing Committee on Public Accounts

[211] In February 2012, the Standing Committee on Public Accounts issued a report following the *2011 Status Report of the Auditor General of Canada* (see Annex, ex. 21 [*2012 Report of the Standing Committee on Public Accounts*]).

[212] Deputy Minister of AANDC, Michael Wernick, testified before the Committee and "…agreed, without reservation, with the OAG's diagnosis of the problem…" (*2012 Report of the Standing Committee on Public Accounts* at p. 3). Mr. Wernick stated to the Committee:

> One of the really important parts of the Auditor General's report is that it shows there are four missing conditions. The combination of those is what's likely to result in an enduring change. You could pick any one of them, such as legislation without funding, or funding without legislation, and so on. They would have some results, but they would probably, in our view, be temporary. If you want enduring, structural changes, it's the combination of these tools." He also said, "With all due respect, I want to send the message that, if Parliament demands better results, it has to provide us with better tools.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 3 [footnotes omitted])

[213] With specific regard to the FNCFS Program, the Deputy Minister stated:

> We have fixed the funding formula. We make sure resources are available for prevention services. And we've put in place these kinds of tripartite agreements, because these are creatures of the provincial child protection statutes. In six of the provinces, I think it is, we have $100 million or more in funding over several budgets. They go at the pace at which we can conclude agreements with the provinces--I can certainly provide the list--but we're now covering about 68% of first nations kids with this prevention approach.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 9 [footnote omitted])

[214] The Standing Committee concluded its report with the following statements:

> The Committee notes that the government is taking a number of concrete actions to improve conditions for First Nations on reserves, and the Deputy Minister of AANDC expressed his commitment to address the structural impediments identified by the OAG. Like the Deputy Minister, the Committee is optimistic that progress can be made, but it will require significant structural reforms and sustained management attention. The Committee believes that AANDC, in coordination with other departments, needs to develop and commit to a plan of action to take the necessary steps, and the Committee intends to monitor the government's progress to

> ensure that First Nations on reserves experience meaningful improvements in their social and economic conditions.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 12)

[215] The then Minister of AANDC, Mr. John Duncan, responded to the *2012 Report of the Standing Committee on Public Accounts* (see Annex, ex. 22 [*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*]). Of note, Minister Duncan acknowledged the following:

> I would also like to acknowledge the work of the Office of the Auditor General in providing Parliament, the Government of Canada, and Canadians with valuable insights into Canada's approach to program delivery for First Nations on reserves. I consider the six-page preface to Chapter 4 of the 2011 Status Report of the Auditor General of Canada to be an important roadmap for Parliament in moving forward on First Nation issues.
>
> […]
>
> I agree that many of the problems faced by First Nations are due to the structural impediments identified – the lack of clarity about service levels, lack of a legislative base, lack of an appropriate funding mechanism, and a lack of organizations to support local service delivery.
>
> […]
>
> Through the Enhanced Prevention Focused Approach for First Nations Child and Family Services clarity about service levels and comparability of services and funding levels have been addressed at tripartite tables with the six provinces that have transitioned to the new approach.
>
> […]
>
> The Office of the Auditor General observed that there are challenges associated with the use of contribution agreements to fund programs and services for First Nations. For instance, agreements may not always focus on service standards or the results to be achieved; agreements must be renewed yearly and it is often unclear who is accountable to First Nations members for achieving improved outcomes. In addition, contribution agreements involve a significant reporting burden, and communities often have to use scarce administrative resources to respond to the numerous reporting requirements stipulated in their contribution agreements.

> The Government of Canada recognizes that reliance on annual funding agreements and multiple accountabilities when funding is received from multiple sources can impede the provision of timely services and can limit the ability of First Nations to implement longer term development plans.
>
> To address these concerns, Aboriginal Affairs and Northern Development Canada is implementing a risk-based approach to streamlining funding agreements, and reporting requirements. The General Assessment tool supports increased flexibility by assessing the capacity of recipients to access a wider range of funding approaches, including multi-year funding agreements. In addition, a pilot initiative with 11 First Nations communities is currently being implemented using a new approach to reporting which is increasing transparency and accountability at the community level by using the First Nations website as a reporting tool and addressing capacity issues created by the reporting burden.
>
> (*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*)

[216] The *NPR*, Wen:De reports and the Auditor General and the Standing Committee reports all have identified shortcomings in the funding and structure of the FNCFS Program. This was further demonstrated in other evidence presented to the Tribunal and to which the Panel will return to below. First, however, we will outline the evidence advanced with regard to the funding of child and family services under the *1965 Agreement* in Ontario, along with the other provincial agreements in Alberta and British Columbia.

c. 1965 Agreement in Ontario

[217] There is also evidence indicating shortcomings in the funding and structure of the *1965 Agreement* in Ontario.

[218] In 1965, the federal government entered into an agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations communities on reserve. Around the same time, child welfare authorities in Ontario began the large-scale removal of Aboriginal children from their homes and communities, commonly referred to as part of the "Sixties Scoop". Ms. Theresa Stevens, Executive Director for Anishinaabe Abinoojii Family Services in Kenora, Ontario, described

how buses would drive into communities and take all the children away (see *Transcript* Vol. 25 at pp. 28-30). As will be explained in more detail below, the collective trauma experienced by many First Nations in Ontario as a result of the Sixties Scoop informs the climate for the provision of child and family services in the province. The Panel acknowledges the suffering of Aboriginal children, families and communities as a result of the Sixties Scoop.

[219] The *1965 Agreement* is a cost-sharing agreement where Ontario provides or pays for eligible services up front and invoices Canada for a share of the costs of those services pursuant to a cost-sharing formula. Eligible services for cost sharing under the *1965 Agreement* are described in its Schedules. Mr. Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, testified at the hearing and explained how the *1965 Agreement* works. At the beginning of each fiscal year, Ontario provides AANDC with a cash flow forecast. Once approved, AANDC provides Ontario with a one-month cash advance, followed by monthly instalments. There is a 10% holdback on the payments, which is paid out (with any adjustments) at the end of the year after an audit. There is no overall cap on expenditures under the *1965 Agreement*.

[220] The cost-sharing formula is set out at clause 3 of the *1965 Agreement* and is based on two elements: the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to persons other than Indians with Reserve Status in Ontario"; and, the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to Indians with Reserve Status in Ontario".

[221] According to Mr. Digby, social assistance is the area where there was the best data that gave a good proxy for the proportionate share of costs and relative share of costs in First Nations communities vis-à-vis the rest of Ontario. As of 2011-12 the average cost of providing social assistance to persons living off reserve was approximately $200. For First Nations living on reserve it was about $1,200. AANDC's share of the costs is calculated by taking 50% of the average cost of providing social assistance to persons living off reserve (200 x 0.50 = 100) and dividing it by the average cost of providing social assistance to persons living on reserve (100/1200 = 0.0833); subtracting the average cost of providing social assistance to persons living off reserve from the average cost of providing social

assistance to persons living on reserve (1200 – 200 = 1000) and dividing that amount by the average cost of providing social assistance to persons living on reserve (1000/1200 = 0.8333); and then, adding those two numbers together to arrive at the cost-sharing ratio (0.0833 + 0.8333 = 0.9166). Pursuant to these numbers, AANDC paid approximately 92% of the eligible costs under the 1965 Agreement in 2011-12. According to Mr. Digby, the *1965 Agreement* cost-sharing formula recognizes the higher per capita costs of providing social assistance to First Nations on reserves and AANDC's agreement to take the financial responsibility for these additional costs (see testimony of P. Digby, *Transcript* Vol. 59 at pp. 24-28).

[222] There are two mechanisms used by the province of Ontario to provide child welfare services on reserve: (i) child welfare societies, including provincial child welfare agencies and FNCFS Agencies; and (ii) service contracts for prevention services. There are seven fully-mandated FNCFS Agencies in Ontario and they are funded according to the same funding model as provincial child welfare agencies in Ontario. There are also six pre-mandated FNCFS Agencies who do not have a full protection mandate and are in the process of developing their capacity to become fully-mandated FNCFS Agencies. There are also approximately 25 First Nations reserves that receive prevention services via service contract.

[223] The *1965 Agreement* has never undergone a formal review by AANDC. The sections of the agreement dealing with child and family services have not been updated since 1981, and the Schedules to the agreement have not been updated since 1998. This is significant given in 1984 Ontario implemented the *Child and Family Services Act*, which incorporated elements from other pieces of legislation (for example, youth justice and mental health) to address the child and family services needs of Ontarians. At that time, the Government of Canada took the position that AANDC did not have the mandate or resources to start funding justice and health programs, as those types of programs would fall under a different department (see testimony of P. Digby, *Transcript* Vol. 59 at p. 69).

[224] In 2000, the *NPR* recommended a tripartite review be done of the *1965 Agreement* (see at pp. 18 and 121). The *2008 Report of the Auditor General of Canada* also noted that there are provisions in the *1965 Agreement* to keep it up-to-date and that they could

be used to ensure both the *1965 Agreement* and the services that the federal government pays for are current.

[225] The fact that the *1965 Agreement* has not been kept up-to-date with Ontario's *Child and Families Services Act* was highlighted by Mr. Digby in a 2007 discussion paper (see Annex, ex. 23 [*1965 Agreement Overview*]). The Panel finds the *1965 Agreement Overview* document to be relevant and reliable, especially given Mr. Digby's involvement in its authorship. According to the *1965 Agreement Overview* discussion paper, at page 4, issues raised by various stakeholders with regard to the *1965 Agreement* and its implementation include:

> Concern that the agreement is bilateral, not tripartite, since First Nations were not asked to be signatories in 1965. While clause 2.2 of the 1965 Agreement indicates that bands are to signify concurrence to the extension of provincial welfare programs, this does not reflect the type of intergovernmental relationship sought by many First Nations.
>
> […]
>
> First Nations and the provincial government have, from time to time, expressed interest in INAC cost-sharing additional provincial social service programs to be extended on reserve. INAC has generally not had the resources to 'open up' new areas for cost-sharing. […] There has been no update to the agreement schedule with regard to cost-sharing child welfare. As several programs within the provincial Child and Family Services Act (CFSA) fall outside of INAC's mandate, the department is not in a position to 'open up' discussion on cost-sharing the full CFSA.

[226] In 2011, the Commission to Promote Sustainable Child Welfare (the CPSCW) prepared a discussion paper regarding Aboriginal child welfare in Ontario (see Annex, ex. 24 [*CPSCW Discussion Paper*]). The CPSCW was created by the Minister of Children and Youth Services in Ontario to develop and implement solutions to ensure the sustainability of child welfare. It reports to the Minister thereon. In light of this public mandate, the Panel finds the discussion paper relevant and reliable to the issue of the provision of child and family services to First Nations on reserve in Ontario.

[227] The *CPSCW Discussion Paper*, at page 4, begins by noting the impact of history on many Aboriginal communities:

> The combination of colonization, residential schools, the Sixties Scoop, and other factors have undermined Aboriginal cultures, eroded parenting capacity, and challenged economic self-sufficiency. Many Aboriginal people live in communities that experience high levels of poverty, alcohol and substance abuse, suicides, incarceration rates, unemployment rates, and other social problems. Aboriginal children are disproportionately represented in the child welfare system and in the youth justice system. Suicide rates for Aboriginal children and youth surpass those of non-Aboriginals by approximately five times. Aboriginal youth are 9 times more likely to be pregnant before age 18, far less likely to complete high school, far more likely to live in poverty, and far more likely to suffer from emotional disorders and addictions.

[228] Despite these specific risk factors for Aboriginal peoples, the *CPSCW Discussion Paper* notes that many provincial child welfare agencies give little attention to the requirements for providing services to Aboriginal children set out in Ontario's *Child and Families Services Act* (see at p. 26). Specifically, the discussion paper points to sections 213 and 213.1 of the *Child and Families Services Act* whereby a society or agency that provides services with respect to First Nations children must regularly consult with the child's band or community, usually through a Band Representative, about the provision of the services, including the apprehension of children and the placement of children in care; the provision of family support services; and, the preparation of plans for the care of children.

[229] According to the *CPSCW Discussion Paper*, Band Representatives can be crucial and tend to fulfill the following functions: serving as the main liaison between a Band and Children's Aid Societies [CASs]; providing cultural training and advice to CASs; monitoring Temporary Care Agreements and Voluntary Service Agreements with CASs; securing access to legal resources; attending and participating in court proceedings; ensuring that the cultural needs of a child are being addressed by the CAS; and, participating in the development of a child's plan of care (see at p. 26).

[230] The *CPSCW Discussion Paper* indicates that, in the past, First Nations were funded on a claims basis by the federal government to hire a Band Representative. However, since 2003, that funding was discontinued. Therefore, some First Nations divert

resources from prevention services to cover the cost of a Band Representative, while others simply do not have one (see *CPSCW Discussion Paper* at p. 26).

[231] Providing child welfare services in remote and isolated Northern Ontario communities was also identified by the *CPSCW Discussion Paper* as a challenge for CASs. Those challenges include the added time and expense to travel to the communities they serve, where some communities do not have year round road access and where flying-in can be the only option for accessing a community. In fact, one agency was required to make up to 80 flights in a day.

[232] Another challenge for remote and isolated communities is recruiting and retaining staff, especially qualified staff from the community. The legacy of the Sixties Scoop and the association of CASs with the removal of children from the community have caused some First Nations community members to resent or resist CAS workers and can create a hostile working environment.

[233] Other challenges for remote and isolated communities are a lack of suitable housing, which makes it difficult to hire staff from outside the community and to find suitable foster homes; limited access to court; and, the lack of other health and social programs, which impacts the performance and quality of child and family services (see *CPSCW Discussion Paper* at pp. 28-29). On this last point, the *CPSCW Discussion Paper* emphasizes that "[p]romoting positive outcomes for children, families and communities, requires a full range of services related to the health, social, and economic conditions of the community: child welfare services alone are not nearly enough" (at p. 29).

[234] The *CPSCW Discussion Paper* also notes that there are many distinct differences between designated Aboriginal and non-Aboriginal CASs: they serve significantly larger and less inhabited geographic areas with lower child and youth populations, they have significantly larger case volumes per thousand, they serve more of their children and youth in care versus in their own homes, and they have smaller total expenditures, but significantly higher expenditures per capita and higher expenditures per case (see *CPSCW Discussion Paper* at p. 29).

[235] Finally, in discussing the federal-provincial dynamics of providing child and family services on reserve, the *CPSCW Discussion Paper* comments that instead of working collaboratively towards providing effective service delivery to Aboriginal peoples, the federal government has devolved some of its responsibilities for Aboriginal peoples to the provincial governments, which contributes to some confusion over ultimate jurisdiction (see *CPSCW Discussion Paper* at pp. 34-35).

[236] On this last point, in 2007 the Ontario Ministry of Children and Youth Services wrote to AANDC expressing their concern over AANDC's decision to no longer provide funding for Band Representatives: "with the withdrawal of federal funding, many First Nations do not have the financial resources required to participate in planning for Indian and native children involved with a children's aid society or to take part in child protection legal proceedings" (Annex, ex. 25 at p. 2).

[237] In 2011, the Ontario Ministry of Children and Youth Services again wrote to AANDC on the issue of funding for Band Representatives:

> The paramount purpose of the CFSA is to "promote the best interests, protection and well-being of children." The band representative function supports not only the purpose of the Act but also the other important purposes and provisions to which the Act pertains. A lack of sufficient capacity within First Nation communities limits their ability to respond effectively and in accordance with legislated times frames for action. The withdrawal of [INAC's] funding for band representation functions has eroded First Nations' ability to participate as intended in the CFSA.
>
> (Annex, ex. 26 at p. 2)

[238] Despite the discordance between Ontario's *Child and Families Services Act* and AANDC's policy to no longer fund Band Representatives, Minister Duncan indicated that "it falls within the responsibilities of First Nation governments to determine their level of engagement in child welfare matters" and "we do not foresee the Government of Canada providing funding support in this area" (Annex, ex. 27 at p.1).

[239] Ambiguity surrounding jurisdiction for the provision of mental health services to First Nations youth has also been a cause for concern. When the Anishinaabe Abinoojii Family Services agency sought a mandate to provide children's mental health services, an

AANDC employee prepared a document to provide information to the Regional Director General and Assistant Regional Directors General on the issue (see Annex, ex. 28 [*Abinoojii Mental Health Services Mandate*]). The Executive Director for Anishinaabe Abinoojii Family Services, Ms. Stevens, testified as to the content of the document (see *Transcript* Vol. 25 at pp. 174-178).

[240] According to the *Abinoojii Mental Health Services Mandate* document, there are waiting lists for First Nations children served by the Abinoojii Family Services agency who require mental health services. The document adds that while there is some cooperation between mental health service organizations and the Abinoojii agency to manage these waiting lists, there is also a need for more resources and culturally appropriate assessment tools and counsellors. The Ministry of Children and Youth Services has a Mental Health Policy for Children and Youth and has some resources for mental health counselling, but the needs outstrip the funding (see *Abinoojii Mental Health Services Mandate* at pp. 1-2).

[241] In considering the request, the *Abinoojii Mental Health Services Mandate* document states that AANDC does not have a mandate for mental health services and that these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling (see *Abinoojii Mental Health Services Mandate* at p. 2).

[242] In a roundtable meeting between Abinoojii Family Services agency, AANDC, Health Canada and the Ministry of Children and Youth Services for Ontario, Health Canada recognized a need to look at the whole system as services/programs tend to work in silos and raised the possibility of re-prioritizing resources or seeking additional funding. AANDC indicated that the province is the lead on child welfare and Health Canada is the lead on health issues at the federal level, but that it supports the work on examining existing programs, outlining gaps and working together to ensure First Nations receive services that are comparable and culturally appropriate (see *Abinoojii Mental Health Services Mandate* at p. 2).

[243] In 2012, the Ontario Association of Children's Aid Societies (the OACAS) produced a report regarding trends in child welfare in Ontario, including in Aboriginal communities (see Annex, ex. 29 [*Child Welfare Report*]). The OACAS is an advocacy group representing the interests of 45 CASs member organizations. Governed by a voluntary board of directors, OACAS consults with and advises the provincial government on issues of legislation, regulation, policy, standards and review mechanisms. It promotes and is dedicated to achieving the best outcomes for children and families (see *Child Welfare Report* at p. 2). Given the OACAS's mandate and focus, the Panel finds its report relevant and reliable.

[244] According to the *Child Welfare Report*, the current funding model does not reflect the needs of Aboriginal communities and agencies for several reasons including: insufficient resources for services, where they tend to be crisis driven; shortage of funding for administrative requirements; lack of funding to establish infrastructure necessary to deliver statutory child protection services, while operating within the extraordinary infrastructure deficits of many of the communities they serve; and, insufficient funds to retain qualified staff to deliver culturally appropriate services (at p. 7). Among other things, at page 7 of the *Child Welfare Report*, the OACAS asked the Ontario government to:

> Establish an Aboriginal child welfare funding model and adequate funding to support culturally appropriate programs that encompass the unique experiences of diverse Aboriginal populations – on-reserve, off-reserve, remote, rural, and urban. Invest in capacity building to enable the proper recruitment, training and retention of child welfare professionals in emerging Aboriginal Children's Aid Societies.

[245] In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, *Transcript* Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop

programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see *Transcript* Vol. 25 at p. 32).

[246] Again, the above evidence on the *1965 Agreement* identifies shortcomings in AANDC's approach to the provision of child and family services on First Nations reserves in Ontario. In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement*"…to make available to the Indians in the Province the full range of provincial welfare programs".

d. Other provincial/territorial agreements

[247] As mentioned above, two other provinces have agreements with AANDC for the provision of child and family services on reserve: Alberta and British Columbia. While in the Yukon, the *Yukon Funding Agreement* applies.

[248] As mentioned above, the *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Schedule "DIAND-3" of the *Yukon Funding Agreement* provides for the application of Directive 20-1 to the funding of child and family services to those First Nations children and families.

[249] In Alberta and British Columbia, AANDC reimburses the provinces for the delivery of child and family services to certain First Nations communities on reserve where there are no FNCFS Agencies. In Alberta, six First Nations communities are served by the *Alberta Reform Agreement* for child and family services. In British Columbia, seventy-two First Nation communities receive services under the *BC Service Agreement*.

[250] Pursuant to the *Alberta Reform Agreement*, AANDC reimburses Alberta for the costs of providing various social services, including child welfare services, to certain First Nations reserves in the province. For those child welfare services, funding is provided at the beginning of the fiscal year based on a funding formula using year-end costs of the preceding fiscal year. Adjustments are made based on actual expenditures during the fiscal year (see *Alberta Reform Agreement* at Schedule A, s. 1).

[251] In British Columbia, the *BC MOU* was in place from 1996 to 2012. Under the *BC MOU*, AANDC reimbursed the province for eligible maintenance expenses based on a per diem formula which accounted for the province's administration, supervision and maintenance costs (see *BC MOU* at s. 5.0; and Appendix B and D). The per diem rates could be adjusted annually and the province could receive an adjustment to the previous year's per diem rates based on actual expenditures (see *BC MOU* at Appendix C). Those adjustments included rate increases based on inflation and increased emphasis on prevention services. For the fiscal year 2006/2007, the recalculation of per diem rates resulted in an invoice to AANDC for over $5 million dollars (see Annex, ex. 30).

[252] In 2012, the *BC MOU* was replaced by the *BC Service Agreement*. The *BC Service Agreement* now provides for reimbursement of maintenance expenses based on actual expenditures. It also provides funding to the province for operations expenses based on a costing model agreed to between the province and AANDC (see *BC Service Agreement* at s. 7; and Appendix A). For fiscal year 2012-2013, operations funding amounted to $15 million.

[253] The *Alberta Reform Agreement,* the *BC MOU* and the *BC Service Agreement* provide reimbursement for actual eligible operating and administrative expenditures, including retroactive adjustments for inflation and increases for changes in programming. This is quite different from FNCFS Agencies in those provinces, including under the EPFA in Alberta, where there is no such adjustments for those types of increases in costs (see testimony of C. Schimanke, *Transcript* Vol. 62 at pp. 53-54). As expressed in the *2008 Report of the Auditor General of Canada* at page 19, these adjustments and reimbursements for actuals are linked directly to provincial child welfare legislation:

> 4.49 INAC funds some provinces for delivering child welfare services directly where First Nations do not. INAC has agreements with three of the five provinces we covered on how they will be funded to provide child welfare services on reserves. We found that in these provinces, INAC reimburses all or an agreed-on share of their operating and administrative costs of delivering child welfare services directly to First Nations and of the costs of children placed in care. […]

> 4.50 INAC funding to cover the costs of operating and administering First Nations agencies is established through a formula. Although the program requires First Nations agencies to meet applicable provincial legislation, we found that INAC's funding formula is not linked to this requirement. The main element of the formula is the number of children aged from 0 to 18 who are ordinarily resident on the reserve or reserves being served by a First Nations agency. […]

[254] The Panel will return to this comparison in the section that follows.

iii. AANDC's position on the evidence

[255] AANDC argues the evidence above is not sufficient to establish adverse treatment in the provision of funding for First Nations child and family services, including that there is a lack of specific examples to support the allegation of a denial of such services. In sum, it claims the reports and evidence regarding the FNCFS Program above should be given little weight, that the choices of FNCFS Agencies in administering their budgets should be considered in evaluating any adverse impacts, along with any additional funding they receive beyond Directive 20-1 or the EPFA, that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*, and, even if it were, such comparative evidence is lacking in this case. Each argument is addressed below.

a. The relevance and reliability of the studies on the FNCFS Program

[256] AANDC views the various studies of the FNCFS Program outlined above as having little weight. It questions the comprehensiveness of the studies, noting the experience of a few agencies does not establish differential treatment.

[257] The Panel finds the *NPR* and Wen:De reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of

these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

[258] In its October 2006 *Fact Sheet* (see Annex, ex. 10), AANDC acknowledged the impacts and findings of the Wen:De reports, along with the *NPR*, and committed to refocusing the FNCFS Program to improve outcomes for First Nations children and families on reserve:

> Currently, Program funding is largely based on protection services, which encourage Agencies to remove First Nation children from their parental homes, rather than providing prevention services, which could allow children to remain safely in their homes.
>
> - Program expenditures were $417 million in 2005-2006 and are expected to grow to $540 million by 2010-11 if the program continues to operate under the protection-based model.
>
> - From 1996-97 to 2004-05, the number of First Nation children in care increased by 64.34%.
>
> - Approximately 5.8% of First Nation children living on reserve are in care out of their parental homes.
>
> **Current Issues:** First Nation children are disproportionately represented in the child welfare system. Placement rates on reserve reflect a lack of available prevention services to mitigate family crisis.
>
> […]
>
> **Changes in the landscape:** Provinces and territories have introduced new policy approaches to child welfare and a broader continuum of services and programs that First Nations Child and Family Services must deliver to retain their provincial mandates as service providers. However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for the agencies to meet their mandated responsibilities.

> **The Future:** A Joint National Policy Review on First Nations Child and Family Services, completed in 2000, recommended that the federal government increase prevention services for children at risk-services that must be provided before considering the removal of the child and placement in out of home care-and that it provide adequate funding for this purpose.
>
> - Indian and Northern Affairs Canada funded research undertaken by the First Nations Child and Family Caring Society of Canada in 2004 and 2005. The reports: *WEN: DE: We are coming to the light of day*, and *WEN: DE: The journey continues*, included recommendations for investments and policy adjustments required to address the shortcomings of the current system. This research will form the basis of Indian and Northern Affairs Canada's request for investments and policy renewal.
>
> […]
>
> - The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.
>
> - The strategy is to refocus the program from a protection-based approach towards a preventive-based model, promote a variety of care options to provide children and youth with safe, nurturing and permanent homes, and build on partnerships and implement practical solutions to improve child interventions services.

[259] Ms. Murphy and Ms. D'Amico also testified about AANDC's reliance on the *NPR* and Wen:De reports in implementing the EPFA (see *Transcript* Vol. 53 at pp. 46-47; and, Vol. 54 at pp. 50-51).

[260] Internal AANDC documents presented at the hearing also support the department's adherence to the findings in the *NPR* and Wen:De reports. AANDC submits the Panel should rely on the testimony of its witnesses rather than what is found in internal documents, given that many of the authors did not testify before the Tribunal in order to provide context and the documents may merely reflect the opinion of employees at a specific time. Therefore, AANDC submits that the Tribunal should assess the weight of documents contextually, with reference to oral evidence regarding their proper

interpretation, and considering the scope of the author's authority to prepare the document in question.

[261] The Panel has considered these arguments in weighing the evidence and finds the documents relied upon below to be straightforward and clear. Many of these documents are presentations prepared for, or delivered to, high level AANDC officials. The Panel finds these presentations highly relevant and reliable given they are the means by which information on the FNCFS Program is provided to AANDC management, including Deputy or Assistant Deputy Ministers, in order to inform policy decisions or future requests to Cabinet (see *Transcript* Vol. 54 at pp. 159, 166; and, Vol. 55 at p. 199). Furthermore, the other AANDC documents referred to below corroborate the information found in those presentations.

[262] A 2005 presentation to the 'Policy Committee' refers to the *NPR* by stating: "[a] 2000 review of FNCFS found that Indian Affairs was funding [FNCFS Agencies] 22% less, on average, than their provincial counterparts" (see Annex, ex. 31 at p. 2 [*Policy Committee presentation*]). The *Policy Committee presentation*, at page 3, goes on to state that, despite maintenance expenditures increasing by 7% to 10% annually, the Department only receives a 2% annual adjustment to the departmental budget. According to the *Policy Committee presentation* at page 3, "[a]dditional investments are now required for further stabilization for basic supports with respect to Enhanced Organizational Support, and Maintenance Volume Growth."

[263] The 2005 *Policy Committee presentation* also indicates FNCFS Agencies are threatening to withdraw from service delivery because they cannot deliver provincially mandated services within their current budgets. The presentation continues by stating that provincial governments have written to the Minister of AANDC indicating their concern that the department is not providing sufficient funding to permit FNCFS Agencies to meet provincial statutory obligations. As a result, the *Policy Committee presentation* warns that provinces may refuse to renew the mandates of FNCFS Agencies or give mandates to new agencies (see at p. 4).

[264] In line with the *NPR* and Wen:De reports, the *Policy Committee presentation* states: "In addition to enhanced basic supports for First Nation Child and Family Services, fundamental change in the approach to child welfare is required in order to reverse the growth rate of children coming into care" (at p. 5). In this regard, the presentation proposes transformative measures be put in place to allow investment in prevention services according to provincial legislation and standards (see at p. 6). This "[e]nables the availability of a full spectrum of culturally-appropriate programs and services that would eventually reduce the over representation of First Nations children in the child welfare system" (*Policy Committee presentation* at p. 6). It also "…addresses immediate critical funding pressures and would stabilize the child welfare situation on reserve" (*Policy Committee* presentation at p. 6). Finally, according to the *Policy Committee* presentation, "[i]ncreasing the budget for basic services would enable [FNCFS Agencies] to retain and train staff and meet the increased costs of maintaining operations (e.g. cost of living adjustment, legal fees, insurance, remoteness)" (at p. 6).

[265] Similarly, in another document entitled "First Nations Child and Family Services (FNCFS) Q's and A's", it states:

> Circumstances are dire. Inadequate resources may force individual agencies to close down if their mandates are withdrawn, or not extended by the provinces. This would result in provinces taking over responsibility for child welfare, likely at a higher cost to Indian and Norther Affairs Canada.
>
> […]
>
> Over the past decade the trend in child welfare has been towards prevention or least disruptive measures. INAC recognizes that the current funding formula is not flexible enough to follow this trend and needs to be revised. […]INAC received authority in 2004-2005 to implement a Flexible Funding Option for Maintenance resources. This will permit some agencies to reprofile Maintenance resources to allow for greater flexibility in how these funds are utilized by placing greater emphasis on prevention services.
>
> Incremental Operations funding will assist agencies to a very limited extent in providing additional prevention services. Additional Operations resources will assist agencies in coping with funding pressures resulting from increased legal fees, insurance costs and other operational expenses that have not been adjusted for since Program Review was implemented in 1994-1995.

(Annex, ex. 32 at pp. 1-2, 5)

[266] Similarly, the *2005 National Program Manual*, at page 14, section 2.2.3, outlines some of the cost pressures experienced by FNCFS Agencies in terms of their operational funding:

> Although the authorities are clear on what to be included in the operations formula, First Nations have expressed a concern that because the formula was developed in the late 1980's, legislation, standards and practices have changed significantly. Although the following items are included in the Operations, First Nations have stated that Recipients are under increasing pressures due to changes over time with respect to:
>
> - *Information Technology*: In the late 1980's, use of computers was limited. Today, however, they are vital to operating social programs and services.
> - *Prevention (Least disruptive measures)*: Recent trends in provincial and territorial legislation have placed a greater emphasis on prevention. Although prevention resources were included in the current formula, the level of funding may not provide enough resources to meet current needs.
> - *Liability Insurance*: As with prevention, the Operations formula includes funding for insurance. However, since September 11, 2001 (9/11) insurance costs have increased dramatically.
> - *Legal Costs*: Although legal costs are included in the Operations formula, they have become a larger issue than planned for when the formula was developed. A higher incidence of contested cases plus changes in provincial practice requiring cases to be presented by legal representatives rather than social workers has resulted in higher costs. Further, litigation on behalf of injured children can be very expensive, even when adequate liability insurance is carried.
>
> It is anticipated that the review of the Operational formula will address these issues. At the present time, however, the current authorities must be applied.
>
> (Emphasis added)

[267] In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the

cycle of dependency (see Annex, ex. 33 at pp. 1-2 [*Explanations on Expenditures of Social Development Programs* document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (*Explanations on Expenditures of Social Development Programs* document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a significant increase in costs for AANDC. The document provides the example of the Kasohkowew Child Wellness Society in Alberta, where it would cost an additional $2.2 million beyond what AANDC currently funds if social services on that reserve reverted back to the province of Alberta (see *Explanations on Expenditures of Social Development Programs* document at p. 2).

[268] Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [*Social Programs presentation*]). With specific regard to the FNCFS Program, the presentation states that "efforts have been concentrated on child protection and removal of the child from the parental home with the result that the children in care rate continues to increase" (see *Social Programs presentation* at p. 5).

[269] In general, the *Social Programs presentation* states that "[m]any First Nation and Inuit children and families are not receiving services reasonably comparable to those provided to other Canadians" (at p. 3). Relatedly, the presentation notes that "[p]rovinces/territories have been critical of [AANDC] funding levels as they do not enable First Nation service providers to meet the standards stipulated in provincial/territorial legislation" (*Social Programs presentation* at p. 6). According to the presentation, the delivery of social programs on reserves is hampered by the absence of legislation, inadequate funding and a division of responsibilities between federal departments which impedes comprehensive program responses (see *Social Programs presentation* at p. 3).

[270] In another presentation, AANDC describes Directive 20-1 as "broken":

> The current system is BROKEN, i.e. piecemeal and fragmented
>
> The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality
>
> […]
>
> The current program focus is on protection (taking children into care) rather than prevention (supporting the family)
>
> […]
>
> Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand
>
> INAC CFS has been unable to keep up with the provincial changes
>
> Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced
>
> (Annex, ex. 35 at pp. 2-3 [*Putting Children and Families First in Alberta presentation*])

[271] The *Putting Children and Families First in Alberta presentation* touts prevention as the ideal option to address these problems at page 4:

> Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve
>
> Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health

[272] Finally, the *Putting Children and Families First in Alberta presentation* states at page 5:

> The facts are clear:
>
> - *Wen:De* Report - Early intervention/prevention is KEY
>
> […]

- First Nation agencies have been lobbying Canada since 1998 to change the system

[273] AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [*2007 Evaluation of the FNCFS Program*]). The findings and recommendations of the *2007 Evaluation of the FNCFS Program* reflect those of the *NPR* and Wen:De reports. Of note, at page ii, the *2007 Evaluation of the FNCFS Program* makes the following findings:

> Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.
>
> The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed.

[274] In response to these findings, the *2007 Evaluation of the FNCFS Program* made six recommendations at page iii, including that AANDC:

> 1. clarify the department's hierarchy of policy objectives for the First Nations Child and Family Services Program, placing the well-being and safety of children at the top;
>
> 2. correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions;

[275] The *2007 Evaluation of the FNCFS Program* goes on to state that the first step in improving the FNCFS Program is to change Directive 20-1 by providing FNCFS Agencies with a new funding stream that ensures adequate support for prevention work (see at p. 35). In discussing the costs and benefits of increasing the FNCFS Program's focus on prevention, the cost estimates provided in *Wen:De Report Three* are outlined, including the $22.9 million for new management information systems, capital costs (buildings,

vehicles and office equipment), and insurance premiums; and, the $86.4 million for annual funding needs for such things as an inflation adjustment to restore funding to 1995 levels, adjusting the funding formula for small and remote agencies, and increasing the operations base amount from $143,000 to $308,751 (see *2007 Evaluation of the FNCFS Program* at pp. 35-36).

[276] In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children.

[277] Similarly, at the hearing, Ms. Murphy described the EPFA as follows:

> MS MacPHEE: Okay. And I think you touched on this earlier, but I wanted to get you to elaborate a little bit more. Could you tell us a little bit how, more specifically maybe, the new Enhanced Prevention Focused Approach was developed? You know, what was the impetus for developing this new approach?
>
> MS MURPHY: We weren't getting good outcomes. MS MURPHY: We were having challenges with First Nations, we were having challenges with the number of children in care, and we wanted to reduce that number and we wanted to have kids be safe and we wanted to avoid having kids having to come into care. I mean, the challenge for first Nations communities -- and I'm sure this has already been outlined here by others, is that, especially for small, remote communities, when child needs to be taken into care, sometimes there's not community-based options, so the child may not stay in that community. And taking a child away from their family and from their community has impacts for sure. So we wanted to find community-based solutions so kids could stay in their communities, be close to – and hopefully have the families be able to be reunited. So we wanted to do that early intervention work which would actually avoid having to have the children actually being removed from their parental home and perhaps being located outside at a distance from their community.
>
> (*Transcript* Vol. 54 at pp.49-50)

[278] However, as the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada,* and the *2012 Report of the Standing Committee on Public Accounts* pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA.

[279] AANDC argues the *2008 Report of the Auditor General of Canada,* and the *2011 Status Report of the Auditor General of Canada*, should also be given minimal weight since the authors of the reports were not called to substantiate the documents or provide the context of statements or opinions contained therein. Additionally, AANDC argues these reports are not probative of the facts in issue.

[280] The Panel rejects AANDC's arguments concerning the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*. The Auditor General of Canada did not testify before the Tribunal as she or he is not a compellable witness (see section 18.1 of the *Auditor General Act*). Nevertheless, the Panel is satisfied the *2008 Report of the Auditor General of Canada* and *2011 Status Report of the Auditor General of Canada* are highly reliable, relevant, and clear. They are written to report findings in a comprehensive manner so as to allow Parliament and all Canadians to understand its recommendations. As stated at section 7(2) of the *Auditor General Act*, reports of the Auditor General of Canada are filed annually with the House of Commons in order to "…call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons…".

[281] Given that the Auditor General is an independent public office in Canada, serving the interests of all Canadians, it would be unreasonable to expect the Panel give little or no weight to the report and findings in the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*, especially given the fact that many findings in the reports are specific to the FNCFS Program. In addition, as was outlined above, AANDC publicly accepted the recommendations emanating from the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor*

General of Canada, reinforcing the reports' relevance and reliability in this matter. The Panel accepts the findings of the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada.*

[282] Similarly, the Panel finds the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts* to be highly relevant and reliable in this case. In addition to the fact that the reports relate directly of the FNCFS Program, they are also authored by elected officials performing public duties for the benefit of all Canadians. High ranking officials from AANDC were able to testify before the Committee and, in doing so, acknowledged the findings in those reports. Again, the Panel accepts the findings of the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts*.

[283] The statements of the Deputy Minister and Assistant Deputy Minister before the Standing Committee on Public Accounts also indicate that they viewed the EPFA as the solution to address the flaws in Directive 20-1. Again, internal AANDC documents support the findings in the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada* and the *2012 Report of the Standing Committee on Public* Accounts, regarding the need to transition those jurisdictions still under Directive 20-1 to the EPFA, while also acknowledging the need to improve the EPFA.

[284] In 2010, AANDC's Evaluation, Performance Measurement and Review Branch did its own evaluation of the implementation of the EPFA in Alberta (see Annex, ex. 37 [*AANDC Evaluation of the Implementation of the EPFA in Alberta*]). The evaluation found that the design of the EPFA was a move in the right direction with potential for positive outcomes. However, it identified some challenges with the EPFA model, including: timing, provincial requirements, human resources shortages, salaries, support from government/agency management, community linkages, training and geographical isolation. All these were considered by FNFCS Agencies to be essential to the successful implementation of the approach. An additional challenge identified is ensuring that reliable data is collected to allow for accurate performance measurement and some comparability

of prevention services (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. vi, 11,16-17, 21-24).

[285] Moreover, the evaluation noted that, as the EPFA is based on an annual allocation for most aspects and some pieces being determined by a formula, "there is not the flexibility to respond quickly to changes in provincial policy or other external drivers…" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27). According to the evaluation, this lack of flexibility "…is common to INAC programs that adhere to provincial legislation and […] [is] an in-built risk to the program" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27).

[286] Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. 16-18, 21-24).

[287] The evaluation recommended revisiting the EPFA funding model within the next year to learn from the past two years of implementation and to incorporate additional resources to address some of the issues faced by rural and remote communities. As part of this review, it recommended AANDC also determine if the calculations that are based on assumed population of children in care are relevant in achieving desired outcomes (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at p.i).

[288] In 2012, the Evaluation, Performance Measurement and Review Branch of AANDC also did its own evaluation of the implementation of the EPFA in Saskatchewan and Nova Scotia (see Annex, ex. 38 [*AANDC Evaluation of the Implementation of the EPFA in*

Saskatchewan and Nova Scotia]; see also, Annex, ex. 39). Again, the findings are in line with those of the other reports on the FNCFS Program.

[289] The 2012 evaluation found it was unclear whether the EPFA is flexible enough to accommodate provincial funding changes (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). It noted both the Saskatchewan and Atlantic regional offices struggle to effectively perform their work given staffing limitations, including staffing shortages, caseload ratios that exceed the provincial standard, and difficulty recruiting and retaining qualified staff, particularly First Nation staff (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). Capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards, but also as making FNCFS Agencies a more desirable place to work. However, these expenditures were not anticipated when implementing the EPFA and were identified as often being funded through prevention dollars (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 49).

[290] One of the main challenges identified in the implementation of the EPFA in Saskatchewan and Nova Scotia was unrealistic expectations, largely by community leadership, of what agencies are able to achieve with the funding they receive. According to the evaluation, community leadership occasionally expect agencies to cover costs that are social in nature but that do not fall under the agency's eligible expenditures. That is, the conditions which contribute most to a child's risk are conditions that the child welfare system itself does not have the mandate or capacity to directly address, including economic development, health programing, education and cultural integrity (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35, 49, 51). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* states, at page 49: "AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs".

[291] Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35-36).

[292] In an August 2012 presentation, entitled "First Nations Child and Family Services Program (FNCFS) The Way Forward", Ms. Odette Johnson, Director of the Children and Family Services Directorate of AANDC outlined to Françoise Ducros, Assistant Deputy Minister, ESDPPS, the need to reassess the EPFA (see Annex, ex. 40 [the *Way Forward presentation*]). The purpose of the presentation was "[t]o provide options and seek approval for next steps in the reform of the FNCFS Program" (*Way Forward presentation* at p. 2). It identifies the drivers behind this reform as: the provincial/territorial shift to prevention, the high numbers/costs of First Nation children in care, AANDC internal audits and evaluations of the FNCFS (along with those of the Auditor General), the reports of Parliamentary Committees, the human rights complaint, and child advocate reports and other research (see the *Way Forward presentation* at p. 5).

[293] According to the *Way Forward presentation*, "[a]udits and evaluations of between 2008 and 2012 demonstrate a need for the EPFA, but also a need to annually review the EPFA formula as constant provincial changes make it difficult to stay current and enable Agencies to provide a full range of child welfare services" (at p. 9). Furthermore, "[p]rovinces have been shifting their caseloads towards greater emphasis on intake and

investigation which may not have been part of original EPFA discussions and are now creating pressures on Agencies" (see the *Way Forward presentation* at p. 9).

[294] At page 13, the *Way Forward presentation* provides a comparative table of "where we are" and "where we need to go":

Where we are		**Where we need to go**
Taking children into care and some work with families in the home	→	Taking children in care for critical cases but more with the families in the home.
Fund agencies and provinces for basic protection services and some prevention with families in the home.	→	Either fund full range of services provided by provinces (differs among jurisdictions) OR transfer child welfare on reserve to the Provincial/Territorial governments.
Initial investments in EPFA in 6 jurisdictions but not necessarily addressing all aspects of child welfare.	→	EPFA in all jurisdictions **fully costed at $108.13M**, supporting all aspects of child welfare including intake, early intervention and allowing for developmental phase.
Developing some capacity for prevention in communities.	→	All communities have capacity in prevention.

[295] The presentation proposes three options to address these issues: (1) implement EPFA in the remaining jurisdictions; (2) expand the EPFA with increased investments to address cost drivers, including implementing the model in the remaining jurisdiction; and, (3) transfer the program to the provinces/territories.

[296] Under option 1, the costs of transferring the remaining jurisdictions to EPFA are estimated at: $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador. (see *Way Forward presentation* at p. 15). There is also an additional $4 million listed for "Maintenance" which Ms. Murphy explained as an infusion of additional funds to avoid having to re-allocate money from elsewhere in AANDC to cover additional costs that go beyond the standard funding formula (see *Transcript* Vol. 54 at pp. 167-168). Furthermore, an additional $2 million is estimated for "Strength and Accountability" to allow AANDC to better administer the FNCFS Program internally (see testimony of S. Murphy, *Transcript* Vol. 54 at pp. 168).

[297] The presentation lists as a "PRO" for this option the recognition that the FNCFS Program cannot address all root causes of the over-representation of children in care.

Under “CONS” it states the “5-year EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies” (*Way Forward presentation* at p. 15). According to Ms. Murphy, who stated she had signed off on the presentation, the major cost drivers are increases in the rates for maintaining children in care, growth in the number of children that come into care and salary increases (see *Transcript* Vol. 54 at pp. 158-159, 179 and 181). She elaborated on the “CON” for option 1 as follows:

> So with this option we were talking about maintenance, but we weren't necessarily dealing with all of the cost drivers that we were observing.
>
> So, as an example, we know that the cost of foster care is going up and so, Agencies are trying to pay those bills and we hadn't properly calculated that in our model.
>
> This option wasn't trying to re-stabilize the existing EPFA jurisdictions for the cost changes that had happened since we introduced the funding models, it was really about the five. So it was sort of the minimum option at the time.
>
> (*Transcript* Vol. 54 at p. 169)

[298] For option 2, the implementation of the expanded EPFA in the remaining jurisdictions is estimated at $65.03 million, while topping-up the existing EPFA jurisdictions is estimated at $43.10 million, for a total of $108.13 million. In addition to these amounts, the presentation indicates that a 3% escalator will be required every year. The “PROS” of this option are that it ensures agencies are able to meet changing provincial standards and salary rates while maintaining a high level of prevention programming; and, that funding remains reasonably comparable with provinces and territories. Under “CONS”, the presentation states: “Option 2 is more costly than Status Quo EPFA implementation” (*Way Forward presentation* at p. 16). During testimony, Ms. Murphy was asked whether the “PROS” of this option suggest that AANDC is not able to provide a reasonably comparable level of services under the FNCFS Program. Ms. Murphy responded:

> It has always been our intention to provide reasonably comparable services.

> We were noticing trends in increasing kids in care and we were having stresses in our budget to be able to maintain those levels and, of course, the Department's doing re-allocations, but we weren't – we noticed changes for sure and we needed to keep up with those changes and we weren't necessarily being successful in all cases of being able to do that.
>
> (*Transcript* Vol. 54 at pp. 163-164)

[299] Finally, the third option of transferring child welfare on reserve to the provinces/territory does not have an estimated cost, but the presentation indicates there is "[p]otential for dramatic increases in costs" (*Way Forward presentation* at p. 17). As Ms. Murphy put it:

> it's certainly expected that if you were to ask someone else to start to take on the delivery of a program, they're going to have their administrative cost structure, they're going to potentially look for funds to offset the cost of them assuming that role.
>
> […]
>
> It doesn't mean that it would. We didn't -- necessarily hadn't costed any of that, but we wanted to at least highlight that there might be a potential for an increase in costs because we might have to absorb, for instance, increased administrative costs that weren't necessarily there right now in the way that we're funding individual Agencies.
>
> And other costs, we don't know. They may want to negotiate other things as part and parcel of taking on that responsibility and we wouldn't wait until you got to negotiation to find out what that was.
>
> (*Transcript* Vol. 54 at pp. 166-167).

[300] The "PROS" of option 3 include: comparability issue would be resolved and better oversight/compliance of child and family services on reserve. Along with the potential for a dramatic increase in costs, the presentation also includes as "CONS" for this option that support for all First Nations is uncertain, and that it involves complimentary programs, therefore, it is a big task to implement and involves cost implications beyond AANDC (*Way Forward presentation* at p. 17).

[301] Following on the *Way Forward presentation*, in two similar presentations in October and November 2012, Ms. Murphy expanded on the options for reforming the FNCFS

Program (see testimony of S. Murphy, *Transcript* Vol. 55 at p. 199). In these presentations Ms. Murphy proposed that AANDC complete the reform of the FNCFS Program to EPFA in the remaining jurisdictions (estimated at $139.7 million over 5 years and $36.6 million ongoing); stabilize pressures in existing EPFA jurisdictions (estimated at 164.1 million over 5 years); add a 3% escalator per year for all jurisdictions to ensure provincial/territorial comparability (estimated at $105.5 million over 5 years and $23.9 million ongoing); and seek additional resources for increased program management and strengthened accountability (estimated at $11.2 million over 5 years and $2.3 million ongoing) (see Annex, ex. 41 at p. 2 [the *Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation*]; and, Annex, ex. 42 at pp. 2, 5 [the *Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation*]).

[302] The need for this increased funding is explained as:

> Maintenance rate increases for children in care have far exceeded the two percent AANDC receives annually. As a result, the Department must reallocate funds from other program areas to cover the deficit.
>
> AANDC must pay the costs to support children in care and these costs are still rising dramatically. As maintenance rates are essentially dictated by provinces, AANDC has no choice but to support the costs of children in care based on these rates.
>
> In addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve.
>
> […]
>
> Currently, AANDC has very limited human resources dedicated to the FNCFS Program.
>
> No funding for strengthened accountability for results was provided when EPFA was approved in 2007.
>
> AANDC's activities have increased dramatically with the implementation of EPFA in the 6 jurisdictions.
>
> AANDC is currently limited in how effectively it can manage and monitor the program while developing tripartite partnerships to fully implement EPFA.

> (*Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation* at pp. 5-6)

[303] In Ms. Murphy's view, while positive outcomes from the EPFA have been identified, "the program is losing ground due to increasing provincial costs" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 3). Furthermore, she views her proposal as addressing "…rising maintenance costs in all jurisdictions", it "allows the program to accommodate provincial rate changes thereby maintaining comparability", and "will allow agencies to devote appropriate resources to prevention, which will lead to a decrease in long term care placements in the medium to longer term" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 6). The impacts of no new investments in the FNCFS Program would, according to Ms. Murphy, "…not advance improved outcomes for First Nations children and their families" and "[t]he Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 8). At the hearing, Ms. Murphy was asked to expand on this last point:

> MEMBER BELANGER: "The Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support." What are we comparing here?
>
> MS MURPHY: I think what we were saying there was that we were starting to have issues in terms of being able to match salaries and the costs of keeping children in care, those other elements that I have laid out, and that so we may have trouble paying those bills.
>
> We are paying those bills now, but if you keep going, at some point you hit the wall and you don't have the ability to continue to reallocate, you put at risk that policy concept of comparability.
>
> (*Transcript* Vol. 55 at p. 216)

[304] For reasons that were not elaborated upon at the hearing, the above options and recommendations were not implemented in AANDC's 2013 or 2014 budgets (see *Transcript* Vol. 55 at pp. 206-208, 221; see also *Transcript* Vol. 61 at pp. 159-162).

[305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and Wen:De reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and, subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.

b. The choices of FNCFS Agencies and additional funding provided

[306] AANDC argues the difference between the level of services and programs offered on and off reserve may have little to do with funding and more to do with the choices made by FNCFS Agencies about the type of services and programs they want to provide and other administrative issues affecting the overall budget. For example, some agencies decide to allocate funds to the salaries of their board members when the budget should be spent on front line services. Also, AANDC points out that some agencies are successful with their budget, including some agencies who have posted surpluses. AANDC submits it also provides additional funding or reallocates funds where FNCFS Agencies require further funding. Therefore, if there are gaps in funding, AANDC contends it has bridged those gaps through additional funds.

[307] As outlined above, Directive 20-1 and the EPFA have certain assumptions built into their funding formulas. In general, that the child population they serve is 1000 children

aged 0-18, that 6% of the total on reserve child population is in care, and that 20% of families are in need of services. Ms. D'Amico explained the use of assumptions as providing stability for FNCFS Agencies. That is, even if less than 6% of its children are in care and 20% of its families are in need of services, it would not reduce the agency's budget. That may indeed be a beneficial situation for agencies where these assumptions accurately reflect their clientele and may even result in the agency receiving a surplus of funding. However, on this last point, the Panel notes *Wen:De Report Two* stated: "Not surprisingly, it was only BC agencies that advised that they had surpluses and, in almost all cases, the surplus came from the maintenance per diem arrangement" (at p. 213). More fundamentally though, where the assumptions do not accurately reflect the clientele of an FNCFS Agency - where the percentage of children in care and families in need of services is higher than 6% and 20% respectively - the funding formula is bound to provide inadequate funding.

[308] In 2006, 18 FNCFS Agencies had over 10% of their children in care out of the parental home (see *Social Programs presentation* at p. 13). In the same year, there were 257 First Nations communities on reserves with no access to child care and many more communities did not have enough resources to support 20% of children from birth to six years of age (see *Social Programs presentation* at p. 14).

[309] For Alberta, Ms. Schimanke indicated that most FNCFS Agencies have around 6% of children in care, but there are some that have anywhere from 11 to 14% (see *Transcript* Vol. 61 at pp. 113-115). Also, as stated above in the *2008 Report of the Auditor General of Canada*, in the five provinces covered by the report, the percentage of children in care ranged from 0 to 28%.

[310] In Manitoba, Ms. Elsie Flette, Chief Executive Office of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), described the effects of the assumptions on FNCFS Agencies:

> If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by AANDC as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in

> care that you have to spend that money on and, so, you have some flexibility for how else to use that money.
>
> But if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the Southern Authority I believe right now four Agencies that exceed those assumptions. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.
>
> When we look at the families and prevention services, I believe there's about five Agencies that exceed that 20 percent. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on- Reserve are getting service.
>
> They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go – they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.
>
> […]
>
> So, it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if you have higher than seven percent you have unfunded workload.
>
> (*Transcript* Vol. 20 at pp. 104-105, 118)

[311] While additional funds have been provided or reallocated to cover maintenance expenditures and/or some *ad hoc* exceptional circumstances, FNCFS Agencies are expected to cover their operations and prevention costs within their fixed budgets, including using those funds to cover any deficits in maintenance expenditures. Those budgets are based on the formulas that, again, do not account for the actual needs of the FNCFS Agencies. They are also static formulas. That is, as the years go by, the formulas become more and more disconnected from the actual needs of FNCFS Agencies and the children and families they serve. Specifically, the formulas do not apply an escalator for regular increases in costs, including for salaries, where the bulk of funding is spent. While Directive 20-1 calls for a cost of living increase of 2% every year, that increase has not

been applied since 1995-1996. Similarly, once EPFA is implemented in a jurisdiction, aside from adjustments for population size, yearly increases in costs are not accounted for in the funding formula. In Alberta for example, as indicated above, funding under EPFA is provided based on provincial rates from 2006. According to an AANDC official, it is up to FNCFS Agencies to work with the budgets they have:

> MR. POULIN: So for an Agency that is over 6 percent, where you need more protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services.
>
> MS SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.
>
> MR. POULIN: That means paying -- you know, that means in effect paying your workers less than what the province does.
>
> MS SCHIMANKE: It could be, yes. That could be one example of things, yes.
>
> MR. POULIN: It could be having less workers and therefore having a higher case ratio than your workers -- than the province does.
>
> MS SCHIMANKE: It could be, yes.
>
> I do have to show, though, that there are Agencies who are above the 6 percent who still show surpluses, so I don't know what they are doing differently. It could be their salaries have been adjusted very low; we don't know what they are doing to make that happen. It may be they're short-staffed and they are just not -- and the staff are carrying higher caseloads, yeah. So there are various examples of what different Agencies are doing, yes.
>
> (*Transcript* Vol. 62 at pp. 51-52)

[312] These last statements highlight the dichotomy between the objective of the FNCFS Program and its actual implementation through Directive 20-1 and the EPFA. While the program is premised upon provincial comparability, the funding mechanisms do not allow many FNCFS Agencies, particularly those agencies that do not match AANDC's

assumptions about children in care and families in need, to keep up with provincial standards and changes thereto.

[313] As noted by the reports on the FNCFS Program, given that funding under Directive 20-1 and the EPFA is largely based on population levels, small and remote agencies are also disproportionately affected by AANDC's funding formulas. In British Columbia for example, small agencies are the norm, not the exception, including many that serve rural and isolated communities. Their challenges include added costs for travel, accessing the communities they serve and getting and retaining staff (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 87).

[314] Given these agencies are funded pursuant to Directive 20-1, most do not have the flexibility or resources necessary to provide prevention services, even with additional funds. In these rural and isolated communities, it is also difficult for First Nations people to access services which are available off reserve, including: mental health services; services to strengthen families; and services for family preservation and reunification (see Annex, ex. 43; see also testimony of W. McArthur, *Transcript* Vol. 63 at p. 87 and Vol. 64 at pp. 6, 167). Despite moving FNCFS Agencies in British Columbia to funding based on actuals in 2011, with the intent to transition them to the EPFA shortly thereafter to address some of these concerns; and, despite the repeated requests of FNFCS Agencies and the province of British Columbia, that transition had yet to occur at the time of the hearing and no announcement was made for EPFA in the 2013-2014 budgets (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 96-97, 156, 172-173).

[315] The effects of the population thresholds in Directive 20-1, along with the other assumptions built into Directive 20-1 and the EPFA, indicate that a "one-size fits all" approach does not work for child and family services on reserve. The overwhelming evidence in this case suggests that because AANDC does not fund FNCFS Agencies based on need but, rather, based on assumptions of need and population levels, that funding is inadequate to provide essential child and family services to many First Nations. Moreover, the internal AANDC documents outlined above, namely the *Way Forward presentation* and the *Renewal of the First Nations Child and Family Services Program presentation*, indicate that, despite any additional funds provided or reallocated to FNCFS

Agencies, there is still quite a significant difference in funding levels to bring the FNCFS Program into comparability with the provinces. This point is addressed in more detail in the following section.

c. Comparator evidence

[316] AANDC contends that comparison is an essential part of the analysis under human rights legislation. It submits that no evidence was advanced by the Complainants regarding how the provincial or territorial funding models work or what their respective child welfare budgets are as compared to the federal government. In this regard, AANDC argues that the Tribunal should draw a negative inference from the fact that the Complainants did not call provincial and territorial witnesses to testify.

[317] According to AANDC, the Complainants' case lacks substantive evidence about the level of provincial funding compared to federal funding, including addressing the nature and extent of any research thereon. Moreover, no provincial or territorial witnesses were called to support the allegation that there is a difference in child welfare funding or service levels on or off reserve. Given that comparison between federal and provincial funding was at the heart of their case, AANDC submits the Complainants had to demonstrate how much funding is provided by the federal government and each provincial/territorial government for child welfare services. Only if the amount of funding for both was reliably established, could the Tribunal determine if there is a difference and whether that difference amounts to adverse differentiation or a denial of services. According to AANDC, perceived differences in services on and off reserve are not sufficient to substantiate the Complainants' claims.

[318] In any event, AANDC argues that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*.

[319] AANDC's argument regarding the need for comparative evidence, and that comparing the federal and provincial/territorial funding systems is not valid under the *CHRA*, has already been rejected by the Federal Court, the Federal Court of Appeal and this Tribunal. In setting aside the Tribunal's decision on AANDC's jurisdictional motion

(2011 CHRT 4), which advanced this same argument, the Federal Court in *Caring Society FC* found at paragraph 251:

> the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely" in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.

[320] The Federal Court explained some of the patently absurd results of requiring a comparator group in every case:

> [256] On the Tribunal's analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.
>
> [257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.
>
> […]
>
> [259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.
>
> (*Caring Society FC* at paras. 256-257, 259)

[321] After examining the role of comparator groups in a discrimination analysis and the Supreme Court's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (*Withler*), the Federal Court made the following statements with regard to the use of comparator groups in analyzing alleged discrimination against Aboriginal peoples:

> [332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure.

> […]
>
> [337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.
>
> […]
>
> [340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.
>
> (*Caring Society FC* at paras. 332, 337, 340)

[322] On appeal, the Federal Court of Appeal accepted the Federal Court's reasoning regarding the use of comparator groups in a discrimination analysis. In fact, it noted that cases postdating the Federal Court's decision confirmed the reduced role of comparator groups in the analysis:

> In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).
>
> In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply": *Withler*, supra at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative

> role was given to the existence of a comparator group – similar to what the Tribunal did here.
>
> (*Caring Society FCA* at para. 18)

[323] The Panel agrees with the Federal Court and Federal Court of Appeal's reasoning on the role of comparator groups in a discrimination analysis. AANDC's argument regarding the need for comparative evidence in this case is inconsistent with the *Caring Society FC* and *Caring Society FCA* decisions. Furthermore, there is no authority for its proposition that interjurisdictional comparisons are not valid under the *CHRA*.

[324] While the Supreme Court has previously stated that equality is a comparative concept, it has also recognized that "…every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality" (*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at p. 164 [*Andrews*]). With regard to this last statement, the Supreme Court in *Withler*, at paragraph 2, stated that equality is about substance, not formalism:

> In our view, the central issue in this and others. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[325] As noted by the Federal Court of Appeal in *Caring Society FCA*, the decisions in *Moore* and *Quebec (Attorney General) v. A.*, 2013 SCC 5 (*A*), echo the approach to comparator groups enunciated in *Withler*. That is, while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue. In fact, as the Supreme Court noted in *Withler*, at paragraph 59: "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in

light of their distinct needs and circumstances, no one is like them for the purposes of comparison".

[326] Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered (see *Withler* at para. 2). As the Federal Court of Appeal noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paragraph 27 (*Morris*), the legal definition of a *prima facie* case does not require a complainant to adduce any particular type of evidence to prove the existence of a discriminatory practice under the *CHRA*. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove a discriminatory practice. The Federal Court of Appeal in *Morris*, at paragraph 28, concluded that:

> A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms.

[327] In this vein, the Panel notes the present Complaint was brought under both subsections 5(a) and (b) of the *CHRA*. The interpretation of the wording of subsection 5(b), "to differentiate adversely", has largely been the basis for arguing the need for comparative evidence. That is, "to differentiate" is to treat someone differently in comparison to others. Aside from the French version of subsection 5(b) not having the same comparative connotation, as it simply uses the term "défavoriser", subsection 5(a) also does not use wording implying a comparison. It speaks only of being denied a good or a service. As the Federal Court noted in *Caring Society FC*, requiring comparator evidence under 5(b), but not under 5(a), would create an internal incoherence between the subsections by establishing different legal and evidentiary requirements in order to establish discrimination under each provision (see *Caring Society FC* at paras. 276-279).

[328] Similarly, AANDC's argument that there can be no cross-jurisdictional comparisons or comparisons between different service providers is not supported by anything found in the *CHRA* or in the jurisprudence regarding comparator evidence outlined in the preceding paragraphs. In fact, section 50(3)(c) of the *CHRA* allows the Panel to receive and accept

any evidence and information that is sees fit, as long as it is not privileged information [s. 50(4)] or the testimony of a conciliator appointed to settle the complaint [s. 50(5)]. Furthermore, reasonable comparability with provincial/territorial standards is part of AANDC's own objective in implementing the FNCFS Program and negotiating the other provincial/territorial agreements. While AANDC argues "reasonable comparability" is an administrative term and not a legal term requiring mirror services are provided on and off reserve, that argument has no bearing on the Complainants' ability to bring evidence related thereto. AANDC undertook to ensure First Nations on reserve receive reasonably comparable child and family services to those provided off reserve in similar circumstances. It is unreasonable and unfounded to argue the Complainants should not be able to bring evidence related thereto.

[329] While there is no obligation to bring forward comparative evidence to substantiate a discrimination complaint, there was some comparative evidence brought forward in this case demonstrating a difference between child and family services funding and service levels provided on and off reserve. First, the FNCFS Agencies still under Directive 20-1 receive less funding than those who have transitioned to the EPFA. As indicated in the *2011 Status Report of the Auditor General of Canada*, funding for operations and prevention services increased between 50 and 100% in each of the provinces that transitioned to EPFA (see at p. 25, s. 4.54). Furthermore, as indicated above, AANDC has estimated the difference in annual funding to transfer the remaining jurisdictions to the EPFA as $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador (see *Way Forward presentation* at p. 15). As Ms. D'Amico stated at the hearing:

> MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the shortcomings in the funding formulas], there isn't comparability yet; this is something you are trying to attain?
>
> MS. D'AMICO: In six jurisdictions, I can tell you that there is comparability. In the other jurisdictions, because we haven't moved to EPFA, the amounts that they are receiving are more than 20-1, but I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the

> remaining jurisdictions and they would receive more under EPFA based on all of those ratios.
>
> (*Transcript* Vol. 51 at pp. 179-180)

[330] Second, AANDC has identified that increases in funding are even necessary in EPFA jurisdictions to ensure reasonable comparability with the provinces. Again, in the *Way Forward presentation*, it states the "EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies" (at p. 15). To address this, the presentation presents the option of adjusting the EPFA costing model with increased investments to address cost drivers: "EPFA Plus". To implement this increased investment in the jurisdictions that do not function under the EPFA, the *Way Forward presentation* estimates the cost to be $65.03 million. To top-up the existing EPFA jurisdictions, EPFA Plus is estimated to cost $43.10 million. According to the *Way Forward presentation*, EPFA Plus "[e]nsures funding remains reasonably comparable with provinces and territories…" (at p. 16). While AANDC witnesses testified that the amounts in the *Way Forward presentation* are rough estimates that err on the size of magnitude, the Panel still finds they are indicative of the type of investments required to provide more meaningful services to First Nations children and families on reserve and in the Yukon.

[331] Moreover, these amounts are similar to those recommended in *Wen:De Report Three* (see at p. 33). *Wen:De Report Three* also cautioned against implementing its recommendations in a piece meal fashion as doing so would undermine the overall efficacy of its proposed changes (see at p. 15). However, by not addressing all the shortcomings of Directive 20-1 in implementing the EPFA, the overall efficacy of the EPFA model is now undermined as indicated in the *Way Forward presentation*.

[332] A third comparison also arises from the *Way Forward presentation*. To resolve comparability, the presentation recommends AANDC transfer child welfare services on reserve to the provinces/territory. It recognizes that the provinces and territories have expertise in child welfare and that there would be better oversight and compliance of child and family services on reserve if they are given the full range of responsibilities, including the responsibility for funding. However, the presentation notes that this option has the

"[p]otential for dramatic increases in costs" for AANDC (*Way Forward presentation* at p. 17).

[333] In this same vein, another useful comparison in this case is the difference between the delivery of child and family services through the FNCFS Program against the delivery of those services through the *Alberta Reform Agreement*, *BC MOU* and *BC Service Agreement*. AANDC argues these agreements are not evidence of how the province funds the off reserve population or evidence that AANDC underfunds FNCFS Agencies. However, these arguments do not address the fact that FNCFS Agencies are funded in a different manner than the reimbursements provided by AANDC to the provinces. The funding provided to Alberta and British Columbia under these agreements is not based on population levels or assumptions about children in care and families in need. Rather, those provinces are reimbursed for the actual costs or an agreed upon share of the costs for providing child and family services. They receive adjustments for inflation and increases in the costs of services, whereas FNCFS Agencies do not. Most importantly, because of the payment of actuals and adjustments thereof annually, there is a more direct connection between the child and family services standards of those provinces and the delivery of those services to the First Nation communities they serve.

[334] By comparison, neither Directive 20-1 nor the EPFA provide adjustments for the cost of living or for changes in provincial legislation and standards. Both types of adjustments were identified by *Wen:De Report Two* as major flaws in Directives 20-1 and, despite these findings, the EPFA model incorporated these same flaws. As *Wen:De Report Two* specified, not adjusting funding for increases in the cost of living leads to both under-funding of services and to distortion in the services funded (see at p. 45). Furthermore, by not providing adjustments for changing provincial legislation and standards, the FNCFS Program still contains no mechanism to ensure child and family services provided on reserve are reasonably comparable to those provided to children in similar circumstances off reserve (see *Wen:De Report Two* at p. 50).

[335] AANDC's argument about the Complainants' lack of comparative evidence also ignores the fact that the *NPR*, Wen:De reports, Auditor General and Standing Committee reports have all identified a need for AANDC to do this analysis and recommended they do so. Moreover, in response to the Auditor General and Standing Committee reports recommending AANDC perform a comparative analysis of child welfare services provided on and off reserve, AANDC indicated that it has not done so because of inherent difficulties in doing so. Despite said difficulties, "reasonable comparability" remains AANDC's standard for the FNCFS Program.

[336] The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see *Comparability of Provincial and INAC Social Programs Funding* at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services.

[337] Ms. D'Amico also testified about the difficulty in comparing services provided by FNCFS Agencies to those provided by the provinces:

> MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?
>
> MS D'AMICO: I don't believe that we can.
>
> […]
>
> Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.
>
> (*Transcript* Vol. 51 at p. 183)

[338] Because of these difficulties, Ms. D'Amico indicated that AANDC's funding is not premised on comparability of service levels between on and off reserve child and family services, but simply on maintaining comparable funding levels with the province:

> MS D'AMICO: Because in the case of EPFA we have -- we are currently funding at the same salaries and staffing ratios as the province, and that is the only comparable variables that we could find. So it has nothing to do with the service delivery, it has to do with the funding, and that -- and so we have found comparable variables that the province how the province funds is how we fund.
>
> (*Transcript* Vol. 51 at p. 103)

[339] However, as indicated above, even salaries are fixed when the EPFA is implemented and in Alberta, for example, they are still using 2006 salary rates in 2014. Furthermore, as indicated in the *Comparability of Provincial and INAC Social Programs Funding* document, an approach to comparability based on funding and not service levels does not recognize the higher levels of need for services for First Nations or that the services or placement options they require may be at a substantially higher cost.

[340] This last point allows the Panel to make an effective comparison between the child and family services offered on and off reserve based on the principle of the best interest of the child.

iv. Best interest of the child and Jordan's Principle

[341] There is a focus on service levels and the needs of children and families off reserve, namely an emphasis on least disruptive/intrusive measures. On the other hand, under the federal FNCFS Program, there is a focus on funding levels and the application of funding formulas, where funds for prevention/least disruptive measures are fixed and funds to bring a child into care are covered at cost.

[342] Provincial child welfare legislation and standards focus on prevention and least disruptive measures (see for example Ontario's *Child and Family Services Act* at s. 1; Alberta's *Child, Youth and Family Enhancement Act* at s. 2; *The Child and Family Services Act* in Manitoba at Declaration of Principles and s. 2; *The Child and Family Services Act* in Saskatchewan at ss. 3-5; Nova Scotia's *Children and Family Services Act* at Preamble and ss. 2, 13, 20; British Columbia's *Child, Family and Community Service Act* at ss.2-4, 30; and, Quebec's *Loi sur la Protection de la Jeunesse* at ss. 1-4). These statutes recognize that removing a child from his or her family, home or community should only be done when all other least disruptive measures have been exhausted and there is no other alternative.

[343] This focus on least disruptive measures recognizes the significant effect of separating a family. The Supreme Court, in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at paragraph 78, outlined the effects of bringing a child into care:

> The most disruptive form of intervention is a court order giving the agency temporary or permanent guardianship of a child. Particularly in the case of a permanent order, this may sever legal ties between parent and child forever. To make such an order, a court must find that the child is in need of protection within the meaning of the applicable statute. In addition, the court must find that the "best interests of the child" dictate a temporary or permanent transfer of guardianship. As Lamer C.J. observed in *G. (J.)*,

> *supra*, at para. 76: "**Few state actions can have a more profound effect on the lives of both parent and child**."
>
> (**Emphasis added**)

[344] As indicated above, the provinces' legislation and standards dictate that all alternatives measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets for prevention, AANDC's funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for FNCFS Agencies to keep pace with provincial operational requirements that may include, along with the items just mentioned, costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards.

[345] AANDC officials working in the FNCFS Program have indicated that they are not experts in the field of child welfare and, instead, rely on provincial legislation and standards to dictate the level of funding that should be provided on reserves. Yet, they apply a formula to fund FNCFS Agencies that does not take into account the standards for least disruptive measures set by provincial legislation. Tellingly, in funding child and family services, the provinces do not apply a funding formula:

> MS CHAN: In terms of funding, have you seen provincial funding formulas to calculate child welfare payment that is made by the province?
>
> MS D'AMICO: Not to date.

> MS CHAN: What difficulties does this cause for the Program, if any, in determining how you are going to fund?
>
> MS D'AMICO: So this has been our primary challenge, to try and figure out how to fund equitably or comparably because we have consistently asked the province, give us a funding formula for an Agency or for a regional office in your jurisdiction and show us what that is and we will see if we can replicate it, then we would be assured that, you know, infamous provincial comparability.
>
> […]
>
> The provinces don't have that, they have a chart of accounts, they fund based on a variety of different things. You know, an example would be British Columbia, they have five different regional offices; those five different regional offices have different salary grids, they have different operational budgets that are not based on any particular formula.
>
> So it has been incredibly challenging to find those comparable pieces so that we can ensure comparability. It has just been -- it's literally apples and oranges.
>
> So, like I said, it's those variables […] that we have been able to find with the province to be able to inject in our formula so that at least we could have, first of all, a consistent formula across the country, but one that is tailored to every single jurisdiction based on provincial comparability, provincial variables.
>
> So it's not absolute in terms of service. If a service is provided in one community, it's not necessarily being provided in another community even off-Reserve. It's very difficult and the services vary, there is so many different things that child protection and other community partners provide in the vast spectrum of the social safety net.
>
> (*Transcript* Vol. 51 at pp. 184-186)

[346] A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Lawv. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators.
>
> (Bala, Nicholas, "The Best Interests of the Child in the Post-Modernist Era: A Central but Illusive and Limited Concept", in *Special Lectures of the Law Society of Upper Canada 2000: Family Law* (Toronto: LSUC, 1999) at p. 3.1)

[347] With regard to the FNCFS Program, there is discordance between on one hand, its objectives of providing culturally relevant child and family services on reserve, that are reasonably comparable to those provided off reserve, and that are in accordance with the best interest of the child and keeping families together; and, on the other hand, the actual application of the program through Directive 20-1 and the EPFA. Again, while maintenance expenditures are covered at cost, prevention and least disruptive measures funding is provided on a fixed cost basis and without consideration of the specific needs of communities or the individual families and children residing therein.

[348] The discordance between the objectives and the actual implementation of the program is also exemplified by the lack of funding in Ontario, for Band Representatives under the *1965 Agreement*. Not only does the Band Representative address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together and is directly provided for in Ontario's *Child and Family Services Act*.

[349] The adverse impacts outlined throughout the preceding pages are a result of AANDC's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program and *1965 Agreement*. Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner.

[350] In this regard, and in addressing the difference between the allocation of funding by AANDC for First Nations child and family services and that of the provinces, another important consideration brought forward by the Complainants and in the evidence is the application of Jordan's Principle.

[351] Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.

[352] Jordan's Principle is in recognition of Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

[353] On October 31, 2007, Ms. Jean Crowder, the Member of Parliament for Nanaimo-Cowichan, brought forward motion 296 in the House of Commons:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was unanimously passed on December 12, 2007 (see Annex, ex. 45).

[354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [*2009 MOU on Jordan's Principle*]; see also testimony of C. Baggley, *Transcript* Vol. 57 at pp. 9-

13, 23, 40-41, 84-85). In the *2009 MOU on Jordan's Principle*, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "…ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (*2009 MOU on Jordan's Principle* at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see *2009 MOU on Jordan's Principle* at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the *2009 MOU on Jordan's Principle* provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated $11 million to fund goods/services while the dispute is being resolved (see *2009 MOU on Jordan's Principle* at p. 2). The funds were provided annually, in $3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggley, *Transcript* Vol. 57 at pp. 123-125).

[357] According to the *2009 MOU on Jordan's Principle*, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "…supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (*2009 MOU on Jordan's Principle* at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "…crucial to ensuring that funding disputes do not disrupt services provided to a child (*2009 MOU on Jordan's Principle* at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [*2013 MOU on Jordan's Principle*]). Again, signed by an Assistant Deputy Minister from each department, the *2013 MOU on Jordan's Principle* acknowledges that Health Canada and AANDC "…have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (*2013 MOU on Jordan's Principle* at p. 1). The *2013 MOU on Jordan's Principle* now provides that during the resolution of a Jordan's Principle case, the federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the *2012 National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

[362] In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan Principle on the following basis, at page 16:

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.
>
> (Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to

resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

> 4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.
>
> […]
>
> 4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

> 4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.
>
> 4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-

> reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. For example, it took nine months for a First Nations agency to receive confirmation that an $11,000 piece of equipment for a child in care would be paid for by INAC.
>
> (Emphasis added)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (*see* Annex, ex. 49 [*Intake Form*]; see also Annex, ex. 50; and, testimony of C. Baggley, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks "[p]lease provide details on the barriers experienced to access the required services" it states at page 8:

> Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said "absolutely not".
>
> AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.

> Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.
>
> Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.
>
> Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line "Jordan's Principle: Parallel work with HC", the document represents the views of AANDC's British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

> The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program.

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms; where to send the forms and who to call for questions given

the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

> 4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have

> meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.
>
> 4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

> **Approach A**: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.
>
> **Approach B**: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to

> play in improving outcomes for children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.
>
> **Approach C**: In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the 2010 *AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that "[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services" (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

> It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

[376] Jordan's Principle was also considered by the Federal Court in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Pictou Landing Band Council (the PLBC) applied for judicial review of an AANDC decision not to reimburse them for in-home health care to one of its members. The PLBC indicated that Jordan's Principle was at issue. However, after case conferencing with the provincial government

and officials from the PLBC, AANDC and Health Canada determined there was no jurisdictional dispute in the matter as both levels of government agreed that the funding requested was above what would be provided to a child living off reserve.

[377] The Federal Court found AANDC's interpretation of Jordan's Principle to be narrow and the finding that it was not engaged to be unreasonable:

> [96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.
>
> [97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the [*Social Assistance Act*] and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[378] In determining that AANDC and Health Canada did not properly assess the PLBC request for funding to meet its member's needs, the Federal Court concluded that:

> [111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The [*Social Assistance Act*] and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.
>
> […]
>
> [116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC`s position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the $11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

v. Summary of findings

[383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services that are meant to be in accordance with provincial/territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.

[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS

Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC

maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[390] Notwithstanding budget surpluses for some agencies, additional funding or reallocations from other programs, the evidence still indicates funding is insufficient. The Panel finds AANDC's argument suggesting otherwise is unreasonable given the preponderance of evidence outlined above. In addition, the reallocation of funds from other AANDC programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program has been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve. Again, recommendations by the Auditor General and Standing Committee on Public Accounts on this point have largely gone unanswered by AANDC.

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps,

delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.

[392] While seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. For instance, given the agreement has not been updated for quite some time, it does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act*. The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof. Tellingly, AANDC's position is that it is not required to cost-share services that are not included in the *1965 Agreement*.

[393] Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements. These findings are consistent with those of the *NPR,* Wen:De reports, Auditor General of Canada reports and Standing Committee on Public Accounts reports. Again, the Panel accepts the findings in those

reports and has relied on them to make its own findings. Those findings are also corroborated by the other testimonial and documentary evidence outlined above, including the internal documents emanating from AANDC.

[394] As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.

C. Race and/or national or ethnic origin is a factor in the adverse impacts or denials

[395] As mentioned above, there is no dispute in this case that First Nations possess the characteristics of race and/or national or ethnic origin. Discrimination claims regarding Aboriginal peoples have been founded on both grounds (see for example *The Queen v. Drybones*, [1970] SCR 282; *Bear v. Canada (Attorney General)*, 2003 FCA 40; *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3; and *Commission des droits de la personne et des droits de la jeunesse c. Blais*, 2007 QCTDP 11).

[396] The provision of child and family services under the FNCFS Program and the other provincial agreements are specifically aimed at First Nations living on reserve. Under the *Yukon Agreement*, the services are aimed at all First Nations living in the territory. That is, the determination of the public to which the services are offered is based uniquely on the race and/or ethnic origin of the service recipients. Pursuant to the application of the FNCFS Program, corresponding funding formulas and the other provincial/territorial agreements, First Nations people living on reserve and in the Yukon are *prima facie* adversely differentiated and/or denied services because of their race and/or national or ethnic origin in the provision of child and family services.

[397] AANDC argues there is no evidence that any changes to the FNCFS Program and corresponding funding formulas or the other related provincial/territorial agreements would lead to better outcomes for First Nations children and families. Therefore, it argues the Complainants have failed to establish a *prima facie* case of discrimination. In any event,

the question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the *CHRA*.

[398] The *prima facie* discrimination analysis is not concerned with proposed outcomes. It is concerned with adverse impacts and whether a prohibited ground is a factor in any adverse impacts. Proposed outcomes only come into play if the complaint is substantiated and an order from the Tribunal is required to rectify the discrimination under section 53(2) of the *CHRA*. The Panel also disagrees that the question of whether funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under the *CHRA*. That question and evidence related thereto informs the ultimate determination to be made in this case: whether First Nations children and families residing on-reserve have an opportunity equal with other individuals in accessing child and family services. That is, it addresses the issue of substantive equality.

i. Substantive equality

[399] The purpose of the *CHRA* is to give effect to the principle of equality. That "all individuals should have **an opportunity equal with other individuals** to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2, **emphasis added**). The equality jurisprudence under section 15 of the *Charter* informs the content of the *CHRA*'s equality statement (see *Caring Society FCA* at para. 19). In this regard, the Supreme Court has consistently held that equality is not necessarily about treating everyone the same. As mentioned above, "identical treatment may frequently produce serious inequality" (*Andrews* at p. 164).

[400] As articulated in *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 69, "[i]t is easy to say that everyone who is just like "us" is entitled to equality […] it is more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy". In other words, true equality and the accommodation of differences, what is termed 'substantive equality', will frequently require the making of distinctions (see *Andrews* at pp. 168-169). That is, in some cases "discrimination can accrue from a failure

to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public" (see *Eldridge* at para. 78).

[401] In *Eldridge*, the issue was whether the failure to provide sign language interpreters for hearing impaired persons as part of a publicly funded scheme for the provision of medical care was in violation of section 15 of the *Charter*. The Supreme Court held that discrimination stemmed from the actions of subordinate authorities, such as hospitals, who acted as agents of the government in providing the medical services set out in legislation. However, the Legislature, in defining its objective as guaranteeing access to a range of medical services, could not evade its obligations under section 15 of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. The medical care system applied equally to the entire population of the province, but the lack of interpreters prevented hearing impaired persons from benefitting from the system to the same extent as hearing persons. The legislation was discriminatory because it had the effect of denying someone the equal protection or benefit of the law.

[402] In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60).

[403] In providing the benefit of the FNCFS Program and the other related provincial/territorial agreements, AANDC is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory (see *A* at para. 332; and, *Eldridge* at para. 73).

[404] The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

ii. Impact of the Residential Schools system

[405] **Please note** that the information below contains graphic facts about Residential Schools. If this information causes distress, especially for survivors and their families, a 24-hour Indian Residential Schools Crisis Line has been set up to provide support, including emotional and crisis referral services:

1-866-925-4419

a. History of Residential Schools

[406] Dr. John Milloy, a historian and author of *A National Crime, The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 2006) [*A National Crime*]), was qualified as an expert on the history of Residential Schools before the Tribunal. His evidence was uncontroverted and supported by official archives and other documents referenced in his book. As such, the Panel accepts Dr. Milloy's evidence as fact.

[407] During the Residential Schools era, Aboriginal children were removed from their homes, often forcibly, and brought to residential schools to be "civilized". Living conditions in many cases were appalling, giving place to disease, hunger, stress, and despair. Children were often cold, overworked, shamed and could not speak their native language for fear of severe punishment, including some students who had needles inserted into their tongues. Many children were verbally, sexually and/or physically abused. There were instances where students were forced to eat their own vomit. Some children were locked in closets, cages, and basements. Others managed to run away, but some of those who

did so during the winter months died in the cold weather. Many children committed suicide as a result of attending a Residential School.

[408] Overall, a large number of Aboriginal children under the supervision of the Residential Schools system died while "in-care" (see *A National Crime* at p. 51). Many of those who managed to survive the ordeal are psychologically scarred as a result. In addition to the impacts on individuals, Dr. Milloy also explained how the Residential Schools affected First Nations communities as a whole. In losing future generations to the Residential Schools, the culture, language and the very survival of many First Nations communities was put in jeopardy.

[409] Elder Robert Joseph, from the Kwakwaka'wakw community, gave a very moving and detailed account of his personal experience in the Residential Schools system. According to Elder Joseph, abuse, strip searches, withholding gifts and visits from family members, and public shaming were very commonplace. In his view, some of the strip searches were actually veiled instances of sexual assault. In one instance, as a form of punishment, he recounted being stripped naked in front of the boys' division of the school and told to bend over. He also spoke of children being locked in closets and cages and the prevalence of racist remarks.

[410] Elder Joseph's experience gave him a deep sense of loneliness and he turned to alcohol to cope with the despair. He has since turned his life around and is now an advocate for reconciliation and healing for Aboriginal people.

[411] The Government of Canada has recognized the impacts and consequences of the Residential Schools system. In a 2008 Statement of Apology to former students of Residential Schools (see Annex, ex. 52), former Prime Minister Stephen Harper stated:

> The treatment of children in Indian Residential Schools is a sad chapter in our history.
>
> For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential

Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

[…]

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[…]

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks

> the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.

[412] In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day.

b. Transformation of Residential Schools into an aspect of the child welfare system

[413] Residential Schools operated as a "school system" from the 1880's until the 1960's, when it became a marked component of the child welfare system. In about 1969, the Church's involvement in the Residential Schools system ceased, and the federal government took over sole management of the institutions. At around the same time, new regulations came into effect outlining who could attend Residential Schools, placing an emphasis on orphans and "neglected" children. The primary role of many Residential Schools changed from a focus on "education" to a focus on "child welfare". Despite this, many children were not sent home, because their parents were assessed as not being able to assume the responsibility for the care of their children (see *A National Crime* at pp. 211-212; and, testimony of Dr. Milloy, *Transcript* Vol. 34 at pp. 19-20).

[414] Over a 50-year period, between the 1930's to the 1980's, the number of schools declined steadily from 78 schools in 1930 down to 12 schools in 1980. The last school closed in 1986. The FNCFS Program is then implemented in 1990.

c. Intergenerational trauma of Residential Schools

[415] Dr. Amy Bombay, Ph.D. in neuroscience and M.Sc. in psychology, was qualified as an expert on the psychological effects and transmission of stress and trauma on wellbeing. She spoke about the intergenerational transmission of trauma among the offspring of Residential School survivors. The Panel finds Dr. Bombay's evidence reliable and helpful

in understanding the impacts of the individual and collective trauma experienced by Aboriginal peoples and finds her evidence highly relevant to the case at hand.

[416] Dr. Bombay explained how Residential Schools fits into the larger traumatic history that Aboriginal peoples have been exposed to:

> …for indigenous groups in Canada and worldwide, colonialism has comprised multiple collective traumas […] these include things like military conquest, epidemic diseases and forced relocation.
>
> So Indian residential schools is really just one example of one collective trauma which is part of a larger traumatic history that aboriginal peoples have already been exposed to.
>
> (*Transcript* Vol. 40 at p. 94)

[417] According to Dr. Bombay, these collective traumas have had a cumulative effect over time, namely on individual and community health (see *Transcript* Vol. 40 at p. 83). In her words: "these collective effects are greater than the sum of the individual effects" (*Transcript* Vol. 40 at p. 82). Similar effects have been shown in other populations and in other groups who have undergone similar collective traumas, such as Holocaust survivors, Japanese Americans subjected to internment during World War II, and survivors of the Turkish genocide of Armenians (see *Transcript* Vol. 40 at pp. 111-112). To measure and describe the fact that some groups have undergone this chronic exposure to collective traumas, Dr. Maria Yellow Horse Brave Heart of the University of New Mexico coined the term "historical trauma", which is defined as "…the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma" (see testimony of Dr. Bombay, *Transcript* Vol. 40 at pp. 94-95).

[418] For Residential School survivors, Dr. Bombay indicated that they are more likely to suffer from various physical and mental health problems compared to Aboriginal adults who did not attend. For example, Residential School survivors report higher levels of psychological distress compared to those who did not attend, and they are also more likely to be diagnosed with a chronic physical health condition (see *Transcript* Vol. 40 at pp. 109-110).

[419] With respect to social outcomes, Dr. Bombay explained some of the intergenerational impacts of Residential Schools as follows:

> …numerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing -- being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools -- how they treated the children, actually instilled negative -- a lot of negative parenting practices, as this was the only models of parenting that they were exposed to.
>
> (*Transcript* Vol. 40 at p. 110)

[420] Generationally, the above noted impacts could descend from the Residential School survivor, to their children and then to their grandchildren. In this regard, Dr. Bombay indicated, relying on the 2002-2003 Regional Health Survey, that 43% of First Nations adults on-reserve perceived that their parents' attendance at Residential School negatively affected the parenting that they received while growing up; 73.4% believed that their grandparents' attendance at Residential School negatively affected the parenting that their parents received; 37.2% of First Nations adults whose parents attended Residential School had contemplated suicide in their life versus 25.7% whose parents did not; and, the grandchildren of survivors were also at an increased risk for suicide as 28.4% had attempted suicide versus only 13.1% of those whose grandparents did not attend Residential School (see *Transcript* at Vol. 40 pp. 110-11, 114-115).

[421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding

funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[423] AANDC submits that in determining what services to provide and how to deliver them, the FNCFS Agencies decide what is "culturally appropriate" for their community. The definition of what is culturally appropriate depends on the specific culture of each First Nation community. According to AANDC, this is best left to the discretion of the FNCFS Agencies or First Nations leadership.

[424] However, in the *2008 Report of the Auditor General of Canada*, the Auditor General indicated that "[t]o deliver this program as the policy requires, we expected that the Department would, at a minimum know what "culturally appropriate services" means" (at s. 4.18, p. 12). That is, AANDC had no assurances that the FNCFS Program funds child welfare services that are culturally appropriate. In response, AANDC developed a guiding principle for what it understands culturally appropriate services to be:

> the Government of Canada provides funding, as a matter of social policy, to **support the delivery of culturally appropriate services** among First Nation communities that **acknowledge and respect values, beliefs and unique circumstances** being served. As such, culturally appropriate services encourage activities such as kinship care options where a child is placed with an extended family member so that cultural identity and traditions may be maintained.
>
> (see *AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*, **emphasis added**)

[425] Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless. A glaring example of this is the denial of funding for Band Representatives under the *1965 Agreement* in Ontario. Another is the assumptions built into Directive 20-1 and the EPFA. If funding does not correspond to the

actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[426] Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.

[427] In this regard, it should be noted again that the federal government is in a fiduciary relationship with Aboriginal peoples and has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, more has to be done to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children. This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples.

iii. Canada's international commitments to children and Indigenous peoples

[428] As stated earlier, Amnesty International was granted "Interested Party" status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. Amnesty International argues that the interpretation and application of the *CHRA*, and in particular of section 5, must respect Canada's

international obligations as enunciated in various international United Nations instruments, such as the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Elimination of all Forms of Discrimination*, the *Universal Declaration on Human Rights* and the *Declaration on the Rights of Indigenous Peoples*.

[429] Amnesty International also refers to the views of treaty bodies, such as the United Nations Human Rights Committee (UNHRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC) in support of its argument that when a treatment discriminates both on the basis of First Nations identity and because of residency, it constitutes multiple violations of the prohibition of discrimination, which is a peremptory norm of international law. Specifically, Amnesty International points to these bodies' recommendations that special attention must be given to the prohibition of discrimination against children.

[430] In AANDC's view, the international law concepts and arguments advanced by Amnesty International do not assist the Tribunal in interpreting and applying the *CHRA* to the facts of this Complaint. Rather, they see Amnesty International's arguments as a claim that the Government of Canada is in violation of its international obligations, which is beyond the purview of the Complaint.

[431] In order to form part of Canadian law, international treaties need national legislative implementation, unless they codify norms of customary international law that are already found in Canadian domestic law. However, when a country becomes party to a treaty or a covenant, it clearly indicates its adherence to the contents of such a treaty or covenant and therefore makes a commitment to implement its principles in its national legislation. This public engagement is solemn and binding in international law. It is a declaration from the country that its national legislation will reflect its international commitments. Therefore, international law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313.

[432] The basic principle, which is not limited to *Charter* interpretation, is that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at p. 1056). That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).

[433] This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).

[434] In recent years, the Supreme Court has been willing to expand the relevance of international law and to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.

[435] Indeed, since the foundation of the United Nations (the UN), Canada has been actively involved in the promotion of human rights on the international scene. This began with the participation of the Canadian Director of the UN Secretariat's Division for Human Rights, Mr. John Humphrey, in writing the preliminary draft of the *Universal Declaration of Human Rights* (the *Universal Declaration*), in 1947. Today, Canada still voices itself as a strong supporter of human rights at the international level.

[436] Canada's international human rights obligations with respect to equality and non-discrimination stem from various legal instruments. Similarities can be seen in the wording of both domestic and international human rights instruments and in the scope and content of their provisions. The close relationship between Canadian and international human rights law can also be seen both in the periodic reports submitted by Canada to various international treaty monitoring bodies on the steps taken domestically to give effect to the obligations flowing from the treaties and in the monitoring bodies' recommendations to Canada.

[437] Developments in human rights at the national level followed the *Universal Declaration* at the international level. Adopted by the United Nations General Assembly by resolution 217A at its 3rd session in Paris on 10 December 1948, article 2 of the *Universal Declaration* sets out the principle of equality and non-discrimination in the enjoyment of human rights. Article 7 proclaims equality before the law and equal protection of the law. As indicated above, these equality principles are now ingrained in section 15 of the *Charter* and in the purpose of the *CHRA*.

[438] Initially, the *Universal Declaration* was intended as a guide for governments in their efforts to guarantee human rights domestically. It was also meant to enunciate human rights principles that would be further developed into a legally binding convention. This eventually led to the adoption of two covenants and two optional protocols that, along with the *Universal Declaration*, are considered to form the International Bill of Rights.

[439] The first of those two covenants was the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (the *ICCPR*), entered into force by Canada on August 19, 1976. At the same time, Canada recognized the jurisdiction of the UNHRC to hear individual complaints by ratifying the *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302. Articles 2 and 26 of the *ICCPR* guarantee equality and prohibit discrimination in terms that are similar to those of the *Universal Declaration*.

[440] In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the *ICCPR* should be understood to imply:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The UNHRC went on to state that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures (see at paras. 5, 8, and 12-13).

[441] The second of the two covenants that stem directly from the *Universal Declaration* is the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*), which Canada entered into force on August 19, 1976. Article 2(2) guarantees the exercise of the rights protected without discrimination. Article 10 provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

[442] The *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the ICESR (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence (see at para. 34).

[443] In a report to the CESCR outlining key measures it adopted for the period of January 2005 to December 2009 to enhance its implementation of the *ICESCR*, Canada reported on the FNCFS Program and declared that "[t]he anticipated result is a more secure and stable family environment and improved outcomes for Indian children ordinarily

resident on reserve" (see *Canada's Sixth Report on the United Nations' International Covenant on Economic, Social and Cultural Rights* (Minister of Public Works and Government Services, 2013) at para. 103). Canada also reported that it had begun transitioning the FNCFS Program to a more prevention based model, the EPFA, "…on a jurisdiction-by-jurisdiction basis with ready and willing First Nations and provincial/territorial partners […] with the goal to have all jurisdictions on board by 2013" (at paras. 105-106). While the Government of Canada made this undertaking, the evidence is clear that this goal was not met.

[444] In addition to the covenants that protect human rights in general, Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.

[445] The monitoring body of the *ICERD*, the CERD, has discussed the meaning and scope of special measures in the *ICERD*. It has expressed a similar understanding of substantive equality as Canadian courts (see CERD, General Recommendation No. 32, September 24, 2009 (CERD/C/GC/32) at para. 8). In addition, it recognized that "special measures" that may be called for in order to achieve effective equality "…include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus…" (at para. 13).

[446] In 2011, Canada reported to the CERD on the measures taken domestically to implement the *ICERD*. The CERD made several recommendations, including: "[d]iscontinuing the removal of Aboriginal children from their families and providing family

and child care services on reserves with sufficient funding" [see *Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the CERD*, 9 March 2012 (CERD/C/CAN/CO/19-20) at para. 19(f)].

[447] Although AANDC argues that the federal government is merely funding child welfare services on-reserve as a matter of social policy, budgetary measures in and of themselves are an important component of the steps to be taken in order to achieve substantive equality for First Nations children. The recommendation of the CERD, read with the views it expressed in General Recommendation No. 32, indicate that the CERD sees insufficient funding of child care services on reserve as inhibiting substantive equality for First Nations in the provision of child and family services.

[448] Another important international instrument aiming at the protection of a specific group of persons that is relevant to the present case is the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the *CRC*), entered into force by Canada on January 12, 1992. Children have the same human rights as adults. However, they are more vulnerable and in need of protection that addresses their special needs. Consequently, the *CRC* focuses on giving them the special care, assistance and legal protection that they need (see in particular articles 2, 3, 5, 7.1, 8.1, 9, 9.1, 18.1, 20, 25 and 30). Furthermore, when it ratified the *CRC*, Canada made a Statement of Understanding expressing its view that, in assessing what measures are appropriate to implementing the rights recognized in the *CRC*, the rights of Aboriginal children to enjoy their own culture, to profess and practice their own religion and to use their own language must not be denied (Convention on the Rights of the Child, Declarations and Reservations, Canada, online: United Nations <http://www.treaties.un.org>).

[449] The *CRC*'s monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25). With respect to childcare and support services, Canada reported that "[t]he Government of Canada plays a supporting role by providing a range of child and family benefits and transferring funds to other governments in Canada based on shared goals and objectives" (*Canada's Third and Fourth Reports on the Convention on the Rights of the Child*, 20 November 2009 at para. 49). Canada also

reported, as it did to the CESCR, that it is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach and that it expected that all agencies would be using the prevention-focused approach by 2013 (see at para. 98).

[450] In response to Canada, the CRC Committee expressed deep concern "…at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability" (*Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, 6 December 2012 (CRC/C/CAN/CO/3-4) at para. 55). Among other things, the CRC Committee recommended that Canada intensify cooperation with communities and community leaders to find suitable alternative care solutions for children in these communities [see at para. 56(f)]. It further recommended that Canada "[e]nsure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs" [see at para. 68(c)].

[451] Again, the recommendations of the CRC Committee reinforce the need for adequate funding, linked to the needs of First Nations children and families, in order to achieve substantive equality in the provision of child and family services on-reserve.

[452] Finally, the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*), which was adopted by the United Nations General Assembly on September 13, 2007, was endorsed by Canada on November 12, 2010. Article 2 provides that Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular rights based on their indigenous origin or identity. Although this international instrument is, at the time being, a declaration and not a treaty or a covenant, and is not legally binding except to the extent that some of its provisions reflect customary international law, when Canada endorsed it, it reaffirmed its commitment to "…improve the well-being of Aboriginal Canadians"(*Canada's Statement of Support on the United Nations*

Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca>).

[453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.

[454] The concerns expressed by international monitoring bodies mirror many of the issues raised in this Complaint. The declarations made by Canada in its periodic reports to the various monitoring bodies clearly show that the federal government is aware of the steps to be taken domestically to address these issues. Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

[455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

VI. Complaint substantiated

[456] In light of the above, the Panel finds the Complainants have presented sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *CHRA*. Specifically, they *prima facie* established that First Nations children and families living on reserve and in the Yukon are denied [s. 5(a)] equal child and family services and/or differentiated adversely [s. 5(b)] in the provision of child and family services.

[457] Through the FNCFS Program and other related provincial/territorial agreements, AANDC provides a service intended to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserve. With specific regard to the

FNCFS Program, the objective is to ensure culturally appropriate child and family services to First Nations children and families on reserve and in the Yukon that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case demonstrates that AANDC does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve.

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.

- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.

- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

[460] AANDC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds AANDC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, AANDC did not raise a statutory exception under sections 15 or 16 of the *CHRA*.

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with

provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In

this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

[467] The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.

VII. Order

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the

particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[470] The Complainants, Commission and Interested Parties request a variety of remedies to address the findings in this Complaint, including declaratory orders; orders to cease the discriminatory practice and take measures to redress or prevent it from reoccurring; and, compensation under sections 53(2)(e) and 53(3) of the *CHRA*.

[471] Furthermore, unrelated to the remedies requested under section 53(2), the Panel is also seized of a previous motion from the Complainants for costs related to the allegation that AANDC abused the Tribunal's process through its late disclosure of documents.

A. Findings of discrimination

[472] The Caring Society requests several declarations be made by the Tribunal in order to clarify which aspects of the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements are discriminatory. According to the Caring Society, this Tribunal routinely provides declaratory relief in the form of findings of discrimination.

[473] Indeed, throughout this decision, and generally at paragraph 458 above, the Panel has outlined the main adverse impacts it has found in relation to the FNCFS Program and other related provincial/territorial agreements. As race and/or national or ethnic origin is a factor in those adverse impacts, the Panel concluded First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and

family services by AANDC. The Panel believes these findings address the Caring Society's request for declaratory relief.

B. Cease the discriminatory practice and take measures to redress and prevent it

[474] Section 53(2)(a) of the *CHRA* allows the Tribunal to order that the person found to be engaging in the discriminatory practice "cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future". Furthermore, section 53(2)(b) allows the Tribunal to order that the person "…make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice".

[475] Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve.

[476] The Caring Society has provided a detailed methodology of how this reform can be achieved. It proposes a three-step process to redesign the FNCFS Program: (1) reconvene the National Advisory Committee to identify discriminatory elements in the provision of funding to FNCFS Agencies and make recommendations thereon; (2) fund tri-partite regional tables to negotiate the implementation of equitable and culturally based funding mechanisms and policies for each region; and, (3) develop an independent expert structure with the authority and mandate to ensure AANDC maintains non-discriminatory and culturally appropriate First Nations child and family services.

[477] Relatedly, the Caring Society also requests the public posting of information regarding the FNCFS Program, Jordan's Principle and children in care to educate FNCFS Agencies and the public about AANDC's child welfare policies, practices and directives and to help prevent future discrimination. Furthermore, it asks that AANDC staff be trained on First Nations culture, historic disadvantage, human rights and social work.

[478] The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted.

[479] Consistent with Canada's international obligations, Amnesty International stresses the need for a timely and effective remedy to achieve substantive equality for First Nations children and families on reserve, including increased funding, systemic structural changes to the way AANDC provides funding and a comprehensive and systematic monitoring mechanism for assuring non-repetition of breaches of the rights of First Nations children.

[480] AANDC submits that, while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted. According to AANDC, this is particularly appropriate in this case where the policy at issue is a complex scheme that takes into account competing priorities and must fit within broader governmental policy approaches. Such decisions are entitled to some considerable degree of deference and margin of reasonableness. Furthermore, AANDC argues the proposed remedy would intrude into the executive branch of government's role to establish public policy and direct the spending of public funds in accordance with fiscal priorities. AANDC is also concerned that some of the proposed reform measures are over-broad and beyond the scope of the Complaint. As such, it views aspects of the methodology proposed by the Complainants to be beyond the power of the Tribunal or any other court to order.

[481] The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[482] More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "…equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).

[483] That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.

[484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.

C. Compensation

[485] Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the

discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in wilfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000.

[486] The Caring Society asks the Panel to award compensation under section 53(3) for AANDC's wilful and reckless discriminatory conduct with respect to each First Nations child taken into care since February 2006 to the date of the award. In the Caring Society's view, as early as the 2000 findings of the *NPR*, AANDC voluntarily and egregiously omitted to rectify discrimination against First Nations children. It also notes that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. As a result, it believes the maximum amount of $20,000 should be awarded per child. The Caring Society requests the compensation be placed in an independent trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.

[487] The AFN also requests compensation. It asks for an order that it, AANDC, the Caring Society and the Commission form an expert panel to establish appropriate individual compensation for children, parents and siblings impacted by the child welfare practices on reserve between 2006 and the date of the Tribunal's order.

[488] Amnesty International submits any compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.

[489] AANDC submits there is insufficient evidence before the Tribunal to award the requested compensation. It argues the Caring Society's request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of AANDC's funding practices. According to AANDC, the Caring Society's assertions overlook the complex nature of factors that lead to a child being removed from his or her home and, given the absence of individual evidence thereon, it is impossible for the Tribunal to assess compensation on an individual basis. Furthermore, AANDC submits

the Complainants' authority to receive and distribute funds on behalf of "victims" has not been established.

[490] Similar to its comments above, the Panel has outstanding questions regarding the Complainants' request for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Again, within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered.

D. Costs for obstruction of process

[491] As part of a motion for disclosure decided in ruling 2013 CHRT 16, the Complainants requested costs from AANDC with respect to its alleged obstruction of the Tribunal's process. At that time, the Panel took the costs request under reserve and indicated the issue would be the subject of a subsequent ruling. The Complainants have reiterated their request for costs as part of their closing submissions on this Complaint. In response, AANDC reaffirmed its assertion that the Tribunal does not have the authority to award such costs.

[492] The Panel continues to reserve its ruling on the Complainants' request for costs in relation to the motion for disclosure decided in ruling 2013 CHRT 16. A ruling on the issue will be provided in due course.

E. Retention of jurisdiction

[493] The Complainants, Commission and Interested Parties request the Panel retain jurisdiction over this matter until any orders are fully implemented.

[494] As indicated above, the Panel has outstanding questions on the remedies being sought by the Complainants and Commission. A determination on those remedies is still to be made. As such, the Panel will maintain jurisdiction over this matter pending the determination of those outstanding remedies. Any further retention of jurisdiction will be re-evaluated when those determinations are made.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 26, 2016

VIII. Annex: exhibit references

1. **Exhibit HR-6, Tab 74**: *Glossary of Social Work Terms*, prepared for the Canadian Human Rights Commission by Michelle Sturtridge (February 2013)
2. **Exhibit HR-1, Tab 3**: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy ReviewFinal Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)
3. **Exhibit HR-3, Tab 29**: Department of Indian and Northern Affairs Canada, *First Nations Child and Family Services National Program Manual* (Ottawa: Social Policy and Programs Branch, 2004)
4. **Exhibit HR-13, Tab 272**: Indian and Northern Affairs Canada, *National Social Programs Manual* (January 31, 2012)
5. **Exhibit HR-11, Tab 214**: *Memorandum of Agreement Respecting Welfare Programs for Indians*, between the Government of Canada and the Government of the Province of Ontario (19 May, 1966)
6. **Exhibit HR-13, Tab 270**: *Arrangement for the Funding and Administration of Social Services*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of Alberta (23 January, 1992)
7. **Exhibit HR-13, Tab 275**: *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve*, between the Province of British Columbia and Her Majesty the Queen in right of Canada (March 30, 2012)
8. **Exhibit HR-13, Tab 274**: *Memorandum of Understanding for the Funding of Child Protection Services for Indian Children*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the province of British Columbia (28 March, 1996)
9. **Exhibit HR-13, Tab 305**: *Funding Agreement*, between Her Majesty the Queen in Right of Canada and the Government of Yukon (March 23, 2012)
10. **Exhibit HR-4, Tab 38**: *Fact Sheet – First Nations Child and Family Services* (October 2006), previously online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/fnsocec/fncfs_e.html>
11. **Exhibit HR-13, Tab 285**: Indian and Northern Affairs Canada, *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* by Megan Reiter, Barbara D'Amico & Steven Singer (March 16, 2011)

12. **Exhibit HR-15, Tab 404**: Indian and Northern Affairs Canada, *Reform of the FNCFS Program in Quebec (Information for the Deputy Minister)* by Rosalee LaPlante & Catherine Hudon (July 7, 2008)

13. **Exhibit HR-1, Tab 4**: John Loxley, Fred Wien and Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, a summary of research needed to explore three funding models for First Nations child welfare agencies* (Vancouver: First Nations Child and Family Caring Society of Canada, 2004)

14. **Exhibit HR-4, Tab 32**: Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program* (Departmental Audit and Evaluation Branch, March 2007)

15. **Exhibit HR-1, Tab 5**: Dr. Cindy Blackstock et al., *Wen:De We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005)

16. **Exhibit HR-1, Tab 6**: John Loxley et al., *Wen:De The Journey Continues* (Ottawa: First Nations Child and Family Caring Society, 2005)

17. **Exhibit HR-3, Tab 11**: Auditor General of Canada, *May 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2008)

18. **Exhibit HR-3, Tab 15**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Ottawa: Communication Canada-Publishing, March 2009, 40th Parliament, 2nd session)

19. **Exhibit HR-3, Tab 16**: *Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Presented to the House of Commons on August 19, 2009) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

20. **Exhibit HR-5, Tab 53**: Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011)

21. **Exhibit HR-4, Tab 45**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Ottawa: Public Works and Government Services Canada, February 2012, 41st Parliament, 1st session)

22. **Exhibit HR-5, Tab 54**: *Government Response to the Report of the Standing Committee on Public Accounts on Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Presented to the House of Commons on June 5, 2012) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

23. **Exhibit HR-11, Tab 239**: Indian and Northern Affairs Canada, Strategic Direction and Policy Directorate, Ontario Region, Discussion Paper: *1965 Agreement Overview* (November 2007)

24. **Exhibit HR-11, Tab 21**: Commission to Promote Sustainable Child Welfare, Discussion Paper: *Aboriginal Child Welfare in Ontario* (July 2011)

25. **Exhibit HR-14, Tab 362**: Letter from Mary Anne Chambers, Minster of Children and Youth Services, to John Duncan, Minister of Indian and Norther Affairs Canada (February 23, 2007)

26. **Exhibit HR-11, Tab 222**: Letter from Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario, to John Duncan, Minister of Indian and Norther Affairs Canada (March 25, 2011)

27. **Exhibit HR-11, Tab 223**: Letter from John Duncan, Minister of Indian and Norther Affairs Canada, to Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario (n.d. July 7, 2011?)

28. **Exhibit HR-11, Tab 224**: Department of Indian Affairs and Northern Development Canada, *Abinoojii Mental Health Services Mandate*, Information for Regional Director General and Assistant Reginal Directors General prepared by Nicole Anthony (April 1, 2011)

29. **Exhibit HR-11, Tab 209**: Ontario Association of Children's Aid Societies, *Child Welfare Report* (2012)

30. **Exhibit HR-13, Tab 281**: Letter from Glen Foulger, Revenue Manager, and Robert Parenteau, Director of Operations for Aboriginal Regional Support Services, Ministry of Children and Family Development, British Columbia, to Linda Stiller, Manager of Inter-Governmental Affairs, Indian and Northern Affairs Canada (June 22, 2007)

31. **Exhibit HR-14, Tab 353**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS)*, presentation to Policy Committee (April 12, 2005)

32. **Exhibit HR-6, Tab 64**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS) Q's and A's* (n.d.)

33. **Exhibit HR-13, Tab 330**: Indian and Northern Affairs Canada, *Explanations on Expenditures of Social Development Programs* (n.d.)

34. **Exhibit HR-14, Tab 354**: Indian and Northern Affairs Canada, *Social Programs*, presentation (February 7, 2006)

35. **Exhibit HR-6, Tab 81**: Indian and Northern Affairs Canada, *First Nation Child and Family Services: Putting Children and Families First in Alberta*, presentation [n.d.]

36. **Exhibit HR-3, Tab 17**: Letter from Micheal Wernick, Deputy Minister, Indian and Northern Affairs Canada, to Bruce Stanton, Chair of the Standing Committee on Aboriginal Affairs and Northern Development (11 September 2009)

37. **Exhibit HR-5, Tab 48**: Indian and Northern Affairs Canada, *Final Report: Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, September 2010)

38. **Exhibit HR-12, Tab 247**: Aboriginal Affairs and Northern Development Canada, *Final Report: Implementation Evaluation of the Enhanced Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, November 23, 2012)

39. **Exhibit HR-9, Tab 146**: Aboriginal Affairs and Northern Development Canada, *Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia*, presentation (April 27, 2012)

40. **Exhibit HR-12, Tab 248**: Aboriginal Affairs and Northern Development Canada, *First Nations Child and Family Services Program (FNCFS) The Way Forward*, presentation by Odette Johnson, Director of the Children and Family Services Directorate of AANDC to Françoise Ducros, Assistant Deputy Minister, ESDPPS (August 29, 2012)

41. **Exhibit HR-13, Tab 288**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (October 31, 2012)

42. **Exhibit HR-13, Tab 289**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (November 2, 2012)

43. **Exhibit R-14, Tab 85**: Aboriginal Affairs and Northern Development Canada, *British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework*, working draft (December 19, 2013)

44. **Exhibit HR-14, Tab 351**: Indian and Northern Affairs Canada, *Comparability of Provincial and INAC Social Programs Funding*, attachment to an email sent by Serge Menard, Policy Analyst, Social Policy and Programs Branch (October 16, 2008)

45. **Exhibit HR-3, Tab 20**: *Private Members' Business*, 39th Parliament, 2nd Session, *Hansard*, 012 (October 31, 2007); and, *Vote No. 27*, 39th Parliament, 2nd Session, Sitting No. 36 (December 12, 2007)

46. **Exhibit R-14, Tab 41**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Indian and Northern Affairs Canada and Health Canada (June 24, 2009)

47. **Exhibit HR-11, Tab 235**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Aboriginal Affairs and Northern Development Canada and Health Canada (January 2013)

48. **Exhibit R-14, Tab 39**: Health Canada, *Update on Jordan's Principle: The Federal Government Response*, presentation (June 2011)

49. **Exhibit HR-15, Tab 420**: *Jordan's Principle Case Conferencing to Case Resolution Federal/Provincial Intake Form* (November 21, 2012)

50. **Exhibit R-14, Tab 54**: *Federal Focal Points Tracking Tool Reference Chart – Manitoba Region* (January 2013)

51. **Exhibit HR-6, Tab 78**: Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009)

52. **Exhibit HR-3, Tab 10**: Government of Canada, *Statement of Apology - to former students of Indian Residential Schools* (June 11, 2008)

53. **Exhibit HR-14, Tab 340**: Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), 48(4) Transcultural Psychiatry 367

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: 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)

Decision of the Tribunal Dated: January 26, 2016

Dates and Place of Hearing: February 25, 26, 27 and 28, 2013;
March 1, 2013;
April 2, 3, 4, 8 and 9, 2013;
May 13, 14, 21 and 22, 2013;
July 15, 16, 17, 19, 22 and 24, 2013;
August 7, 12, 28, 29 and 30, 2013;
September 3, 4, 5, 6, 11, 12, 23, 24, 25 and 26, 2013;
October 28, 29 and 30, 2013;
November 6, 2013;
December 5, 9 and 10, 2013;
January 9, 10, 13, 14 and 15, 2014;
February 10, 11, 12 and 13, 2014;
March 17, 18, 19 and 20, 2014;
April 2, 3, 4 and 30, 2014;
May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;
October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

Appearances:

Sébastien Grammond, Robert Grant, David Taylor, Anne Levesque, Sarah Clarke, Michael Sabet, Paul Champ and Yavar Hameed, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Philippe Dufresne, Sarah Pentney and Samar Musallam, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

TAB 5

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Introduction

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families…for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities. (see 1996 report of the *Royal Commission on Aboriginal Peoples (RCAP), Gathering strength,* vol. 3, p. 10 part of the Tribunal's evidence record).

[1] **The Special Place of Children in Aboriginal Cultures**

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. (see *RCAP, Gathering strength* vol. 3, p. 21).

[2] This Panel recognizes the shame and the pain and suffering experienced by children, who were deprived of this vital right to live in their families and communities and, also the shame, pain and suffering, that their families and communities experienced as a result of colonization, racism and racial discrimination.

[3] This shame is not for you to bear, it is one for the entire Nation of Canada to bear, in the hope of rebuilding together and achieving reconciliation.

II. Context

[4] In *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 [the *Decision*], this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family

services, pursuant to section 5 of the *Canadian Human Rights Act,* RSC 1985 c H-6 (the *CHRA* or the *Act*).

[5] The Panel generally ordered Aboriginal Affairs and Northern Development Canada (AANDC), now Department of Indigenous Services Canada (DISC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario* (the *1965 Agreement*) to reflect the findings in the *Decision*. Indigenous and Northern Affairs Canada (INAC) was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[6] In the 2016 CHRT 2 *Decision*, at para. 485, the Panel wrote:

> Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in willfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000 under the statute.

[7] The Panel had outstanding questions for the parties in regards to compensation and deferred its ruling to a later date after its questions had been answered. Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long-term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The Panel advised the parties it would address the outstanding questions on remedies in three steps.

> First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. […]
>
> Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring

> will be dealt with as a second step. Finally, the Panel will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*. (see 2016 CHRT 10 at, paras. 4-5).

[9] The Panel reiterated its desire to move on to the issue of compensation in a 2018 ruling and wrote as follows:

> The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the *Decision*. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief. (see 2018 CHRT 4 at, para. 385).
>
> Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc. (see 2018 CHRT 4 at, para. 386).
>
> Moreover, the Panel added that it took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now. (see 2018 CHRT 4 at, para. 387).

[10] The Panel also said:

> Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here. (see 2018 CHRT 4 at, para. 388).

[11] In terms of the impacts of this case on First Nations children and their families the Panel added:

> In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination. (see 2018 CHRT 4 at, para. 389).

[12] After having addressed other pressing matters in this case, the Panel provided clarification questions to the parties on the issue of compensation. The Panel allowed the parties to answer those questions, to file additional submissions and to make oral arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse

effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group, namely First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the Attorney General of Canada's (AGC's) position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The First Nations Child and Family Caring Society of Canada (Caring Society) states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations children and families. Canada also ignored evidence-informed solutions that could have redressed the discrimination well before the complaint was filed, and certainly in advance of the hearings. Indeed, the Tribunal's findings are clear that Canada was reckless and was often more concerned with its own interests than the best interests of First Nations children and their families.

[18] The Caring Society submits that this case embodies the "worst case" scenario that subsection 53(3) was designed for, and is meant to deter. Multiple experts and sources, including departmental officials, alerted Canada to the severe and adverse effects of its FNCFS Program. Over many years, Canada knowingly failed to redress its discriminatory conduct and thus directly and consciously contributed to the suffering of First Nations children and their families. The egregious conduct is more disturbing given Canada's access to evidence-based solutions that it ignored or implemented in a piecemeal and inadequate fashion.

[19] The Caring Society further argues that the evidence is clear that the maximum amount of $20,000 in special compensation is warranted for every First Nations child affected by Canada's FNCFS Program and taken into out-of-home care since 2006. The Government of Canada willfully and recklessly discriminated against First Nations children under the FNCFS Program and it was not until the Tribunal's decision and subsequent compliance orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), 2018 CHRT 4 and 2019 CHRT 7) that Canada has slowly started to remedy the discrimination.

[20] As such, the Caring Society submits that Canada ought to pay $20,000 for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 *Decision*.

[21] Also, the Caring Society adds that every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care between 2006 and the point when the FNCFS Program is free from perpetuating adverse impacts is entitled to $20,000 in special compensation under subsection 53(3) of the *CHRA*. Canada is keenly aware that many of the discriminatory aspects of the FNCFS Program remain unchanged and until long-term reform is complete, First Nations children will continue to experience discrimination. Those children deserve to be recognized and acknowledged, and Canada's continuation of this conduct in this program should be denounced, to (in the words of Mandamin J.) "provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 at, para. 115) in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

[22] The Caring Society contends that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children. Nonetheless, Canada did not take meaningful steps to implement Jordan's Principle for nearly another decade, after this Tribunal's numerous decisions and non-compliance orders requiring it to do so. By failing to implement it and making the informed choice to deny the true meaning of Jordan's Principle, Canada knowingly and recklessly discriminated against First Nations children. The Caring Society submits that the evidence in this case supports an award for special compensation pursuant to subsection 53(3) of the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

[23] The Caring Society is of the view that the special compensation ordered for (i) each First Nations individual affected by Canada's FNCFS Program who, as a child, was been taken into out-of-home care, since 2006; and (ii) for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's willful and/or reckless discriminatory approach to Jordan's Principle from December 2007 to November 2017, should be paid into a trust for the benefit of those children.

[24] The Caring Society is requesting an order similar to that granted by this Tribunal in 2018 CHRT 4: an order under section 53(2)(a) of the *CHRA* for the Caring Society, the Assembly of First Nations (AFN), the Commission, Chiefs of Ontario, Nishnawbe Aski Nation and Canada to consult on the appointment of seven Trustees. If the parties cannot agree on who the trustees should be, the seven trustees of the Trust would be appointed by order of the Tribunal. The mandate of the Trustees will be to develop a trust agreement in accordance with the Panel's reasons, outlining among other things: (i) the purpose of the Trust; (ii) who the beneficiaries are; (iii) how a beneficiary qualifies for a distribution; (iv) programs that will be eligible and in keeping with the objective of the Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Trust will be administered.

[25] The Caring Society further requests an order that the parties report back within three months of the Panel's decision, with respect to the progress of the appointment of the Trustees. The Caring Society believes that an in-trust remedy will provide a meaningful remedy for First Nations children and families impacted by the willfully reckless discriminatory impact of the FNCFS Program and Jordan's Principle. It enables persons who were victims of Canada's discriminatory conduct to access services to remediate, in part, the impacts of discrimination.

[26] The Caring Society supports AFN's request for compensation in relation to both pain and suffering (section 53(2)(e)) and willful and reckless discrimination (section 53(3)) of the *CHRA*. Certainly, the victims in this case have experienced pain and suffering, with some First Nations children losing their families forever and some First Nations children losing their lives. In addition, on a principled basis, the Caring Society agrees with the AFN's request for individual compensation. We also recognize that an individual compensation process will require special and particular sensitivities regarding the significant issues of consent, eligibility and privacy. Many of the victims of Canada's discriminatory conduct are children and young adults who are more likely to experience historical disadvantage and trauma.

[27] According to the Caring Society, any process that is put in place will need to adopt a culturally informed child-focused approach that attends to these realities. Such persons

may also have their own claims against Canada, whether individually or as part of a representative or class proceeding, and it is not possible for the parties to ascertain the views of all such potential claimants on individual compensation through the Tribunal's process. The Caring Society is also aware of the significant and complex assessment processes required to administer and deliver individual compensation. Best estimates suggest that an order for individual compensation for those taken into out-of-home care could affect 44,000 to 54,000 people. In terms of Jordan's Principle, after the Tribunal issued its May 26, 2017 Order, the number of approvals significantly increased (indeed, over 84,000 products/services were approved in fiscal year 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.

[28] Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully advances that the Tribunal, assisted by all of the parties, is in the best position to decide the financial remedy at this stage of the proceeding. The Tribunal has experience in awarding financial compensation to victims of discrimination and has a sense, through a common-sense approach, of what is and what is not reasonable. Indeed, this Panel is expertly immersed in this case. It understands the FNCFS Program and Jordan's Principle, the impacts experienced by First Nations children and the importance of ensuring long-term reform. It has also demonstrated that the centrality of children's best interests in decision-making which is essential to justly determining how the victims of discrimination in this case ought to be compensated.

[29] The victims' rights belong to the victims. While the Caring Society supports the request made by the AFN, the Caring Society's request for an in-trust remedy does not detract or infringe on victims' rights to directly seek compensation or redress in another forum. It is for this reason that the Caring Society respectfully seeks an order under subsection 53(3) that Canada pay an amount of $20,000 as compensation, plus interest pursuant to s. 53(4) of the *CHRA* and Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 until long-term reform is in place and for every First Nations child who did not receive an eligible service or product pursuant

to Canada's discriminatory approach to Jordan's Principle since December 12, 2007 to November 2017.

[30] The Assembly of First Nations (AFN) is requesting an order for compensation to address the discrimination experienced by vulnerable First Nations children and families in need of child and family support services on reserve.

[31] The AFN submits that the Panel stated in the main decision: "Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Residential Schools system is one of the darkest aspects of Canadian history….the effects of Residential Schools continue to impact First Nations children, families and communities to this day"(see 2016 CHRT 2 at, para. 412).

[32] The AFN submits the pain and suffering of the victimized children and families is significant according to the Affidavit of Dr. Mary Ellen Turpel-Lafond affirmed April 3, 2019, and it is also directly linked to the Respondent's discriminatory practice. Based on the circumstances in this case, the AFN seeks on behalf of individual First Nations children and families the maximum compensation available under s. 53(2)(e) and 53(3) of the *CHRA*, on a per individual basis for any pain and suffering. Given the voluminous evidentiary record before the Tribunal in this matter, and the particular experience to date this Panel has had presiding over this matter, as well as the Panel's expertise under the *CHRA*, the AFN believes the Tribunal is the appropriate forum to address individual compensation given the unique circumstances of this case and based on an expert panel advisory.

[33] Individuals subjected to the Respondent's discriminatory practice experienced a great deal of pain and suffering and should receive compensation, in particular those who were apprehended as a result of neglect. The AFN notes that some individuals were apprehended as a result of abuse and access to prevention programs may have prevented such abuse. Thus, in these circumstances a need for a case-by-case approach becomes apparent thereby lending credibility to the AFN's suggested approach to establishing an expert panel to address individual compensation. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including

hearsay. Direct evidence from each individual impacted by the Respondent's discriminatory practice is not necessarily required to issue an award for pain and suffering. Therefore, the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[34] The AFN has been mandated by resolution following a vote by Chiefs in Assembly to pursue compensation for First Nations children and youth in care, or other victims of discrimination, and to request the maximum compensation allowable under the *Act* based on the fact that the discrimination was wilful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis (see Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

[35] The AFN submits that compensation be awarded to each sibling, parent or grandparent of a child or youth brought into care as a result of neglect or medical placements resulting from the Respondent's discriminatory practice, and that such compensation be the maximum allowable under the *Act*.

[36] The AFN submits no further evidence is required from the AFN or other parties to support and award the maximum compensation to the victims of discrimination as requested, but that the Tribunal can rely on its findings to date.

[37] Both the Caring Society and the AFN submit it would be a cruel process to require children to testify about their pain and suffering. Moreover, requiring each First Nations child to testify before the Tribunal is inefficient and burdensome.

[38] The AFN further submits that the effects of the Respondent's discriminatory practices are real and they are significant. As the Panel found, the needs of First Nations children and families were unmet in the Respondent's provision of child and family services which the AFN submits has caused pain and suffering for which compensation ought to be awarded. The discrimination as found by the Panel was occurring across Canada.

[39] The AFN recognizes that the payment of compensation to the victims of discrimination may be a significant endeavor, considering the large number of individuals and time period. An independent body, such as the Commission, could facilitate the compensation scheme and payments. Whichever body is tasked with issuing the compensation, such body will require timely, accurate and all relevant records from the Respondent. Provisions will need to be adopted to protect the victims from unscrupulous money lenders and predatory businesses. Finally, a notice plan may facilitate connecting individuals who are entitled to compensation payments.

[40] The AFN's remedial request suggests that an expert panel be established and mandated to address individual compensation to the victims of the Respondent's discriminatory practice as an option. This function can be carried out by the Canadian Human Rights Commission should they elect to take on this task. If so, the Respondent should be ordered to fund their activities.

[41] Additionally, the AFN states that the request for compensation to be paid directly to the victim of the Respondent's discrimination is not unprecedented, and in fact many parallels can be drawn from the Indian Residential School Settlement Agreement (IRSSA). Parallels such as the Common Experience Payment (CEP) and its surrounding processes, as well as the Independent Assessment Process (IAP), provide guidance in how a body issuing payments could be established to address individual compensation with respect to First Nations children and families discriminated against and victimized in this case.

[42] The AFN also submits that its National Chief and Executive Committee work in collaboration with the Caring Society to ensure the administration and disbursement of any payments to victims of discrimination come from funds other than the awards to the victims, so that no portion of the quantum awarded be rolled back or claimed by lawyers or legal representatives for assisting the victims.

[43] Overall, the AFN is interested in establishing a remedial process that may include both monetary and non-monetary remedies under a process overseen by an independent body. Given the potential for conflicts of interest in such a process, there would be a need to ensure matters dealt with in the remedial process are free from the influence of the

parties, in particular Canada. In the IRSSA, the IAP process was isolated from the outside litigation amongst the parties for this reason.

[44] The proposed remedial process to be overseen by the requested independent body would be non-adversarial in nature, which is another hallmark from the IRSSA that the AFN submits could be carried over in this case. Also, it could be based on an application process that is designed to be streamlined and efficient.

[45] The AFN advances that it is aware of the proposed class proceeding filed in Federal Court last month. Currently, the class action is in the beginning stages and is uncertified, and the nature of the action is very similar to the case at hand. The AFN questions the accuracy of paragraph 11 of the statement of claim which reads mid-paragraph: “No individual compensation for the victims of these discriminatory practices has resulted or will result from the Tribunal decision”. It would appear the claimant is anticipating that no individual compensation will result in this case before the Tribunal. In response, the AFN and the other parties have planned all along that compensation was a long-term remedy that should be addressed after the interim and mid-term relief was addressed. The parties are currently carrying out that plan. The AFN submits the Panel ignore that particular submission.

[46] The Chiefs of Ontario (COO) did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties’ requests for compensation.

[47] The Nishnawbe Aski Nation’s (NAN) goal is to ensure First Nations children receive compensation for the discrimination found by this Tribunal. The NAN is in support of the remedies sought by the Caring Society.

[48] The AGC, relying on a number of cases, makes several arguments that will not be reproduced in their entirety. Rather, given that the Panel considered all of them, it is appropriate to summarize them here and for the same above-mentioned reasons.

[49] The Attorney General of Canada (AGC) submits that remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing

the systemic problems identified, and not awarding monetary compensation to individuals. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal's past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

[50] Moreover, the AGC states that the C*HRA* does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the *Act*. A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court (see T-402-19).

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

[52] Also, the AGC argues, that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies. Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms. This complaint is advanced by two organizations, the AFN and the Caring Society who sought systemic changes to remedy discriminatory practices. It is not a complaint by individuals seeking compensation for the

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

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

[54] Furthermore, the AGC submits the evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

[55] Likewise, the AGC adds that in their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. The framing of the complaint is important. In the *Moore v. British Columbia (Education),* 2012 SCC 61, [*Moore*] case, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination.

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

[57] According to the AGC, this Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered. In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies. An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim. The AGC submits further that no case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at least one representative individual complainant providing the evidence needed to properly assess their compensable damages.

[58] Moreover, the AGC advances that neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties, and to extrapolate from the evidence of a group of representative complainants. However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis. The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence, and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62).

[59] The AGC adds that the Commission's submissions on compensation indicate that this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation "en masse" (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991, although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not).

[60] In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995 (CHRT) at paras. 496-498. The *Canada Post* case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims.

[61] The AGC further contends that the Complaint is not a class action and the remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court.

[62] Also, the AGC submits that in *Moore v. British Columbia (Education),* 2012 SCC 61, [*Moore*], the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education. The B.C. Tribunal relied on that evidence to award systemic remedies. However, the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint *as framed by the Complainant*" (para. 61 [emphasis in original]). The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim. According to the AGC, while the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The AGC adds that the lack of evidence of harm suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

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

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

[64] Furthermore, the AGC adds that given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec's Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights in the civil law context in *Commission des droits de la personne et des droits de la jeunesse c. Québec (Procureur général),* 2007 QCTDP 26 (CanLII). The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court." (para. 105). The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members" (para. 109). Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute. The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where statutory conditions are met and therefore cannot be transplanted into Tribunal proceedings without legislative authority.

[65] The AGC also argues that while not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the Federal Court Rules, which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the Rules to accommodate class

proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

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

[67] The AGC contends there is no legal basis for compensating the Complainants. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act*. The Tribunal's task is to adjudicate the claim before it. Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint. The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act*.

[68] In regards to pain and suffering, the AGC adds that section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice. However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice." (*Canada (Attorney General) v. Hicks*, 2015 FC 599 at, para. 48). Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices'' (*Closs v. Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30 at, para. 84) with regards to the complainants. Redressing

the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

[69] In regards to pain and suffering, the AGC adds that for discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behavior that is devoid of caution or without regard to the consequences of that behavior. Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination. The complainant organizations were not victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with orders.

[70] The AGC submits this claim raises novel issues. There were no orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties" (2017 CHRT 14 at, para. 32). They do not demonstrate that Canada has acted without caution or regard to the consequences of its behavior. Concerns about the adequacy of the Government's response to studies and reports in the past do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons. Since the AGC's submissions, Bill C-92 received Royal assent.

[71] The AGC argues this Tribunal understands the limitations of its remedial jurisdiction. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised

reasonably and on a principled basis considering the link between the discriminatory practice and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.

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

[73] Also, according to the AGC, the Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In Re: *C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) [*C.N.R.*], the Court found that compensation is limited to victims which made it “impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination” where, as here “by the nature of things individual victims are not always readily identifiable”.

[74] The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination. As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint: “where the breach of a human rights obligation raises structural or systemic issues --- such as longstanding policy practices that discriminate against Indigenous women - the underlying violations must be addressed at the structural or systemic level" (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. 18).

[75] The AGC also argues that any compensation must be paid directly to victims of the discrimination. There is no legal basis for the Caring Society's requests that compensation

for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs. Compensation is only payable to victims under the terms of the *Act* and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

[76] Furthermore, the AGC contends that compensation is inappropriate in claims alleging breaches of Jordan's Principle in light of the fact there is no basis to award compensation under the *Act* to either the complainant organizations or non-complainant individuals for alleged breaches of Jordan's Principle. As the Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.

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

[78] According to the AGC, the Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation. The AGC submits neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

[79] The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the IRSSA and the AFN is requesting payment of compensation directly to victims and their families. The AGC says the Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the Tribunal question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

[80] Finally, according to the AGC, compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

[81] The Commission while not making submissions on the remedies sought made helpful legal arguments on the issue of compensation and in response to the AGC's legal position on this issue which will be summarized here. The Commission agrees that any award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses (emphasis ours).

[82] The Commission further submits that awards for pain and suffering under the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization. The award rightly includes compensation for harm to a victim's dignity interests. The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim. Medical evidence is not needed in order to claim compensation for pain and suffering, although such evidence may be helpful in determining the amount, where it exists.

[83] Furthermore, the Commission submits the Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment. The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions, and (ii) Supreme Court of Canada case law recognizing that children are a highly vulnerable group.

[84] According to the Commission, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.

[85] Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario Human Rights Code, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [*Code*] by effectively setting a "licence fee" to discriminate" (*Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, para. 59).

[86] The Commission adds that the Court of Appeal noted in *Lemire v. Canada (Human Rights Commission),* 2014 FCA 18, [*Lemire*], the wording of s. 53(3) of the *CHRA* does not require proof of loss by a victim. In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.

[87] Additionally, the Commission argues that sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

[88] Also, the Commission advances the argument that in most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[89] In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

[90] The Commission further submits that in *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) [*Walden*], the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[91] The Commission notes that in questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding

compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.

[92] The Commission further notes that in her questions, the Panel Chair asked if it might instead be preferable to have an expert panel do the preliminary work of identifying victims, and present their circumstances to the Tribunal for determination. If the Tribunal is inclined to go in this direction, the Commission simply observes that the Tribunal's remedial powers only allow it to make orders against the person who infringed the *CHRA* here, Canada. As a result, any order regarding an expert panel should not purport to bind the Commission or any other non-respondent to participate on an expert panel.

[93] Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

V. The Tribunal's authority under the *Act* and the nature of the claim

[94] The Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for *example Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]*; Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII) at para. 81; and *Canada* (*Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) at para. 62 [*Mowat*]).

> The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, 158, and further articulated by the *Supreme*

Court of Canada in Winnipeg School Division No. 1 v. Craton 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156 where the court stated:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577) (see also 2018 CHRT 4 at, para. 29).

It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered (…) (see 2018 CHRT 4 at, para. 30).

It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at, paras. 25 and 55), (see also 2016 CHRT 2 at, para. 469).

[98] Moreover, the Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented. (see *Tanner v. Gambler First Nation,* 2015 CHRT 19 at para. 161 (citing *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII), at para. 37); and *Hughes v. Elections Canada,* 2010 CHRT 4 at para. 50).

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para. 4, Translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

> "Complaint forms are not to be perused in the same manner as criminal indictments". (*Translation, see Canada (Procureur général) c. Robinson,* [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para. 22).

> « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

> Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,
>
> (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada*, 2013 CHRT 7, at para. 3).
>
> It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway,* 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:
>
> > . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. … As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement".
>
> (…)
>
> As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at, paras. 13 and 36).

[103] It is useful to look at the claim in this case which in this case includes the complaint, the Statement of Particulars and the specific facts of the case to respond to the AGC's argument that this is a systemic claim and not suited for awards of individual remedies.

[104] The complaint form in this case alleges that: ''the formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures''. These services are vital to ensuring the First Nations children have the same chance to stay safely at home with support services as other children in Canada (see Complaint form at, pages 2-3).

[105] The Panel already found in past rulings that it is the First Nations children who suffer and are adversely impacted by the underfunding of prevention services within the federal funding formula. The Panel considered the claim including the complaint, Statement of Particulars as well as the entire evidentiary record, arguments, etc. to arrive at its findings. As exemplified by the wording above, the complaint specifically identifies First Nations children and the AFN and the Caring Society advanced the complaint on their behalf.

[106] Furthermore, the Statement of Particulars of the Caring Society and the AFN of January 29, 2013: "request pain and suffering and special compensation remedies under section 53(2) (e) of the *CHRA* and (f)…'' (see page 7 at para. 21 reproduced below):

> Relief requested:
>
> Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to: (a) As compensation, subject to the limits provided in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

[107] In this case, the fact that there is no section 53 (2) (f) in the *CHRA* but rather a paragraph 3 is a small error that does not change the nature of the requested remedies. Moreover, this error was later corrected in the Caring Society's final submissions.

[108] It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

[109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

[110] As shown by the AGC's position on the relief requested by the Complainants:

> With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering and for certain services) and 21(5) of the Complainants Statement of particulars, the requested relief is beyond the jurisdiction of the Tribunal (...) No compensation should be awarded under section 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meet the definition of victim within the section. In the alternative, any compensation awarded under s.53(2)(e) should be limited to a maximum of $40,000 (calculated as follows: the maximum available, $20,000, multiplied by the number of Complainants, two, equals $40,000). (See AGC particulars at page 15, para. 64 and 66).

[111] The Panel finds this demonstrates that the AGC was fully aware that compensation remedy for victims/survivors who were not the Complainants was part of the Complainants' claim before the Tribunal. Moreover, it admitted that compensation was an issue to be determined by the Tribunal in a Consultation Protocol signed in these proceedings by all parties and by Minister Jane Philpott, as she then was, on behalf of Canada:

> WHEREAS, the Tribunal retained jurisdiction to ensure the implementation of its Decision, and subsequently directed that implementation be done in three steps, namely: (1) immediate relief; (2) mid to long term relief; and (3) compensation, and has reserved its ruling regarding the Complainants' motion for an award against Canada in relation to the costs of its obstruction of the Tribunal's process in relation to document disclosure and production (see Consultation Protocol, signed March 2, 2018 at page. 2)
>
> The Tribunal has directed that the implementation of its *Decision* be done in three steps, namely: (1) immediate relief, (2) mid to long term relief and (3) compensation. Canada commits to consult in good faith with the Complainants, the Commission and Interested Parties on all the three steps, to the extent of their respective interests and mandates. (see Consultation Protocol, signed March 2, 2018 at, para. 4, page. 7)

VI. Victims under the *CHRA*

[112] Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:

> 40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> Consent of victim
>
> (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

[113] This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent.

[114] In this case, the Commission referred the complaint to the Tribunal and does not oppose the remedy sought on behalf of victims.

[115] Consequently, the Panel agrees with the Commission that the *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[116] Additionally, the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, discussed the meaning of the term victim where the Court stated:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no

> means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

[117] The Tribunal has already distinguished complainants from victims who are not complainants within the *CHRA* framework:

> On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding. (see *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada),* 2011 CHRT 19 at, para. 25).

[118] This speaks against the AGC's argument that the Tribunal cannot make awards to individuals that are not complainants and to the other AGC's argument that the Tribunal has no jurisdiction to award remedies for a "group" of victims represented by an organization.

[119] In *Walden,* both the Tribunal's liability and remedy decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage loss including benefit. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue (see *Walden v. Canada (Social Development),* 2011 CHRT 19 (CanLII), at para. 3).

[120] While the end result in that case was a consent order on pain and suffering remedies, the Tribunal could not make orders that would fall outside its jurisdiction under the *Act*.

[121] The AGC relies also on a Federal Court case to support its position that compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights

complaints, as recognized by the Federal Court in *Canada* (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62.

[122] The Panel disagrees with the AGC's interpretation and application of the Federal Court decision to our case. The analysis, the factual matrix and the findings from the Federal Court are different from the case at hand. The Panel finds it does not support the AGC's position to bar the Tribunal from awarding compensation to non-complainant victims in this case.

[123] This case was always about children as exemplified by the claim written in the complaint and in the Statement of Particulars and the Tribunal's decisions. Moreover, the AGC is aware that the Tribunal views this case as being about children. What is more, the Panel agrees that AFN and the Caring Society filed the complaint on behalf of a representative group who are identifiable by specific characteristics if not by name. Furthermore, the Panel believes it is important to consider the nature of this case where the victims/survivors are part of a group composed of vulnerable First Nations children.

[124] While there are other forums available for filing representative actions, the AFN stated that Tribunal was carefully chosen in this case due to the nature of the claim, but, also due to the means of redress available under the *CHRA* for members of a vulnerable group on whose behalf the AFN has advanced a case of discrimination contrary to the *Act*.

VII. Pain and suffering analysis

[125] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *CHRA*). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) [*Walden*]). In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 (CanLII) at para. 27), (see 2019 CHRT 7 at, para. 47). Therefore, in the

presence of sufficient evidence and a remedy that flows from the claim, the Tribunal may make the orders it finds appropriate.

[126] In a recent Tribunal decision, *Lafrenière v. Via Rail Canada Inc.,* 2019 CHRT 16, at para. 193 Member Perreault wrote about the pain and suffering award under section 53(2)(e) of the *CHRA*:

> However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[127] The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (*see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 [*Jane Doe*], at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para. 115*; and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).

[128] Furthermore, "when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. (…) However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances" (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para. 115 recently cited in *Jane Doe,* at, para. 29).

[129] The pain and suffering remedy sought as part of this ruling is found at para. 53 (2)(e) of the *CHRA*. Section 53 (2) reads as follows:

> Complaint substantiated

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[130] Section 53 imposes a logical requirement for any award of remedies that is, the remedy should flow from a finding that the complaint is substantiated. If this is the case, an array of remedies is available to the victim of the discriminatory practice. The wording of section 53(2) is unambiguous and allows the victim of the discriminatory practice to obtain any remedies listed in section 53 as the member or panel finds appropriate: ‘’(..) and include in the order any of the following terms that the member or panel considers appropriate’’. It is clear that the language of the *CHRA* does not prevent awards of multiple remedies even if systemic remedies have been ordered.

[131] The AGC's argument that systemic discrimination requires systemic remedies is correct. However, the AGC's argument that it precludes other awards of remedies as the Panel deems appropriate in light of the facts and the evidence before the Tribunal is incorrect.

[132] The way to determine the issue is to look at the Statute first:

> The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd*. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21, see also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 at, para. 12).

[133] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para. 13).

[134] Consequently, analyzing the specific facts of the case and weighing the accepted evidence in the Tribunal record is of paramount importance. Indeed, the Federal Court of Appeal recently described the exercise of statutory interpretation:

> To discern the meaning of "compensate", the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by

> reading paragraph 53(2)(e) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the *Act*. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect. (see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at, paras. 23).

[135] The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. As mentioned above, one should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[136] The AGC relies on the *Moore* case to support its assertion that individual remedies cannot be awarded in a systemic case. However, the Panel disagrees with the AGC's interpretation of this case.

[137] The Supreme Court decision in *Moore* did not say that both systemic and individual remedies cannot be awarded to victims of discriminatory practices rather it emphasizes the need for the remedy to be connected to the claim and the need for an evidentiary basis to make orders. The case of Jeffery Moore was a complaint of individual discrimination where the Tribunal went beyond the claim and made findings of systemic discrimination. This is the issue discussed by the Supreme Court which described the case as follows:

> This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public-school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[138] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a "service (…) customarily available to the public", contrary to s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (*Code*). (see *Moore* at paras. 1-2).

[139] Additionally, the Supreme Court discussed the remedy as follows: ‘’But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission’’. (see *Moore* at paras. 64).

[140] The case at hand on the contrary, is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families.

[141] It is worth mentioning that the *Decision* on the merits begins with this important finding: “**This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.**” (see 2016 CHRT 2, at para. 1, emphasis added).

[142] In claiming there is no evidence in the record to support compensation to individual victims who are not a complainant in this case, the Panel finds that the AGC does not consider section 50 (3)(c) of the *CHRA*: “(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law”. The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[143] The word “may” suggests that this limitation is imposed or not at the discretion of the Member or Panel.

[144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case.

[145] In *Canada (Social Development) v. Canada (Human Rights Commission*), 2011 FCA 202 at para. 73 [*Walden* FCA], as mentioned by the Commission, the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[146] The Panel does not accept that a systemic case can only prompt systemic remedies. As mentioned above, nothing in the *CHRA* prohibits the Tribunal's discretion to order systemic remedies along with individual remedies if the complaint is substantiated and the evidence supports it.

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation.

[149] The use of the “words unnecessarily removed” account for a distinction between two categories of children: those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the *Decision*. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

[153] Throughout all the *Decision* and rulings, references were made to First Nations children and their families. The Panel did not focus on the complainants when analyzing the adverse impacts. The Panel analyzed the effects/impacts of the discriminatory practices on First Nations children and clearly expressed this. The findings focused on the agencies’ abilities to deliver services and most importantly, the First Nations children, their

families and their communities who are the victims/survivors of the discriminatory practices. First Nations children and families are referenced continuously throughout the *Decision*. The *Decision* starts with: "**This decision concerns children.** More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities" (para. 1, emphasis added).

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial discrimination. The Panel also made numerous findings of adverse impacts toward First Nations children and families, adverse impacts that cause serious harm and suffering to children: the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people,** in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para. 459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to**

remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves (see 2016 CHRT 2 at, para. 467).

Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective**. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon**, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements (see 2016 CHRT 2 at, para. 393).

As will be seen in the next section, **the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.** (see 2016 CHRT 2 at, para. 394).

The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that **these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.** (see 2016 CHRT 2 at, para. 404).

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[…]

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this (...) (see 2016 CHRT 2 at, para. 411).

In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day (see 2016 CHRT 2 at, para. 412).

Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless (…) With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity (see 2016 CHRT 2 at, para. 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (see 2016 CHRT 2 at, para. 426).

(…) On that point, the Panel would like **to stress how important it is to address the issue of mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views from one Nation to another, surely the need to keep the children in their communities as much as possible is the same (see 2018 CHRT 4 at, para. 62).

This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the

specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other. (see 2018 CHRT 4 at, para. 66).

This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it.

There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings (see 2018 CHRT 4 at, para. 121).

Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short-term plan was presented to address this matter. **The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children** (see 2018 CHRT 2 at, para. 132).

The Panel finds (…) There is a real need to make further orders on this crucial issue to **stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities** (…) (see 2018 CHRT 4 at, para. 133).

It is important to remind ourselves that this is about children experiencing **significant negative impacts on their lives**. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *Decision* at paras. 341-347), (see also 2018 CHRT 4 at, para. 166).

Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Decision* and rulings. **It incentivizes the removal of children** rather than assisting communities to stay together. (see 2018 CHRT 4 at, para. 230).

> It is important to look at this case in terms of bringing Justice and not simply the Law, especially with reconciliation as a goal. **This country needs healing and reconciliation and the starting point is the children and respecting their rights.** If this is not understood in a meaningful way, in the sense that it leads to real and measurable change, then, the TRC and this Panel's work is trivialized and unfortunately t**he suffering is born by vulnerable children** (see 2018 CHRT 4 at, para. 451).

VIII. The Evidence in the Tribunal record

[156] In order to respond to the AGC's argument that there is a lack of evidence in the record to support a pain and suffering remedy, a review of some relevant elements of the evidence before this Tribunal follows:

> Mr. Dufresne: Why did you file the complaint?
>
> DR. BLACKSTOCK: I filed the complaint as a last resort. I -- I'm one of those people that believes that you have to try and work towards solutions first. And we did that not only once but we did that twice over a period of many years. We got to the place of documenting the inequality. In my view there was consensus that that inequality existed. We talked about and I believe with the respondent agreed with the harms to children that were a result of not taking action, that being there growing numbers of children in care and hardships for families, and the unequal access of services or the denial of services to children.
>
> We developed solutions to that, first in the National Policy Review and secondly in the Wen:de reports. We even in the Wen:de reports took the time to present those results to central authorities in October of 2005, and nothing had changed remarkably at the level of the child. We felt that there was no other alternative than to bring a human rights complaint. And even as we brought it, I was very hopeful that that would be incentive enough for the respondent to take the action needed on behalf of the children, but we find ourselves here today. (See Testimony of Dr. Cindy Blackstock, StenoTran transcripts February 28, 2013, page 3, lines 17-25 and page 4, lines 1-19 vol 4).

[157] Dr. Blackstock testified before the Tribunal and the Panel finds her testimony to be reliable and to speak to the issue of harm suffered by First Nations children as a result of the discrimination.

[158] Mr. Dubois is the Executive Director, Touchwood Agency and has a Bachelor of Social Work degree from the University of Calgary and also testified before the Tribunal:

> (…) MR. DUBOIS: I raised the issue with Indian Affairs.
>
> MR. POULIN: Why?
>
> MR. DUBOIS: Because I wanted to get away from just being limited to having to -- it was a situation where you kind of -- **you had to break up a family under Directive 20-1 before you could provide the services. It's only when you took a child into care that you could start to rebuild the family.** I wanted to be proactive. And this goes back to our history as a First Nations people, including my history where, you know, having to endure boarding school, like my dad, my late father was in boarding school, and the damage it did to us or the interference that back then that the church had on our family systems, so I wanted to **get away from that. Like having lived that experience, we don't need more interference. We don't need more -- for lack of a better word, wreaking havoc on our families. I come with the frame of mind that our families need healing and I, as a trained professional, and others out there in Saskatchewan and the other agencies, you know, like there has to be a different way to do child welfare other than breaking families up. We want to heal. We need to heal.** We have to do things differently, which is why when I referenced the SDM it was really appealing to me because it focuses on our strengths, you know, it builds on what we are and what we have. (see Testimony of Derald Richard Dubois, April 8, 2013, StenoTran transcript at, pp. 60-61 lines 7-24; 1-11, vol 9). See also testimony of Mr. Derald Richard Dubois, StenoTran transcripts April 8, 2013, at p.2, line 19 to p. 129, line 12 (April 8, 2013); p. 1, line 14 to p. 85, line 11 (April 9, 2013) vol 9).

[159] Mr. Dubois who is a child welfare professional refers to the Federal funding formula Directive 20-1 that was found discriminatory by this Panel causing significant adverse impacts to First Nations children and their families. What is more, he testifies of one of the worst of those adverse impacts being the unnecessary removal of children from their homes, families and communities.

[160] This is a reliable and powerful testimony that exemplifies the pain and suffering and harm done to First Nations children, families and communities as a result of the racial and systemic discrimination that is perpetuating historical wrongs.

[161] The Panel finds that unnecessarily removing a child from their family and community is a serious harm causing great suffering to that child, the family and the community.

[162] There is also evidence of harm/suffering to First Nations children and families in several reports forming part of the evidentiary record already considered and relied upon by the Panel in arriving to its findings of adverse impacts in the 2016 *Decision*. The Wen:de we are coming to the light of day, 2005 report (Wen:de) was filed into evidence before the Tribunal. The AGC had the opportunity to make submissions on this report and the Panel made findings on the reliability of this report. Moreover, the Tribunal accepted the findings in Wen:de as its own findings (See *Decision* 2016 CHRT 2 at, para. 257): "The Panel finds the NPR and Wen:De reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program" in a piecemeal fashion.

[163] Additionally, Canada was part of this study and fully aware of its findings and impact of its practices on First Nations children which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in the 2005 year of the report which will also be revisited in the wilful and reckless section below. The Panel had reviewed all the Wen:de reports before accepting it as its own and included some references of those findings in the *Decision*. The following additional findings support the issue of compensation for pain and suffering of children and their families and inform the Panel in drafting its orders:

> Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the **key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse** (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing

> improvement. **The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently.** The **third factor, substance misuse, is within the personal domain for change but requires access to services.** Overall, CIS- 98 results suggest **that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children.** (emphasis ours).

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The Wen:de report goes on to say that:

> (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see Wen:de at, pp.13-14) (emphasis ours).
>
> Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody

wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see Wen:de pp.13-14).

The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples (…)

Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting effect.** - **Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**

The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see Wen:de at, pp.90-91).

The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see Wen:de at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil,* La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
>
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered **a strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**
>
> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see Wen:de at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
>
> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the

> government's failure to provide adequate funding and services (see Wen:de at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (Wen:de at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discusses the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself…. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.** Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:

> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life**. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.**
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**
>
> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[170] Another report filed in evidence supports the existence of pain and suffering of First Nations children and their families. Several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning. In 1996, more than 10% of Aboriginal children (age 0-14) were not living with their parents. see p. 7 Joint National policy review (NPR) exhibit filed into evidence. Akin to the Wen:de report, the Tribunal accepted the findings in the NPR as its own findings (see 2016 CHRT 2 at, para. 257). Additionally, Canada was part of this study and fully aware of its findings which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in 2000, year of the report. This will also be discussed later.

[171] More recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. **She affirms that**

she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard. (see 2018 CHRT 4 at, para. 122).

Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. **The day they remember most vividly was the day they were taken from their home**. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para. 123).

Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that **the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system**. (see 2018 CHRT 4 at, para. 124).

In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care. (see 2018 CHRT 4 at, para. 125).

According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. **She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.** (see 2018 CHRT 4 at, para. 126).

The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care. (see 2018 CHRT 4 at, para. 127).

[172] The Panel received Ms. Wilson's evidence in 2017-2018 and has relied upon it in its ruling. The ruling was accepted by Canada in its submissions following receipt of an advanced confidential copy of the ruling and the Panel included Canada's submissions and the Panel's comments in the ruling:

> Finally, on the same day, the AGC (…) **indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.**
>
> The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree (see 2018 CHRT 4 at, paras. 449-450).

[173] This was reiterated later on, as part of a consultation protocol with all parties in this case and signed by Minister Jane Philpott as she then was (see Consultation Protocol signed March 2, 2018).

[174] Moreover, Canada has accepted the TRC's report authored by the 3 Commissioners including Ms. Wilson, and undertook to implement all 94 calls to action (see 2018 CHRT 4 at, para. 61). It is unlikely that Canada would accept the recommendations yet not the findings that led to those recommendations.

[175] What is more, the Panel believes that the highly credible TRC Commissioner like other adults referred to above speak on behalf of children and voice the harm and suffering endured by First Nations children who are vulnerable and need not testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination.

[176] Furthermore, as mentioned above, the Tribunal has already recognized the need and importance for First Nations children, communities and Nations for urgent action to eliminate the removal of First Nations children from their families and communities as a result of the discrimination and Canada's part in remedying it in the March 2, 2018 Consultation protocol signed by Minister Philpott:

> To address what the Tribunal in paragraph 47 of the February 1st Ruling refers to as the "mass removal of children". As the Tribunal states: "There is urgency to act and prioritize the elimination of the removal of children from their families and communities". (Consultation protocol signed March 2, 2018 at, section d, page 5)
>
> To promote substantive equality for First Nations children, families and communities on reserves and in the Yukon in the delivery of child and family services, particularly in light of their higher level of needs because of historical disadvantages suffered by First Nations families, children and communities as a result of the legacy of colonialism and Indian Residential Schools. (Consultation protocol at, section g, page 5).

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve the interplay of numerous underlying factors (see for example, 2016 CHRT 2 *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[178] Moreover, the Panel found that in this case we are in a unique constitutional context namely, Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act*, 1867. Furthermore, Canada, is in a fiduciary relationship with Aboriginal Peoples. What is more, Canada has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, the Panel found that more has to be done by Canada to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children (see 2016 CHRT 2 *Decision* at, para. 427).

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial

agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: "Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care." (see 2016 CHRT 2 *Decision* at, para. 197).

[182] The pain and suffering caused by the unnecessary removal of First Nations children and their families and Canada's role is at least reasonably quantifiable to $20,000. While it is the maximum compensation allowed under section 53 (2) (e) of the *CHRA,* it is not much in comparison to the egregious harm suffered by the First Nations children and their families as a result of the racial discrimination and adverse impacts found in this case. Other pain and suffering caused by other actors could potentially be sought in other forums. The Panel's role is to quantify as best as possible the appropriate remedy to compensate victims/survivors as part of these proceedings with the evidence available.

[183] Furthermore, the AGC relies also on the *Public Service Alliance of Canada v. Canada Post Corporation* case (see 2005 CHRT 39 at para. 991) to suggest that the Tribunal cannot award remedies for pain and suffering to the non-complainant victims "en masse". The *Canada Post* case made a finding that there was a lack of evidence before the Tribunal and that there was no systemic case. This is different from this case where there is sufficient evidence to support findings of systemic discrimination and findings of suffering borne by the victims/survivors in this case, the First Nations children and their families.

[184] The evidence is ample and sufficient to make a finding that each First Nations child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grandparent who had one or more children under her or his care who was unnecessarily removed from their home, family and community has suffered. Any parent or grandparent if the parents were not caring for the child who had one or more children removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grandparents, the grandparents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grandparents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grandparents.

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the *Decision*. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged *Decision*. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the *Decision* and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[188] The Panel need not hear from every First Nations child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not (see section 50 (3) (c) of the *CHRA*). We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47, 62, 66, 121, and 133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[189] Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how they felt to be separated from their family and community.

[190] The Panel rejects the AGC's argument that there is no evidence of harm the victims suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation.

[191] The evidence is sufficient to establish a connection between the systemic racial discrimination and the First Nations children who did not receive services or did receive services that were inadequate and harmful. This was all explained in the *Decision* and it is now too late to challenge those findings. The children should not be penalized because the Panel had outstanding questions concerning compensation which prompted further submissions from the parties.

[192] Finally, on this point, the Panel rejects the assertion made by the AGC that there is no evidence permitting the Panel to determine the extent and seriousness of the harm in order to assess the appropriate compensation for the individual victims. Furthermore, the AGC's argument that there is no evidence of pain and suffering from children and families as a result of the discrimination is simply not true. This is a similar assertion that Canada has made on the evidence to prove the complaint on its merits. In fact, such a conclusion by Canada is concerning to say the least. It also raises questions from this Panel. The harm done to First Nations children who are vulnerable and to families and communities is precisely why the Panel issued numerous rulings requesting immediate action. This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Decision* on the merits 2016 CHRT 2 at, para. 346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII) at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:
>
> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para. 346).
>
> Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at, para. 3).

[193] This is where the urgency of remedying systemic racial discrimination comes from. It is clearly expressed in the Panel's rulings. Removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense

consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering.

[194] The Panel's urging Canada to act on a number of occasions was not expressed without a reason. It was for the reason that this case is about children and there is urgency to act and the Panel understood it.

[195] In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 69-71 [*Baker*] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.

[196] The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para. 448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Decision* at paras. 437-439).

[197] The Panel agrees that remedies **under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

IX. Organizations cannot receive compensation and do not represent victims argument

[198] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that

they are able and wish to have, are First Nations children (see 2017 CHRT 14 at, para. 116).

[199] The Panel sees no merit in accepting the AGC's argument that if the Tribunal finds it has jurisdiction to award remedies under section 53 (2) (e) the AFN and the Caring Society should be awarded the remedies and not the First Nations children. This contradicts the AGC's own argument that acknowledges that the AFN and the Caring Society are organizations not victims (see para. 110 above).

[200] In a previous ruling, the Panel discussed the AFN and the Caring Society's roles in representing First Nations children's rights:

> To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials (see 2017 CHRT 14 at, para. 118).

[201] However, it is true that the Complainants do not have a legal representation mandate given by each First Nations child and parent living on reserve to seek remedy on their behalf at the Tribunal. What they do have is a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their elected First Nations Chiefs. Some First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out. The opting-out possibility will form part of the compensation process discussed below.

[202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out. The Panel believes also that

the COO and the NAN should be able to speak on behalf of their children and voice their needs and seek redress for compensation. Also, the Caring Society directed by Dr. Cindy Blackstock has worked tirelessly for numerous years to represent the best interest of children with an Indigenous lens and has invaluable expertise to assist the Panel and the parties in this process.

[203] This being said the Panel does not believe that it has jurisdiction to create another Tribunal to delegate its responsibilities under the *CHRA* to it. The compensation process will be discussed below.

X. The right to exercise individual rights, class action and victims' identification

[204] The Panel believes that individuals have the right to exercise their individual rights and for those who choose to do so, they should be able to opt-out from receiving the compensation ordered in this ruling.

[205] The Panel also notes that the class action has not yet been certified by the Federal Court. Moreover, the possibility of a future certified class action and, if successful, orders made for punitive damages remedies under the Charter amongst other things being offset by the capped remedies orders under the *CHRA* made by this Tribunal is not a convincing argument to refrain from awarding compensation in these proceedings. Additionally, the Tribunal's orders below do not cover years 1991 to 2005. The Tribunal's orders below also cover First Nations children and First Nations parents or grandparents.

[206] The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy the discrimination and if applicable as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[207] In regards to identification of victims/survivors, as explained by the Caring Society, some of the children can be identified by the Indian Registry and following a process agreed upon by the parties who wish to participate. Therefore, their identities are not

impossible to obtain and are readily available contrary to the situation in the *C.N.R.* case from the Federal Court of Appeal that the AGC relies upon. The AGC argues the Court concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The AGC added the Court found that compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable". Again, this is not the case here.

[208] The Panel finds this is a case where it is appropriate to compensate victims/survivors since the systemic racial discrimination and the adverse impacts found by the Panel in its *Decision*, subsequent rulings and this ruling, caused serious harm to victims/survivors. While the task to identify all the individuals is a complex one, it is not impossible given the Indian Registry and the Jordan's Principle process and records.

XI. Class actions and representative of the victims

[209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition.

[210] In any event, even proof by presumption of facts, provided that such presumptions are sufficiently serious, precise and concordant, applies to class actions (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211,

1996 CanLII 172 (SCC) at, para. 132). More so in front of a Human Rights Tribunal allowed to receive any type of evidence under the *Act.*

XII. Jordan's Principle remedies

[211] There is no doubt that Jordan's Principle has always been part of the claim from the complaint to the Statement of Particulars to the presentation of evidence and the Tribunal's findings and orders. This question was answered and cannot be revisited.

[212] In sum, in honor and memory of Jordan River Anderson, Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living (see 2017 CHRT 35 at, para. 135,1.B.i.).

[213] Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. (see 2017 CHRT 35 at, para. 135,1.B.ii.).

[214] What is more, the Panel rejects the AGC's argument that compensation is inappropriate in Jordan's Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminates discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan's Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic

and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan's Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan's Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

> The purpose of the *CHRA* is to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.
>
> (Section 2 of the *CHRA*).

[217] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities,* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. (see *Grant* at paras. 103-104). Moreover, article 1 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at. 71 (1948), which provides that all human beings are born free and equal in dignity and in rights.

[218] The concept of objective appreciation of dignity when vulnerable mentally disabled persons who are not always in a position to appreciate their own self-dignity or breach there of as been recognized by the Supreme Court of Canada:

> Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.

(…)

> In the case before us, it appears to me that the majority of the Court of Appeal properly pointed out that, in considering the situation of the mentally disabled, the nature of the care that is normally provided to them is of fundamental importance. We cannot ignore the fact that the general objective of the services provided at the Hospital goes beyond meeting the patients' primary needs (see *Commission des droits de la personne v. Coutu*, 1995 CanLII 2537 (QC TDP), [1995] R.J.Q. 1628 (H.R.T.), at pp. 1652-53). This is apparent from, inter alia, the legislator's intention (see *An Act respecting health services and social services*, R.S.Q., c. S-4.2) and the fact that there is a certain level of social consensus concerning what sort of support services are required in order for the needs of these people to be met.
>
> This being said, the fact that some patients have a low level of awareness of their environment because of their mental condition may undoubtedly influence their own conception of dignity. As Fish J.A. observed, however, when we are dealing with a document of the nature of the Charter, it is more important that we turn our attention to an objective appreciation of dignity and what that requires in terms of the necessary care and services. In the case at bar, I believe that the trial judge's findings of fact indicate, beyond a shadow of a doubt, that, although the discomfort suffered by the patients of the Hospital was transient, it constituted interference with the safeguard of their dignity, a right guaranteed by s. 4 of the Charter, despite the fact that, as the trial judge noted, these patients might have had no sense of modesty. (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 105 and 107-108), [*Public Curator*].

[220] Furthermore, the Supreme Court found that disrupting services was an interference of the service recipients' dignity and causing them a moral prejudice under rules of civil liability and under the Charter:

> Moreover, the pressure that the appellants wanted to bring to bear on the employer inevitably involved disrupting the services and care normally provided to the patients of the Hospital, and necessarily involved intentional interference with their dignity (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, para. 124) [*Public Curator*].

[221] While this is not a class action or a civil liability or Charter case, the principle can be applied here to support the finding that the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of

their dignity applying the objective appreciation of dignity principle. Under the *CHRA* this would be covered under section 53 (2) (e). This reasoning also applies to First Nations children and families in the case of the removal of a child from the home, family and community.

[222] What is more, the Tribunal has already made findings in past rulings in regards to gaps, delays and denials of essential services to First Nations children under Jordan's Principle and also its connection to child welfare, some of them are reproduced here:

> **Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues** (see *Decision* at para. 356) (…) (see 2017 CHRT 14, at para. 78).
>
> The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: **that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve.** The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program (see 2016 CHRT 2 at, para. 369).
>
> Another medical related expenditure identified as a **concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist** (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3). (see 2016 CHRT 2 at, para. 372).
>
> In the Panel's view, **it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and**

well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in **service gaps, delays and denials** for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see 2016 CHRT 2 at, para. 381).

More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made (see 2016 CHRT 2 at, para. 382).

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements **have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves.** Non-exhaustively, the **main adverse impacts** found by the Panel are:

(…) **The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children** (see 2016 CHRT 2 at, para. 458).

In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure (see 2017 CHRT 7 at, para. 8).

The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused (See 2017 CHRT 7 para. 9).

Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and

Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5) (See 2017 CHRT 7 para. 10).

The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances (See 2017 CHRT 7 para. 11).

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordan's Principle funds (See 2017 CHRT 7 Annex A letter Re: Choose Life Pilot Working Group, dated March 22, 2017 from Nishnawbe Aski Nation Grand Chief Alvin Fiddler to Dr. Valerie Gideon, Assistant Deputy Minister Regional Operations First Nations and Inuit Health Branch Health Canada).

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on **Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children**. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. **After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, over 165 000 Jordan's Principle approved services have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel.** In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that **Jordan's Principle is not a program, it is considered a legal rule by Canada.** This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of

Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle (see 2019 CHRT 7 at, para. 25).

The Panel is delighted to hear that **thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.** We would like to honor Jordan River Anderson and his family for their legacy. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children. (see 2019 CHRT 7 at, para. 26).

The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at, paras. 365-382 and 391) (see 2019 CHRT 7 at, para. 73).

[223] All the above findings support a finding that First Nations children and their families experienced pain and suffering and a breach of their dignity as a result of gaps, delays and denials of essential services.

[224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.
>
> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
>
> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>
> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada's approach to Jordan's Principle that led to the Tribunals' rulings in this case.

[226] First Nations children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation: wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[228] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[228A] The Tribunal in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 (CanLII), recently reiterated this Panel's legal reasons on the special compensation, Member Gaudreault wrote:

> In the decision rendered in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) [*Family Caring Society*], at paragraph 21, members Sophie Marchildon, Réjean Bélanger and Edwards P. Lustig addressed the special compensation provided under subsection 53(3) of the *CHRA*:

> The Federal Court has interpreted this section as being a ". . .punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone,* 2013 FC 113 (CanLII), at para. 155, aff'd 2014 FCA 110 (CanLII) [*Johnstone* FC]). A finding of wilfulness requires "(…) the discriminatory act and the infringement of the person's rights under the *Act* is intentional" (*Johnstone* FC, at para. 155). Recklessness involves ". . .acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone FC*, at para. 155), (see *Duverger* at para. 293).

[229] The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para. 13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

[230] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para. 119).

[231] The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the Wen:de report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada who has international, constitutional and human rights obligations towards First Nations

children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples:

> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (Wewaykum at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in Haida Nation, at paragraph 17:
> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31, (see *Decision* 2016 CHRT 2 at, para. 95).

[233] In light of Canada's obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor than cannot be overlooked.

[234] The Panel finds it has sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what we have referred to as a worst-case scenario under our *Act*.

[235] What is more, many federal government representatives of different levels were aware of the adverse impacts that the Federal FNCFS Program had on First Nations children and families and some of those admissions form part of the evidence and were referred to in the Panel's findings. A review of the Panel's findings contained in the *Decision* and rulings supports this.

[236] The Panel rejects Canada's position that the reports in the evidentiary record and findings cannot lead to a finding of wilful and reckless conduct by this Tribunal's findings because they were improving the services over time. Wen:de specifically cautioned against a piecemeal implementation of the recommendations and that is precisely what Canada did. This was also explained in the *Decision.*

[237] In addition, the Tribunal already made findings about Canada's conduct and awareness of the adverse impacts to First Nations children and their families in past

rulings. Although too numerous to reproduce them entirely in this ruling, some are above mentioned and some will be mentioned here and those findings cannot be challenged now:

> In another presentation, AANDC describes Directive 20-1 as “broken”:
>
> **The current system is BROKEN, i.e. piecemeal and fragmented**
>
> **The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality**
>
> […]
>
> **The current program focus is on protection (taking children into care) rather than prevention (supporting the family)**
>
> […]
>
> **Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand**
>
> **INAC CFS has been unable to keep up with the provincial changes**
>
> **Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced**
>
> (Annex, ex. 35 at pp. 2-3 [Putting Children and Families First in Alberta presentation]) (see 2016 CHRT 2 at, para. 270).
>
> Putting Children and Families First in Alberta presentation touts prevention as the ideal option to address these problems at page 4:
>
> **Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve**
>
> **Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health** (see 2016 CHRT 2 at, para. 271).
>
> Finally, the Putting Children and Families First in Alberta presentation states at page 5:
>
> The facts are clear:

Wen:De Report - Early intervention/prevention is KEY

[…] (see 2016 CHRT 2 at, para. 272).

[238] The above citations were presentations prepared by staff in the Federal Government supporting the fact that they were well aware of what needed to be done to stop the systemic racial discrimination and that prevention is a key component. This being said, while Canada increased prevention funds, it applied an insufficient and piecemeal approach and the Panel also found this in the *Decision.*

[239] First Nations agencies have been lobbying Canada since 1998 to change the system (see 2016 CHRT 2 at, para. 272). Ten years later, in a 2018 CHRT 4 ruling, the Tribunal had to order Canada to fund prevention services:

> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. **Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Decision* and rulings**. **It incentivizes the removal of children rather than assisting communities to stay together** (see 2018 CHRT 4 at, para. 230).

[239A] All this time Canada knew the benefit of prevention services to keep children safe within their homes and families yet it did not sufficiently fund and reform the system to foster this shift.

> This is contrary to the Tribunal's order to provide services based on need, which requires Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, **Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children** (see 2018 CHRT 4 at para. 143).
>
> The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services. (see 2018 CHRT 4 at, para. 161).

> **The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*.** Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief (see 2018 CHRT 4 at para. 146).
>
> This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children (see 2018 CHRT 4 at para. 195).

[240] The Panel made numerous findings on the need for prevention services to reverse the removal of First Nations children from their homes, families and communities:

> Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). **Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve** (see AANDC Evaluation of the Implementation of the EPFA in Alberta at pp. 16-18, 21-24) (see 2016 CHRT 2 at, para. 286).
>
> Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to

support a third office in the southwestern part of the province (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at pp. 35-36) (see 2016 CHRT 2 at, para. 291).

AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [2007 Evaluation of the FNCFS Program]). The findings and recommendations of the 2007 Evaluation of the FNCFS Program reflect those of the NPR and Wen:De reports. Of note, at page ii, the 2007 Evaluation of the FNCFS Program makes the following findings:

Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed (see 2016 CHRT 2 at, para. 273).

(…) correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions (see 2016 CHRT 2 at, para. 274).

In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children (see 2016 CHRT 2 at, para. 276).

However, as the 2008 Report of the Auditor General of Canada, the 2009 Report of the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General of Canada, and the 2012 Report of the Standing Committee on Public Accounts pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA (see 2016 CHRT 2 at, para. 278).

> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see 2016 CHRT 2 at, para. 461).

[241] One of the most tragic and worst-case scenarios in this case and in the Jordan's Principle context is one of unreasonable delays in providing prevention and mental health services as exemplified in the situation in the Nation of Wapekeka. This delay was intentional and justified by Canada according to financial and administrative considerations. It was devoid of caution and without regard for the serious consequences on the children and their families. Some extracts of the Panel's findings are reproduced here:

> The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16) (see 2017 CHRT 14 at, para. 89).
>
> While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle (see 2017 CHRT 14 at, para. 90).
>
> Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death

> situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see Transcript of Cross-Examination of Ms. Buckland at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16). (see 2017 CHRT 14 at, para. 91).
>
> If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (Affidavit of Robin Buckland, January 25, 2017, Exhibit F, at p. 3); see also Transcript of Cross-Examination of Ms. Buckland at p. 82, lines 1-12] (see 2017 CHRT 14 at, para. 92).
>
> More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process. (see 2017 CHRT 14 at, para. 93).
>
> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision* (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grandparents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at $20,000 under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations
>
> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to

> have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting

them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community between **January 1, 2006** (date following the last Wen:de report as explained above) until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nations child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $20,000 to each First Nations parent or grandparent of a First Nations child removed from their home, family and community between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the

parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grandparent lost 3 children in those circumstances, they should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community from **January 1, 2006** until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home and placed in care in order to access services and for each First Nations child who was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve or off reserve who, as a result of a gap, delay and/or denial

of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations parent or grandparent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grandparent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nations child, parent or grandparent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a child from a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware of the discriminatory practices of its child welfare program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nations child and parent or grandparent identified in the orders above.

[254] Canada is ordered to pay $20,000 to each First Nations child and parent or grandparent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children

from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long-term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grandparent recognizes that some children may not have parents and were in the care of their grandparents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grandparent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grandparents are caring for the child, both grandparents are entitled to compensation as described above.

[256] For clarity, parents or grandparents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grandparent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grandparent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-

by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grandparents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common Experience Payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language, culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para. 10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grandparents until the age of majority.

[263] For all the other children who have no parents, grandparents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grandparents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nations child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grandparents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall

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

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[273] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past (see for example, *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 20 at, para. 21).

XVII. Retention of jurisdiction

[277] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 6, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 6, 2019

Date and Place of Hearing: April 25 and 26, 2019
Gatineau, Québec

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. and Max Binnie, counsel for the Respondent

Maggie Wente, counsel for the Chiefs of Ontario, Interested Party

Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 6

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 7
Date: April 16, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

Reasons on Three Questions Regarding Eligibility for Compensation

I. Context

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

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

> [13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which […] and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its Decision that the Federal First Nations child welfare program is negatively impacting

> First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws
>
> [14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination
>
> [15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada.
>
> (*Compensation Decision* at paras. 13-15)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Assembly of First Nations' Position

[17] The AFN disagrees with the Caring Society's proposal on this issue, pointing instead to provincial legislation on age of majority as well as laws which lay out duties of property guardians upon a minor attaining the age of majority. Section 53 of Ontario's *Children's Law Reform Act*, RSO 1990, c C.12, for example, provides that guardians of property must transfer to the child all property in the care of the guardian when the child attains the age of eighteen years. Similarly, the *Indian Act*, RSC 1985, c I-5 provides at s. 52 that the Minister can appoint guardians of property for infant children under the Act's jurisdiction, but at s. 52.3(1) specifies that any property held for them must be conveyed to the child in lump sum upon attaining the age of majority.

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

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

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

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

C. The Canadian Human Rights Commission's Position

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

D. The Chiefs of Ontario's Position

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

E. The Nishnawbe Aski Nation's Position

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

F. Canada's Position

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

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

G. Analysis

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

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

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

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

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

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

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

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

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

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

[33] The Panel generally agrees with those recommendations.

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

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

H. Order

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

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

[37] **Decision**: Yes

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

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

[39] The Caring Society argues that an interpretation of the *Compensation Decision* which includes children in care as of January 1, 2006 (but who were removed earlier) and their caregivers is supported by the Tribunal's reasons in both *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and the *Compensation Decision*.

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

B. The Assembly of First Nations' Position

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

C. The Canadian Human Rights Commission's Position

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

[43] The Commission also points to para. 270 of the *Compensation Decision*, where the Panel explicitly retained jurisdiction over a number of issues, welcoming "any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added." This, the Commission argues, is indicative of a clear retention of jurisdiction and thereby the Panel is not *functus officio* on those matters.

D. The Chiefs of Ontario's Position

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

E. The Nishnawbe Aski Nation's Position

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

F. Canada's Position

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

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

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

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

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

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

G. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[…]

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

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

Relief Requested

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

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

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

> They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.
> (*Merit Decision* at para. 257)

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

> Canada was aware of the discrimination and some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunals orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.
> (*Compensation Decision* at para. 231, emphasis added see also, paras. 156, 162 and 170)

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

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

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

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

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

> The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA*

[70] Moreover, the Panel already voiced the crucial context of this case namely, the mass removal of children from their respective First Nations along with "the impracticalities and the risk of revictimizing children which outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community." (*Compensation Decision* at para. 189).

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

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

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

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

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

H. Orders

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

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

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

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

[77] **Decision**: Yes

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

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

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

[80] In addition to caselaw cited by the Commission and some other provincial decisions, the Caring Society raises the 2003 Ontario case of *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27. In that decision, the Ontario Human Rights Tribunal adopted a similar principled analysis to that of this Tribunal in *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) [*Stevenson*], ruling that the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant.

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

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

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

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

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

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

B. The Assembly of First Nations' Position

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

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

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

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

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

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

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

C. The Canadian Human Rights Commission's Position

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

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

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

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

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

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

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

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

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

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

D. The Chiefs of Ontario's Position

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

E. The Nishnawbe Aski Nation's Position

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

F. Canada's Position

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

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

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

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

G. Analysis

[105] The specific facts and context of this case and the *CHRA's* objective and purpose are the starting point in the Panel's analysis (*Compensation Decision* at paras. 94-97 and 132): "The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. […] [O]ne should not search for ways and means to minimize those rights and to enfeeble their proper impact." (*Compensation Decision* at para.135).

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

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission*), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13)
>
> (*Compensation Decision* at para. 133)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[112] Furthermore, the HRTO, adopted a similar principled analysis to that of this Tribunal in *Stevenson*, ruling that the death of a complainant does not terminate a proceeding under the Ontario *Human Rights Code* and does not abolish the HRTO's jurisdiction to hear the complaint. In fact, the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant. (see *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27 at paras. 13-14).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. Order

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

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

I. Other Important Considerations

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

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

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

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

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

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

V. Retention of Jurisdiction

[157] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 16, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: April 16, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Max Binnie, counsel for the Respondent

Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 7

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 15
Date: May 28, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

Compensation Process Ruling on Outstanding Issues in Order to Finalize the *Draft Compensation Framework*

I. Introduction

[1] This ruling follows this Tribunal's compensation decision and orders rendered on September 6, 2019 (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*Compensation Decision*]) and subsequent ruling on additional compensation requests emanating from some parties arising out of the compensation orders (*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).

[2] In the *Compensation Decision*, Canada was ordered to pay compensation in the amount of $40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) and to consult with the Canadian Human Rights Commission (Commission) and the interested parties, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), to co-develop a culturally safe compensation process framework including a process to locate the victims/survivors identified in the Tribunal's decision, namely First Nations children and their parents or grandparents. The parties were given a mandate to explore possible options for the compensation process framework and return to the Tribunal. The AFN, the Caring Society and Canada have jointly indicated that many of the COO, the NAN and the Commission's suggestions were incorporated into the *Draft Compensation Framework* and *Draft Notice Plan*. The Panel believes that this is a positive outcome.

[3] However, some elements of the *Draft Compensation Framework* are not agreed upon by all parties and interested parties. In particular the two interested parties, the COO and the NAN, made additional requests to broaden the scope of the *Compensation Decision* orders with which the other parties did not agree, as it will be explained below. Further, the

COO and the NAN made a number of specific requests for amendments to the *Draft Compensation Framework.* The NAN's requests mainly focus on remote First Nations communities, some of which will be discussed below. This reflects the complexity of this case in many regards. The Panel is especially mindful that each First Nation is unique and has specific needs and expertise. The Panel's work is attentive to the inherent rights of self-determination and of self-governance of First Nations which are also important human rights. When First Nations parties and interested parties in this case present competing perspectives and ask this Tribunal to prefer their strategic views over those of their First Nations friends, it does add complexity in determining the matter. Nevertheless, the Panel believes that all the parties and interested parties' views are important, valuable and enrich the process. This being said, it is one thing for this Panel to make innovative decisions yet, it is another to choose between different First Nations' perspectives. However, a choice needs to be made and the Panel agrees with the joint Caring Society, AFN, and Canada submissions and the AFN's additional submissions on caregivers which will be explained below. At this point, the Panel's questions have now been answered and the Panel is satisfied with the proposed *Draft Compensation Framework* and *Draft Notice Plan* and will not address all of the interested parties' suggestions that were not accepted by the other parties (i.e. the Caring Society, the AFN and Canada) ordered to work on the *Draft Compensation Framework*. The Panel will address the contentious issue involving specific definitions including some suggestions from the NAN concerning remote First Nations communities and two substantial requests from the COO and the NAN to broaden the scope of compensation below. For the reasons set out below, the Panel agrees with the Caring Society, the AFN and Canada's position on the COO and the NAN's requests.

[4] Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions resulting in the *Draft Compensation Framework* and *Draft Notice Plan* have been productive, and the parties have been able to agree on how to resolve most issues. At this point, there remains disagreement on three important definitions on which the parties cannot find common ground. These definitions are "essential service", "service gap" and "unreasonable delay". While the Panel is not imposing the specific wording for the definitions, the Panel provides

reasons and guidance to assist the parties in finalizing those definitions as it will be explained below.

[5] The Caring Society, the AFN and Canada wish to clarify the proposed process for the completion of the Tribunal's orders on compensation. As the AGC outlined in its April 30, 2020 letter, the Complainants and the Respondent are submitting the *Draft Compensation Framework* and *Draft Notice Plan* for the Tribunal's approval in principle. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the *Draft Compensation Framework* will be adjusted to reflect said orders and will undergo a final copy edit to ensure consistency in terms. The Complainants and the Respondent will then consider the document final and will provide a copy to the Tribunal to be incorporated into its final order. The Panel agrees with this proposed process.

[6] The Panel wishes to thank the Caring Society, the AFN, Canada, the COO, the NAN and the Commission for their important contributions to the realization of the *Draft Compensation Framework*.

II. Reconciliation and Jordan River Anderson and his Family

[7] In its recent ruling dealing with three questions related to the compensation process (2020 CHRT 7), the Panel asked the parties to consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and also to his father and First Nations peoples in similar situations should be paid as part of this Tribunal's compensation process. While the Panel did not make a final determination on this issue, the Panel requested further submissions from the parties and interested parties on this point.

[8] While the AFN and the Caring Society agreed with the spirit of this possible amendment to the Tribunal's compensation orders, they feared this could jeopardize the compensation process as a whole given that Canada opposes it. Canada previously submitted that with respect to compensation under Jordan's Principle, the Panel was clear. At paragraph 251 of the *Compensation Decision*, compensation was granted for a defined period, Dec. 12, 2007- to November 2, 2017. These dates were also placed in bold in the judgment.

[9] Canada argues that their comments on the temporal scope above do not suggest a reopening of these compensation orders under Jordan's Principle. Additionally, Canada submits that the complaint mentioned Jordan's Principle and did not mention services prior to the adoption of Jordan's Principle in December 2007.

[10] The NAN also made submissions in favour of such broadened compensation orders as described above. However, upon consideration, the Panel does not want to jeopardize the compensation process as a whole.

[11] In light of the above, the Panel strongly encourages Canada to provide compensation to Jordan River Anderson's estate, his mother's estate, his father and siblings as a powerful symbol of reconciliation.

III. Framework for the Payment of Compensation under the *Compensation Decision* (*Draft Compensation Framework* and *Draft Notice Plan*)

[12] The Panel has studied the *Draft Compensation Framework* and *Draft Notice Plan* alongside all the parties', including interested parties', submissions and requests. The Panel approves the *Draft Compensation Framework* and *Draft Notice Plan* "in principle", with the exception of the issues addressed below. The "in principle" approval should be understood in the context that this framework is not yet finalized and that the parties will modify this *Draft Compensation Framework* and *Draft Notice Plan* to reflect the Panel's reasons and orders on the outstanding issues regarding compensation. The *Draft Compensation Framework, Draft Notice Plan* and the accompanying explanations in the joint Caring Society, AFN and Canada submissions provide the foundation for a Nation-wide compensation process. The opt-out provision in the *Draft Compensation Framework* addresses the right of any beneficiary to renounce compensation under this process and pursue other recourses should they opt to do so. The opt-out provision protects the rights of people who disagree with this process and who prefer to follow other paths. The Panel expects that the parties will file a final *Draft Compensation Framework* and final *Draft Notice Plan* seeking a consent order from this Tribunal.

[13] The reasons on the outstanding compensation issues are included below.

IV. The COO and the NAN Request for the *Compensation Decision* Order to Apply Equally to First Nations Persons On or Off Reserve in Ontario

[14] The Panel has considered all the parties and interested parties' submissions to determine this request. In the interest of brevity, the Panel has not reproduced all of those submissions. Rather it focuses on the COO's submissions on this point, summarized below, given that the Panel provides reasons to the COO explaining why it does not accept its request.

Key Positions of the Parties

[15] The COO submits that in Ontario, the *Compensation Decision* Order should apply equally to First Nations persons on or off reserve. From an Ontario-specific perspective, the COO urges the Panel to consider the scope of the definition of "beneficiary" for the purposes of First Nations people in Ontario who would benefit from the *Compensation Decision* Order. The NAN adopts the COO's submissions on this point.

[16] The COO advances that the Panel's findings with respect to the delivery of child and family services in Ontario pursuant to the *Memorandum of Agreement Respecting Welfare Programs for Indians* (*1965 Agreement*) at *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] (found at paras. 217-246) rightly centre the locus of racial discrimination in the *1965 Agreement*[1]. The Panel held, at paragraph 392, that there was discrimination under the *1965 Agreement* because First Nations children did not receive all the services set out in the Ontario child welfare legislation, the *Child and Family Services Act,* RSO 1990, c C.11 [*CFSA*], and its predecessors (now replaced by the *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1 [*CYFSA*]). Rather, Canada underfunded services to First Nations children under the *1965 Agreement* by funding only some of the

[1] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve (see *Merit Decision* at para. 49).

services set out in provincial legislation, and failed to keep up to date with Ontario legislation (*Merit Decision* at paras. 222-226).

[17] The COO submits the resulting discrimination runs through Ontario's programs and funding formulas, which apply equally to First Nations children receiving services from First Nations child welfare agencies and those receiving services from provincial "mainstream" child welfare agencies, as noted by the Panel in the *Merit Decision* at para. 222. The programs and funding formulas apply equally whether on or off reserve.

[18] The COO contends that it is helpful to remember that the *1965 Agreement* does two main things. One, it requires Canada to pay a cost-share to Ontario, and that cost-share is indeed based on a calculation that uses the population of registered Indians mainly (though not exclusively) on reserve. Two, it requires Ontario to make the listed services available to "Indians" throughout the province, and not merely to those on reserve. The very nature of the *1965 Agreement* is that service provision extends, via the Government of Ontario, both on and off reserve.

[19] The COO submits that from the perspective of a First Nations child, parent, or grandparent as a service recipient, the service they received was discriminatory both on and off reserve. The system of service provision under the *1965 Agreement* does not draw a reserve-based distinction at the service delivery level.

[20] The NAN's Chiefs Committee on Children, Youth, and Families has highlighted that NAN First Nations have members who live off-reserve in Ontario who have also experienced discrimination in child and family services. The NAN submits these individuals should not be excluded from eligibility for compensation solely for reasons of off-reserve residency.

[21] The NAN adopts and relies upon the submissions of the COO on the topic of eligibility for off-reserve First Nations children and their caregivers in relation to the *1965 Agreement*.

Reasons on Compensation Off-Reserve in Ontario

[22] The Panel understands the COO's comment on First Nations children, parents or grandparents' perspective as service recipients and it is true to say that the Panel found the

1965 Agreement discriminatory. Given this important perspective, the Panel reviewed the record, its own findings, the complaint, the parties' and the interested parties' Statements of Particulars and amended Statements of Particulars, the parties' and interested parties' final arguments, the remedies requested in 2014, 2019 and 2020 and the Tribunal's own findings in the *Merits Decision*. After a thorough review of the documents referred to above, the Panel finds it does not support the COO's position of a broadened compensation under the *Compensation Decision* to include those children who were removed off-reserves. The COO's own Statement of Particulars mentions on-reserve First Nations and adopts the Commission's theory of the case and requested remedies contained in its amended Statement of Particulars which refer to on-reserve First Nations. The Commission and the COO's final arguments, while addressing the *1965 Agreement's* discriminatory impacts, did not adduce sufficient evidence and arguments on off-reserve children and families. Rather, they focused towards on-reserve First Nations in Ontario and, in so doing, were able to meet their onus. The Tribunal's findings were made after having carefully considered the COO and the Commission's positions, the evidence, the submissions and the final arguments. Moreover, the Panel crafted its *Compensation Decision* orders based on the above. The Panel posed compensation questions to the parties prior to the compensation hearing held in 2019. The COO did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties' requests for compensation.

[23] The Panel did invite parties to propose categories of children that could be added so the COO and the NAN's request is completely understandable, however, the requests need to be connected to the claim and supported by the evidence and the findings. The Panel to arrive at its *Merit Decision* and rulings, did not consider if First Nations children in Ontario were unnecessarily removed from their homes off-reserves under the *1965 Agreement* because it was not argued, proven or requested until now. The Panel believes that doing so now would require additional evidence and submissions and that it would be unfair to authorize this to take place at this late stage. In fact, in its ruling granting the NAN interested party status, the Tribunal wrote:

> However, given we are at the remedial stage of these proceedings, the NAN's written submissions should only address the outstanding remedies and not

> re-open matters already determined. The hearing of the merits of the complaint is completed and any further evidence on those issues is now closed. The Panel's role at this stage of the proceedings is to craft an order that addresses the circumstances of the case and the findings already made in the [*Merit*] *Decision* (see 2016 CHRT 11, at para.14).

[24] Additionally, reopening matters to adduce new evidence and arguments could jeopardize the compensation process entirely as it may be viewed as unfair by some parties and this could significantly delay compensation to the victims identified in this case. The new evidence that the Panel accepts is geared towards the effectiveness and implementation of the Panel's orders for immediate, mid-term and long-term reform including the order to cease and desist from the discriminatory practices identified in the *Merit Decision* and in its subsequent rulings. The off-reserve discriminatory impacts of the *1965 Agreement* towards First Nations children off-reserve can be addressed by reform of the *1965 Agreement* and Jordan's Principle but unfortunately not under the Tribunal's *Compensation Decision* orders outside of Jordan's Principle orders.

[25] Nonetheless, in the *Merit Decision*, the Panel found the *1965 Agreement* discriminatory and found:

> AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:
>
> […]
>
> - The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act* (see *Merit Decision* at para. 458, emphasis added).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the

> FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see *Merit Decision* at para. 461, emphasis added).
>
> Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve (see *Merit Decision* at, para. 475, emphasis added).
>
> The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted (see *Merit Decision* at para. 478, emphasis added).
>
> The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's principle and to take measures to immediately implement the full meaning and scope of Jordan's principle (see *Merit Decision* at para. 481).

[26] The *1965 Agreement* is discriminatory and needs to be entirely reformed and the Ontario Special study of the *1965 Agreement* may be a helpful tool to achieve this goal for the benefit of First Nations children in Ontario.

[27] For those reasons, the Panel denies the COO and the NAN's request to broaden the scope of compensation to include First Nations children who were not resident on reserves

or ordinarily resident on reserves and who were unnecessarily removed from their off-reserve homes.

V. The COO and the NAN Request that the Category of Eligible Caregivers Be Expanded from Parents or Grandparents to Other Caregivers

Key Positions of the Parties

[28] In sum, the COO believes that the reality of families in First Nations communities means that aunts, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation.

[29] In sum, the NAN submits it is not unusual in NAN First Nations for individuals other than parents or grandparents to act in a primary caregiving capacity. This reality is not reflected in the *Compensation Decision* Order. The NAN requests the category of eligible caregivers be expanded from parents or grandparents to include aunts, uncles, cousins, older siblings, or other family members and kin who were acting in a primary caregiving role.

[30] While the Panel issued the *Compensation Decision* after thoughtful deliberations, the Panel still reconsidered its decision based on the NAN and the COO's suggestions. However, for the reasons explained below, the Panel denies their request.

Reasons on Compensation Eligibility for Additional Caregivers

[31] The COO and the NAN made extensive suggestions on how this compensation process could potentially work to include an expanded category of caregivers. Many suggestions have merit, however, the approach proposed by the NAN and the COO significantly departs from the approach the Tribunal adopted in the Compensation Decision where it agreed with the Caring Society and the AFN that children should not be retraumatized by being forced to testify about their circumstances and the trauma of being removed from their homes. This approach is paramount and is reflected in the Compensation Decision.

[32] The Panel entirely agrees with the AFN's compelling submissions, summarized below, and believes those submissions are a full answer to the COO and the NAN's request on this issue. Moreover, the AFN's submissions convey the Panel's findings, goal and approach to compensation and reasons why it chose to adopt such an approach. The Panel's decision was carefully crafted to shield children from additional trauma and to account for the need to adopt a culturally safe and appropriate process.

[33] Moreover, unless the parties in this case agree in a settlement to create an adjudicative function outside the Tribunal, the Tribunal has no jurisdiction to order the creation of another tribunal to delegate its functions under the *Canadian Human Rights Act,* RSC 1985, c H-6 in order to adjudicate compensation arising out of its compensation orders. The AFN, the Caring Society and Canada reject this approach and the Panel agrees with them. This is consistent with the Panel's *Compensation Decision*.

[34] Furthermore, the AFN submits it is deeply concerned about the COO and the NAN's request to expand the definition of "caregiver" to other individuals. Both the COO and the NAN's proposals would greatly complicate the compensation process and give rise to competing claims of who was the rightful caregiver. The Panel believes this to be true.

[35] The AFN notes that this Panel's *Compensation Decision* Order was modeled after the Indian Residential Schools Settlement Agreement's Common Experience Payment. The trigger that would entitle an individual to compensation is the apprehension of a child or the denial or delay of a service under Jordan's Principle. There would be no reason for a person to justify any individual harm, nor would it require an individual to provide evidence to justify why they are entitled to compensation. This Panel opted to adopt a similar approach to the Common Experience Payment in determining eligibility for compensation to victims to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped. A simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. Both the COO's and the NAN's recommendations would mark a significant departure from the Common Experience Payment model. Currently, one must demonstrate that they or their child/grandchild was apprehended/removed or impacted by the misapplication of Jordan's Principle. Upon verification they would be paid compensation.

However, both the COO and the NAN suggest that the compensation process now include an adjudicative function whereby a parent or grandparent must participate in contested proceedings along with the child's uncles, aunts, cousins or other relatives. Under this proposed process, the parent/grandparent may have to prove: (1) they were the relevant caregiver; (2) they were financially responsible or paid more to support the child; (3) they loved the child more than others; and (4) they maintained a parental role or bond. They may also be expected to obtain the child's written testimony that they believed their parents/grandparents were the primary caregivers. Again, the Panel believes this to be exact.

[36] The AFN submits that this proposed process is not in the best interests of the beneficiaries. This process will be traumatic for all involved, especially the child who might face pressure, coercion, bullying and stress in stating who stood in their life as the parental figure.

[37] Much like the COO and the NAN, the AFN agrees that every child is very important to the extended family. It is often recognized in First Nations that "it takes a community to raise a child". As such, every member of the child's family, the Chief and Council, educators, health professionals and others all owe a sacred duty to the child. Children are the most precious resource of a First Nations community.

[38] Building on the importance of family that both the COO and the NAN identify, the AFN acknowledges that other factors also play a significant role in how First Nations children are raised. For instance, this Panel has accepted evidence that housing shortages in First Nations communities exist. Typically, this results in more than two families living in a single housing unit. Often members of the same family would occupy such a residence. It therefore would not be unusual for a child to live with their parents, grandparents, uncles, aunts or older cousins. Strong family bonds are created in such a setting and a child may rely on more than one adult figure for things such as getting food to eat, seeking assistance in homework, etc.

[39] According to the AFN, despite the close kinship, the biological parents or grandparents of the child remain the most important figures in the child's life, followed by the child's siblings.

[40] Additionally, the AFN submits this Panel took notice of the widespread poverty many First Nations individuals suffer. Poverty related issues, systemic discrimination in the criminal justice system, and pursuit of economic opportunities can result in one or both parents leaving the community for a short period of time. During the brief period of a parent's absence, a grandparent or other family member may care for the child.

[41] Under the COO and the NAN's proposal, any of these adults living in the same dwelling as the child, and those who temporarily are looking after a child while their parents are away working or temporarily incarcerated would be able to contest an application for compensation filed by a parent. The AFN submits that the compensation plan has to be practical and very clear on who is eligible for compensation.

[42] Both the COO and the NAN assert that guidelines can be developed by the parties to address these types of competing claims. However, determining what types of caregiving was provided and the length of time associated therewith would require intrusive and in-depth investigation into potential beneficiary's history. It is clear that this form of compensation process would be ripe for abuse. There is the potential that people could be compensated whom the apprehended child may not even know or remember. In the circumstance of a child who was apprehended, this system raises the specter that individuals who cared for the child on and off for a few months could become entitled to compensation. In addition, situations may arise where a family member filed and obtained compensation prior to and without the knowledge of the parents or grandparents applying for compensation. The Panel agrees with the AFN's position.

[43] The AFN submits that both the COO and the NAN appear to focus on those individuals who were willing to assist in caregiving and/or contributing financially towards the care of a child as a determining element of compensation. The AFN submits that this may not be the best approach. The purpose of compensation is not meant to repay expenses or address the inconveniencing of family members. Rather, compensation is meant to

compensate for the trauma of losing a family member who was apprehended as a result of Canada's discrimination.

[44] The AFN adds that when compensation is expanded to other caregivers, the compensation is no longer for the loss of a biological child or grandchild by apprehension or misapplication of Jordan's Principle. The nature and purpose of the compensation changes to that of compensating people for their time, expense and love for the child. The AFN submits that the purpose of the compensation awarded by the Panel is to compensate a biological parent or grandparent for the loss of their child to a system that targeted them because they were First Nations.

[45] The AFN submits the compensation scheme is meant to be objective, not subjective. To investigate the relationship between an adult and child removes the objective element and replaces it with an interrogatory process, which goes against AFN's strong position that children in care not be subjected to the same traumatic process as Residential School survivors in the Independent Assessment Process. The Panel finds this to be the correct interpretation of the approach taken by the Panel in the *Compensation Decision.*

[46] Additionally, the COO asserts that caregivers beyond parents and grandparents aligns more closely with the family structures and practices experienced in many First Nations communities.

[47] However, the AFN contends that the COO references Canadian case law and legislation to suggest principles such as physical care, presentation of a parent-like relationship, financial contributions and intention to treat a child like their own should be determinative in this assessment. Likewise, while the NAN asserts First Nations laws, practices and traditions should be the guiding factors in determining who may be a potential caregiver, the NAN also seeks to avail to Canadian jurisprudence and legislation to compel the Central Administrator to make a subjective consideration on who is the most appropriate caregiver. This would import an adjudicative function into the compensation process that would likely require the creation of an industry that employs third party adjudicators and lawyers.

[48] The AFN strongly disagrees with the suggestion that a child's perspective on who the appropriate caregiver is should be taken into account. The NAN does not propose a method on how the child's perspective will be recorded. The only viable mechanism to adduce this information would be to question current or former children in care or Jordan's Principle candidates about which caregiver, parent or grandparent they loved more, or who is more deserving of compensation. This approach would be traumatic as it effectively puts the relationship between a child and their family members on trial, which would certainly stress and potentially harm the emotional bonds between a child and their family members.

[49] Finally, the AFN does not support the COO's proposal on how to address Ontario's *CYFSA* and under-identification. The Ontario *CYFSA* was enacted in 2017. It replaced the former Ontario *CFSA* which was in place in Ontario from 1990-2017. The 1990 *CFSA* does not include an interpretation section which outlines the definition of "child in need of protection". Therefore, the COO's concerns would only capture children and youth beneficiaries from 2017 to 2020 and will not apply to the majority of beneficiaries in Ontario, much less the rest of Canada. The original taxonomy suggested by the Complainants and the Respondent would apply in almost all circumstances and cover those children impacted by the *CYSFA*. The Panel accepts this position.

[50] For those reasons, the Panel denies the COO and the NAN's request for additional orders to expand the category of caregivers in this compensation process.

VI. The NAN Request Relating to Remote First Nations Communities

Key Positions of the Parties

[51] The NAN provided a reply to the responding joint submissions filed on behalf of the Caring Society, the AFN, and Canada and to the additional submissions filed on behalf of the AFN and on behalf of Canada. The NAN's reply submissions address two novel issues raised in the joint submissions and additional submissions: (1) conflicting messages regarding the Framework's responsiveness to remote First Nations; and (2) Canada's suggestion that it would be procedurally unfair for this Tribunal to consider the NAN and the

COO's submissions of May 1, 2020 regarding caregivers given that the round of submissions was closed on March 16, 2020.

[52] In sum, the NAN submits that the parties oppose the NAN's proposed modification to section 6.3 of the *Draft Compensation Framework*, a modification which would list considerations specific to remote First Nations, when determining resourcing requirements on the basis that such inclusion "risks excluding the unique needs of other First Nations communities." At the same time, the Caring Society, the AFN and Canada oppose affirmation of the unique needs of other First Nations through incorporation of a proposed guiding principle that would affirm that "the compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations." For the NAN, these are contradictory messages. In the context of proceedings in which substantive equality has been central, the NAN is surprised and confused by the opposition to the proposed guiding principle.

[53] The NAN argues that the concern regarding section 6.3 can be addressed by a simple drafting change indicating that the specific considerations listed by the NAN are not an exclusive or exhaustive list. The NAN provided the following copy of section 6.3, with the NAN's initial proposed modifications underlined, and the NAN's new proposed modification underlined and in bold:

> 6.3 First Nations will require adequate resources to provide support to beneficiaries. Canada will assist First Nations where requested by providing reasonable financial or other supports. In providing these support and determining what constitutes "reasonable financial or other supports" and what constitutes "sufficient resources" in section 6.2(b), consideration will be given to **all relevant factors, including** the particular needs and realities of remote First Nations with limited resources or infrastructure for providing support to beneficiaries, and who face increased costs in provision of services due to remoteness.

[54] The NAN contends that in its submission of May 6, 2020, the AFN opposes the NAN's position that the Compensation Framework needs to be implemented in a way that takes into account regional specificities. However, in the same submissions, the AFN states that "regional considerations are adequately incorporated into the *Draft Compensation Framework*."

[55] With respect to the NAN's submission, the Caring Society, the AFN and Canada submit the intention is not for "discussions to continue" on any substantive issues outlined in the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products prior to or after the final rulings. For greater clarity, the Complainants and the Respondent have not filed the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products subject to any right by the NAN to return before the Tribunal "should an issue of concern arise". It is the view of the Caring Society, the AFN and Canada that this was not the process envisioned by the Tribunal.

Reasons on the Proposed Modifications to Section 6.3

[56] The Panel is not privy to the Parties discussions on this *Draft Compensation Framework* and does not wish to rewrite the framework achieved by the Caring Society, the AFN and Canada in consultation with the Commission and the interested parties, the COO and the NAN. However, the Panel finds there is merit to the NAN's argument and finds the proposed amendments to section 6.3 above to be appropriate. This provision addresses resources to support beneficiaries financially or otherwise and while the *Compensation Decision* orders and process are Nation-wide support to beneficiaries should account for their specific needs including the particular needs and realities of remote First Nations. The Panel does not see why adding a precision such as this one poses a difficulty or risks excluding the unique needs of other First Nations communities. The Panel's substantive equality approach focuses on unique needs of First Nations including remote First Nations. Moreover, this reality has formed part of the Tribunal's findings since 2016.

[57] The Panel directs the Caring Society, the AFN and Canada to discuss this possible amendment further when they finalize the *Draft Compensation Framework*. If this poses a significant roadblock preventing the finalization of the *Draft Compensation Framework*, the parties should inform the Tribunal and provide sufficient information to assist the Panel in understanding the underlying issues. This is not an invitation for the interested parties to return to the Tribunal with other issues surrounding the *Draft Compensation Framework* given that the objective is to finalize it shortly. The Panel is satisfied that the interested parties were consulted, some of their suggestions were included, another one identified

above was found acceptable by this Panel and the other suggestions put before the Tribunal have been answered in the negative by the other parties and the Panel accepts this outcome.

Reasons on Procedural Fairness in Considering the NAN and the COO's May 1, 2020 Submissions regarding Caregivers

[58] This being said, on the issue of procedural unfairness raised by Canada, the Panel's response mirrors what it has mentioned in previous rulings to reject Canada's unfairness argument:

> Moreover, the Federal Court of Canada in regards to remedies stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands **innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility." (emphasis added)** [emphasis in original]. (see 2018 CHRT 4 at para. 39).

Additionally, this intricate task necessarily requires some back and forth between the Tribunal and the parties.

> In this case, it is very different as the Tribunal has heard the merits of the case extensively and made findings and orders. It retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented. This necessarily requires some back and forth between the parties and the Tribunal unless all parties agree and propose consent orders to the Tribunal [emphasis added]. (see 2019 CHRT 7 at para. 47).

[59] In another ruling the Tribunal's referred to *Grover* and to the notion that it is an intricate task to fashion effective remedies to a complex dispute:

> Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36) [emphasis added]. (see 2017 CHRT 14 at para. 29).

[60] Furthermore, after the Panel's questions to the COO and the NAN, the Panel allowed the parties to respond to the COO and the NAN's submissions. Finally, the Panel rejected the COO and the NAN's requests. Additionally, the other parties' replies to the COO and the NAN's supplemental submissions were instrumental in assisting the Panel in determining the issues. In light of the above, the Panel rejects the AGC's procedural unfairness argument.

VII. Definitions for Essential Service, Service Gap, Unreasonable Delay

[61] The remaining points on which the Caring Society, the AFN and Canada require the Tribunal's direction are the definitions of the terms "service gap", "unreasonable delay", and "essential service" for the purposes of eligibility for Jordan's Principle compensation. The parties submit these are important threshold terms in deciding the types of situations that qualify as a "worst-case scenario" for the purposes of receiving compensation as set out in the Tribunal's *Compensation Decision* order from September 6, 2019.

[62] In sum Canada submits the Tribunal has ordered compensation for Canada's failure to provide "essential services" to First Nations children. The word "essential" is thus a significant qualifier, and should be interpreted in a common-sense way. Canada proposes that it include those services considered necessary for the child's safety and security, while considering substantive equality, cultural appropriateness and best interests of the child. "Service gap" is a concept that the Tribunal has used to describe a failure to provide a necessary service for reasons such as incompatibility between government programs, or Canada's use of an unduly narrow definition of Jordan's Principle. The definition Canada proposes helps ensure that the "gap" was a circumstance that resulted in a serious need going unmet for discriminatory reasons. An "unreasonable delay" is one that could reasonably have had an adverse impact, there was no reasonable justification for the delay, and the delay was outside a normative standard.

[63] Canada argues that providing clear definitions to these terms will greatly facilitate the compensation process. The definitions will help identify First Nations children intended to be beneficiaries. The definitions should be succinct and clear, so as not to encourage

unreasonable expectations of receiving compensation, and not to discourage those who may be eligible from applying.

[64] Each of these three definitions is discussed in turn below. The Panel carefully reviewed all of the parties and interested parties' submissions, however, in the interest of brevity not all views will be discussed here. Rather, the Panel will focus its summaries and reasons on the contentious areas surrounding the definitions.

A. Service Gap

Key Positions of the Parties

[65] Canada's proposed definition is as follows:

> "Service gap" is a situation where a child requested a service that was not provided because of a dispute between jurisdictions or departments as to who should pay; would normally have been publicly funded for any child in Canada; was recommended by a professional with expertise directly related to the service; but the child did not receive the service due to the federal government's narrow definition of Jordan's Principle.

[66] Canada submits that the Tribunal's *Merit Decision* identified two types of service gap. One type of gap arises from the narrow definition of Jordan's Principle applied by Canada at certain points in the past. The second involves the lack of coordination among the various programs intended to address First Nations children's health. The Tribunal expressed the concept in the following paragraph:

> In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see *Merit Decision* at para. 381).

[67] According to Canada, the *Compensation Decision* itself also suggests that the reason for giving compensation for children experiencing service gaps in relation to Jordan's

Principle was that the service gaps led to some children being placed “outside of their homes, families, and communities in order to receive those services.” (see *Compensation Decision* at para. 250). Placing these children outside their families, homes and communities could itself be seen as a harm.

[68] There is substantial agreement between the parties as to how service gaps arose under the application of Jordan’s Principle when Canada was applying an unduly narrow definition. Canada also agrees that where a child did not receive a service simply because the lack of co-ordination of programs meant no payment was permitted, compensation is appropriate.

[69] The essence of the dispute between the parties in relation to this definition concerns whether some necessary limitations should apply to ensure that there was indeed a gap. Canada proposes that the service in question must be one that was ordinarily provided to other children in Canada under certain conditions: such conditions could include the need to travel to certain locations, eligibility criteria including specific age brackets, limited frequency, and within certain income thresholds. This is less a limitation than inherent in the understanding of the word “gap”: the need to compensate arises because there was a gap between the services a First Nations child was receiving and the services other Non-First Nations children received.

[70] The second part of Canada’s definition is aimed at ensuring that the service in question was recommended by a professional with the relevant expertise to determine that the service is essential to meet the child’s needs. As Valerie Gideon described, it is sometimes the case in considering Jordan’s principle cases that a service request is supported by a recommendation from someone who does not have the required professional expertise. In these cases, the Department will offer support for the child to access the needed professional referral. Such situations should not be compensable, since they do not provide evidence either of a service gap or of unreasonable delay. They are just a necessary step to ensure that the approved service will meet the assessed need of the child.

[71] Finally, Canada submits it is important to note that many programs are not universally available across communities. This may cause differences in the availability of supports, products or services, but this a common practice among governments to respond to specific needs where they arise; it is not based on discriminatory treatment of specific children.

[72] Governments must prioritize resources and will do so based on varying criteria: unmet needs, conditions for success of the initiative, demonstration of results for future implementation in other communities. A proper understanding of the existence of a service "gap" must recognize that the availability of programs to First Nations children must be assessed against programs that are generally available to most other children.

[73] Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

[74] Canada proposes a definition of "service gap" where (a) a child "requested" a service; (b) the service was not provided due to a dispute between jurisdictions or departments as to who should pay; (c) the service would normally be publicly funded for any child in Canada; and (d) was recommended by a professional with expertise directly related to the service.

[75] The AFN requests that this Panel reject the requirement that claimants must have made a request to Canada to receive a product or service. Canada's historical approach to Jordan's Principle and requests for products or services not normally funded under the First Nations Inuit Health Benefits Program would have dissuaded individuals from making a formal request. Put simply, if one knew their request would be declined or not even considered, why would one apply for the service at all? This Panel noted that Canada's narrow definition of Jordan's Principle resulted in not a single application being approved (see *Merit Decision* at para. 381).

[76] Secondly, the AFN submits that Canada's proposed definition could be viewed as regressive, particularly in situations where one level of government was required to provide a specific service or product for all other children. The present definition of Jordan's Principle now enables Canada to fund goods and services not normally provided to other Canadians, based on the principle of substantive equality. Finally, the requirement that the service be

recommended by a professional with expertise directly related to the services is too narrow. A medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field.

[77] The AFN adds that one must be cognizant to the fact that parents were desperately seeking services for their sick, disabled, or special needs child after the House of Commons adopted *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279). In some cases, the First Nations government assisted, in other situations family members contributed or pooled funds.

[78] Unfortunately, there are examples where these vulnerable children did not receive the service they required. With respect to "service gaps", this Panel addressed "gaps" in its 2017 CHRT 14 ruling: The Decision found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Merit Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Merit Decision* at para. 380 and more generally paras. 350-382).

> Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision*, entitled INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see 2017 CHRT 14 at para. 47).

[79] The AFN submits the definition for "service gaps" should focus on an unmet medical or other need(s) of a First Nations child. This would cover a product or service a medical or other professional who is licensed or who has the necessary expertise has recommended, based on the best interests of the child. It should also give consideration to overcoming historic disadvantages and address substantive equality.

[80] The Caring Society proposes the following definition of a “service gap”:

> “Service gap” is a situation where a child needed a service that
>
> • was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;
>
> • was recommended by a professional with expertise directly related to the service need;
>
> but the child’s needs were not met due to the federal government’s discriminatory definition of and approach to Jordan’s Principle.
>
> For greater certainty, the discriminatory definitions and approach employed by the federal government demanded satisfaction of all the following criteria during the following time periods:
>
> a) Between December 12, 2007 and July 4, 2016
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve;
>
> • Child with multiple disabilities requiring multiple service providers;
>
> • Limited to health and social services;
>
> • A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
>
> • The case must be confirmed to be a Jordan’s Principle case by both the federal and provincial Deputy Ministers; and
>
> • The service had to be consistent with normative standards
>
> b) Between July 5, 2016 and November 2, 2017
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);
>
> • The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
>
> • The service was limited to health and social services (July 5, 2016 to May 26, 2017).

[81] The Caring Society strongly disagrees with three of the requirements that Canada would impose on the definition of a "service gap". Canada says that: (a) there must have been a "request" for a service; (b) there must have been a dispute between jurisdictions or departments as to who should pay; and (c) the service must have been normally publicly funded for any child in Canada.

[82] The Caring Society argues that these three requirements impose restrictions arising from aspects of Canada's approach to Jordan's Principle that the Tribunal has already ruled to be discriminatory. The Caring Society's position is that a "service gap" should be defined with reference to a child's confirmed needs at the time and in keeping with the principles of a child's best interests, substantive equality, and consideration of distinct circumstances. The Caring Society's proposition is that needs that were not met due to the discriminatory definition and implementation of Jordan's Principle ought not to be equated to a frivolous request that was never made.

[83] The Caring Society submits that as demonstrated by Canada's witnesses and the documents it filed before the Tribunal, Canada's discrimination shaped both its definition of Jordan's Principle and the approach to implementing it. In particular, Canada did not publicize Jordan's Principle, did not have an application process for Jordan's Principle, did not have a systematic process for documenting requests, and the few cases that managed to surface as "requests" never met Canada's requirements to be termed a Jordan's Principle case.

[84] Canada is relying on its "old mindset" to support its contention that compensation should only be awarded where an individual applied for a service or a product. As the record indicates, Canada's approach to Jordan's Principle until July 2016 ensured that First Nations children did not have a path to come forward with a service or product request when they had a need. Indeed, during the hearing on the merits, Canada's witness, Ms. Corinne Baggley (Senior Policy Manager at Aboriginal Affairs and Northern Development responsible for Jordan's Principle between 2007-2014) provided important insight into how Canada's "old mindset" contributed to so few requests coming forward. Canada's approach was constructed in such a manner that the public knew little to nothing about Jordan's

Principle. During her testimony, Ms. Baggley spoke directly to Canada's decision to not "publicize" Jordan's Principle:

> […] that wasn't within our mandate when we implemented Jordan's Principle to publicize the approach. We had a communications strategy in place that was more reactive, so we weren't really permitted to publicize, you know, the – where to bring Jordan's Principle cases to. (Examination-in-Chief of Ms. Corinne Baggley, May 1, 2014 (Steno Tran Transcript Vol 58) at p 32 line 8 to line 14.)

[85] The Caring Society submits that Ms. Baggley also confirmed that federally appointed focal points, on whom Canada relied to manage Jordan's Principle cases, were not identified to the public. In fact, when the AFN requested a list of focal points in 2009, it was only furnished three years later. This highlights a deep flaw in Canada's reliance on "requests" to identify compensable Jordan's Principle cases. It is entirely unclear why Canada would require a "request" to identify a compensable Jordan's Principle case when it specifically failed to establish any public mechanism for such requests to come forward.

[86] There was also no mechanism for requestors to apply for products or services under Jordan's Principle. Indeed, Ms. Baggley's evidence directly confirmed this point:

> Ms. Arsenault: Is it or was it possible to apply for Jordan's Principle funding?
>
> Ms. Baggley: No. It is -- as I explained earlier, it's not a program, so like the other programs we have across the federal family, there are no Terms and Conditions, there are no eligible beneficiaries, eligible recipients, eligible expenditures identified, it is very much a policy initiative and it is very much a process that is used to resolve cases. (See Examination-in-Chief of Ms. Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 128 line 13 to line 23).

[87] Furthermore, even if a request did come forward, focal points had no special training on how to handle Jordan's Principle cases, other than general periodic procedural discussions.

[88] However, Ms. Baggley's testimony also illuminated significant shortcomings in Canada's process for receiving and documenting those Jordan's Principle requests that did come forward despite the obstacles imposed by Canada.

[89] According to Ms. Baggley, First Nations were not involved in the formulation of Canada's definition of Jordan's Principle:

> Mr. Poulin: But there is no First Nation -- my understanding is there is no First Nation agreement on the definition that is used by the federal government.
>
> Ms. Baggley: Well, it's a federal definition, as I have explained, and we didn't go out seeking agreement with our definition, and we certainly do acknowledge in any documents that we develop through the agreements for example, if there are other definitions that the parties are working with, we do acknowledge and reference those. (See Cross-Examination of Ms. Corinne Baggley, May 1, 2014, (Steno Tran Transcript Vol 58) at p 11 line 13 to line 24).

[90] The Caring Society contends that it is important to acknowledge that Canada's definition shaped its approach to Jordan's Principle, including its system for receiving and documenting requests. The documentation that Canada did produce is sparse, is often region-specific, and restricted to children with disabilities. Taken together, the record before the Tribunal shows that Canada crafted a system that blocked service and product requests from coming forward, and now seeks to benefit from that system to reduce the scope of victims entitled to compensation for their pain and suffering resulting from this wilful and reckless discrimination.

[91] The result of Canada's proposed approach would limit compensation to those who received direct denials prior to 2016 as, even when cases came to Canada's attention, they employed an approach that failed to yield a single Jordan's Principle case prior to the Tribunal's 2016 decision. As the Tribunal noted in its May 2017 Ruling, "it was Health Canada's and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle" (see 2017 CHRT 14 at para 77, citing *Merit Decision* at paras. 379-382).

[92] In the same way that the Caring Society argued in its February 21, 2020 submissions that Canada ought not profit by denying beneficiaries compensation because they died waiting for Canada to end its discrimination, the Caring Society contends that Canada ought not profit by restricting compensation to persons who "requested" compensation when it was Canada's discrimination that directly suppressed such requests from coming forward in the first place.

[93] As such, the Caring Society's position is that a "request" is not required for a "service gap" to exist. Rather, the analysis should focus on the child's need(s) that arose during the period of Canada's discrimination. Such needs should be assessed based on the child's best interests, substantive equality and consideration of distinct circumstances – all guiding principles that the Tribunal has already made clear must apply in this case.

[94] Furthermore, the Caring Society argues the approach to Jordan's Principle ordered by the Tribunal focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. This is logical as, until 2017, processes did not exist for requests to come forward. As noted above, the Tribunal found in May 2017 that "Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children" (2017 CHRT 14 at para. 112). In such circumstances, where the Tribunal has already reached an unchallenged conclusion that Canada's approach was so discriminatory that families did not know they could come forward, it defies logic to require a request to have been made in order to identify a service gap.

[95] The Caring Society's position is supported by contrasting "service gaps" to "denials" and "unreasonable delays". Unlike service gaps, denials and delays presume that requests have been made. Denials and delays have as their point of reference the request that was made for a service or product. In the case of a denial, a specific "ask" was refused. For delays, the "clock" on unreasonable delay begins running when the request was made. Requiring a "request" in order to identify a service gap would be entirely redundant, as all "requests" result in approvals, denials, or delays and would be covered by those terms, such that there would be no "definitional work" left for a service gap.

[96] Indeed, a gap is entirely different than a denial or a delay, as it references unmet needs that are not addressed by existing services. The Panel addressed "service gaps" most directly at paragraphs 381-382 of its *Merit Decision*:

> *In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which*

> *jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.*
>
> *More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made* (see *Merit Decision* at paras. 381-382, italics added).

[97] Even where a service request had been made, Canada would also require that the service "was not provided because of a dispute between jurisdictions or departments as to who should pay". Adding such a requirement flies in the face of the Tribunal's 2017 CHRT 14 decision, which held that "[w]hile Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle." (see 2017 CHRT 14 at para. 135(1)(B)(v), see also 2017 CHRT 35 at para. 10).

[98] The Caring Society contends that it is evident even in Canada's own briefing materials produced following the Tribunal's *Merit Decision* that a dispute between governments should not be required in order for a service gap facing a First Nations child to constitute a "worst-case scenario" of discrimination.

[99] On February 11, 2016, sixteen days after the *Merit Decision*, Canada produced a document titled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*. In this document, which the Tribunal found "relevant and reliable", (2017 CHRT 14 at para. 51). Canada acknowledged that "[t]he focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services" (see 2017 CHRT 14 at para. 50). The Tribunal agreed (see 2017 CHRT 14 at para. 71).

[100] The Caring Society submits it is entirely unclear why Canada is attempting to reintroduce this definitional requirement more than four years after recognizing that disputes between or within governments do not account for service gaps. In essence, Canada is trying to get a “new decision” on previously adjudicated points that Canada lost and chose not to judicially review. This cannot be permitted.

[101] The NAN submits that in any process developed to process claims for Jordan’s Principle-related compensation, the NAN believes the following principles should apply in order to be responsive to the unique reality experienced by children and families in remote and isolated First Nations:

> a) Canada should not benefit from its discriminatory conduct;
>
> b) A claimant should not automatically be denied eligibility for being unable to demonstrate that a request for a service/support was made; and
>
> c) A claimant should not automatically be denied eligibility for being unable to establish that the service/support was, historically, recommended by a professional.

[102] Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived.

[103] In many instances, however, the reality will be far-removed from the ideal because Canada’s discriminatory conduct, as found by this Tribunal, prevented or discouraged a referral and/or a request from being made in the first place. As a result, the process for determining eligibility must not require proof of a request for a service from Canada, nor proof of a recommendation or referral from a professional.

[104] The NAN’s concern about a requirement that an individual must establish historical proof of an assessment, referral and recommendation for a service or product to be eligible for compensation is this: the requirement will unfairly bar from compensation citizens of NAN First Nations who were never able to access assessment and identification services due to systemic barriers and gaps.

[105] While the proof of assessment, referral or recommendation for a service or product can help establish a successful claim, their absence should not automatically disentitle a claimant.

Reasons on the Definition of "Service Gap"

[106] The Panel agrees with the AFN and the Caring Society's positions, summarized above, and their characterisation of the Tribunal's past findings and approach to remedying discrimination by ensuring substantive equality. It is accurate to say that the Tribunal focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. Moreover, a "service gap" should be defined with reference to a child's confirmed needs during the period of Canada's discrimination and such needs should be assessed based on the principles of a child's best interests, substantive equality, overcoming historic disadvantages and consideration of distinct circumstances. The AFN and the Caring Society are correct in affirming that those are all guiding principles that the Tribunal has already made clear apply in this case.

[107] Therefore, the Panel rejects the following parameters proposed by Canada that there must have been a "request" for a service; there must have been a dispute between jurisdictions or departments as to who should pay; and the service must have been normally publicly funded for any child in Canada.

[108] Also, the Panel relies on its unchallenged *Merit Decision* and subsequent rulings especially the Panel's orders on Jordan's Principle definition (see 2017 CHRT 14 and 35) and believes they provide an answer to the dispute over this definition.

[109] This definitional exercise should focus on what the Tribunal meant in its rulings when it referred to essential services, service gaps and unreasonable delay. This is done in reference to the Tribunal's findings and evidence in the record.

[110] In terms of parties bringing suggestions and new perspectives, this is more appropriately directed to the efficiency of the compensation process than to the definitional exercise.

[111] The Panel finds that Canada is bringing forward some arguments that were raised and addressed in the *Merit Decision* and previous rulings. For example, the arguments in the two paragraphs below were advanced at the hearing on the merits, considered and rejected after weighing the evidence as a whole.

[112] Canada already argued at the merits hearing and again advances in this matter that governments must prioritize resources and will do so based on varying criteria including unmet needs, conditions for success of the initiative, and demonstration of results for future implementation in other communities. A proper understanding of the existence of a "service gap" must recognize that the availability of programs for First Nations children must be assessed against programs that are generally available to most other children.

[113] Similarly, Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

[114] The above arguments were advanced by Canada in the hearing on the merits where an exhaustive list of programs on reserves was filed in evidence and tested. Canada's arguments on programs addressing needs of First Nations children were rejected and discussed at length. The Panel already found that Canada was unable to measure comparability with provincial services offered to children.

[115] Without repeating all the previous reasons found in multiple rulings, a few examples are reproduced below:

> *In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the cycle of dependency (see Annex, ex. 33 at pp. 1-2 [Explanations on Expenditures of Social Development Programs document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (Explanations on Expenditures of Social Development Programs document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a*

significant increase in costs for AANDC (see *Merit Decision* at para. 267, italics added).

Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [Social Programs presentation] (see *Merit Decision* at para. 268, italics added).

The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see Comparability of Provincial and INAC Social Programs Funding at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services." (See *Merit Decision* at para. 336, underlining added).

MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?

MS D'AMICO: I don't believe that we can.

[…]

Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.

> (Transcript Vol. 51 at p. 183) (see *Merit Decision* at, para. 337, italics added. See also paras. 463-464).

[116] The Panel is concerned by those submissions contesting systemic discrimination already found in the *Merit Decision*. The Compensation process is focused on harms to individuals caused by the systemic discrimination found in the *Merit Decision*.

[117] This being said, the Panel agrees there is merit in Canada's argument that a service should have been recommended by a professional with the relevant expertise to determine that the service is essential to meet the child's needs. This criterion is consistent with the amendments agreed to by the parties in this case and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs […]". This could bring objectivity and efficiency to the compensation process as beneficiaries can indicate the service that was recommended but not obtained. However, the Panel agrees in part with the AFN that a medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field. This being said, the Panel believes exceptions should be made when the treatment also contains risks to the child that require a specialist to determine if the treatment's benefits outweigh the risks. Ultimately, the decision concerning the child will belong to the parent or guardian. Those situations are not the norm and should not be used as a criterion to exclude children. Rather, it accounts for some situations that may arise in the treatment of children. This flexibility should be reflected in the compensation process. Moreover, the Panel recognizes the systemic barriers encountered by many First Nations peoples in accessing services and agrees with the NAN that the absence of proof of assessment, referral or recommendation should not automatically disentitle a claimant. This flexibility should also be reflected in the parameters of the compensation process.

[118] The next step to require that a request was made is to be entirely rejected given the accurate interpretation of the Tribunal's findings made by the AFN and the Caring Society,

mentioned above. As already mentioned, the Panel's past *Merit Decision*, rulings and findings are a full answer to this aspect of Canada's request.

[119] Moreover, the criteria that a jurisdictional dispute occurred is to be rejected as it would be less inclusive than what the Panel found in past unchallenged rulings and in the definition agreed to by the parties and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada's definition and application of Jordan's Principle shall be based on the following key principles […] While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.". The Panel has no intention to reopen this matter. The parties who successfully proved their case in this matter disagree and understandably view this as regressive, trying to reopen matters that were previously decided and not challenged. Consequently, this request is denied.

[120] Similarly, the Panel rejects Canada's requirement that the service must normally have been publicly funded for any child in Canada given the Panel's substantive equality findings and its orders accepted by Canada in 2017 CHRT 14 and in 2017 CHRT 35 at paragraph 135: "[…] When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child […]".

B. Essential Service

Key Positions of the Parties

[121] Canada's proposed definition is as follows:

> "Essential service" is a support, product or service that was:
>
> > requested from the federal government;
> >
> > necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety.
>
> In considering what is essential for each child the principles of substantive equality and the best interests of the child will be considered to ensure that the focus is on the individual child.

[122] Canada submits the term "essential service" appears nine times in the *Compensation Decision*, but is not specifically defined. However, in paragraph 226 of the *Compensation Decision*, the Tribunal gave considerable guidance as to its meaning:

> First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

[123] In considering Canada's proposed definition, the concepts of safety and security should be interpreted to capture situations in which the child's ability to thrive, health or personal safety would be compromised by failure to provide the support, product or service concerned. This approach encompasses the requirement that there be a prospect of real harm flowing from a failure to respond appropriately to a request for such support, service or product.

[124] The Tribunal's reference to "real harm" is a significant qualifier, one that accords with a common-sense understanding of what is truly "essential". Not all supports, products and services are equally necessary, and the failure to provide them, or the failure to provide them in a timely way, should not be compensable. Canada is not suggesting that the harm actually had to occur, since the child may have obtained a product or service by other means and avoided the harm. However, the potential harm for non-provision should have had to have been at least objectively foreseeable for compensation to be given.

[125] Canada submits the affidavit of Valerie Gideon includes as an exhibit a chart of the broad range of supports, products and services that have been provided under Jordan's Principle since the Tribunal set out its definition in 2017 CHRT 14 and 2017 CHRT 35. The chart demonstrates that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making. In particular, it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services, as the Tribunal has approvingly noted (see *Compensation Decision*, at para. 222).

[126] But not every service on that chart is equally necessary. Ms. Gideon's affidavit also includes examples of services that the Caring Society definition of "essential services" would encompass, and demonstrates why an overly-expansive definition is unjustified.

[127] To be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential". Canada's definition does that.

[128] Another difference between the parties is that Canada's definition requires that the child, or someone on the child's behalf, must have made a request. It need not be the case that the person applying used the term "Jordan's Principle," but they must have brought the service request to Canada's attention. While the Caring Society is correct that Canada did not make a significant effort to establish a simple mechanism for families or service providers to come forward with Jordan's Principle requests, Canada did provide a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. Unless the definition includes the making of a request as a condition, the process risks becoming a search back in time for a service that might have been requested had the person chosen to do so. Canada cannot be accused of discrimination for failing to respond to requests that were never made. Compensation should not be provided in such cases.

[129] The AFN submits that First Nations children face unique challenges in accessing services, and Jordan's Principle is an essential mechanism for ensuring their human, constitutional, and treaty rights.

[130] The AFN argues that Canada is proposing a definition of “essential service” as a product or service that was (i) requested from the federal government; and (ii) is necessary for the safety and security of the child, the interruption of which would adversely impact the child’s ability to thrive, the child’s health, or the child’s personal safety.

[131] The AFN submits that Canada’s proposal is limited in scope. First, it would only cover those services requested from the federal government. This Panel has ruled that Jordan’s Principle is to apply to all jurisdictional disputes (see 2017 CHRT 14 at para. 135).

[132] Secondly, the AFN argues that Canada’s definition means that services would have to be necessary and any interruption would adversely impact a child. This definition assumes that a child was able to secure a service and was already receiving treatment, and as a result, the operative element would focus on the interruption of existing services. Evidence was provided to this Panel illustrating that not all individuals were able to access services. The AFN would support a definition of “essential services” that is consistent with the finding of this Panel. In this Panel’s 2017 CHRT 14 decision, this Panel noted that Jordan’s Principle is designed to ensure substantive equality for First Nations children (see 2017 CHRT 14 at paras. 69-75).

[133] Building on international standards, the AFN recommends that the definition for “essential services” incorporate some recognized international principles. Under international human rights law, defining what an essential medical service or treatment is for a child must follow components of the right to health for children. These components have been drafted and agreed upon by the international community and provide that children are entitled “to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” (United Nations’ *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Article 24 [*CRC*]). This right is articulated in Article 24 of the *CRC*, which is a widely ratified international human rights instrument and consolidates all previous treaties on the rights of children. Further, international human rights law provides that the right to health for children has long been understood to be an “inclusive” right, which extends beyond protection from immediately identifiable infringements, such as limitations on access to health care or services, and includes the wide range of rights and freedoms

that are determinate to children's health, such as the rights to non-discrimination and access to health-related education and information.

[134] Moreover, it is defined in international human rights law that the right to health, outlined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 in General Comment 14 of the Committee on Economic, Social and Cultural Rights, includes the following core components:

> a) Availability: Refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all.
>
> b) Accessibility: Requires that health facilities, goods, and services must be accessible to everyone. Accessibility has four overlapping dimensions:
>
> - non-discrimination
> - physical accessibility
> - economical accessibility (affordability)
> - information accessibility.
>
> c) Acceptability: Relates to respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater to the specific needs of diverse population groups and in accordance with international standards of medical ethics for confidentiality and informed consent.
>
> d) Quality: Facilities, goods, and services must be scientifically and medically approved. Quality is a key component of Universal Health Coverage, and includes the experience as well as the perception of health care. Quality health services should be:
>
> - Safe – avoiding injuries to people for whom the care is intended;
> - Effective – providing evidence-based healthcare services to those who need them;
> - People-centred – providing care that responds to individual preferences, needs and values;
> - Timely – reducing waiting times and sometimes harmful delays.

> • Equitable – providing care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status;
>
> • Integrated – providing care that makes available the full range of health services throughout the life course;
>
> • Efficient – maximizing the benefit of available resources and avoiding waste.

[135] Lastly, the World Health Organization has provided its definition of quality of care as "the extent to which health care services provided to individuals and patient populations improve desired health outcomes. In order to achieve this, health care must be safe, effective, timely efficient, equitable and people-centred."[2] This is critical in how essential services within states are to operate and the degree of care needed for not only children, but all individuals in the state.

[136] The Caring Society suggests the following definition of "essential service" is appropriate:

> "Essential service" is a support, product or service that was:
>
> > • necessary to ensure substantive equality in the provision of services, products and/or supports to the child.
>
> In considering what is essential for each child, the focus will remain on the principles of substantive equality (taking into account historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and/or supports) and the best interests of the child.

[137] The Caring Society argues that Canada also proposes to narrow "essential services" to consider only the safety and security of children, or their "ability to thrive". The Caring Society views safety and security as part of a child's best interests, but not limited thereto.

[138] The Caring Society understands that Canada takes the position that the existence of a "request" having been made of the federal government is an important limitation that it would like to impose on compensation under the Tribunal's order. However, for the reasons outlined above in the Caring Society's submissions regarding "service gaps", this would not

[2] https://www.who.int/maternal_child_adolescent/topics/quality-of-care/definition/en/

be appropriate due to Canada's discriminatory approach to Jordan's Principle having foreclosed those with need from coming forward.

[139] The Caring Society submits the notion of a "request" is inherent in situations where an essential service was "denied" (as denials can only follow requests) or "unreasonably delayed" (as, once again, delays can only be calculated with respect to the time of the request). Accordingly, any requirement for a "request" should be dealt within relation to the definition of a "service gap", such that the matter of a request need not be dealt with when defining the words "essential service". Services are essential, whether requested or not. Canada's definition of "essential service" also limits the eligible range of services, supports or products to those "necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety."

[140] However, the Caring Society argues this definition appears to roll back Jordan's Principle to Canada's definition in place from July 5, 2016 to May 26, 2017, which focused on disabilities and critical needs for health and social supports. The Tribunal ruled that that definition was discriminatory in the 2017 CHRT 14 decision, confirmed with amendments approved by the Tribunal following the consent of the parties in 2017 CHRT 35. Canada discontinued its judicial review of the 2017 CHRT 14 decision on November 30, 2017.

[141] Moreover, Jordan's Principle is designed to ensure substantive equality to First Nations children. In keeping with the purpose of the *CHRA*, Jordan's Principle is a particular tool to provide First Nations children "an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices" (*CHRA*, s. 2, explained in 2017 CHRT 14 at paras. 69-75).

[142] The Caring Society contends the Tribunal provided a very clear metric of the importance of substantive equality to this analysis in its *Merit Decision*. Speaking in the context of the FNCFS Program, the Tribunal said that Canada "is obliged to ensure that its involvement […] does not perpetuate the historical disadvantages endured by Aboriginal

peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory" (see *Merit Decision* at paras. 399-404).

[143] The Caring Society submits the metric of an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. Effectively, wilful and reckless 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 only when it had an adverse impact on the health or safety of a First Nations child.

[144] Canada ought not be permitted to shield itself from compensation for its discriminatory conduct by recirculating arguments that the Tribunal has already rejected.

[145] The Commission submits it would be inappropriate to effectively penalize the claimant for not having approached Canada in this context. First Nations children and families in vulnerable circumstances should not be expected to have made hopeless service requests in order to take the benefit of human rights protections.

Reasons on the Definition of an "Essential Service"

[146] The Panel already provided reasons above rejecting Canada's proposal that the definition include the requirement that a request was made. This same reasoning applies here in denying this aspect of Canada's proposed requirement. The Panel agrees with the AFN, the Caring Society and the Commission's positions above. Given the discrimination findings in this case, it is not appropriate to require that a request was made for beneficiaries to be eligible for compensation under this Tribunal process.

[147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. The Panel also agrees that a 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 only when it had an adverse impact on the health or safety of a First Nations child.

[148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.

[149] The Panel also understands that Canada is bringing forward examples of supports, products and services that were approved by Canada after the Tribunal's rulings 2017 CHRT 14 and 2017 CHRT 35 showing the wide range of services to support this valid aspect of their argument.

[150] Moreover, the Panel agrees that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making and that it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services after the Tribunal's 2017 CHRT 14 and 2017 CHRT 35 rulings. The Compensation period for

Jordan's Principle ends on the day the Tribunal released its ruling in 2017 CHRT 35. All the evidence showing compliance is helpful to inform the reasonableness interpretation.

[151] The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.

[152] Furthermore, Canada already made the argument as part of the hearing on the merits of this case that it provided a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. This was part of their defense and cannot be reopened here. This was rejected by the Panel as it reviewed the arguments and evidence. The Panel found that this was insufficient to meet the real needs of First Nations children and their families. The Panel need not reiterate all its reasons detailed in its *Merit Decision* and many rulings to reject this argument. The *Merit Decision* and those earlier rulings provide a full answer on this point.

C. Unreasonable Delay

Key Positions of the Parties

[153] Canada's proposed definition is as follows:

> "Unreasonable delay" is informed by:
>
> > the nature of the product, support or service sought;
> >
> > the reason for the delay;
> >
> > the potential of delay to adversely impact the child's needs;
> >
> > the normative ranges for providing the category or mode of support or services across Canada by provinces and territories.

> For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service that was not provided through Jordan's Principle or another federal program, delay resulting from administrative procedures or jurisdictional dispute will be considered unreasonable.

[154] Canada argues that all Canadians understand that some amount of delay is endemic in our health care system. Few, however, would expect to receive compensation where they experienced some delay in getting the service. To be worthy of compensation, the delay must, in some objective sense, be unreasonable based on the harm (actualized or potential) experienced by the individual.

[155] Canada's definition would accept that if the reason for delay was jurisdictional wrangling over who should pay, the delay was unreasonable. That is a reality that First Nations children experienced that other Canadian children did not, or were much less likely to experience. Jordan's Principle is now in place to prevent these situations from occurring.

[156] As pointed out above, Canada submits the Tribunal was concerned in its *Compensation Decision* about the possibility of harm to children because of delay. Conversely, where there was no reasonable possibility of harm, that factor should weigh against the provision of compensation.

[157] The essence of the dispute between the parties under this definition is whether the Tribunal's judgment imposing 12- and 48-hour standards for the provision of services should be the touchstone for compensation. However, as the affidavit of Valerie Gideon sets out, those standards exceed the standards set by the federal government with respect to services to children and families, and those of provinces and territories.

[158] The fact that Canada is bound by the Tribunal's order to observe much higher standards is a mechanism to ensure the longstanding injustices experienced by First Nations children will cease. However, minor deviations from those high standards should not lead to compensation: it is simply not evidence of discrimination to fail to achieve standards that exceed those of other jurisdictions and experienced by other children.

[159] Instead, what Canada proposes is that the failure to achieve normative standards, that is, standards which other Canadian jurisdictions strive to achieve with respect to

services to children, should be the benchmark against which the reasonableness of delay is assessed. On that standard, the evidence is that Canada is achieving such standards.

[160] The AFN recognizes the fears and helplessness parents and children encounter when waiting for a service or product to be provided, especially in cases of medical treatments or services that can improve the quality of life of an individual. It is all too tragic where a delay in accessing services results in permanent disability, long-term adverse health impacts, or even death.

[161] The AFN agrees with the Commission's suggestion that the definition of "unreasonable delay" should incorporate the Jordan's Principle service standards that were agreed to by all Parties. Urgent individual cases should generally be determined within 12 hours, and non-urgent individual cases within 48 hours. These timeframes should set the basis on which a common understanding should be built.

[162] Nevertheless, the AFN recognizes that not all delays past 12 hours in urgent cases or 48 hours in non-urgent cases will be unreasonable in every circumstance. However, claimants should not have to bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada. In these circumstances, Canada should be required to rebut the presumption of unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application. The process for this rebuttal can be further explored in the ongoing discussions between Canada, the AFN and the Caring Society.

[163] The Caring Society proposes the following definition of "unreasonable delay":

> "Unreasonable delay" will be presumed where a request was not determined within 12 hours for an urgent case, or 48 hours for other cases. Canada may rebut the presumption of unreasonable delay in any given case with reference to the following list of contextual factors, none of which is exclusively determinative:
>
> • the nature of the product, support and/or service sought;
>
> • the reason for the delay;
>
> • the potential for the delay to adversely impact the child's needs;

> • whether the child's need was addressed by a different service, product and/or support of equal or greater quality, duration and quantity, otherwise provided in a reasonable time;
>
> • the normative standards for providing the support, product and/or services across Canada by provinces and territories, that were in force at the time of the child's need; and
>
> • the timelines established on November 2, 2017 by the CHRT[3] for Canada to determine requests under Jordan's Principle: 12 hours for urgent cases, 48 hours for other cases.
>
> As part of the Guide, the parties will agree on a process for Canada to provide the Central Administrator with information on the factors noted above in order to rebut the presumption.

[164] The Caring Society submits that in its *Compensation Decision*, the Tribunal recalled a case that embodies the tragic human consequences of Canada's unreasonable delay in providing services and products to children in need:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline 30 degrees in order to alleviate the respiratory distress that resulted from her condition (see *Compensation Decision* at para. 224).

[165] The Caring Society argues that the Tribunal found as a fact in its *Merit Decision* that delays were built into Canada's response to Jordan's Principle:

> The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see *Merit Decision* at para. 379).

[166] This conclusion was restated in the Tribunal's summary of its findings and orders made with respect to Jordan's Principle in its 2017 CHRT 14 decision:

> In the [*Merit*] *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases (see 2017 CHRT 14 at para. 5).

[3] See the decision of the CHRT in 2017 CHRT 35.

[167] The Tribunal found that these problems were not cured by the *Merit Decision*, as Canada's implementation of Jordan's Principle operated without timelines until sometime in February 2017:

> While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity around what the process actually way (see 2017 CHRT 14 at para. 92).

[168] The Caring Society submits that Canada's system for considering Jordan's Principle cases was rife with built-in delays, claimants should not bear the onus of proving that their delay was unreasonable if it exceeded the 12- or 48-hour standards for evaluating and determining requests.

[169] However, the Caring Society recognizes that not all delays in excess of 12-hours in urgent cases or 48-hours in non-urgent cases will be unreasonable. As such, the Caring Society suggests that the factors outlined in its proposed definition afford Canada with a fair opportunity to rebut the presumption of unreasonable delay by providing the Central Administrator with particular details related to the child's case. Much like the other processes laid out in the Compensation Process Framework, this mechanism's operation will be spelled out in further discussions between Canada, the AFN and the Caring Society.

Reasons on the Definition of "Unreasonable Delay"

[170] Again, the Panel believes that the analysis of the term "unreasonable delay" should start by considering what the Tribunal meant by unreasonable delay.

[171] The Panel agrees that some delay in receiving services is acceptable in some circumstances. This is why the Panel used the words "unreasonable delay". The Panel believes that some reasonableness should form part of the analysis. The Panel agrees that minor deviations in some cases from those high standards ordered by the Tribunal and agreed to by all parties including Canada (see Consent order in 2017 CHRT 35) such as in the example outlined by Canada of providing a laptop to a child, mentioned above, should not lead to compensation. The opportunity for Canada to rebut the presumption of

unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application is an acceptable suggestion in this compensation process framework to avoid having claimants bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada.

[172] The question here is fully answered when looking at the reference period for compensation which is from December 12, 2007 to November 2, 2017. This period coincides with Canada's systemic discriminatory practices adversely impacting children. The Panel discussed examples in the *Compensation Decision* and previous rulings and the *Merit Decision* of harm caused by delays. Again, this was discussed at length in the unchallenged *Merit Decision* and subsequent rulings. While Canada argues it complies with normative provincial standards for service provision this is not what the Tribunal found occurred in this case up to November 2, 2017. The Caring Society and the AFN's examples referred to in the Tribunal's previous unchallenged *Merit Decision* and rulings, summarized above, indicate that those delays were unreasonable and caused harm to children. There is abundant evidence in this case of unreasonable delays causing harm to children. The recognition that Canada was abiding by the Panel's specific orders is reflected in the compensation period ending in November 2017.

[173] Advancing arguments and evidence now to challenge the Tribunal's previous systemic discrimination findings for the same reasons already mentioned in the service gaps section cannot be permitted. Current compliance to the Tribunal's orders is not the appropriate lens to assess compensation for past discrimination. The Panel rejects this approach.

[174] This being said, the Panel believes that making the argument for exceptions to the "high standards" must be possible to avoid situations such as the "laptop situation" referred to above. As mentioned above, the rebuttal of the presumption of unreasonable delay is an adequate option to account for those exceptional situations.

[175] For the above reasons, the Panel agrees with many aspects of the Caring Society and the AFN's proposed definitions and with some aspects proposed by Canada. The Panel generally agrees with the Caring Society's first three proposed general principles (see

Annex 1). The Panel directs the parties to consider the Panel's reasons above mentioned and to adapt the three definitions to reflect the Panel's reasons in the finalization of the *Draft Compensation Framework*.

VIII. Retention of Jurisdiction

[176] The Panel retains jurisdiction until the process for compensation issue has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Annex 1: General Principles

1. For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service, support and/or product to safeguard the child's best interests that was not provided through Jordan's Principle or another program, delay will be considered unreasonable.

2. Seeing as the principle of substantive equality involves consideration of a First Nations child's needs and circumstances in relation to cultural, linguistic, historical and geographic factors, Canada will provide the Central Administrator with access to the information in its possession regarding the historical and socio-economic circumstances of First Nations communities. The Central Administrator will make use of the information to inform the determination of what was an "essential service", a "service gap" or "unreasonable delay".

3. Individual claims are required in all cases, even where more than one child in a community faced similar unmet needs due to the lack of access to the same or similar essential services.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 28, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 28, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Max Binnie, counsel for the Respondent

Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 8

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 20
Date: July 17, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Context

[1] The Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *CHRA*).

[2] In *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 (the *Merit Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA*.

[3] In the *Merit Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, Aboriginal Affairs and Northern Development Canada (AANDC), now Indigenous Services Canada (ISC), was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Merit Decision* at paras. 379-382, 458 and 481).

[4] Three months following the *Merit Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[5] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. The Panel noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34).

[6] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[7] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[8] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In the 2016 CHRT 16 ruling, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC was ordered to provide all First Nations and First Nations Child and Family Services Agencies (FNCFS Agencies) with the names and contact information of the Jordan's Principle focal points in all regions.

[9] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120).

[10] In May 2017, the Panel made additional findings in light of the new evidence before it and has partially reproduced some of them below for ease of reference:

> Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the [Merit] Decision and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the [Merit] Decision and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.
>
> (see 2017 CHRT 14 at para. 67).
>
> Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above

does not answer the findings in the Decision with respect to substantive equality and the need for culturally appropriate services (see [Merit] Decision at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see [Merit] Decision at paras. 399-427),

(see 2017 CHRT 14 at para. 69).

However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

(see 2017 CHRT 14 at para. 71, addition to quotation in original).

This potential gap in services was highlighted in the Pictou Landing [Band Council v. Canada (Attorney General), 2013 FC 342] case and in the [Merit] Decision. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see Pictou Landing at paras. 96-97).

Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the [Merit] Decision at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and wellbeing of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also Transcript Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past

> harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.
>
> (see 2017 CHRT 14 at para. 72)

[11] Also, in the 2017 CHRT 14 ruling the Panel made additional findings that are relevant to the questions before us as part of this ruling:

> Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the [*Merit*] *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the [*Merit*] *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the [*Merit*] *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.
>
> (see 2017 CHRT 14 at para. 73, emphasis added).
>
> Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families […] along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

(see 2017 CHRT 14 at para. 74).

Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

(see 2017 CHRT 14 at para. 75).

[12] Further in the ruling, the Panel wrote:

Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the [*Merit*] *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the [*Merit*] *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see [*Merit*] *Decision* at para. 356)

(see 2017 CHRT 14, at para. 78).

Despite this, nearly one year since the April 2016 ruling and over a year since the [*Merit*] *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada.

(see 2017 CHRT 14 at para. 80).

The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the [*Merit*] *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

(see 2017 CHRT 14 at para. 133).

[13] Akin to what was said in 2019 CHRT 7 at para. 16, the above will also inform some of the reasons in this ruling.

[14] The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

[15] Canada challenged some aspects of the 2017 CHRT 14 ruling by way of a judicial review which was subsequently discontinued following a consent order from this Tribunal essentially amending, on the consent of the parties, some aspects of the orders pertaining to timelines and clinical case conferencing. No part of this judicial review questioned or challenged the Tribunal's order that Canada's definition and application of Jordan's Principle must apply equally to all First Nations children, whether resident on or off reserve.

[16] In 2017 CHRT 35, the Tribunal amended its orders to reflect some wording changes suggested by the parties. The Jordan's Principle definition ordered by the Panel and accepted by the parties is reproduced in bold below:

> **B. As of the date of this ruling, Canada's definition and application of Jordan's Principle shall be based on the following key principles:**
>
> > **i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.**
> >
> > **ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.**
> >
> > **iii. When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service**

navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not

> **available. After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government.**
>
> **v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.**
>
> **C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).**

[17] The Panel found that while it is accurate to say the Tribunal did not provide a definition of a "First Nation child" in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring its remedies are efficient and effective in light of the evidence before it and in the best interests of children more than on Canada's compliance (see 2019 CHRT 7 at para. 20).

[18] The parties have been discussing the issue outside the Tribunal process but have not yet reached a consensus on this issue. Therefore, the Caring Society requested adjudication of whether Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle complies with this Tribunal's orders.

[19] In an interim ruling, the Panel determined the issue of a "First Nations child" definition was best addressed by way of a full hearing. The Panel Chair requested the parties to make arguments on international law including the United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*); the recent UN Human Rights Committee's *McIvor* [*McIvor UNHRC*] decision findings that sex discrimination continued in the *Indian Act*, RSC 1985, c I-5; Aboriginal law; human rights and substantive equality; constitutional law and other aspects, in order to allow the Panel to make an informed decision on the issue of the "First Nation child" definition following the upcoming hearing. Doing this analysis through a multi-faceted lens is paramount given the probable incompatibilities between the *UNDRIP* and the *Indian Act* (see 2019 CHRT 7 at para. 22).

[20] The Panel further wrote that:

> […] if the current version of the *Indian Act* discriminates and excludes segments of women and children, it is possible that but for the sex discrimination, the children excluded would be considered eligible to be registered under the *Indian Act*.
>
> (2019 CHRT 7 at para. 22).

[21] It further wrote that:

> In those circumstances the child would be considered by Canada under Canada's Jordan's Principle eligibility for registration criteria for First Nations children who are not ordinarily resident on-reserve and, who do not have *Indian Act* status. While this should not be read as a final determination on Canada's current policy under Jordan's Principle, the Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies. Hence, the need for a full and complete hearing on this issue where the above would be addressed by all parties.
>
> (2019 CHRT 7 at para. 22).
>
> During the January 9, 2019 motion hearing, Panel Chair Marchildon expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only recognizes these rights as inherent to Indigenous Peoples, they are also human rights of paramount importance. The Panel in its [*Merit*] *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children are respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
>
> (see 2019 CHRT 7 at para. 23).

This Panel continues to supervise Indigenous and Northern Affairs Canada, now Indigenous Services Canada's, implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA* (see the [*Merit*] *Decision*).

(see 2019 CHRT 7 at para. 24)

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, **over 165 000 Jordan's Principle approved services** have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel. In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle

Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle […] **There cannot be any break in Canada's response to the full implementation of Jordan's Principle.** [Emphasis added]

(see 2019 CHRT 7 at para. 25)

The Panel is delighted to hear that thousands of services have been approved since it issued its orders. It is now proven that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.

> **We would like to honor Jordan River Anderson and his family for their legacy**. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made **substantial efforts** to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children.
>
> (see 2019 CHRT 7 at para. 26).

[22] On February 21, 2019, the Tribunal issued an interim ruling on Jordan's Principle (see 2019 CHRT 7) and found:

> [85] Furthermore, the Panel believes it would be in the best interests of non-status off-reserve children to make a temporary order with parameters that would apply until the "First Nation child" definition has been resolved, so as to avoid situations like the one that occurred in S.J.'s case. Especially that it may take a few months before the issue is resolved.
>
> [86] Finally, the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:
>
> The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the *Indian Act* by creating seven new registration categories, in response to the decision in *Descheneaux c. Canada* rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada **re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision**. (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).
>
> Additional amendments to the definition under the *Indian Act* will be developed subsequent to a period of consultation with First Nations. When part B of Bill

S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para. 16).

[87] The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant section 53 (2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle.

[88] This order will be informed by the following principles:

[89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the *UNDRIP* and the Convention on the Rights of the Child guide all decisions concerning First Nations children.

[90] The Panel is not deciding the issue of Jordan's Principle eligibility based on status versus non-status. This issue will be further explored at a full hearing on the merits of this issue.

[91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

[92] This interim relief order only applies until a full hearing on the issue of the definition of a "First Nation child" under Jordan's Principle and a final order is issued.

[23] The present ruling deals with the issue on its merits.

II. Position of the Parties

A. The Caring Society's Position

[24] The Caring Society argues that Canada is impermissibly narrowing the scope of "all First Nations children" in the context of Jordan's Principle, as set out in the Panel's Order in paragraph 135(1)(B)(i) of 2017 CHRT 14. In particular, the Caring Society contends that Canada's interpretation does not comply with the Order in paragraph 135(1)(c) of the same ruling that "Canada shall not use […] a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(B)."

[25] The Caring Society identifies three categories of First Nations children it indicates Canada has agreed are within the scope of the order:

A. A child, whether resident on or off reserve, with Indian Act status;

B. A child, whether resident on or off reserve, who is eligible for Indian Act status; and

C. A child, residing on or off reserve, covered under a First Nations self-government agreement or arrangement.

[26] The Caring Society presents three additional categories of First Nations children that it argues Canada is improperly excluding, and who are the focus of its submissions:

A. Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;

B. First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and

C. First Nations children, residing on or off reserve, who do not have Indian Act status and who are not eligible for Indian Act status, but have a parent/guardian with, or who is eligible for, Indian Act status.

[27] The Caring Society does not seek to expand Jordan's Principle beyond the categories it identifies. In particular, it does not seek relief for individuals who self-identify as First Nations but lack one of the three objective markers, nor does it seek relief for Inuit and Métis children through this complaint.

[28] The Caring Society submits that the Tribunal's Orders have consistently referred to "all First Nations children" without any limitation based on *Indian Act* status or on-reserve residency. The Caring Society asserts that *Indian Act* status or residence on a reserve do not correspond with the discrimination in this case that is "on the basis of race and/or national or ethnic origin" (2016 CHRT 2 at paras 6, 23, 395-396, 459, and 473). The Caring Society contends that applying Jordan's Principle to all First Nations children is consistent with human rights principles that focus on the needs of the children. Failing to consider requests from First Nations children living off-reserve without *Indian Act* status introduces discrimination on the basis of reserve residency. The Caring Society suggests the focus should be on the best interests and individual needs of each First Nations child and that *Indian Act* status and on-reserve residency will not identify all First Nations children in need. The Caring Society notes that Jordan's Principle does not mean every child will be granted services. Rather, Jordan's Principle requires the individual needs of all First Nations children to be considered on the merits.

[29] The Caring Society asserts that Canada's definition of First Nations children does not acknowledge First Nations children recognized by a First Nation as belonging to the First Nation. The Caring Society highlighted the Panel Chair's remarks earlier in the case that children are at the heart of First Nations communities. The Caring Society claims that Canada's definition fails to recognize that "[c]ultural and ethnic labels do not lend themselves to neat boundaries" (*Daniels v. Canada (Indian and Northern Affairs Development),* 2016 SCC 12, at para 17 [*Daniels*]). In a Nation-to-Nation relationship, it is appropriate to recognize First Nations communities' views of First Nations identity. This is consistent with the position of the Chiefs-in-Assembly and self-determination principles underlying s. 35 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The Caring Society also invokes Canada's fiduciary duty to First Nations children as a reason Canada must provide Jordan's Principle services to First Nations children who are recognized by their community.

[30] The Caring Society suggests that Canada's criteria for Jordan's Principle eligibility exclude First Nations children who have lost their connection to their community due to the Indian Residential Schools System, the Sixties Scoop, or discrimination within the First

Nation Child and Family Services Program. The Caring Society refers to Panel's finding in 2018 CHRT 4, at para. 452, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence". The Caring Society argues that First Nations children face historical disadvantage regardless of *Indian Act* status or on-reserve residency. This broad disadvantage is recognized in other contexts such as the criminal justice system (see *R. v. Gladue*, [1999] 1 SCR 688; *R. v. Ipeelee*, 2012 SCC 13). Specifically, inter-generational trauma from cultural displacements creates particular disadvantages for First Nations children (see *Daniels*).

[31] The Caring Society submits that First Nations children with one parent with s. 6(2) *Indian Act* status and who are not eligible for *Indian Act* status themselves ought to benefit from Jordan's Principle.[1] Parents and guardians have significant responsibility for securing services for their children and their *Indian Act* status may cause obstacles in accessing services for their children. Treating two First Nations children differently based on whether their parent has s. 6(1) or s. 6(2) *Indian Act* status is discrimination on the basis of family status. The Caring Society advances that children who may gain status from the implementation of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25 [*Bill S-3*] should not be required to wait until the implementation of the Act to receive services under Jordan's Principle.

[32] The Caring Society agrees with Amnesty International's submissions on Canada's international legal obligations.

[33] The Caring Society rejects Canada's argument that Jordan's Principle was not within the scope of the complaint. The Caring Society identifies references to Jordan's Principle in both its own Statement of Particulars and Canada's. Further, the Caring Society relies on *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 for the assertion that in a case such as this, the Tribunal ought to take a "functional approach" to pleadings. Similarly, the Caring

[1] A child who has one parent with s. 6(1) *Indian Act* status and one parent without *Indian Act* status is entitled to s. 6(2) *Indian Act* status. On the other hand, a child who has one parent with s. 6(2) *Indian Act* status and one parent without *Indian Act* status is not eligible for *Indian Act* status.

Society rejects Canada's argument that the Tribunal's supervisory powers are limited to First Nations children and families ordinarily resident on reserve, noting that Canada did not judicially review the Tribunal's orders relating to Jordan's Principle.

B. The Assembly of First Nations' Position

[34] The AFN submits that Canada's interpretation of "all First Nations children" fails to appropriately consider First Nations jurisdiction over citizenship and self-government rights of First Nations to determine who should be viewed as a "First Nations child". The AFN advances that "all First Nations children" includes children who are recognized by their First Nation as being a member. The AFN highlights that First Nations children who have lost *Indian Act* status and a connection to their First Nations community through discriminatory practices such as the Indian Residential School System and the Sixties Scoop require specific consideration from this Panel. The AFN contends that the scope of this complaint does not include other off reserve non-status, Métis, or Inuit children.

[35] The AFN specifically requests an order that Jordan's Principle applies to the following groups:

A. A registered Status Indian;

B. A person entitled to be registered as a Status Indian;

C. Individuals who are recognized by their First Nation as a member; and

D. Individuals covered under a self-government agreement.

[36] The AFN takes no position on whether First Nations children who are not eligible for status but have a parent with s. 6(2) *Indian Act* status should be included in the scope of the order.

[37] The AFN maintains that the *Indian Act* does not recognize First Nations right to self-determination or Canada's commitment to reconciliation and a Nation-to-Nation relationship with First Nations. The AFN represents that Canada's use of the *Indian Act* to determine First Nation membership and to identify First Nations children is a continuation of colonial, oppressive and racist policies. Canada should transition responsibility for determining First

Nations membership to First Nations. This is further supported by international and domestic law, including s. 35(1) of the *Constitution Act, 1982* and treaties with First Nations. In particular, many of the treaties grant all the descendants of the treaty signatories access to government services and restrictions based on *Indian Act* status breach those treaty provisions. The treaty relationships, especially the Numbered Treaties, are very important for many First Nations communities and individuals' identities. The treaties should be considered in the determination of a First Nations child.

[38] The AFN submits that both First Nations children who are recognized by their community and those entitled to *Indian Act* status should be included within a definition of First Nations child. Despite the *Indian Act's* flaws, including discrimination on the basis of sex such as found in *McIvor (UNHRC)*, it is the only legislation available to determine registered status. For non-registered First Nations children residing off reserve, the AFN argues that a connection to a First Nation's community is required. The AFN argues that defining a "First Nations child" affects First Nations jurisdiction over citizenship even though the definition is in the context of a specific program.

[39] The AFN contends that the Honour of the Crown requires Canada to ensure full participation of First Nations in recognizing who is a First Nations child. Recognizing First Nations rights to determine their citizenship in this manner is consistent with the honourable dealing required from the Crown.

[40] The AFN argues that while the focus of Jordan's Principle eligibility has been on rights of the child and the best interests of the child, the communally held First Nations rights to self-determination and self-government are also affected. Further, the AFN is concerned that First Nations might face legal challenges from individuals a First Nation refuses to recognize as belonging to the community. The AFN is also concerned that broadening eligibility criteria will drain financial resources and deprive already recognized First Nations children of services. The AFN notes that First Nations that have self-government agreements often do not receive funding for First Nations members who do not have *Indian Act* status. The AFN contends that a child who does not have *Indian Act* status and resides off reserve would ordinarily have access to provincial or territorial services that a child with status living on reserve does not have access to. The AFN acknowledges that the Tribunal

can order Canada to provide additional resources to maintain the availability of Jordan's Principle services for First Nations children already recognized as eligible.

[41] The AFN asserts that defining who is "First Nations" is difficult because the term describes over 63 organic political/cultural groups of people rather than a race from particular areas. First Nations are distinct peoples under customary international law, which creates unique questions of group identity in a human rights context. The definition of "First Nations" is also continuing to evolve as First Nations exercise their self-determination. Given this difficulty in defining a "First Nations child", any definition should not be imposed on First Nations using a top down approach but rather it should incorporate the viewpoints of First Nations communities.

[42] The AFN maintains that it would be inappropriate to adopt tests related to Indigenous identity developed in other circumstances. For example, it would not be appropriate to rely on the *R. v. Powley,* 2003 SCC 43 test for Métis identity or the *R. v. Ipeelee*, 2012 SCC 13 test for Aboriginal identity under the *Criminal Code*, RSC 1985 c. C-46.

[43] The AFN recognizes that Métis, Inuit or non-status Indigenous children may suffer discrimination on the basis of race, national or ethnic origin but argues that such discrimination should be addressed under a different complaint and evidentiary record. Most of the evidence in this complaint has been specific to First Nations with *Indian Act* status and First Nations children on reserve have been identified by the Panel as particularly vulnerable.

[44] The AFN proposes that a validation method similar to that in Part X of Ontario's *Child and Family Services Act*, R.S.O. 1990, c. C.11 for consulting with First Nations would be appropriate to determine whether an applicant under Jordan's Principle is a member of the First Nations community. The application ought to proceed under the presumption that there is a connection to the First Nations community. If the First Nations community responds denying the applicant's membership in the community, Canada ought to make a determination about whether the applicant is eligible. The AFN also identifies that entitlement to *Indian Act* status is currently changing and argues that this ongoing change should be considered by the Panel. Finally, the AFN submits that if First Nations are involved

in the validation process, this method may alleviate concerns raised by the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN).

C. The Chiefs of Ontario's Position

[45] The COO submissions sought to provide practical considerations for an order that "all First Nations children" includes children recognized by their First Nation as being a member. In particular, the COO seeks to assist in crafting an order that can be implemented without causing delays to children receiving Jordan's Principle services and which respects First Nations' jurisdiction over citizenship. In particular, the COO requests that no duty of care or other legal duty be placed on First Nations to confirm citizenship, that First Nations in no way be required to recognize individuals in a way that is inconsistent with their traditions, laws or customs, that First Nations not be required to undertake new processes or systems, that recognition by a First Nation that a child is a member can be done through email, letter, or phone, and that Canada should provide First Nations and relevant organisations funding to educate First Nations about the Tribunal's order and to develop capacity to recognize citizenship when Jordan's Principle requests are made.

[46] The COO takes no position on the Caring Society's requested relief for children who have lost contact with their First Nations group, community or peoples.

[47] The COO supports First Nations right to determine their own citizenship through their own laws, traditions and customs. Any practical challenges do not mean the COO endorses or accepts the *Indian Act*, nor does it seek to perpetuate the *status quo* in Jordan's Principle cases.

[48] The COO identifies barriers to First Nations exercising jurisdiction over citizenship from the imposition of the *Indian Act*, Canada's failure to provide resources for First Nations individuals recognized through custom membership codes, disruptions to citizenship laws through the Indian Residential Schools System, forced disenfranchisement, the Sixties Scoop, and the First Nations Child and Family Services program. Most First Nations do not have a custom membership code and those that do not do not necessarily have codified or agreed upon citizenship laws, customs or traditions.

[49] The COO asserts that any order regarding recognition of a child by a First Nation should be directed only at the mechanism of evidencing that recognition and not direct First Nations when or how to exercise jurisdiction over citizenship.

[50] The COO highlights that while First Nations should be given an opportunity to voice their perspective on a child's citizenship, First Nations will not necessarily have the capacity to respond. This is particularly true given the 12-48 hour Jordan's Principle timelines. The COO argues First Nations require funding to have the capacity to respond to Jordan's Principle membership questions and that First Nations should ideally be given an opportunity and capacity to develop their own citizenship or membership codes.

D. The Nishnawbe Aski Nation's Position

[51] The NAN supports the Caring Society's position. The NAN submits that Jordan's Principle must be implemented in a non-discriminatory manner that respects First Nations inherent jurisdiction over citizenship and does not impose administrative burdens or legal liability on First Nations. The NAN supports the Caring Society and Amnesty International's submissions, subject to concerns about the best interest of the child. The NAN supports the submissions of the COO regarding First Nations jurisdiction and capacity. The NAN supports the Caring Society and Commission's submissions that Jordan's Principle has always been part of the complaint.

[52] The NAN advances that it is discriminatory and contrary to First Nations self-determination to exclude First Nations children recognized by a First Nation from Jordan's Principle. For Canada to continue to use *Indian Act* status and on-reserve residency as criteria for Jordan's Principle eligibility is inconsistent with the *UNDRIP,* Canada's commitment to reconciliation, and human rights principles that prohibit discrimination on the grounds of race, national or ethnic origin, and reserve residency.

[53] The NAN highlights that any discussion of the "best interest of the child" must consider how the principle has been used to support harmful practices such as the Indian Residential Schools System, the Sixties Scoop, and the child welfare system.

E. The Congress of Aboriginal Peoples' Position

[54] The Congress of Aboriginal Peoples (CAP) generally supports the Caring Society's position. The CAP submits that, in order to promote substantive equality, the definition of "First Nations child" should be based on the Honour of the Crown and, consistent with the principles in *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, ought to adopt inclusion over exclusion. The CAP requests that consultations be part of the remedy ordered.

[55] The CAP represents off-reserve status and non-status Indians, Métis, and Southern Inuit Indigenous Peoples. The CAP identifies various socio-economic disadvantages suffered by its members in Canadian society. The CAP identifies Canada's policies as a key reason many of its members lack connections to their Indigenous families and communities. The CAP advances that its members are particularly disadvantaged and ought to be included in a remedial process seeking substantive equality.

[56] The CAP contends that the Honour of the Crown is a constitutional principle that affects how the Crown must fulfil its obligations to Indigenous Peoples. The Honour of the Crown requires negotiation in good faith and must be liberally and generously construed.

[57] The CAP advances that *Daniels* requires an inclusive definition of First Nations child in order to be constitutionally sound.

F. The Canadian Human Rights Commission's Position

[58] The Commission does not take a position on the definition of a "First Nations child" motion, instead providing submissions on the Tribunal's jurisdiction and identifying substantive evidence the Commission believes is relevant to the Panel's decision.

[59] The Commission represents that Jordan's Principle has always been within the scope of the complaint, noting that complaints should not be read as pleadings. The Statements of Particulars did not limit the Jordan's Principle relief requested to individuals with *Indian Act* status or living on reserve. The Panel has already addressed the scope of

Jordan's Principle, including that it applied both on and off reserve, which Canada should not now be entitled to challenge through a collateral attack.

[60] The Commission notes that there is uncertainty on whether Canada currently applies Jordan's Principle to First Nations children who do not have *Indian Act* status but are included in the membership code of a First Nation with a self-government agreement or self-government legislation. The Commission indicates that ISC staff have recently indicated these children are eligible while Canada's submissions on this motion appear to exclude this group.

[61] The Commission identifies concepts and sources of law that may relate to First Nations citizenship. *Indian Act* status is one recognition, although it has been found to be discriminatory. Custom membership codes, recognized under the *Indian Act*, may be more or less extensive than *Indian Act* status. First Nations with self-government agreements often have provisions to determine their membership. First Nations may have traditional laws with respect to citizenship. Section 35(1) of the *Constitution Act, 1982* and *UNDRIP* both recognize principles of self-determination.

[62] The Commission submits that there is a two-step framework, established in *Battlefords and District Co-operative Ltd. v. Gibbs,* [1996] 3 SCR 566, typically used to determine whether eligibility criteria for benefits are having a discriminatory impact. The first step is to determine the purpose of the benefit plan at issue. The second step is to determine whether the benefits criteria appropriately provide the benefit to individuals with the needs and circumstances the benefit program is intended to address.

[63] The Commission contends that previous decisions from the Panel have identified the purposes of Jordan's Principle as ensuring services to First Nations children are not delayed due to jurisdictional gaps and promoting substantive equality by providing services that may go beyond the normative standard of care and respond to the actual needs of First Nations children. The Commission argues the Panel ought to consider whether Canada's criteria are appropriate proxies for identifying the First Nations children with the sorts of needs identified by Jordan's Principle. The Commission is unable to identify evidence in the record that First Nations children living off reserve without *Indian Act* status face jurisdictional gaps in

accessing services but the Panel should consider any evidence that these First Nations children have actual needs that go beyond the normative standard of care and are rooted in historical and contemporary disadvantage that underlies a substantive equality analysis. The Commission identifies passages from the Supreme Court of Canada in *Daniels* and *Lovelace v. Ontario,* 2000 SCC 37 on the circumstances of off reserve First Nations individuals who do not have *Indian Act* status.

[64] The Commission opposes including a limitation of liability or indemnity in the final order for First Nations asked to confirm whether a child seeking Jordan's Principle services is a member of the First Nation. The Commission submits an order negating future duties of care or liabilities or ordering Canada to indemnify First Nations is outside the scope of the Tribunal's statutory powers. The Commission argues that such a case can be appropriately addressed if and when it arises.

G. Amnesty International's Position

[65] Amnesty International submits that Canada's interpretation of a "First Nations child" is too narrow to comply with Canada's obligations under international human rights law. The presumption of conformity, per *R. v. Hape*, 2007 SCC 26, indicates that courts should favour an interpretation of domestic law that conforms with international law. Amnesty International asserts that the *Convention on the Rights of the Child,* Can. T.S. 1992 No. 3 and the *UNDRIP* are particularly applicable.

[66] Amnesty International advances that international law protects the right to culture and cultural identity, which would be infringed if Canada's definition of a First Nations child were imposed on First Nations communities. Amnesty International notes that international human rights organisations have declined to adopt a formal definition of "Indigenous Peoples" in light of the harm caused by externally imposed definitions of membership. The *UNDRIP* specifically identifies an obligation to maintain cultural connections for children living outside their communities.

[67] Amnesty International highlights that Indigenous Peoples right to self-determination is protected in international law such as *UNDRIP*. The right to self-determination includes

Indigenous groups' right to determine their own membership in accordance with their customs and traditions.

[68] Amnesty International contends that the best interests of the child test applies here. The best interests of the child emphasizes eliminating barriers for children receiving services and obliges Canada not to create barriers limiting vulnerable children's ability to access services.

[69] Amnesty International argues that international law, including *UNDRIP*, requires states to take special measures to eradicate discrimination. That includes measures to redress actions that deprived Indigenous Peoples of their culture and identity. Special measures, aimed at ensuring substantive equality, must be applied in a non-discriminatory manner.

[70] Amnesty International asserts that budgetary considerations should not impact the scope of Canada's human rights obligations, as states must pursue rights fulfilment to the full extent of the nation's available resources.

H. Canada's Position

[71] Canada submits that the eligibility criteria it applies for Jordan's Principle are compliant with the Panel's orders and not only avoids jurisdictional disputes but provides substantive equality by funding services not provided to all other children. In particular, Canada argues that it complies with the orders by providing Jordan's Principle eligibility to:

A. Registered First Nations, living on or off reserve;

B. First Nations children who are entitled to be registered; and

C. Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve.

[72] Canada advances that it is not appropriate to extend the scope of Jordan's Principle to cover the three categories of First Nations children requested by the Caring Society. Canada suggests that the lack of consensus between the parties reflects that the Caring Society seeks an order extending Jordan's Principle beyond the limits of the litigation as

reflected in the complaint, the particulars and the evidence and beyond the Tribunal's jurisdiction. While Canada notes some agreement among the other parties to include First Nations children recognized by a First Nation as belonging to that group, community or people, Canada identifies that there is little agreement on how that recognition might occur. Canada represents that the Tribunal lacks the jurisdiction to require First Nations who are not part of this proceeding to participate in any process for recognizing Jordan's Principle applicants.

[73] Canada contends that it has expanded its definition of Jordan's Principle eligibility to remedy the funding gap identified by the Panel and complies with the direction to apply Jordan's Principle "equally to all First Nations children on and off reserve" (2017 CHRT 14, para. 135 1.B.i). Canada submits that "all First Nations children on and off reserve" must be understood in the context of the complaint and the evidence heard, which focused on children subject to Canada's funding regime rather than every child in Canada who identifies as First Nation. Canada asserts that coverage for children with *Indian Act* status living off reserve recognizes potential service gaps for children perceived by provinces to fall under federal jurisdiction. Coverage for Indigenous children living on reserve who do not have *Indian Act* status recognizes that most federal programs are residency based and that failing to cover these individuals could cause a gap in coverage. Canada argues that its Jordan's Principle eligibility criteria satisfy the two step test proposed by the Commission for determining if a benefits program is under-inclusive.

[74] Canada submits that the Caring Society's request to expand coverage to additional First Nations children is beyond the scope of the complaint and the evidence. The Jordan's Principle complaint was about how Canada's funding regime caused gaps in the provision of services to First Nations children and families on reserve. Canada advances that the Panel has identified that the complaint against Canada is in relation to funding child welfare programs on reserve, which constitute providing a service under section 5 of the *CHRA*. First Nations children without *Indian Act* status who reside off reserve do not receive a service from Canada as they fall exclusively under provincial jurisdiction. Canada argues that the initial complaint, the Statements of Particulars, and key sections of the Panel's reasons refer to First Nations children on reserve. Canada asserts that the Panel has not

heard any evidence that First Nations children without *Indian Act* status who reside off reserve face the sorts of jurisdictional barriers or gaps in services that Jordan's Principle addresses. Canada maintains that the Panel has not been presented with any evidence about the services that First Nations children living off reserve receive from provincial or territorial government, nor that children living off reserve face jurisdictional gaps in accessing services. Regardless of the needs of those children, their needs fall outside the scope of this complaint. Canada asserts that the broad and complex issues of First Nations identity and self-determination should engage broader consultation beyond the scope of this complaint.

[75] Canada advances that its interpretation of Jordan's Principle is consistent with *UNDRIP* and other international human rights obligations as Canada ensures First Nations children subject to federal funding do not face discrimination. Canada suggests that *McIvor (UNHRC)* does not support a broader approach to defining a First Nations child for Jordan's Principle eligibility as the changes to *Indian Act* status will not increase the number of First Nations eligible for *Indian Act* status nor will it impact any individual's ability to pass on entitlement to *Indian Act* status to their children. Canada disagrees with Amnesty International's argument that international law broadens the definition of a First Nations child beyond the children at the centre of the complaint.

[76] Canada rejects the argument that it has a fiduciary duty to extend Jordan's Principle. Canada maintains that the Panel's earlier analysis of the fiduciary duty in 2016 CHRT 2 was limited to First Nations children and families receiving services on reserve. Canada notes that none of the three branches of the *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 are met for First Nations children without *Indian Act* status living off reserve. Canada does not exercise the required degree of control, discretion or power required to trigger a fiduciary relationship.

[77] Canada submits that the Honour of the Crown is not capable of assisting in the interpretation of a "First Nations child". While Canada acknowledges that the Honour of the Crown requires it to act honourably, the specific obligations that arise in the implementation of a constitutional duty to Indigenous Peoples, fiduciary duties to Indigenous Peoples or treaty making do not apply in this case.

[78] Canada's position is that *Daniels* does not assist in defining Jordan's Principle eligibility. *Daniels* determined that constitutional division of powers enables Canada to enact legislation with respect to Métis and Indigenous Peoples without *Indian Act* status but it does not require Canada to do so. The *Daniels* complainants sought a declaration to address Canada's failure to accept responsibility for Métis and Indigenous Peoples without *Indian Act* status which they argued deprived those groups of programs, benefits and treaty opportunities available to individuals with *Indian Act* status.

[79] Canada asserts that there is no basis to extend Jordan's Principle eligibility beyond the age of majority in the given province or territory. There was no evidence presented during the hearing about services for adults and increasing the age of entitlement has significant implications for other federal, provincial and territorial government programs that have not been canvased.

I. Post-Hearing Developments

[80] Since the Panel held the hearing on this issue and issued an interim ruling, the Caring Society advised the Tribunal of a development in the factual background to the Caring Society's motion regarding the exclusion of First Nations children living off-reserve who do not have, and are not eligible for, registration under the *Indian Act* from Canada's definition of "First Nations children" under Jordan's Principle.

[81] As was canvassed during the May 9, 2018 cross-examination of Mr. Sony Perron, *Bill S-3* did not fully come into force on Royal Assent. The coming into force of sections 2.1, 3.1, 3.2, and 10.1 were delayed to a date to be fixed by the Governor in Council.

[82] The Caring Society advised the Tribunal that the remaining sections of *Bill S-3* came into force on August 15, 2019, pursuant to Order-in-Council P.C. 2019-116. The Order-in-Council was also filed with the Tribunal by the Caring Society. ISC has advised the Caring Society that it does not have projections for the number of individuals impacted by the coming into force of these provisions as the range of data and assumptions that would have to be made do not allow for accurate estimations.

[83] The Panel enquired with Canada and the other parties to determine if they desired to provide additional submissions on this specific question. Canada and the other parties indicated they had no further submissions to make on this question.

III. General Considerations in Jordan's Principle Eligibility

A. Considerations only apply for the purpose of Jordan's Principle

[84] The Panel has recognized in its interim ruling that there is a "significant difference" between determining who is a "First Nation child" as a citizen of a First Nation and determining who is a "First Nation child" entitled to receive services under Jordan's Principle and what is the appropriate eligibility criteria to use in the latter case (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan's Principle services before the Tribunal, but not citizenship, which is the prerogative of First Nations not the Tribunal or Canada. Nevertheless, some First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will address their concerns as part of this ruling as it will be further explained below.

[85] The Panel has already mentioned it recognizes the First Nations human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[86] Moreover,

> [d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its [*Merit*] *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous

> rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
>
> (see 2019 CHRT 7 at para. 23, emphasis omitted).

[87] Additionally, in the interim ruling, the Panel stressed "the importance of the First Nations' self-determination and citizenship issues", and added that "the interim relief order or any other orders is not intended to override or prejudice First Nations' rights" (see 2019 CHRT 7 at para. 91, emphasis omitted).

B. Jordan's Principle's objective and context for eligibility

[88] The purpose of this ruling is not to change in any way the Tribunal's definition ordered in 2017 CHRT 14 and 35 nor is it intended to revisit previous findings leading to those rulings. Rather this ruling, relying on previous orders, aims to further clarify who is eligible to receive services under Jordan's Principle as per the Tribunal's orders and to determine who should define, and how to define, who is a First Nations child for the purpose of Jordan's Principle.

[89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the Convention on the Rights of the Child and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government

services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[90] The Panel's rulings referred to government services affecting First Nations children including: Federal-Provincial; Federal-Federal; and Federal-Territorial. While the Panel has no jurisdiction over Provinces and Territories, it does have jurisdiction over Canada's Jordan's Principle involvement in all Federal services offered to First Nations children.

[91] Additionally, Jordan's Principle is a broader aspect of the complaint in front of the Tribunal where the Panel found, in the *Merit Decision*, that while Jordan's Principle is not a strict child welfare concept, it is intertwined with child welfare (see *Merit Decision* at para. 362). Therefore, the Panel's general reasoning on child welfare is also relevant to Jordan's Principle cases. However, it does not provide the full answer. For Jordan's Principle, the Panel issued additional rulings and orders that form part of the analysis.

[92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4).

[93] Moreover,

> [t]he discrimination found in the [*Merit*] *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,
>
> (2017 CHRT 14 at para. 73).

[94] There is a need to take a closer look at the differences between the FNCFS Program and Jordan's Principle which is not a Program rather it is a legal rule and mechanism meant to enable First Nations children to receive culturally appropriate and safe services and

overcome barriers that often arise out of jurisdictional disputes within Canada's own organization of Federal Programs and within Canada's constitutional framework including the division of powers.

[95] Additionally, while the existence of a jurisdictional dispute is not required to obtain Jordan's Principle services, the occurrence of a jurisdictional dispute was recognized and included since *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279) and in the Panel's previous rulings. This also includes disputes between the Federal government and Provinces/Territories.

[96] Moreover, the Panel agrees with Canada that the evidentiary record and findings focus on Federally funded programs, the lack of coordination and gaps within Federal Programs offered to First Nations children and families and that this is also one important aspect of the service analysis under section 5 of the *CHRA* that Canada was ordered to remedy.

[97] Additionally, the Tribunal's Jordan's Principle findings also focus on the lack of surrounding services for First Nations children triggering their parents/caregivers or FNCFS agencies to seek services off-reserves. The Panel found a correlation between the Federal Programs' failure to address gaps in services to on-reserve children and the underfunding of the FNCFS Program driving First Nations children in care or to receive services often off-reserve. The on-reserves-off-reserves jurisdictional wrangling was considered by the Panel to arrive at its findings. For example, as part of the evidentiary record, mental health services gaps for First Nations children placed in care off-reserves was considered. Health Canada provided short-term funding for mental health crisis and the Province of British Columbia provided limited mental health funding for ongoing needs of First Nations children in care. This is a clear Jordan's Principle example where the Province should provide the service and then recover the funds from the Federal Government. This situation occurred off-reserve in the Provincial system.

[98] The same document also refers to first-hand provincial scenarios in the BC region and to different definitions of on-reserve/off-reserve residency in relation to gaps in service

delivery (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3; see also *Merit Decision* at para. 372).

[99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.

[100] The focus is on the child and is personalized to the child's specific needs to receive adequate services in a timely fashion without being impacted by jurisdictional disputes or other considerations not in line with what the child requires. First Nations children experience those barriers because of race, national or ethnic origin. This is what causes governments and departments to dispute who pays for the service.

[101] This requires a case-by-case approach considering for example whether a Province or Territory considers a First Nations child a Federal responsibility solely based on *Indian Act* status or whether it considers broader criteria to avoid providing services or to claim repayment from the Federal government. A Jordan's Principle case analysis of this situation would likely reveal this so as to demonstrate if the criteria used by the Province/Territory and the Federal government generate gaps in services.

> In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of

> stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60).
>
> (*Merit Decision* at para. 402, emphasis added).

C. Use of the term "All First Nations children" by the Panel

[102] The use of the expression "All First Nations children" used in the Tribunal's rulings and according to the evidence before the Tribunal was not based on a criterion rooted in the *Indian Act*. None of the Panel's rulings focus on the *Indian Act* or on status registration under the *Indian Act*. As demonstrated by the *Merit Decision* and subsequent rulings, the Panel understands and considered the historical context and its connection to the discrimination found in this case which also triggered orders to provide culturally appropriate services. This context transcends the *Indian Act* and its colonial perspective on First Nations governments.

[103] This being said, the Tribunal did not provide a definition of who is a "First Nations child" under Jordan's Principle. Instead it provided a definition of Jordan's Principle and its applicability, including how to eradicate the discrimination found in this case.

[104] The 2016 CHRT 16 ruling clarified that "all First Nations children" did not only mean on reserve First Nations children. This was especially true given the fact that Canada's own program was broader and given that the realities experienced by First Nations children as a result of Canada's racial discrimination drove many First Nations families to bring children in care off-reserve in order to access services. The expression "ordinarily on reserve" captures a portion of this aspect. Another reality in this case is that some First Nations children on reserve may not have *Indian Act* status, yet they live on reserve or ordinarily on reserve and experience the same hardships in accessing services, as all the other children with *Indian Act* status on reserve in their communities given the adverse impacts and the lack of surrounding services found in the *Merit Decision* and subsequent rulings. The rulings also clarified that the health condition of a child should not be driving the definition. In other words, a top-down analysis requiring a child to present specific health issues was not an appropriate objective criterion as it was too narrow.

[105] Furthermore, the Panel used the term “all First Nations children” as referred to in the House of Commons *Motion 296* adopting Jordan’s Principle. Therefore, the Panel did not define who is a “First Nations child” for eligibility purposes under Jordan’s Principle. The Panel relied on the same terminology employed in the House of Commons *Motion 296*. The Panel did not focus on the *Indian Act, Indian Act* status or on reserve residency given the application of Jordan’s Principle to federal government departments/programs affecting children (see 2016 CHRT 2 at para. 391-392; 2017 CHRT 14 at paras. 2, 73-74, 98 and 135). The Panel recognized in a past ruling, that was accepted by Canada, Indigenous Peoples’ right to self-government, Canada’s goal to rebuild the Nation-to-Nation relationship and the Truth and Reconciliation Commission’s (TRC) recommendation to use the *UNDRIP* as a framework for reconciliation (see 2018 CHRT 4 at para. 114).

[106] Moreover, the Panel in the same ruling expressed its goal to eliminate the discrimination found in this case and “fully supports Parliament’s intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament’s goal (see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12), and commends it for adopting this approach” (2018 CHRT 4 at para. 66).

[107] Furthermore, the Panel in its *Merit Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada’s programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account (see 2019 CHRT 7 at para. 23).

[108] The Panel did, however, provide some clarification in previous rulings that the term “all First Nations children” is not limited to on reserve children and that it applied to on and off reserve First Nations children. The Panel ordered INAC, now ISC, to immediately apply Jordan’s Principle to all First Nations children, not only to those residing on reserves (see 2016 CHRT 16 at paras. 107 and 117).

[109] Furthermore, the Panel found that

> On the issue of the breadth of INAC’s new formulation of Jordan’s Principle, the Panel notes that the motion unanimously passed by the House of

> Commons did not restrict the application of the principle solely to First Nations children on reserve, but to all First Nations children: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children" (see [*Merit*] *Decision* at para. 353, emphasis added). INAC's formulation of Jordan's Principle is also not in line with the eligibility requirements for its own FNCFS Program, which applies to First Nations "resident on reserve or Ordinarily Resident On Reserve" (see ss. 1.3.2 and 1.3.7 of the *2005 FNCFS National Program Manual* and s. 1.1 of the *2012 National Social Programs Manual* at paras. 52-53 of the [*Merit*] *Decision*). That is, the application of Jordan's Principle only to First Nations children living on reserve is more restrictive than the definition included in INAC's FNCFS Program. This type of restriction will likely create gaps for First Nations children and is not in line with the [*Merit*] *Decision* (see paras. 362, 364-382 and 391),
>
> (see 2016 CHRT 16 at para. 117).

[110] Furthermore, in the *Merit Decision*, 2016 CHRT 2 at para. 151:

> The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:
>
> > First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[111] This is a serious issue that also needs non-pecuniary redress and is justified by the findings and the evidence in this case. The Tribunal ordered Canada in the *Merit Decision* to cease the discriminatory practice.

[112] This being said, in interpreting the Panel's findings and orders, Canada currently considers a First Nations child eligible for services under Jordan's Principle if the child falls in the categories below:

> a) First Nations children registered under the *Indian Act*, living on or off reserve;

> b) First Nations children eligible to be registered under the *Indian Act*, living on or off reserve; and
>
> c) non-status First Nations children without *Indian Act* status who are ordinarily resident on reserve (the AFN appears to dispute this however, this forms part of the Tribunal's findings in 2016 CHRT 16 at para. 117, quoted above).
>
> d) First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and who have urgent and/or life-threatening needs as per the Tribunal's interim order in (2019 CHRT 7 at paras. 88-89).

[113] The Panel confirms that all the above categories are eligible to receive services under Jordan's Principle.

[114] The question to be determined here is if Canada's current eligibility criteria under Jordan's Principle remedy the discriminatory practice and are sufficiently responsive to the Panel's reasons, findings and orders.

[115] As mentioned in the interim ruling, the Panel still believes it would be unfair to make a finding of non-compliance of the Tribunal's orders against Canada given that while the Tribunal did not use the *Indian* Act registration provisions as an eligibility criteria and did not limit Jordan's Principle to children on reserve, it did not provide a definition of who is a First Nations child eligible under its Jordan's Principle orders (see 2019 CHRT 7 at para. 20). While it is accurate to say the Tribunal did not provide a definition of a "First Nations child" in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring remedies are responsive to the discriminatory practice in light of the evidence before it and in the best interests of children, rather than on Canada's compliance. On this point, the Panel agrees with the NAN and the AFN that the best interests of children should be interpreted through an Indigenous lens. The Panel considers First Nations perspectives of the best interests of their children in determining the matters in this case.

[116] The Panel believes that Canada has been responsive to the Tribunal's Jordan Principle's orders to a great degree and has worked to remedy the discrimination. Canada has now moved from zero Jordan's Principle cases at the time of the hearing to a few hundred a few months after the *Merit Decision* to thousands of approved requests as of July

2016 to, at the time of this ruling, over **607 000** approved requests for services for First Nations children who otherwise would not have received them since the Tribunal's ruling ordering its definition in 2017 CHRT 14. This is two years after the TRC's final report and one year and a half after the *Merit Decision*. Of note, this was made possible by the Panel's retention of jurisdiction allowing parties to bring evidence and make additional requests.

[117] In light of the above, the Panel does not make a non-compliance finding against Canada here. Rather, it will examine the responsiveness of Canada's eligibility criteria to Jordan's Principle, including to Jordan's Principle's objective previously found by this Panel and already mentioned above and its responsiveness to the Panel's previous orders. The Panel, following its past approach, will also examine if there is a need for further orders to clarify its previous orders so as to ensure their effectiveness.

D. Objective of Panel's Retention of Jurisdiction

[118] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past (see 2018 CHRT 4 at para. 50).

[119] If the past discriminatory practices are not addressed in a meaningful fashion, the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system (see 2018 CHRT 4 at para. 53).

E. Structure

[120] Issue one will address children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

[121] Issue two will be dealing with the issue of First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[122] Issue three will be dealing with the issue of First Nations children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.

IV. Issue I

> Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

A. Introduction

[123] The Panel views this first part of the ruling as an interpretation exercise of what the Panel meant to cover under Jordan's Principle under previous findings and rulings as opposed to the two other sections which raise new questions where the Panel will not only do an interpretation exercise but also will make findings in light of the evidence or lack thereof before it.

[124] In the *Merit Decision*, the Panel applied the test in *Moore v. British Columbia (Education),* 2012 SCC 61 at para. 33 [*Moore*] and *(Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 at paras. 44-52 [*Bombardier*] (see 2016 CHRT 2 at paras, 22-25).

> In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

(see *Merit Decision* at para. 22).

[125] The Panel applied the *Moore* test as follows and found the complaint was substantiated:

> It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.
>
> (see *Merit Decision* at para. 28).

[126] Additionally, the Panel used an international law framework to support its reasons on substantive equality in the *Merit Decision* and subsequent rulings.

[127] The Panel finds it is not necessary to redo the same analysis for this first section of this ruling given that the First Nations complainants have met their burden of proof and discrimination was established. Moreover, denials, delays and adverse impacts were all demonstrated and formed part of the Panel's analysis under Jordan's Principle. Jordan's Principle is a separate part of the complaint and is broader than the on-reserve FNCFS Program and applies to all Federal Programs concerning First Nations children. The Panel will be clarifying the use of the terms "all First Nations children" in the legal and evidentiary context that led to previous findings and orders in this case.

[128] The applicable human rights framework will be further discussed under issues two and three of this ruling. In light of the Panel's past findings, reasons, rulings and orders and, for the reasons outlined below, the Panel clarifies that "All First Nations children" also includes on and off-reserve First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations whether under agreements, treaties or First Nations' customs, traditions and laws who experience the same barriers as on-reserve First Nations children with *Indian Act* status or who are eligible for *Indian Act* status. These First Nations children are eligible to be considered on a case-by-

case basis using a substantive equality analysis under the Tribunal's Jordan's Principle orders.

B. First Nations identity versus First Nations categories of who is eligible under Jordan's Principle

[129] The Panel has recognized in its interim ruling that there is a "significant difference" between determining who is a "First Nation child" as a citizen of a First Nation and determining who is a "First Nation child" entitled to receive services under Jordan's Principle and what is the appropriate eligibility criteria to use in the latter (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan's Principle services before the Tribunal, but not citizenship which is the prerogative of First Nations not the Tribunal or Canada. Moreover, the AFN, the COO and the NAN all made arguments to this effect and those arguments need to be addressed. First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will consider their concerns as part of this ruling. In that regard, the Panel will use the terminology "eligibility criteria under Jordan's Principle" to distinguish it from the terms "definition of a First Nation child'' purposely to avoid any misunderstanding that the Panel is attempting to define who is a First Nations child for any purpose but the eligibility to access Jordan's Principle services.

C. First Nations Rights to Self-Determination

[130] The Panel already mentioned it recognizes First Nations' human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[131] Moreover,

> [d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies to respect Indigenous Peoples' inherent rights of self-determination and of self-governance including their right to determine who their citizens are. Another important point is that the Panel not

> only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its Decision and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
>
> (see 2019 CHRT 7 at para 23, emphasis omitted).

[132] Additionally, in the interim ruling, the Panel stressed "the importance of the First Nations' self-determination and citizenship issues", and added that the "interim relief order or any other orders is not intended to override or prejudice First Nations' rights" (see 2019 CHRT 7 at para. 91, emphasis omitted).

[133] In 2018 CHRT 4, the Panel found that:

> national human rights legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the *UNDRIP*.
>
> (see 2018 CHRT 4 at para. 81).

[134] The Panel also recognized "the Indigenous Peoples' right to self-government and Canada's goal to rebuild the Nation-to-Nation relationship and the TRC's recommendation to use the *UNDRIP* as a framework for reconciliation" (see 2018 CHRT 4 at para. 114).

[135] Finally, on this point, the Panel finds that the various domestic and international legal instruments discussed above all support the inherent self-determination right of First Nations to identify their citizens and members outside the narrow lens of the *Indian Act*. In particular, this approach is consistent with protecting First Nations individual and collective human rights as articulated in the *UNDRIP and* other relevant international instruments, section 35 of the *Constitution Act, 1982*, and the quasi-constitutional *CHRA*. It is consistent with

Canada's public commitment to implement the TRC recommendations, rebuild a Nation-to-Nation relation with First Nations, and advance reconciliation. And it is consistent with the Tribunal's previous approach, in particular as applied in the *Merit Decision* and in the 2018 CHRT 4 ruling.

D. International Law

[136] Canada has accepted the *UNDRIP* without reservation, but has not yet enacted it into domestic law. However, Canada has fully endorsed the *UNDRIP*, and committed to implementing it through the review of laws and policies, as well as other collaborative initiatives and actions. Further, and importantly, this Tribunal has already provided an analysis of the *UNDRIP* and its relevance to this proceeding.

[137] In 2018 CHRT 4, The Panel also reiterated its findings made in the *Merit Decision* that the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Merit Decision* at paras. 437-439 and 2018 CHRT 4 at para. 69).

[138] Furthermore, the Panel made findings that

> […] Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under *UNDRIP*, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the [*Merit*] *Decision.*
>
> (see 2018 CHRT 4 at para. 131).

[139] As already mentioned in the *Merit Decision*,

> in *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the *United Nations' Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.
>
> (see 2018 CHRT 4 at para. 70).

As described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances.

(see 2018 CHRT 4 at para. 71).

[140] The Panel also found that

the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*) is of particular significance especially in this case. It outlines the individual and collective rights of Indigenous Peoples. In May 2016, Canada endorsed the *UNDRIP* stating that "Canada is now a full supporter of the Declaration, without qualification.

(see 2018 CHRT 4 at para. 72).

Moreover, the *UNDRIP* at Articles 3, 4, 5, 14, 15, 18, 21 support the rights of equal and just services and programs for Indigenous, with consultation on their social, economic and political institutions.

(2018 CHRT 4 at para. 73).

Additionally, the *UNDRIP* Articles 7, 21 (2), 22 (1) (2), state that Indigenous Peoples have the right to live in freedom and shall not be subject to violence including the forceful removal of their children; that Indigenous People have the right to the improvement of their economic and social conditions; and states will take measures to improve and pay special attention to the rights and special needs of children.

(see 2018 CHRT 4 at para. 74, emphasis omitted).

Furthermore, the *UNDRIP* Articles (Article 2, 7, 22) relate directly to the protection of Indigenous children and their right to be free from any kind of discrimination

(see 2018 CHRT 4 at para. 75).

Article 7

> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
>
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

(see *UNDRIP*)

[141] Moreover,

> Article 8 of *UNDRIP* reminds governments of their responsibility to ensure that forced assimilation does not occur and that effective mechanisms are put into place to prevent depriving Indigenous Peoples of their cultural identities and distinctive traits, disposing them of their lands, territories or resources, population transfer which violates or undermines Indigenous rights, forced assimilation or integration, and discriminatory propaganda.
>
> (see 2018 CHRT 4 at para. 76).

[142] As such, self-determination is codified by article 3 of the *UNDRIP* which states:

> Article 3
>
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[143] Furthermore, self-government is codified under article 4, *UNDRIP*, which states,

> Article 4
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

[144] While the *UNDRIP* is to be read as a whole with the understanding that all the rights enunciated are interdependent, Articles 5, 9, 15, 18-19, 23, 33-34 and 37 of the *UNDRIP* are of particular significance:

> Article 5
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> Article 9
>
> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

> Article 34
>
> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
>
> Article 37
>
> 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
>
> 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

[145] The rights and the Tribunal's approach mentioned above support a departure from the *Indian Act* criteria as a sole means to determine who is eligible to receive Jordan's Principle services.

[146] In addition, in 2015, Canada accepted to fully implement the 94 TRC calls for action. Child welfare and Jordan's Principle are first to fifth calls to action.

[147] Of significance, the TRC called for cooperation and coordination between all levels of government and civil society to implement its calls to action, and for government to fully adopt and implement the *UNDRIP* as the framework for reconciliation.

[148] In 2018, the Panel found that the TRC calls to action and the *UNDRIP* informed the Panel's reasons and orders in this ruling (see 2018 CHRT 4 at para. 83). Of note, this specific ruling led to a consultation protocol signed by all parties and included Canada's commitment to comply with all of the Panel's orders including those found in 2018 CHRT 4. This same ruling and orders acknowledged the Nation-to-Nation relationship and the recognition that this relationship meant that First Nations can choose to govern their own child welfare services. As such, Canada accepted this ruling in its entirety which was informed by the *UNDRIP*.

[149] Of note, the Panel Chair's final remarks in that same ruling mentioned that

> [g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence,
>
> The building of a Nation-to-Nation relationship cannot be more significant than by stopping the unnecessary removal of Indigenous children from their respective Nations. Reforming the practice of removing children to shift it to a practice of keeping children in their homes and Nations will create a channel of reconciliation […]
>
> (see 2018 CHRT 4 at paras. 452-453, emphasis omitted).

[150] Furthermore, when interpreting Canadian law, Parliament is presumed to act in compliance with its international obligations and to respect the values and principles enshrined in international law through the presumption of conformity. Moreover, the Supreme Court in interpreting the scope of the application of the *Charter*, stated in *R. v. Hape, 2007 SCC 26* that:

> …the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.
>
> (see *R. v. Hape*, 2007 SCC 26 at para. 56).

[151] Therefore, international instruments such as *UNDRIP*, should inform the contextual approach to statutory interpretation.

[152] Consequently,

> International law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88, [1987] 1 SCR 313.
>
> (see also 2016 CHRT 2 at para. 431).
>
> That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).
>
> (see also 2016 CHRT 2 at para. 432).
>
> This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of

> domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).
>
> (see 2016 CHRT 2 at para. 433).

[153] The Supreme Court of Canada in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, at p. 1056-7, discussed the importance of international law as an important interpretative tool in applying human rights law such as the *Charter*:

> As was said in *Oakes, supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.), supra*, I had occasion to say at p. 349:
>
> > The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter* 's protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, **the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.**
>
> (emphasis ours).

> In recent years, the Supreme Court expanded the relevance of international law to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.
>
> (see *Merit Decision* at para. 434).

[154] Moreover, in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 175 citing R. Sullivan, Driedger on the Construction of Statutes (3rd Ed. 1994) at p. 330 the Court stated,

> ... the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

[155] Furthermore, the Panel wrote in the *Merit Decision* that:

> [t]he *ICESCR* [*International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3] is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR [Committee on Economic, Social and Cultural Rights] stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESR* (see paras. 5 and 7). The CESCR also affirmed that the **aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence** (see at para. 34).
>
> (2016 CHRT 2 at para. 442), (emphasis ours).
>
> In addition to the covenants that protect human rights in general, the Panel wrote that Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial*

> *Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.
>
> (2016 CHRT 2 at para. 444, emphasis ours).

[156] The Panel in the *Merit Decision* wrote that "Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric," (see 2016 CHRT 2 at para. 454).

[157] While the Panel is not making findings of violation of international law as Canada argued the Tribunal lacks jurisdiction to do so, the Panel does have jurisdiction to rely on international law in interpreting the *CHRA* and domestic human rights. Again, it did so in the unchallenged *Merit Decision* and previous unchallenged rulings especially in regards to substantive equality which is at the core of Jordan's Principle. The Panel in light of the above, finds that Canada's practice and eligibility criteria under Jordan's Principle is underinclusive and inconsistent with protected international human rights enshrined in the *UNDRIP*. More importantly, it fails to account for the inherent right to self-determination and to self-governance, both human rights of paramount importance that Canada publicly committed to uphold and also included in the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 which will be discussed below.

E. An Act respecting First Nations, Inuit and Métis children, youth and families

[158] While the AFN indicated that they advocated for the inclusion of a reference to the Tribunal's decision in *An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019, c. 24 which was rejected by Canada, the Panel recognizes similar language used in its 2016 CHRT 2 decision in *An Act respecting First Nations, Inuit and Métis children, youth and families,* especially with regard to substantive equality.

[159] The *Act respecting First Nations, Inuit and Métis children, youth and families,* only came into force on January 1, 2020 after the present motion was argued. However, it was raised by the AFN and other parties were given an opportunity to respond as part of this motion and, at that time, it had undergone second reading. While the Panel recognizes that the legislation was not in force at the time of the hearing and that there is no provision giving the legislation retroactive effect, the Panel believes that it is appropriate to consider Parliament's goal and intentions and its purpose for enacting the legislation. Additionally, the Panel considers the rule of law that is applicable at the time it makes its orders. At the time it renders this ruling, the *Act respecting First Nations, Inuit and Métis children, youth and families* is now law in Canada. The same reasoning applies concerning *Bill S-3* which will be discussed further below. It is appropriate for the Tribunal to consider the current state of the law at the time of its ruling especially, as in this case, where the parties were able to anticipate the change and had an opportunity to make appropriate submissions. The Tribunal will not, however, consider secondary sources on such as public reports that were not addressed by the parties and not available at the time of the hearing.

[160] The Preamble is particularly instructive of Parliament's goal in enacting this important legislation.

> Preamble
>
> Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;
>
> Whereas Canada ratified the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination;
>
> Whereas Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices;
>
> Whereas Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage;

Whereas Parliament recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services;

Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children;

Whereas Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services;

Whereas Parliament affirms the need

> to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,
>
> to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons,
>
> to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,
>
> […]

And whereas the Government of Canada acknowledges the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities;

Moreover, according to the *Act respecting First Nations, Inuit and Métis children, youth and families*, an

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Indigenous peoples has the meaning assigned by the definition of aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.

[161] Similar to the language found in section 25 of the *Canadian Charter of Rights and Freedoms*:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
>
> The *Act respecting First Nations, Inuit and Métis children, youth and families*, at section 2 stipulates:
>
> This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

[162] Section 7 of the *Act respecting First Nations, Inuit and Métis children, youth and families,* affirms that this "Act is binding on Her Majesty in right of Canada or of a province".

[163] Section 8 mentions that

> [t]he purpose of this Act is to
>
> > (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
> >
> > (b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
> >
> > (c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

[164] In light of the above, it is Parliament's clear intent to uphold the inherent rights of self-determination and of self-governance of First Nations, Inuit and Métis Nations in the areas of child welfare and to respect substantive equality, an area covered by Jordan's Principle and domestic and international human rights. This is consistent with the Panel's approach in this case and this clear intent from Parliament informs the eligibility criteria under Jordan's Principle and also further supports a departure from the *Indian Act* criteria as the sole means to determine who is eligible to receive Jordan's Principle services.

F. Indian Act

[165] The Panel will now turn to the subject of the *Indian Act*, followed by Section 35 of the *Constitutional Act, 1982* and treaties.

[166] The Supreme Court of Canada recently discussed the *Indian Act* in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31 at paragraph 4:

> Since its enactment in 1876, the *Indian Act* has governed the recognition of an individual's status as an "Indian". In its current form, the *Indian Act* creates a registration system under which individuals qualify for status on the basis of an exhaustive list of eligibility criteria. The *Indian Act*'s registration entitlements do not necessarily correspond to the customs of Indigenous communities for determining their own membership or reflect an individual's Aboriginal identity or heritage. However, it is incontrovertible that status confers both tangible and intangible benefits.

[167] As Masse J. recognized in *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555 at paragraph 230:

> […] it should also be noted that, according to expert Stewart Clatworthy, the logic of section 6 and its "second generation cut off" dictates that, given the current state of affairs, in about 100 years, no new child will be entitled to have his or her name added to the Register in the plaintiffs' Bands. If there are more people registered under 6(1), this evolution will be slightly slower, but because of the nature of the mechanism in subsection 6(1), there will eventually be no more children born with an entitlement to be entered in the Register. There is no evidence on other Indian Bands specifically, but it should be noted that the same mechanism is at work.

[168] The recent amendments to section 6(1) of the *Indian Act* will be discussed below. However, the issue remains that Registered "Indians" under section 6(2) are unable to transmit status to their children which will inevitably result in the situation Masse J. identifies above.

[169] The AFN's Chiefs-in-Assembly passed significant resolutions pertaining to the *Indian Act* and its effects on First Nations. For instance, Resolutions 30/2017, 71/2016, and 53/2015 provide:

> Resolution Provisions 30/2017

WHEREAS:

[…]

B. There is a long history of hardship and discrimination imposed on Indigenous peoples by the *Indian Act's* Indian status provisions.

C. Federal legislation enacted in the past and implemented still today was designed to assimilate and erode First Nations citizenship.

[…]

E. Indian children lose Indian status after two generations of out-marriage, and with the current rate of out-marriage many First Nations communities will disappear within a few generations due to rapid decline in numbers of Status Indians with their citizenship.

F. First Nations have always asserted their jurisdiction to determine and define their citizenship, regardless of Canada's unilateral imposition of the *Indian Act* that determines that status.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Affirm the authority of First Nations to determine their own citizenship and eligibility for registration.

71/2016

[…]

THEREFORE BE IT RESOLVED THAT the Chiefs-in-Assembly:

[…]

3. Call on Canada to repeal the impugned provision in its entirety and to transfer the authority of citizenship and identity to the First Nations.

53/2015

WHEREAS

[…]

B. First Nations peoples always governed themselves according to their customs, laws, and traditions, which included the determination of their individual and collective identities. The federal government has unilaterally interfered with Indigenous peoples and violated our inherent rights by

> determining who is a registered Indian under the registration provisions of the *Indian Act*.
>
> […]
>
> F. The federal government must stop interfering with the right of First Nations to determine their individual and collective identities and recognize the people accepted by First Nations as belonging to them on the basis of their own customs, laws, and traditions.
>
> THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:
>
> 3. Direct the federal government to immediately cease imposing *Indian Act* criteria for registration upon First Nations and recognize citizens as defined by First Nations.
>
> […]
>
> 6. Direct the federal government to provide resources to First Nations to support their exercise of jurisdiction over citizenship.
>
> (see Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit "E", Tab 2 of the Jan 9 CSMR).

[170] In the case of *Indian Act* band councils (which are not institutions of Indigenous design), extensive authority to review and intervene in the decisions of their institutions remains vested in the Minister of Indian Affairs (see for example *Indian Act,* sections 66, 67, 79 and 83).

[171] As demonstrated above, the *Indian Act* was designed to assimilate First Nations Peoples and does not reflect First Nations' definitions of themselves as Nations.

[172] In light of the above, the AFN and the Caring Society argue it cannot be the case that a legislative regime that will eventually result in a generation of First Nations children born without any *Indian Act* status can be the only measure for determining the First Nations children who require the protection of Jordan's Principle. The Panel agrees with this assertion.

G. Treaties and Section 35 of the of the *Constitution Act, 1982*

[173] Section 35 of the of the *Constitution Act, 1982* recognizes and affirms aboriginal and treaty rights of Aboriginal Peoples meaning, First Nations, Inuit and Métis peoples in Canada:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[174] The Panel agrees with the AFN that the issue of citizenship is an Aboriginal right and treaty right, constitutionally protected by virtue of s. 35(1) of the *Constitution Act, 1982*. Moreover, as demonstrated above, an even greater protection of Indigenous rights exists under the *UNDRIP* and other international instruments that Canada has ratified (see *Merit Decision* at paras.431-455).

[175] Finally, treaties are also of significance in protecting First Nations rights. A treaty is an agreement made between the Government of Canada (or made by the British Crown and inherited by Canada), Indigenous groups and often provinces and territories that defines ongoing rights and obligations on all sides. These agreements set out continuing treaty rights and benefits for each group. Treaty rights and Aboriginal rights (commonly referred to as Indigenous rights) are recognized and affirmed in section 35 of the *Constitution Act, 1982* and are also a key part of the *UNDRIP* which the Government of Canada has committed to adopt. Treaties with Indigenous Peoples include both historic treaties with First Nations and modern treaties (also called comprehensive land claim agreements) with Indigenous groups. The various treaties between First Nations and Canada, the Constitution, the *UNDRIP* and the *CHRA* all have primacy over the *Indian Act*.

[176] This important analysis above is employed by the Panel when it is asked by Canada to respect the fact that the *Indian Act* is law in Canada and that the Panel has to apply it. When asked to apply non-quasi-constitutional Federal legislation, the Panel must consider the legislation's effect on the quasi-constitutional human rights it is being asked to adjudicate. The Panel agrees with Canada that the Panel's role here is not to find sections of the *Indian Act* inoperative. While the *Charter* was referred to by some parties, a proper *Charter* challenge is not before the Tribunal as part of this motion.

[177] This being said, the Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring.

[178] This reasoning also supports the Panel's response to Canada's argument that the Panel cannot draft policy. The Panel's goal is to eliminate the discrimination found in this case which includes Jordan's Principle and did not focus on the *Indian Act* in the provision of services. The Panel's interpretation is through a human rights lens and a focus to ensure that its orders are effectively implemented in a non-discriminatory manner and not drafting policy. The Tribunal is not attempting to draft policy. It analyzes the responsiveness of the governmental approach taken to implement the Panel's orders to cease the discriminatory practice and, if warranted, provides guidance to eradicate residual discrimination.

[179] The Tribunal has jurisdiction to consider this motion and corresponding request for further orders given that the Tribunal remained seized of all its orders to monitor their implementation with a focus to ensure their effectiveness and to eliminate the discrimination found. This mechanism is broad enough to allow the Panel to consider this issue and make clarification orders if needed and supported by the evidence.

[180] The Panel rejects Canada's argument that this interpretation exercise is expanding the complaint. Firstly, the complaint is part of the claim but is not its entirety. Secondly, Jordan's Principle is a broader aspect of the claim as it encompasses all government services offered to First Nations children and has an interplay with the Provinces and Territories. The Complainants who were successful in this case and the evidence they

presented does not support a finding that Jordan's Principle eligibility criteria was limited to the *Indian Act.*

[181] Finally, on this point, the evidence and legal framework discussed as part of this motion support the Tribunal's jurisdiction and clarification orders that will be discussed below.

[182] Returning to the subject of treaties, the Royal Commission on Aboriginal Peoples identified citizenship as an Aboriginal Right protected by s. 35 of the *Constitution Act, 1982* in its recommendations, when it stated that:

> In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

[183] Furthermore, in *R. v. Sioui*, 1990 CanLII 103, [1990] 1 SCR 1025, Lamer J. noted that the Royal Proclamation recognized the authority of Indigenous nations to continue to exercise autonomy over their internal affairs (see p. 1052-3). Similarly, in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*] at paragraph 145, the Supreme Court of Canada affirmed that the assertion of British sovereignty over Indigenous lands did not displace the pre-existing Indigenous legal orders, but protected them.

[184] The AFN submits that attempts at limiting the scope of a "First Nations child" on the basis of colonially derived preconceptions of *Indian Act* status, instead of deferring to First Nations concepts of citizenship and membership, flies in the face of First Nations jurisdiction over this area. Section 91 of the *Constitution Act*, *1867* did not only delineate that individuals with *Indian Act* status or those resident on reserves were under the jurisdiction of Canada,

and therefore entitled to the benefit of federal services, but in fact more broadly confirmed "Indians, and Lands reserved for Indians" fell under federal jurisdiction.

[185] The AFN also submits the Supreme Court of Canada in *Daniels* explained that section 35's purpose is to protect First Nations communities' rights, while subsection 91(24)'s purpose is about the federal government's relationship with Aboriginal Peoples in Canada. (see *Daniels* at para. 49).

[186] Furthermore, the AFN adds that Dr. Gideon confirmed in her May 24, 2018 affidavit that for the 11 self-governing First Nations who are subject to a Self-Government Agreement, the eligibility for Jordan's Principle is determined based on whether the child is included in the self-governing First Nation's membership code. This practice is confirmed in a January 9, 2019 email from the Acting Regional Director, Operations of ISC's Northern Region. As such, Canada has agreed that membership in a self-governing First Nation has been confirmed as an eligibility criterion that can be implemented.

[187] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive [A]boriginal societies with the assertion of Crown sovereignty (see para. 49; see also para. 50 on the importance of taking account of the Aboriginal perspective to achieve reconciliation).

[188] Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty (see *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida Nation*] at para. 20).

[189] The Supreme Court of Canada in decisions such as *Van der Peet* at paragraph 42 and *Delgamuukw* at paragraph 112 defined Aboriginal rights as "intersocietal" law, with their source in the interaction of pre-existing Indigenous legal systems with the common law system. The Court has also recognized Indigenous nations as holding pre-existing sovereignty, in particular in *Haida Nation* at paragraph 20. The Supreme Court of Canada has implied the existence of a right to self-government, for example by acknowledging in *Delgamuukw* that Aboriginal title is held communally, a state of affairs that would require some form of self-government to regulate the community's use of its lands. (see *Delgamuukw* at para. 115).

[190] Moreover, in *Reference re. Secession of Quebec,* [1998] 2 S.C.R. 217 [*Secession Reference*] at paragraph 114, the Supreme Court of Canada analyzed the right to self-determination of peoples in international law:

> The existence of the right of a people to self-determination is now so widely recognized in conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (see A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171-72; K. Doehring," Self-Determination" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.)

[191] If one understands the reconciliation of the pre-existing sovereignty of Indigenous Peoples and the de facto sovereignty of the Crown to be a fundamental principle of our constitutional order, the Constitution, both written and unwritten, must be interpreted in the context of the principle of reconciliation. This is so because, as the Supreme Court said in its *Secession Reference* judgment at paragraph 50, "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."

[192] It is important, in undertaking this task, that one keeps in mind that the Constitution is not simply the texts of the constitutional statutes listed in the Schedule to the *Constitution Act, 1982*. As the Supreme Court of Canada said in the *Secession Reference*,

> although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference* [[1997] 3 S.C.R. 3]. Finally, as was said in the Patriation Reference, [[1981] 1 S.C.R. 753], at p. 874, the Constitution of Canada includes
>
> > the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.
>
> These supporting principles and rules…are a necessary part of our *Constitution* because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning

(see *Secession Reference* at para. 32).

[193] The British Columbia Supreme Court in *Campbell v. British Columbia (Attorney General),* 2001 BCSC 1400 found that Indigenous self-government is an existing right and that Indigenous jurisdiction existed outside the division of powers between the federal and provincial governments in the *Constitution Act, 1867*. See, for example, *R. v. Pamajewon*, [1996] 2 S.C.R. 821. Likely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell*, though this case was never appealed to a higher court. These cases suggest that the courts may be returning to an earlier understanding of the relationship between the Crown and Indigenous peoples as being between self-governing co-creators of the Canadian constitutional order, rather than as sovereign and subject. The treaties provide evidence of the Crown's view of Indigenous nations as sufficiently independent and self-governing to warrant a treaty process, which implies a longstanding recognition of Indigenous authority to exercise self-government; these principles have never been entirely abrogated and they therefore continue to underpin Canada's legal structure. (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173, at 197).

[194] In *Simon v. The Queen*, [1985] 2 SCR 387, the Supreme Court addressed the interaction between the Treaty of 1752 between the Mi'kmaq and the Crown and s. 88 of the *Indian Act*, RSC 1985, c I-5 that provides that the general applicability of provincial law to Indians is "[s]ubject to the terms of any treaty". The decision confirms that Treaty Rights should be given "a fair, large and liberal construction" (para. 27).

[195] The Panel finds that the law on treaties is aptly summarized in Ian Peach's "More than a Section 35 Right: Indigenous Self-Government as Inherent in Canada's Constitutional Structure"[2]. The Panel entirely agrees with Ian Peach and authors John Borrows, Patrick Macklem and James Tully's characterisation of treaties in Canada's historical context and finds they concisely summarize the applicable law and context. The references below translate the Panel's views on this question. This also supports the AFN's position on treaties between First Nations and Canada.

[2] *Canadian Political Science Association*, https://www.cpsa-acsp.ca/papers-2011/Peach.pdf.

Probably the strongest source for the authority of Indigenous peoples to exercise self-determination in the Canadian constitutional order, however, is in the confirmation and recognition by the Crown of the pre-existing and continuing sovereignty of the Indigenous peoples of Canada through the negotiation of treaties. As John Borrows comments, one of the best examples of the governance powers of Indigenous peoples is their power to make treaties with the Crown, over 350 of which were made prior to Confederation.[3] The legitimacy of Indigenous government in Canada is based not simply on the prior occupancy of the territory by Indigenous peoples, but on their prior sovereignty; as Patrick Macklem describes it, this sovereignty and Crown sovereignty were distributed, or shared, through a series of acts of mutual recognition, in the form of treaty-making.[4] The treaties manifestly considered Indigenous nations as distinct political communities with territorial boundaries within which their authority was exclusive, so that they and European settler nations were recognized one another as equal and co-existing nations, each with their own forms of government, traditions, and ways of living, and agreed to cooperate in various ways.[5] There are numerous examples of treaties between European nations and Indigenous peoples in North America that used Indigenous legal forms. These were part of a larger set of intersocietal encounters through with Indigenous and non-Indigenous participants generated norms of conduct and recognition that structured their ongoing relationships. Throughout, the Indigenous understandings of the treaties were relatively uniform, as a means by which Indigenous nations sought to retain their traditional authority over their territories and govern their communities in the face of colonial expansion.[6]

Once this form of mutual recognition was worked out, the only way the Crown could acquire land and establish sovereignty in North America was to gain the consent of the Indigenous nations, consistent with what Tully describes as the most fundamental constitutional convention, that of consent of the people.[7]

Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians today appreciate that treaties, through which this mutual recognition and consent

[3] John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285, at 296.
[4] Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Standford L. Rev. 1311 ["Distributing Sovereignty"], at 1333.
[5] Ibid. at 124.
[6] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash. U. J. L. & Pol'y 167, at 179 ["Indigenous Legal Traditions in Canada"] and Patrick Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001) [Indigenous Difference], at 137, 152-3 for a discussion of these matters.
[7] James Tully, Strange Multiplicity: Constitutionalism in an age of diversity (Cambridge: Cambridge University Press, 1995), at, 122.

were worked out, are an important part of the foundation of the Canadian state.[8]

Crown-Indigenous treaties were regarded by both sides as constitutive of normative arrangements, a conclusion confirmed by the customary practice of renewing past commitments and redefining acceptable political conduct, for example through the annual practice of "brightening" the covenant chain in nation-to-nation councils.[9] As Mark Walters comments, the British officials involved knew perfectly well how Indigenous peoples interpreted British conduct in brightening the covenant chain, so there can be no question about whether or not there was a shared understanding or "meeting of minds".[10]

Indeed, The Treaty of Niagara of 1764, which confirmed and extended a nation-to-nation relationship between the Crown and Indigenous peoples and affirmed the covenant chain relationship, is a prime example of the British understanding of the meaning of Indigenous forms.[11] This, the first legal act that the Crown undertook after the Royal Proclamation, expressed their mutual aspiration to live together, but also to respect one another's autonomy.[12] At this event, presents were exchanged and covenant chains and wampum belts were presented to the British to establish a treaty of alliance and peace.[13] One of the belts exchanged here, the two-row wampum belt, was used by Indigenous nations to reflect their understanding of the Royal Proclamation and the Treaty as one of peace, friendship, respect, and non-interference in one another's internal affairs.[14] A second belt exchanged represented an offer of mutual support and assistance, but also respected the independence of each party.[15]

As Barsh and Henderson describe it, the treaty process produced a consensual distribution of constitutional power and established a compact between the treaty parties, thus securing to the treaties the status of constitutional documents.[16] The acceptance of a shared normative meaning

[8] J.R. Miller, Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada (Toronto: University of Toronto Press, 2009), at 3.
[9] Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 Dalhousie L.J. 75, at 129.
[10] Ibid. at 130.
[11] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at 20.
[12] John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153, at 163.
[13] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at, 23.
[14] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at 24.
[15] Borrows, Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002) [Recovering Canada], at 127.
[16] Russel Lawrence Barsh and James Youngblood Henderson, The Road: Indian Tribes and Political Liberty (Berkeley and Los Angeles: University of California Press, 1980) at 270-1; see also Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001) [Indigenous Difference], at 154.

> for the treaties from what both sides said and did results in the conclusion that Indigenous sovereignty and Crown sovereignty really were linked together in a genuine sense. Over time, the linkages were implicitly increased and strengthened with each present-giving ceremony until, on the eve of Confederation, it was understood that Indigenous nations enjoyed an inherent right of self-government, at least as a matter of internal sovereignty, under the protective umbrella of Crown sovereignty, in a manner consistent with Binnie J."s conception in *Mitchell*.[17]
>
> Tully refers to this as “treaty constitutionalism”, in which Indigenous peoples participate in the creation of constitutional norms to govern their relationship with the Crown, thereby taking an active role in the production of the basic legal norms governing the distribution of authority in North America.[18]

[196] While the Panel’s reasons and present ruling do not turn on the supporting doctrine referred to above, it does find it instructive and consistent with the Panel’s views on the law in regards to treaties and their important status in Canada’s constitutional framework. This supports the primacy of treaties over the *Indian Act*.

[197] Furthermore, in *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30, Parliament recognized the importance of giving due regard to First Nations customary laws and legal traditions in applying the *CHRA* and when applying the *Indian Act*.:

> Aboriginal rights
>
> 1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.
>
> Regard to legal traditions and customary laws
>
> 1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and

[17] Ibid. at 137-8.
[18] James Tully, Strange Multiplicity: Constitutionalism in an age of diversity (Cambridge: Cambridge University Press, 1995), at, 117.

> interests, to the extent that they are consistent with the principle of gender equality.

[198] All the above justify a broader interpretation of Jordan's Principle eligibility criteria that goes beyond the narrow parameters of the *Indian Act*.

H. Scope of Complaint

[199] As summarized earlier in this decision, Canada argued that the relief requested in this motion was beyond the scope of the complaint currently before the Tribunal. Again, the Panel disagrees with this assertion.

[200] The Panel already addressed the scope of the claim (complaint, Statement of Particulars, evidence, arguments, etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras. 99-102):

> [99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para. 4, translation).
>
> [100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:
>
> > "Complaint forms are not to be perused in the same manner as criminal indictments''. (Translation, see *Canada (Procureur général) c. Robinson*, 1994 CanLII 3490 (FCA), [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para. 22).
> >
> > « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »
>
> [101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:
>
> > Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,
> >
> > (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case

> (...) (see Kanagasabapathy v. Air Canada 2013 CHRT 7 at para. 3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway*, 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> …[I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the Act. As the Tribunal stated in Gaucher, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in Gaucher and Casler, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also Polhill v. Keeseekoowenin, see also, First Nation 2017 CHRT 34 at paras. 34 and 36).

[201] This question was already asked and answered. The only other question to be answered on the Tribunal's jurisdiction here is if this motion goes beyond the claim or not. The Panel's response is that for issues I and II of this ruling it does not.

[202] Furthermore, the case in front of the Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations. In fact, the Panel in a ruling adding the NAN as an interested party wrote the following:

> The Assembly of First Nations and the Chiefs of Ontario represent the various First Nations communities across Canada and Ontario. The interests of First Nations children, youth and families, along with the agencies that serve them, are represented by the First Nations Child and Family Caring Society of Canada. Furthermore, the Canadian Human Rights Commission (the Commission) represents the public interest and has led the majority of the evidence in this matter, including the evidence relied upon by the Panel to make the findings in the Decision identified above about remote Ontario communities.
>
> With the assistance of these parties and interested parties, along with the NAN and INAC, the Panel believes it will have more than enough submissions to craft a meaningful and effective order in response to the [Merit] Decision,
>
> (see 2016 CHRT 11 at paras. 16-17).

[203] This demonstrates that the focus of the claim revolved around First Nations representatives who had standing in this case and who were part of this complaint. Any clarification exercise on the terms “all First Nations children” is not unfair or outside this claim. Additionally, the Panel referred to the term communities over a hundred times in the Merit Decision and always believed First Nations communities should define themselves. This transpired in the Panel’s rulings especially in 2018 CHRT 4.

[204] Moreover, the Complainants’ Statement of Particulars alleged that underfunding of the FNCFS Program infringed Jordan’s Principle, and sought very broad relief to redress discriminatory practices in “…the application of Jordan’s Principle to federal government programs affecting children…”. The prayer for relief thus was not limited to the FNCFS program, or tied to *Indian Act* status or reserve residency.

[205] The issues pleaded are thus broad enough to encompass the clarification now being sought regarding eligibility under Jordan’s Principle.

[206] Furthermore, the Tribunal has already made rulings dealing with the scope and meaning of Jordan’s Principle, clarifying that it is not restricted to the resolution of jurisdictional disputes and that it applies to a broad range of services both on and off reserve. The Tribunal has retained jurisdiction over the implementation of its rulings and orders and the current motion simply seeks clarification of a matter that was not specifically addressed in those previous rulings – namely, who is eligible to receive the benefits that the Tribunal has already identified and described.

[207] The current motion asks the Tribunal for clarification intended to assist with such implementation and is squarely within the scope of the Tribunal’s retained jurisdiction.

[208] In the interim ruling, new evidence filed as part of the interim motion for further relief was considered by the Panel to arrive at its findings and order. The Caring Society had recently intervened to pay for medical transportation for a young First Nations child living off-reserve and without *Indian Act* status who required a medical diagnostic service, an essential scan, to address a life-threatening condition because Canada would not pay due to the child’s off reserve residence and lack of *Indian Act* status.

[209] The Panel found that the lack of *Indian Act* status was the primary reason for the refusal to cover the medical transportation costs:

> The fact that the child is not covered under Jordan's Principle for lack of status is the focus of the refusal,
>
> (see 2019 CHRT 7 at para. 69).

[210] The Panel found Canada's denial to be unreasonable:

> […] the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the [*Merit*] *Decision* (see at paras. 365-382 and 391).
>
> (see 2019 CHRT 7 at para. 73).

I. Conclusion

[211] The question is two-fold. The first part is the following:

> Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?

[212] The Panel, in light of the reasons outlined above, answers yes to this question. A mechanism ordered to eradicate discrimination must, in order to be effective in eradicating discrimination, be responsive to the entirety of the discrimination and apply a human rights framework. If services are offered, they must be offered in a manner respecting substantive equality and, in this case, inherent Indigenous human rights including self-determination. An eligibility criteria under Jordan's Principle ought to respect the protected rights discussed

above such as First Nations Self-government agreements, treaties, customs, laws, traditions, the *UNDRIP*.

[213] The second part is the following:

> If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?

[214] The Panel believes that it is the latter. Moreover, ensuring that First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations are not excluded automatically from Jordan's Principle does not necessarily mean that they receive services under Jordan's Principle because there is a need to achieve a case-by-case analysis. Nothing prevents the analysis to assess what services are required, if the province provides them, whether the child needs services above the normative standard, etc.

[215] Instead of excluding children based on assumptions, an effective approach in line with human rights and substantive equality and consistent with the Panel's previous rulings which did not focus on the *Indian Act* or on-reserve residency would be to include them in Jordan's Principle, get them "through the door" and do the verification of the particular case to see if the child is a citizen and/or a member of a First Nation according to a process proposed by First Nations that is also reasonably workable for Canada.

[216] Consequently, in light of the above and the Panel's Jordan's Principle definition, Canada's history of discrimination, the current rule of law, evolving case law and the need to craft effective remedies that do not condone other forms of discrimination, "all First Nations children" also includes First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations regardless of where they live, whether on or off-reserve.

[217] The Panel clarifies that in the spirit of its past findings, reasons, analysis, *Merit Decision* and previous rulings and orders and human rights laws namely the *CHRA* and the

UNDRIP, it is appropriate for Canada to consider First Nations children who do not have *Indian Act* status but are recognized as citizens and/or members of their respective Nations in accordance with their customs, laws, traditions, treaties and Self-government agreements to be considered eligible for services under Jordan's Principle.

[218] The Panel disagrees with Canada's position on this point and does not view this issue as outside its jurisdiction or outside the scope of the present claim given the historical and legal context forming part of this claim including Canada's acceptance of the *Merit Decision* and subsequent rulings especially 2018 CHRT 4 where Canada signed and confirmed its full acceptation of the Panel's reasons and orders. Again, this ruling also dealt with the importance of aligning human rights protected by the *CHRA* with the *UNDRIP* as explained above. Moreover, as already mentioned, the Panel did not narrow its view of Jordan's Principle services to First Nations children within the confinements of the *Indian Act*.

[219] Given the Panel's clarification above, the next step for this section is to address the meaning of "All First Nations children" for Jordan's Principle purposes. In considering the First Nations parties' requests in this case, the Panel opts to request the parties to discuss and generate potential eligibility criteria under Jordan's Principle only and in considering the Panel's clarification reasons outlined above.

[220] Additionally, contentious views arose from the interim order (2019 CHRT 7) and in discussions surrounding the process to allow First Nations to identify their citizens and/or members without placing a burden on First Nations who may not have capacity to address those requests in the short timeframe prescribed under Jordan's Principle. The Panel sought the parties' views to ensure that Canada has an effective way to verify if a First Nations child without *Indian Act* status is recognized by a First Nation. The COO brought many concerns and suggestions on the issue of potential liability for First Nations who, given they lack capacity, may not respond in time or may not respond at all to requests for identification of their citizens or members. The COO suggested that the Tribunal declare that this ruling does not impose any duty of care or responsibility on First Nations, and/or order Canada to indemnify First Nations for any liability they may incur.

[221] In sum, the Commission submits that with respect to negating future duties of care or liability, it must be remembered that the Tribunal is a creature of statute. Its mandate is to conduct hearings into alleged violations of the *CHRA*, and where infringements are found, to determine appropriate remedies under s. 53. The Tribunal does not have jurisdiction to make rulings that would purport to negate any private law duties of care that First Nations might owe as a matter of common or civil law. Further, even in the context of the *CHRA*, one panel of the Tribunal does not have the power to make a ruling that would compel the Commission (as gate-keeper) or future panels (as quasi-judicial decision-makers) to reach particular results, regardless of the facts and arguments that may be before them. This would unduly fetter future decision-making, and unfairly restrict the rights of any parties to those hypothetical future cases.

[222] The Commission also does not feel it would be appropriate at this point to order that Canada always indemnify First Nations for liabilities incurred in connection with requests for recognition. Such an order would likely be outside the Tribunal's jurisdiction, to the extent it sought to impose requirements to indemnify First Nations for liability incurred at common or civil law. Even within the *CHRA* scheme, one can imagine situations where discriminatory practices within a First Nation might make it more appropriate for the First Nation, rather than Canada, to bear responsibility for any infringements. Overall, the better approach would be to leave such matters to be determined in the context of future cases, using mechanisms and principles that already exist as a matter of human rights law.

[223] The Panel entirely agrees with the Commission's submissions above and believes it is the correct legal interpretation to apply in this case.

[224] The Panel finds the AFN's suggestion below to be helpful and a potential solution in identifying First Nations children under Jordan's Principle that addresses some of the concerns raised by the COO and Canada:

> With respect to verifying applicants under Jordan's Principle who are non-registered Indians without status, and residing or ordinarily resident off reserve, the AFN submits a solution exists in providing written notice and/or consulting the appropriate First Nations community. This is already an established practice regarding family and child matters under provincial child welfare legislation, such as Part X under Ontario's *Child and Family Services*

> *Act*.[19] It is also part of the Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, for example, under the current ss. 12, 13 and 20.[20]
>
> (see AFN submissions at para. 66).
>
> The AFN submits that by providing written notice and/or consultation, that could come in the form of a standardized letter which does not contain personal information, it offers the First Nations community *the opportunity* to confirm or deny, if it chooses, whether an applicant is indeed a member of the community. To be clear, the applicant ought to identify a connection with a particular First Nations community, and Canada ought to notify and/or consult that First Nations about the request to access services under Jordan's Principle.
>
> (see AFN submissions at para. 67).
>
> The application ought to proceed on the presumption that there is a connection to a First Nations community, so if the First Nations community does not respond, then the application is undisturbed. Under this presumption, Canada's logistical and operational concerns about "recognition as a member by their nation" are sufficiently addressed.[21] However, if the First Nations community responds, and denies there is a connection between the applicant and community, then Canada ought to make a determination whether the applicant is indeed eligible and whether the services ought to be offered.

[225] The Panel agrees with Canada that it cannot order First Nations who are not parties to do anything. The Panel does not impose the verification of the identity of the First Nations child on the First Nation but on Canada who is a party to these proceedings. The obligation is on Canada to provide all First Nations an opportunity to participate in identifying First Nations children for the purposes of Jordan's Principle eligibility. Additionally, the elaboration of the identification process as per the Panel's orders concerns First Nations who are parties to these proceedings and recognizes their expertise and valuable input in determining an identification process.

[226] Moreover, a process seeking the First Nations' viewpoints on the First Nations child's citizenship and/or membership is in line with their inherent right of self-determination and aims to recognize their right to determine who their citizens/members are. It also moves

[19] *Child and Family Services Act*, R.S.O. 1990, c. C.11, Part X (Indian and Native Child and Family Services).
[20] Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st Session, 42nd Parliament, Canada, December 3, 2015, ss. 12, 13, 20, House of Commons Second Reading.
[21] Affidavit of Leila Gillis, affirmed March 7, 2019, paras 5-9.

away from the issue of self-identification alone determining First Nations identity. The Panel finds that the AFN's suggestion for a recognition process potentially addresses Canada's concerns.

[227] Finally, on Canada's argument that the Tribunal must respect the division of powers between the Federal and Provincial governments and that off-reserve services are outside the purview of this claim preventing the Panel to make the orders requested, the Panel relies on the Supreme Court of Canada decision in *Daniels*:

> Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, [2010] 2 S.C.R. 696, at para. 3.
>
> (see Daniels at para. 51).

[228] The Panel finds the issue discussed in this section falls squarely within the core of the Indian power and forms part of this claim.

J. Order

[229] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above and

2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[230] The parties will return to the Tribunal with their potential eligibility criteria and mechanism by **October 19, 2020**.

V. Issue II

> First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian* Act status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

A. Legal framework

[231] As mentioned above, the Panel in the *Merit Decision*, applied the tests found in *Moore* and *Bombardier*., (see 2016 CHRT 2 at paras. 22-25). The Panel finds it is still applicable and will apply the same tests again for issues two and three of this ruling.

[232] Furthermore, the majority in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 [*Gibbs*] articulated a two-stage framework to determine claims for discrimination in an insurance benefits plan. The first step is to determine the true character of or underlying rationale of the benefits plan in this case, Jordan's Principle, which was already explained above. The second step is to consider whether benefits differ as a result of protected characteristics that are not relevant to the stated purpose. This analysis has subsequently been applied to other ameliorative programs (e.g. an employment policy in *Lavoie v. Treasury Board of Canada*, 2008 CHRT 27 at para. 136).

[233] *Gibbs* predates the establishment of the current three-part prima facie test for discrimination articulated in *Moore* at paragraph 33 and affirmed subsequently in *Bombardier* at paragraph. 35-54 and *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 at para. 24. The test requires that a complainant have a characteristic protected from discrimination under the *CHRA*; that they experienced a denial and/or an adverse impact with respect to the service; and that the protected characteristic was a factor in the denial and/or adverse impact.

[234] In *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 [*Skinner*], the Nova Scotia Court of Appeal persuasively articulated how the *Gibbs* test could be applied within the *prima facie* test for discrimination articulated in *Moore*. In particular, the Court used *Gibbs* to analyze whether the protected characteristic was a factor in the adverse impact (*Skinner* at paras. 52-70). This approach is consistent with the approach

taken by Member Bélanger in *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20, aff'd *Canada (Attorney General) v. Hicks*, 2015 FC 599 where he first determined that the complainant had a protected characteristic and suffered an adverse treatment before applying *Gibbs*.

[235] In summary, in alleging an ameliorative program is under inclusive, the burden remains with the complainant to establish a *prima facie* case of discrimination. The complainant must establish that they have a characteristic protected from discrimination under the *CHRA*, that they were denied and/or experienced an adverse impact with respect to the service, and that the protected characteristic was a factor in the denial and/or adverse impact. In order to demonstrate that the protected characteristic was a factor in the denial and/or adverse impact, it is open to the complainant to use the *Gibbs* framework in which the first step is to identify the true character or underlying rationale of the ameliorative program. The second step is to consider whether program benefits differ as a result of protected characteristics that are not relevant to the stated purpose.

[236] The Panel described Jordan's Principle as a substantive equality mechanism to ensure that First Nations children access governmental services, they need without experiencing gaps, delays or denials. For clarity, Jordan's Principle is not a program, it is considered a legal rule by Canada. This was already established in the past (see 2019 CHRT 7 at para. 25). However, the Panel finds the *Gibbs* test applicable and useful in analyzing eligibility for services under Jordan's Principle.

[237] Canada's position appears to be that it considers Indigenous children, including those without *Indian Act* status, who are ordinarily resident on reserve to be within the scope of Jordan's Principle. This includes the First Nations children in this issue ordinarily resident on reserve. Therefore, the central dispute here is with respect to First Nations children residing off-reserve who are not eligible for *Indian Act* status but have a parent who is.

[238] The Panel believes that is does have jurisdiction to examine this category of children as part of this claim without unduly expanding the scope of the complaint in any way. The Jordan's Principle distinction based on the *Indian Act* was made by Canada and raised after the *Merit Decision*. As already explained above, the Panel did not focus its *Merit Decision*

on considerations under the *Indian Act*. Additionally, Jordan's Principle applies on and off-reserve given its substantive equality nature and its goal to enable First Nations children to access services that are culturally appropriate and safe and account for intergenerational trauma and other relevant specific needs that may only be addressed in providing services that could be considered above normative standards. While Jordan's Principle can include FNCFS, it is broader than the part of the complaint addressing on-reserve FNCFS services. The Panel clearly made this distinction in its *Merit Decision* and subsequent rulings providing clarification based on the evidence in front of the Tribunal.

[239] In light of the Panel's past findings and rulings and its reasons on issue I, the Panel considered if any off-reserve First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status and have actual needs for services that (i) go beyond normative standards of care, and (ii) are rooted in the kinds of historical and contemporary disadvantages that breathes life into the substantive equality analysis – such as the legacies of stereotyping, prejudice, colonialism, displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop – is eligible for Jordan's Principle services. For the reasons outlined below, the Panel finds there is an evidentiary and legal basis that off-reserve children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status share the same characteristics and have similar needs as the other First Nations children eligible for Jordan's Principle services but these children are denied the benefit of those services because of *Indian Act* status distinctions based in whole or in part on the prohibited ground of race and/or national or ethnic origin.

[240] The first element in the *prima facie* discrimination test is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics. The Supreme Court decision in *Daniels* determined that First Nations without *Indian Act* status, and regardless of their parents' *Indian Act* status, are "Indians" for the purposes of 91(24) of the *Constitution Act* of 1867. Therefore, a First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is

eligible for, *Indian Act* status possesses the same characteristics as registered or eligible to be registered First Nations children namely race and national or ethnic origin protected under the *CHRA*. Moreover, the Panel never made this distinction in the *Merit Decision* since it viewed First Nations and the protected ground of race and national or ethnic origin in a broader sense given the reasons explained above.

[241] The second element in the *prima facie* discrimination test is that the First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* must experience a denial and/or adverse impact in the services provided by Canada under Jordan's Principle.

[242] Based on the findings made in the interim ruling, it is clear that a First Nations child living off-reserve who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* status is denied services by not being considered eligible to receive Jordan's Principle services, with some exceptions, since Canada considers those children to be receiving provincial services. Under the Panel's substantive equality mandatory definition in 2017 CHRT 14 at paragraph 135, Canada must also provide culturally appropriate and safe services that may be considered above normative standards to all First Nations children on and off-reserve.

[243] However, Canada's eligibility criteria exclude First Nations children without *Indian Act* status even if one of their parents has status or is eligible for status under 6(2) of the *Indian Act*. The reason behind this is because a parent that has 6(2) *Indian Act* status cannot transmit it to their children. This is what the AFN resolution above described as the erosion of First Nations. The issue here in the provision of services is that because Canada unilaterally imposes the *Indian Act* as the criteria for access to services under Jordan's Principle a situation may arise of two siblings sharing only one parent registered under 6(2) of the *Indian Act* being treated differently for Jordan's Principle eligibility. The child whose second parent is registered under 6(1) of the *Indian Act* may be considered eligible for Jordan's Principle services. On the other hand, the child whose second parent is not eligible for registration under the *Indian Act* may not be eligible for Jordan's Principle services. The Panel finds that benefits to First Nations children differ as a result of protected characteristics that are not relevant to Jordan's Principle's stated purpose of substantive equality for First

Nations children. There is no doubt that this outcome is discriminatory and should not be the criteria used to remedy the discrimination found in this case.

[244] We are not discussing a self-identified First Nations person who had a First Nations ancestor twelve generations ago here. We are discussing First Nations children who, but for the discriminatory way in which the *Indian Act* categorizes them, are denied services under Jordan's Principle meant to address substantive equality. Jordan's Principle accounts for these children's specific needs as well as the legacies of stereotyping, prejudice, colonialism and displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop. Moreover, the Panel already found that

> AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see *2009 MOU on Jordan's Principle* at pp. 1-2),
>
> (see 2016 CHRT 2 at para. 355).

[245] Additionally, Health Canada and Aboriginal Affairs and Northern Development Canada (AANDC), now ISC, has "a role to play in supporting improved integration and linkages between federal and provincial health and social services" (*2013 MOU on Jordan's Principle* at p. 1), (see 2016 CHRT 2 at para. 358).

[246] As already noted, the evidence before the Tribunal and findings indicated that a child who was living off reserve, was not recognized as being ordinarily resident on reserve, and was not eligible for *Indian Act* status registration was denied a service above normative standards. The child, who was an infant, was waiting for an essential scan prescribed by a physician in order to assist in determining the appropriate treatment and operation for a rare and serious medical condition (see 2019 CHRT 7 at paras. 64 and 72). The Panel found that the fact that the child was not covered under Jordan's Principle for lack of status was the focus of the refusal (see 2019 CHRT 7 at para. 69).

[247] Moreover, in the interim ruling the Panel found the outcome of the child's case unreasonable. The coverage under Jordan's Principle was denied because the child's mother is registered under 6(2) of the *Indian Act* and could not transmit status to her child in

light of the second-generation cut-off rule. This is the main reason why the child's travel costs were refused (see 2019 CHRT 7 at para. 73).

[248] Thirdly, as demonstrated above, race and national or ethnic origin is a factor in the denial of services namely above normative standard and culturally appropriate and safe under Jordan's Principle. A child with a parent who is registered under 6(2) of the *Indian Act* and with a parent with no status or eligibility to status will be treated differently than a child who has a parent registered under 6(1) of the *Indian Act*. No other children in Canada will be categorized in this manner, only First Nations children. Therefore, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison" (see *Withler v. Canada (Attorney General),* 2011 SCC 12 at para. 59). Moreover, the same reasons and findings in the *Merit Decision* in terms of substantive equality and race and/or national or ethnic origin apply to this unilaterally created by Canada category of eligible First Nations children, (see for example 2016 CHRT 2 at paras. 395-467).

> In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the ICCPR should be understood to imply:
>
> > any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
>
> Moreover, the Panel relied on General Comment No. 18 of the UNHRC's stating "that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures" (see at paras. 5, 8, and 12-13).
>
> (see *Merit Decision* at para. 440, emphasis added).

[249] The Panel found in the *Merit Decision* the narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children again, while it did include on-reserve First Nations children in Jordan's

Principle, it did not restrict it to only those on-reserve or on any reliance on the *Indian Act* criteria (see 2016 CHRT at paras. 351-355, 360-381 and 458).

[250] Furthermore, the Panel relied on General Comment No. 20 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*) that stated that

> [t]he *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESR* (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence (see at para. 34),
>
> (see 2016 CHRT 2 at para. 442, emphasis added).

[251] Moreover, the Panel already found that

> [c]oordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need
>
> (see 2016 CHRT 2 at para. 381, emphasis added).
>
> More importantly, Jordan's Principle is meant to apply to all First Nations children
>
> (see 2016 CHRT 2 at para. 382, emphasis added).

[252] Furthermore, Canada itself admitted that Federal Programs are more residency based than *Indian Act* based. Additionally, while Jordan's Principle is meant to address jurisdictional disputes amongst Federal Departments it also addresses jurisdictional disputes amongst the Federal government and Provincial and Territorial governments which clearly indicates that off-reserve considerations also form part of Jordan's Principle's process.

B. The discriminatory impact of section 6(2) of the *Indian Act* and its adverse effects on First Nations children

[253] On this point the parties have argued that the unanimous Supreme Court of Canada decision *Canadian Human Rights Commission v. Canada (Attorney General)*, 2018 SCC 31 to support their respective positions. This decision was a combined appeal from the judicial review of two decisions before the Tribunal: *Matson et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 13 [*Matson*] and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada,* 2013 CHRT 21 [*Andrews*].

[254] The two Tribunal decisions were first affirmed by the Federal Court and the Federal Court of Appeal and finally affirmed by a unanimous Supreme Court of Canada decision. The *Matson* and *Andrews* decisions are well known by the Panel given that each Panel Member rendered one of the two decisions.

[255] Section 6 of the *Indian Act* defines the various persons who are entitled to be registered as “Indian”. In *Matson*, the complainants claimed that, due to their matrilineal Indian heritage, they are treated differently in their registration under subsection 6(2) of the *Indian Act*, when compared to those whose lineage is paternal and are registered under subsection 6(1). Namely, registration under subsection 6(2) does not allow the complainants to pass on their status to their children. In *Andrews*, the issue was the previous enfranchisement provisions of the *Indian Act*. According to the complainant, had his father not enfranchised, he would have been entitled to registration under section 6(1), as opposed to his current status under 6(2). With subsection 6(1) status, the complainant would then be able to pass 6(2) status along to his daughter.

[256] Both complaints were argued under section 5 of the *CHRA* as discriminatory practices in the provision of a “service”. That is, Indian registration was argued to be a “service” within the meaning of section 5 of the *CHRA*. The Tribunal disagreed. While the processing of registration applications by the then INAC could be viewed as a service, the Tribunal found that the resulting status or lack thereof could not. INAC did not, and ISC now does not, have any involvement in determining the criteria for entitlement to be registered,

or not registered, as an Indian under section 6 of the *Indian Act*. Nor does it have any discretion in determining entitlement to be registered, or not registered, as an Indian pursuant to the criteria in section 6 of the *Indian Act*. Entitlement was determined by Parliament, not INAC, through section 6 of the *Indian Act*; and INAC was obliged to follow this section in processing applications for registration.

[257] Therefore, the Tribunal was of the view that the complaints were challenges to section 6 of the *Indian Act* and nothing else. Pursuant to the Federal Court of Appeal's decision in *Public Service Alliance of Canada v. Canada Revenue Agency,* 2012 FCA 7 [*Murphy*], the Tribunal determined that complaints aimed at legislation per se, and nothing else, fall outside the scope of the *CHRA*. An attempt to counter the application of legislation based solely on its alleged discriminatory impact would better be addressed by a constitutional challenge. The Tribunal also rejected additional arguments, i.e. (1) that *Murphy* was superseded by other Supreme Court of Canada authorities regarding the primacy of human rights legislation; (2) that provincial human rights bodies had accepted that human rights legislation could render legislation inoperable; and, (3) that current and former provisions of the *CHRA* (including the former s. 67) indicated Parliament's intent to allow challenges to legislation under the *Act*.

[258] With the repeal of section 67 of the *CHRA*, the Tribunal now has the jurisdiction to consider discrimination complaints emanating from the application of the *Indian Act.*

[259] In these two decisions, the Tribunal provides analysis and interpretation of the *CHRA*. Some examples of the Tribunal's analysis include the Tribunal's determination that the complaint could be dismissed as a challenge to legislation, interpretation of the term "service" as used in s. 5, and a determination regarding the primacy of human rights legislation.

[260] However, the case at hand can absolutely be distinguished from the *Matson* and *Andrews* cases given that the Panel found in the *Merit Decision* and subsequent rulings there are discriminatory practices that need to be eradicated. In *Andrews*, the Panel Chair Sophie Marchildon in this case chairing the *Andrews* case, wrote on the *Indian Act's* purpose. The following comments in particular are relevant for this ruling:

> Indian status is a legal construct created by the federal government. Through various provisions of the *Indian Act*, R.S.C., 1985, c. I-5 [the *Indian Act*] and its prior enactments, the federal government has defined the persons who are entitled to registration as "Indian". The statutory concept of "Indian" from early colonialism to the present day does not reflect the traditional or current customs of First Nations peoples for defining their social organization and its membership (see *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at paras. 8-12 [*McIvor*]),
>
> (see *Andrews* at para.1).

[261] Additionally, in *Andrews*, the issue of the need to establish the existence of a discriminatory practice was discussed and is particularly helpful in this case:

> I do not read these cases as foregoing the jurisdictional requirement for the Tribunal to find the existence of a "discriminatory practice" within the meaning of the *Act*
>
> (see *Andrews* at para. 78)
>
> This only further confirms the conclusion which I have already made, namely that while the Supreme Court has affirmed the primacy of human rights legislation, this principle applies to a "discriminatory practice" under the *Act*
>
> (see Andrews at para. 85, emphasis added).
>
> While my reasoning precludes challenges of decisions and/or actions which emanate directly from the *Indian Act*, decisions and/or actions which constitute a "discriminatory practice" pursuant to sections 5 to 25 of the *Act* and which would have previously been made "under the authority" of the *Indian Act* now fall within the Tribunal's jurisdiction. The fact that the Tribunal has already started to see cases of this kind is further evidence of this (See for example *Louie and Beattie v. Indian and Northern Affairs Canada*, 2011 CHRT 2),
>
> (see *Andrews* at para. 107, emphasis added).

[262] This case at hand is not a challenge to the *Indian Act* legislation. This case deals with discriminatory services and the use of a discretionary discriminatory criteria for eligibility purposes under Jordan's Principle. Furthermore, this ruling does not propose to strike down section 6(2) of the *Indian Act* as this was not properly brought before the Panel and this is not the appropriate way to do so. However, insofar as it conflicts with the *CHRA* and human rights protected under the *CHRA* in the presence of discrimination that the Tribunal is seeking to eliminate, the quasi-constitutional *CHRA* supersedes the *Indian Act*.

[263] Furthermore, the Panel finds that Canada uses its discretion to establish *Indian Act* registration or entitlement to registration eligibility criteria to restrict access and therefore deny Jordan's Principle services to First Nations children residing off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status. Relying on the discriminatory criteria of the *Indian Act* adversely differentiates between siblings or other family members because of a second-generation cut-off rule that is meant to assimilate and erode First Nations citizenship. This amounts to discrimination and runs counter to what the Panel is aiming to achieve in this case, namely to ensure Canada ceases the discriminatory practice and takes measures to redress the practice or to prevent the same or a similar practice from occurring in future (see section 53 (2) a of the *CHRA*). The Panel chair in her final remarks in a previous ruling wrote that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence", (see 2018 CHRT 4 at para. 452).

[264] To arrive to its conclusion, the Panel follows a similar analysis and approach to that taken by Member Lustig in *Beattie v. Aboriginal Affairs and Northern Development Canada,* 2014 CHRT 1. In that case, the Tribunal addressed whether AANDC discriminated against Joyce Beattie in relation to her entitlement for *Indian Act* registration. Shortly after birth, Ms. Beattie was adopted through a custom adoption by parents who had *Indian Act* status in a different *Indian Act* Band than her birth mother. Once the *Gender Equity in Indian Registration Act*, S.C. 2010 c. 18 amended the *Indian Act*, Ms. Beattie's grandchildren became eligible for *Indian Act* status if Ms. Beattie had s. 6(1)(c) *Indian Act* status through her adopted parents but not if she had s. 6(1)(f) through her birth parents. AANDC refused, for a period of about two and a half years, to recognize Ms. Beattie's custom adoption and registered her under s. 6(1)(f). AANDC similarly refused to allow Ms. Beattie to have her name removed from her birth mother's Band list.

[265] The Tribunal found that the complaint was substantiated. The Tribunal found that processing an application for *Indian Act* registration constituted a service under s. 5 of the *CHRA*. *Indian Act* registration is work done by government employees on behalf of an applicant so that benefits may flow to that individual. The Tribunal found that AANDC's

decisions were discretionary decisions within the scope of the *CHRA*. The complaint was not a disguised attack on the *Indian Act* itself. AANDC's eventual recognition of Ms. Beattie's entitlement to registration through her adoptive parents and eventual removal from her birth mother's Band list confirmed that AANDC had discretion in how it interpreted the *Indian Act*. As such, AANDC had an obligation to choose a broad, liberal and purposive interpretation of the *Indian Act* that was consistent with human rights principles and did not discriminate on the basis of family status.

[266] Similarly, ISC has confirmed it uses its discretion in determining who is eligible to receive Jordan's Principle services:

> When a request is submitted on behalf of a non-status child, the Jordan's Principle Focal Point works with the requestor to understand if the child would be eligible for registration by learning about the parents' status, potential status under *Bill S-3*, as well as with the Office of the Indian Registrar. If there is uncertainty as to the eligibility of the child, the Focal Point can err on the side of caution and approve the request within the domain of "best interests of the child", particularly where there are concerns about meeting the ordered timeframes (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at paras. 35-39)
>
> (see 2019 CHRT 7 at para. 42).

[267] Additionally, this Panel has already indicated its desire to ensure remedies do not condone another form of discrimination:

> The Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies
>
> (2019 CHRT 7 at para. 22).

[268] The interim relief order informs the required analysis under Jordan's Principle:

> 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. **Canada should ensure that the need to address gaps in services, the need to eliminate all forms**

> **of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the *UNDRIP* and the *Convention on the Rights of the Child* guide all decisions concerning First Nations children.**
>
> (2019 CHRT 7 at paras. 89, original emphasis omitted and new emphasis added).

C. S-3 and Enfranchisement provisions

[269] The Panel sees no reason why First Nations children who will inevitably become eligible to receive services under Jordan's Principle because of their eligibility for registration and obtaining status under the *Indian Act* following S-3 amendments should wait for Canada's process to implement the changes before they can obtain services such as above normative standards and culturally appropriate and safe services. Otherwise, those soon-to-have *Indian Act* status children will experience unnecessary delays and may, where applicable, ask for retroactive services once they obtain *Indian Act* status. Following substantive equality principles and given the history and discriminatory impacts found in the *Merit Decision* and subsequent rulings and of the *Indian Act*, Canada is ordered pursuant to section 53 (2) of the *CHRA* to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation. The same reasoning applies to parents who will become eligible to obtain registration/status under S-3 implementation.

[270] Finally, on this point, the same reasoning should apply to those parents of First Nations children in need of Jordan's Principle services above normative standards and culturally appropriate and safe services who were enfranchised and are now eligible for registration under the *Indian Act*.

[271] It appears that Canada is raising a *bona fide* cost defence under section 15(1)(g) and 15(2) of the *CHRA* when Canada submits that an inclusive definition of a "First Nations child" would "risk leaving the needs of those children who are properly the subject of the complaint, unmet." While the argument that Canada's resources are not unlimited has merit, aside from this assertion no sufficient evidence was brought forward to support such a statement. Therefore, the Panel finds this argument unconvincing.

D. Order

[272] The Panel pursuant to section 53 (2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[273] Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

VI. Issue III

> First Nations children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.

A. Structure

[274] This last section will deal with two additional categories:

- First Nations children without Indian Act status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.
- First Nations children without Indian Act status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons.

[275] As already discussed under the previous issue, the Panel understands Canada's position to be that it already considers Indigenous children living on reserve to be within the scope of Jordan's Principle and the Panel anticipates that would apply to the First Nations children under this heading who are living on reserve.

[276] The Panel made numerous findings, rulings and orders under Jordan's Principle all accepted by Canada. The Panel continues to retain jurisdiction concerning those orders to

monitor the implementation and in ensuring that the discrimination found in this case is eliminated. Therefore, the Panel has jurisdiction to deal with these requests in determining the effectiveness of its orders in light of the evidence it has before it and the discrimination found in this case.

B. Analysis

[277] There is no doubt that the Tribunal has jurisdiction to analyze this request given that Jordan's Principle is within this claim and the Panel has retained jurisdiction over its orders. The Panel therefore has jurisdiction to clarify its orders and make further orders when necessary when supported by the evidence before it.

[278] The Panel will address the two categories referred to above interchangeably given the fact that the legal framework discussed below applies to both categories.

[279] Despite the lack of evidence referred to and relied upon by the parties in support of this issue three request, the Panel extensively reviewed the evidence before it. In reviewing the record, the Panel reviewed the Parties' Statements of Particulars, the Parties' final arguments, the evidence the Parties relied on in their arguments, and the evidence as part of the interim motion.

[280] This being said, the Panel finds that First Nations children residing off reserve who have lost connection to their First Nations communities for other reasons than the discrimination found in this case fall outside of the claim before it. The claim was not focused on this at all until the 2019 motion and sufficient evidence has not been presented to support such a finding. As the Panel previously said, the Supreme Court of Canada stated in *Moore* that the remedy must flow from the claim.

[281] What the Panel found in the *Merit Decision* was that First Nation children of Residential School and of Sixties Scoop survivors have suffered, may have higher needs often as a result of intergenerational trauma, colonialism, systemic racism and other historical wrongs done by Canada. As already explained above, this forms part of the substantive equality analysis under Jordan's Principle. The Panel in making those findings did so without any focus on *Indian Act* status or on-reserve residency.

[282] Additionally, the same can be said for all First Nations children who were discriminated against by Canada in the provision of federally funded services which are covered by Jordan's Principle. Since the 2017 CHRT 14 and 35 orders that provided clarification on Jordan's Principle, a federal service also includes a service above normative standard which aims to remedy the discrimination found in this case and rightfully accounts for substantive equality and the specific and distinct needs of First Nations children.

[283] However, the Panel did not make findings in regards to the services First Nations children of Residential School and of Sixties Scoop survivors receive off-reserve who are not recognized as part of a First Nation community given that it was not advanced by the parties in their claim or arguments before this motion and insufficient evidence was presented.

[284] The Panel did not prevent the parties from bringing evidence as part of this motion. Of note, evidence was brought by the Caring Society and Canada to support the interim motion and was relied upon by the Panel in section two of this ruling.

[285] Given the lack of evidence in this motion, the Panel is not in a position to make findings let alone remedial orders for the two above categories at this time.

[286] Furthermore, the Panel agrees with the Commission and Canada that there is insufficient evidence in the record to make fact findings concerning off-reserves First Nations children without *Indian Act* status who have lost connections with their First Nations or who have parents that self-identify as First Nations. Again, the claim and arguments were not brought, argued or proven before this Panel, (see for example the Caring Society's 2014 final arguments for the hearing on the Merits at paras. 368-369; 374; 394-396; 398; 400-401; 403; 407; 424-425; 439; and 453-456).

[287] Additionally, the legal tests developed in *Moore* and *Gibbs* are not meant to simply stand-alone absent evidence; rather they find their meaning when applied to the facts and evidence presented. If there is insufficient evidence the onus is not met and no remedy is ordered.

[288] Furthermore,

> [a]s the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General*)*,* 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial. (see 2017 CHRT 14 at para. 30),
>
> (see also interim order 2019 CHRT 7 at, para.47).

[289] In this specific section, the Panel cannot make this finding of fact other than find those First Nations children are denied access to Jordan's Principle services. This denial is clear from Canada's submissions and the evidence in the record:

> the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:
>
> > The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the Indian Act by creating seven new registration categories, in response to the decision in Descheneaux c. Canada rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision. (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).
> >
> > Additional amendments to the definition under the Indian Act will be developed subsequent to a period of consultation with First Nations. When part B of Bill S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.16).
>
> (see 2019 CHRT 7 at para. 86, emphasis omitted).

[290] Nevertheless, the tests must be applied to the proven facts and are intimately linked to the evidence in front of the Tribunal. This is what justifies a remedy. As opposed to the first two issues, the Panel was not provided much to work with to make findings that will have considerable impacts involving rights holders outside this case.

[291] The CAP's intervention is an example of this. The CAP was not allowed to bring evidence before the Tribunal as parties raised expeditiousness concerns. The Panel after considering the matter has a better understanding of the bigger picture here. Essentially the CAP desires to be part of the consultations surrounding off-reserve First Nations children without *Indian Act* status, including those who have lost connection with their First Nations and who self-identify as First Nations.

[292] Additionally, the AFN is very concerned that this could include false claims by self-declared First Nations and take away resources meant for vulnerable First Nations children who need services. The Panel finds this to be a serious issue that needs important considerations that are beyond the evidence before it at this time. The AFN argued that the above normative standards services under Jordan's Principle are enticing to many. The AFN further submits that recognizing them and others who have First Nations identity but have lost connection with a First Nation would result in depleting resources that are meant to address the discrimination in federal services and programs found in this case for First Nations children.

[293] While the Panel agrees with the Caring Society and the NAN that absent a proven section 15 of the *CHRA* defence when the complainants onus has been met, there is no reason to limit access to services to some children, the Panel also understands the social impacts the AFN is bringing to our attention and the broader context requiring supporting evidence, as Canada advances, discussions outside the Tribunal. For Canada, at this time this type of order would be unworkable given the need to have much broader consultations with First Nations, Inuit and Metis Nations, Provinces and organizations to name a few. The Panel agrees and believes those broader consultations would be more beneficial in order to consider all circumstances affecting those children if the consultations are organized, planned and actually occur in a reasonable timeframe.

[294] This being said, for those who have First Nations identity without *Indian Act* status or eligibility to receive *Indian Act* status and who have no connection with their First Nation and who have experienced cultural displacements as a result of Residential Schools, Sixties Scoop and the FNFCS program, the Panel believes they should be considered for Jordan's

Principle services against the backdrop of Justice Phelan's findings and the Supreme Court of Canada's findings.

[295] The Supreme Court of Canada decision in *Daniels* determined that Métis and non-Status Indians fall under federal jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. The Court effectively described a situation whereby the term "Indians" was broadly defined when it served Canada's needs, but construed narrowly when doing otherwise would require something of the federal government. At the same time, provincial governments typically refused entreaties for help from Métis and non-status Indians as well, claiming that these were federal responsibilities.

[296] Moreover, the Court ruled that delineating and assigning constitutional authority between the federal and provincial governments, "will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution." (*Daniels* at para. 12).

[297] The Court described this as a "jurisdictional wasteland" that has left Métis and non-status Indians with "no one to hold accountable for an inadequate status quo." (*Daniels* at para. 15).

[298] Despite acknowledging that there is no consensus on who is considered Métis or non-status Indian, the Supreme Court wrote:

> These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.
>
> (*Daniels* at para. 19).

[299] The Supreme Court went on to say:

> Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3

> S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: para. 62, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.
>
> (see *Daniels* at para. 34).
>
> The term "Indian" or "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples.
>
> (see *Daniels* at para. 35).

[300] The Supreme Court was explicit that the decision was meant to advance reconciliation in terms of the relationship between Canada and Indigenous Peoples. Justice Abella determined that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal, drawing on

> [t]he constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final report of the Truth and Reconciliation Commission of Canada*.
>
> (*Daniels* at para. 37).

[301] The preponderance of the reasons for the SCC's findings deal with the Métis aspect of the question, as the Crown conceded in oral argument that non-status Indians were "Indians" under s. 91(24). Based on its analysis, the Court held that the declaration should be granted.

[302] The Court acknowledged that there is no consensus on who is considered Métis or non-status Indian, but did not believe this was a bar to issuing the declaration. The Court declined to establish definitional criteria for Métis and non-status Indians, stating broadly instead that "Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future..." (*Daniels* at para. 47).

[303] The Supreme Court distinguished the different purposes between Section 91(24): ""Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and

Métis" (see Daniels at para.19) and section 35: "The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. … Section 91(24) serves a very different constitutional purpose," (see *Daniels* at para. 49).

> The third criterion — community acceptance — raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.
>
> (*Daniels* at para. 49).
>
> But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, at para. 3.
>
> (see *Daniels* at para. 51).
>
> Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.
>
> (see *Daniels* at para. 13).

This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

> One of the results of the positions taken by the federal and provincial governments and the "political football — buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. . . .
>
> . . . the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]
>
> See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para. 70.

(*Daniels* at para. 14).

With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

(see *Daniels* at para.15).

Should a person possess "sufficient" racial and social characteristics to be considered a "native person", that individual will be regarded as an "Indian" . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p.43]

(see *Daniels* para. 33).

[304] The following words from Justice Phelan's Federal Court decision are instructive in this context:

> [84] The circumstances which the Plaintiffs claim to have given rise to this litigation is well described in a memorandum to Cabinet from the Secretary of State dated July 6, 1972:
>
> > The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.
>
> (see *Daniels v. Canada*, 2013 FC 6 at para. 84).

[305] The Panel addressed section 91(24) of the Constitution, the double aspect rule, the living tree doctrine, federalism, fiduciary relationship and the Honor of the Crown in the *Merit Decision* and does not propose to repeat the findings here other than finding it is consistent with the Supreme Court Decision in *Daniels* and read together the reasoning is also applicable here. Additionally, *Daniels* confirms that Non-Status First Nations are in a similar situation of "jurisdictional tug-of-war" that can trigger a Jordan's Principle case and that the spirit of Jordan's Principle is meant to address.

[306] A case-by-case approach based on needs and the specific situation of the child still needs to occur. This is consistent with the approach taken by this Tribunal and the direction from the Supreme Court in *Daniels*.

[307] Furthermore, the Supreme Court in *Daniels* confirmed the Federal government's power to legislate on issues related to Métis and Non-Status Indians. Of note, section 2 of the CHRA stipulates:

> The purpose of this *Act* is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (emphasis added).

[308] The Supreme Court of Canada decisions are binding and provide valuable information relevant to the case at hand. Additionally, section 50 (3) (c) of the CHRA allows the Tribunal to consider and accept any evidence and other information. However, the Panel finds this is insufficient to make such requested orders without supporting evidence. Additionally, as explained above, the case in front of the Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations persons. While the Panel believes that all children in Canada should receive the services they need, the case in front of the Panel is focused on First Nations. Consequently, the Panel does not make orders for this section, rather it provides some guidance relying on the case law and on Jordan's Principle's mechanism and purpose.

[309] This being said, in light of the above and international instruments that Canada has accepted, signed, signed and ratified, Canada has positive obligations towards all First Nations children whether they have *Indian Act* status or not and therefore, Canada must implement specific measures to protect children regardless of status. The Panel believes that the use of the term Indigenous Peoples is more reflective of the Principles protected by international law. Canada's domestic and international obligations are to ensure that all First Nations children have access to culturally appropriate and safe services and that the principle of substantive equality is upheld for all First Nations children regardless of status. Canada also has a domestic and international duty to its children wherever they live in Canada. The fact that other actors, including provincial actors, may be involved in the provision of the service is not a shield that Canada can use to avoid its own responsibilities to First Nations children under section 91(24) (see 2016 CHRT 2 at para.39). The Supreme Court of Canada also considered this historic disadvantage in the context of First Nations adults without *Indian Act* status in the criminal justice system in *R. v. Gladue* and *R. v. Ipeelee*. The Supreme Court of Canada supported the inference that, as compared to Canada's settler population, First Nations persons without *Indian Act* status also have greater needs.

[310] For the categories of children who lost *Indian Act* status or never received it due to Canada's discrimination, the Panel understands Canada's argument that they are presumably served by the provinces and territories and may not experience the same gaps,

delays and denials as those children on reserve if they are not considered to have *Indian Act* status.

[311] The difficulty here is that many First Nations have been deprived of eligibility for *Indian Act* status as a result of the discrimination found in this case. Some of them are parents who have lost connection with their First Nation, and have no *Indian Act* status. Their children are not eligible for *Indian Act* status. Those First Nations children possibly have the same higher needs, often above provincial normative standards, as on-reserve First Nations in terms of mental health, special needs education, Fetal Alcohol Syndrome, loss of connection, loss of culture, language etc. The intergenerational trauma was recognized by this Panel and forms part of the findings in this case. The Panel did find that intergenerational trauma experienced by First Nations children often causes those children to have higher needs.

[312] It is helpful to consider a hypothetical but plausible example given the evidence heard in this case and referred to above. This example involves a child without *Indian Act* status and who is not eligible for Indian Act status. However, this child is a First Nations child (for example, removed as a result of discrimination, third or fourth generation, etc.) who lost any connection to a First Nation. This child suffers mental health issues as a result of intergenerational trauma and racial discrimination. The province's normative standard is to offer children who suffer similar health issues 10 and exceptionally 12-15 sessions with a child psychologist. If the child requires 50 sessions instead of 15 because the trauma is linked to intergenerational trauma and being a First Nations child, an appropriate substantive equality analysis would result in the child receiving all 50 mental health sessions as recommended by professionals. Because the normative standard is 15 sessions, the province may require the parents of that child to seek the extra mental health through alternate means. The province may refer the child to the Federal Government for those extra services. The Federal Government under its current eligibility criteria may respond that the child does not have *Indian Act* status, there is no emergency and no life-threatening issue and, therefore, the child should obtain the services via the provincial system. This type of bouncing back and forth is precisely what Jordan's Principle aims to rectify. A lot of the service needs required by First Nations children regardless of *Indian Act* status are

connected to them being First Nations and requiring an Indigenous lens, culturally safe and appropriate services under a substantive equality analysis. If the service required is above normative standard because of intergenerational trauma for example, this service need cannot be disassociated from the nationality of the child regardless of how the government defines it.

[313] Moreover, Canada accepted the TRC report and committed to implement the 94 calls to action. The TRC report was filed in evidence as part of this claim and relied upon by the Panel on multiple occasions. Call to action number 20 is particularly instructive:

> In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.

[314] Further, the Panel find the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* to be relevant. Given that it was not released, and therefore not argued by the parties, at the time of the hearing, the Panel did not rely on it to make its findings. This being said, Canada publicly accepted the report therefore, the Panel simply highlights the report's call to justice 12.10:

> Adopt the Canadian Human Rights Tribunal 2017 CHRT 14 standards regarding the implementation of Jordan's Principle in relation to all First Nations (status and non-status), Métis, and Inuit children.

[315] Those standards include the definition and the substantive equality analysis that may require Canada to provide services above the normative standard when necessary to respond to the child's needs.

[316] The Panel agrees with the Caring Society that an exclusive focus on whether a First Nations child without *Indian Act* status lives off-reserve, as opposed to why that child lives off-reserve fails to recognize that the off-reserve residence of a First Nations child without *Indian Act* status may well be related to Canada's past discriminatory provision of services on-reserve. The Panel also agrees with the Caring Society that chronic and perpetual discrimination within the FNCFS Program also raises the spectre of cultural displacement and the Caring Society's appropriate characterization of the Panel Chair's observation at

the conclusion of the Panel's February 1, 2018 decision, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence," (see 2018 CHRT 4 at para. 452).

[317] Accordingly, First Nations children who have lost their connection to their communities, or who may not even know to which community they belong, due to the operation of colonial or discriminatory policies such as Indian Residential Schools, the Sixties Scoop, or the discrimination within the FNCFS Program should not be excluded from Jordan's Principle's reach. Indeed, given the inter-generational trauma of such experiences, these individuals risk facing disadvantage on the basis of their "race and/or national or ethnic origin" that non-Indigenous Canadians do not face.

[318] The Panel finds that based on the above, Canada has a positive obligation towards "all First Nations children" regardless of *Indian Act* status or eligibility to *Indian Act* status.

[319] This may require additional funding and other resources to ensure the First Nations children protected by the Panel's orders, including those in this ruling which were based on the evidence in the record, continue to receive Jordan's Principle services in a sustainable manner for years to come.

[320] The Panel encourages Canada to implement specific measures and to be proactive and have those discussions in a timely manner to ensure all First Nations children in Canada have access to substantive equality.

VII. Orders

[321] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above in sections I and II and

2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need

for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[322] The parties will return to the Tribunal with their potential Jordan's Principle eligibility criteria and mechanism as ordered above by **October 19, 2020**. Until such time and until a final order (on consent or otherwise) is made by this Panel on this issue, the 2019 CHRT 7 interim ruling remains in effect.

[323] The Panel pursuant to section 53 (2) of the *CHRA* Canada is ordered

3. to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for Indian Act registration/status under S-3 implementation.

VIII. Retention of jurisdiction

[324] The Panel retains jurisdiction on all its Jordan's Principle orders including the orders above. Once the parties have drafted a potential Jordan's Principle eligibility criteria and mechanism as ordered above and returned to the Tribunal, the Panel will then revisit the need for further retention of jurisdiction on the issue of Jordan's Principle. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
July 17, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: July 17, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor, Sarah Clarke, and Barbara McIsaac, Q.C., counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

David Nahwegahbow, Stuart Wuttke, and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. Jonathan Tarlton and Patricia MacPhee, counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

Robert Bertrand, National Chief for the Congress of Aboriginal Peoples, Interested Party

TAB 9

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 36
Date: November 25, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

Table of Contents

Ruling Relating to Proposed Jordan's Principle Eligibility

I. Context

[1] This ruling arises in the context of a complaint by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) that Canada provides inequitable and discriminatory funding for First Nations children living on reserve and in the Yukon. In particular, this systemic racial discrimination manifests in many different forms including inadequate funding of child welfare services and gaps, delays and denials of services under Jordan's Principle. The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory and set out its reasons for that finding in *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 (the *Merit Decision*).

[2] In this ruling, the parties request approval of the process they have established to determine which children are eligible for consideration to receive services under Jordan's Principle. The scope of this ruling is solely in relation to Jordan's Principle: this ruling, and all the rulings in this case, explicitly avoids defining who is a First Nations child. The Tribunal respects First Nations right to determine their own citizens/members.

[3] In the *Merit Decision*, the Tribunal found that Canada's definition and implementation of Jordan's Principle was inadequate and excessively narrow which resulted in discriminatory service gaps, delays and denials of services for First Nations children (paras. 381, 391 and 458). Throughout the *Merit Decision* and subsequent rulings, the Tribunal documented a number of instances of the tragic consequences of Canada's discriminatory policy: the experiences of Jordan River Anderson (*Merit Decision*, para. 352); a child requiring medical equipment due to anoxic brain damage during a regular medical procedure (*Merit Decision*, para. 366); the failure to provide emergency mental health counselling and treatment aimed at preserving life (2017 CHRT 7, paras. 8-10); the refusal to provide services for a teenager with disabilities (2017 CHRT 14, para. 48, citing *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342); and an infant who required an essential medical diagnostic test for which Canada would not provide travel

funding because the infant lacked *Indian Act* status even though the mother had it (2019 CHRT 7, paras. 58-60).

[4] In the course of this proceeding, the Tribunal has issued a number of remedial decisions addressing Jordan's Principle. Their key points in relation to this motion are summarized below.

A. Initial Jordan's Principle Rulings

[5] In 2016 CHRT 10, the Tribunal emphasized the importance of taking immediate action to implement Jordan's Principle and recognized the efforts Canada had taken since the *Merit Decision* (paras. 2 and 9). The Tribunal noted that there was a workable definition of Jordan's Principle adopted by the House of Commons in *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279) that could serve as a basis for immediate action (para. 32). The ruling emphasized the importance of applying Jordan's Principle to all jurisdictional disputes rather than only those of children with multiple disabilities (para. 30). The ruling did not address how it could be determined whether a child was a First Nations child for the purpose of Jordan's Principle eligibility.

[6] The 2016 CHRT 16 decision reviewed updates on Canada's response to implementing Jordan's Principle and identified a number of steps for Canada to take to demonstrate it was complying with the Tribunal's orders (paras. 107-120). In its analysis, the Tribunal noted that Canada was inappropriately limiting Jordan's Principle to First Nations children living on reserve. The Panel confirmed and ordered Canada to apply Jordan's Principle to all First Nations children and not just those living on reserve (para. 118).

[7] In 2017 CHRT 14, the Tribunal addressed important issues related to Jordan's Principle. The main issue in the ruling was the scope of services and conditions Canada considered to fall under Jordan's Principle. However, the motion also considered whether Canada was appropriately complying with the order in 2016 CHRT 16 that Jordan's Principle apply to all First Nations children rather than being limited to those First Nations children

living on reserve (para. 12). The Tribunal found that the option Canada selected for implementation was overly narrow in only including children on reserve or ordinarily resident on reserve (paras. 50, 52-54, 67). The Panel again confirmed in its order that Jordan's Principle "applies equally to all First Nations children, whether resident on or off reserve." (para. 135, 1.B.i.). This point was confirmed in the amendment to the order issued in 2017 CHRT 35.

[8] The parties sought explicit clarification on who constituted a First Nations child in 2019 CHRT 7 (para. 20). The parties had been unable to resolve the question without the Tribunal's assistance (para. 21). The Tribunal directed the issue to be determined at a full hearing and, in the meantime, provided an interim decision (paras. 22 and 80). The Tribunal determined that a final order on this issue would consider "international law including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the recent UN Human Rights Committee's ("UNHRC") *McIvor Decision*" (para. 22). The Tribunal anticipated discrepancies between UNDRIP and the *Indian Act*, RSC 1985, c I-5 (para. 22). The Tribunal also anticipated issues relating to discriminatory definitions within the *Indian Act*, in particular in relation to sex (para. 22). The Tribunal stated its commitment to providing a remedy that would respect First Nations rights to self-determination and self-government, in particular as they relate to determining membership (para. 23).

[9] In 2019 CHRT 7, the Tribunal found that there was a disagreement over what constituted an urgent medical need, that First Nations children without status were not receiving necessary services, and that Jordan's Principle decisions were not adequately considering the best interests of the child (paras. 79, 84 and 85). Accordingly, the Tribunal ordered that "Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) Indian Act status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle." (para. 87). The order also identified the following principles that guide its interpretation (emphasis in original):

> [89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. <u>In evaluating urgent and/or life-threatening needs due consideration must be given to the</u>

> seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the UNDRIP and the Convention on the Rights of the Child guide all decisions concerning First Nations children.
>
> …
>
> [91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

B. Ruling on Jordan's Principle Eligibility Criteria: 2020 CHRT 20

[10] In 2020 CHRT 20, the Tribunal considered eligibility of First Nations children for Jordan's Principle on the merits. The Tribunal aimed to rely on its previous orders in 2017 CHRT 14 and 2017 CHRT 35, as well as the findings in its previous decisions, and provide additional clarity around the scope of Jordan's Principle (para. 88).

[11] The Tribunal emphasized its commitment to respecting First Nations self-government and that its consideration of a First Nations child was only in the context of Jordan's Principle eligibility. Furthermore, the Tribunal concluded that recognizing this right to self-determination was recognized and consistent with the UNDRIP; section 35 of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982 c 11; and the *Canadian Human Rights Act,* RSC 1985, c H-6 (*CHRA* or the Act). It recognized that some of the First Nations participants in the hearing were concerned that the question of who was a First Nations child for the purposes of Jordan's Principle could not be entirely separated from the question of First Nation membership and citizenship. The Tribunal committed to crafting a ruling that would address these concerns (2020 CHRT 20, paras. 84-87, 130-135).

[12] The Tribunal reiterated its finding that Jordan's Principle is a human rights principle grounded in substantive equality. Jordan's Principle focuses on the specific needs of First Nations children which include experiences of intergenerational trauma and other disadvantages resulting from the discrimination found in the *Merit Decision*. It is part of the solution for remedying the discrimination found in this case (2020 CHRT 20, para. 89).

Jordan's Principle is not limited to the child welfare program and instead addresses all inequalities and gaps in federal programs for First Nations children (2020 CHRT 20, para. 92).

[13] Jordan's Principle is not a program but a legal rule and a mechanism to provide First Nations children culturally appropriate and safe services. It aims to overcome barriers First Nations children face in accessing services because of jurisdictional disputes either between programs for First Nations within the federal government or arising from Canada's constitutional division of powers in relation to First Nations (2020 CHRT 20, para. 94). Jordan's Principle accordingly seeks to prevent service gaps, delays and denials to First Nations children that occur because of their race, national or ethnic origin (2020 CHRT 20, para. 100).

[14] The Tribunal recognized that the failure to provide appropriate services on-reserve drove families and children to move off-reserve to seek the services but that jurisdictional disputes often remained. The Tribunal also emphasized that, as a remedial provision aimed at providing substantive equality, Jordan's Principle required that Canada provide services that are above the normative provincial or territorial standard of care (2020 CHRT 20, paras. 97-100).

[15] In determining that Jordan's Principle applied to all First Nations children, the Tribunal relied on the House of Commons *Motion 296* in reference to First Nations children. The Tribunal did not rely on the *Indian Act* or residency on reserve to determine eligibility and reiterated that it had previously confirmed that fact. Further, the Tribunal reiterated its commitment to recognizing First Nations right to self-determination and current attempts by Parliament to refashion the historically colonial relationship Canada established with First Nations (2020 CHRT 20, paras. 105-109).

[16] The Tribunal noted that its earlier findings including the effects on First Nations children of intergenerational trauma from residential schools and disruptions to identity from moving off reserve required more than pecuniary redress (2020 CHRT 20, para. 111).

[17] The Tribunal confirmed that the following categories, in use at the time by Canada, are appropriately considered to be First Nations children for the purposes of Jordan's Principle (2020 CHRT 20, para. 112):

> a) First Nations children registered under the *Indian Act*, living on or off reserve;
>
> b) First Nations children eligible to be registered under the *Indian Act*, living on or off reserve; and
>
> c) non-status First Nations children without *Indian Act* status who are ordinarily resident on reserve (the AFN appears to dispute this however, this forms part of the Tribunal's findings in 2016 CHRT 16 at para. 117, quoted above).
>
> d) First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and who have urgent and/or life-threatening needs as per the Tribunal's interim order in 2019 CHRT 7 at paras. 88-89.

[18] The Tribunal subsequently considered whether three contested categories of children constituted First Nations children for the purpose of Jordan's Principle eligibility. The first issue was eligibility of children residing on or off reserve who were recognized by a First Nations group, community or people as belonging to that group, community or people in accordance with the customs or traditions of that First Nations group, community or people. The second was eligibility of children residing on or off reserve who do not have, and are not eligible for, *Indian Act* status but who have a parent or guardian with, or eligible for, *Indian Act* status. The third was children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the First Nation Child and Family Services (FNCFS) Program (2020 CHRT 20, paras. 120-122).

[19] On the first issue of children recognized as citizens or members by a First Nation, the Tribunal found that these children were within the scope of Jordan's Principle (2020 CHRT 20, paras. 128, 211-212).

[20] The Tribunal relied on its analysis from the *Merit Decision* and subsequent rulings to conclude that these children suffered from the discriminatory conduct that was the subject of the complaint (paras. 123-128).

[21] In analysing the first issue, the Tribunal relied on its reasons in 2018 CHRT 4 and the *Merit Decision* to conclude that it could appropriately rely on UNDRIP and the Truth and Reconciliation Commission's (TRC) calls for action to inform its analysis. Articles 3–5, 9, 18, 19, 23, 34 and 37 emphasize rights of self-determination while article 33 in particular confirms that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions" (cited in 2020 CHRT 20, para. 144). The Tribunal recognized that removing First Nations children from their community destroyed the community's identity and was contrary to international legal norms. In order to prevent this, it was necessary to give First Nations an opportunity to govern their own child welfare services. The Tribunal relied on international legal norms to inform its interpretation of the *CHRA* (2020 CHRT 20, paras. 136-157).

[22] The Tribunal considered the support *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 that reflects Parliament's intent to uphold First Nations inherent rights of self-determination and self-governance and First Nations right to substantial equality in relation to child welfare, which is the very issue that Jordan's Principle addresses (2020 CHRT 20, paras. 158-164).

[23] The Tribunal determined that it was inappropriate to rely on the *Indian Act* to determine who is considered a First Nations child for the purpose of Jordan's Principle. The Tribunal reviewed evidence that the *Indian Act* was designed to assimilate First Nations such that they would lose *Indian Act* status over a few generations. The *Indian Act* accordingly cannot be the only means of determining First Nations identity (2020 CHRT 20, paras. 165-172).

[24] The Tribunal considered First Nation treaty rights, including as recognized by Canada's written and unwritten constitution. The Tribunal found that First Nations right to determine citizenship was constitutionally recognized as an Aboriginal right and treaty right and reflected in prior jurisprudence affirming a general principle that a people have a right

to self-determination. The Tribunal reviewed various treaties such as the Treaty of 1752 between the Mi'kmaq and the Crown and the Treaty of Niagara of 1764 to conclude treaties recognized First Nations right to self-government (2020 CHRT 20, paras. 173-196).

[25] The Tribunal identified sections 1.1 and 1.2 of *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30 that confirmed that the *CHRA* was not intended to derogate any Aboriginal or treaty rights. Further, provisions were made to recognize First Nation laws (para. 197).

[26] The Tribunal relied on its earlier analysis to conclude that Jordan's Principle eligibility for First Nations children recognized by their community and children who are not eligible for *Indian Act* status despite having a parent who is eligible are within the scope of the complaint (2020 CHRT 20, paras. 199-210). Further, the Tribunal relied on *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 to dispose of the argument that First Nations children living off reserve were subject to provincial jurisdiction to the exclusion of federal jurisdiction (2020 HRT 20, paras. 227-228).

[27] The Tribunal recognized the concerns First Nations raised that requiring First Nations to confirm that a child is recognized by a First Nation places an additional administrative burden on such nations. The Tribunal directed the parties to negotiate appropriate supports, including funding, for First Nations in order for them to confirm whether individuals are a member of the First Nation (2020 CHRT 20, paras. 220-226).

[28] The second issue was whether First Nations children who are not eligible for *Indian Act* status but who have a parent that is eligible are within the scope of Jordan's Principle. The Tribunal confirmed that they are.

[29] The Tribunal concluded that it had not previously considered whether this category of First Nations children was included within Jordan's Principle and applied the test for discrimination to the evidence in the case to determine that these First Nations children suffered from the discrimination Jordan's Principle aimed to remedy. In particular, these First Nations children had actual needs that went beyond the normative standard of care and are rooted in the historical and contemporary disadvantage that informs a substantive equality analysis. These First Nations children share the same legacy of stereotyping, prejudice,

colonialism, displacement and intergenerational trauma relating to the Indian Residential Schools System and the Sixties Scoop as those First Nations children with *Indian Act* status. Accordingly, they are denied equivalent services based on the prohibited ground of race or national or ethnic origin (2020 CHRT 20, paras. 231-252).

[30] The Tribunal distinguished this case from *Matson et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 13 and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21, confirmed in *Canadian Human Rights Commission v. Canada (Attorney General),* 2018 SCC 31, on the basis that this case is not a challenge to the *Indian Act* legislation. Instead, this case considers whether the *Indian Act* is the appropriate method to determine which First Nations children experience discrimination in the receipt of services. The Tribunal found that, as in *Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1, this was a case where the government used discretion in determining eligibility for services it offered (2020 CHRT 20, paras. 253-268).

[31] The Tribunal recognized that there were upcoming changes to the *Indian Act* that would result in more individuals being eligible for registration. The Tribunal concluded that those individuals who would become eligible for *Indian Act* status be treated as though they had it for the purposes of Jordan's Principle (2020 CHRT 20, paras. 269-270).

[32] While the Tribunal recognized that Canada may raise a defense that broad eligibility criteria for Jordan's Principle would cause undue hardship due to the resulting costs, the Tribunal found Canada did not lead sufficient evidence to support its assertion (2020 CHRT 20, para. 271).

[33] On the third issue, the Tribunal considered First Nations children who had lost their connection to their First Nations community due to the operation of the Indian Residential Schools System, the Sixties Scoop, discrimination within the FNCFS Program, or other reasons. The Tribunal found that First Nations children who had lost their connection to their community for reasons other than the identified ones fell outside the scope of the claim. While the Tribunal considered the tragedies experienced by Residential School survivors and victims of the Sixties Scoop and the intergenerational trauma they may have passed on

to their children, the Tribunal was not presented with sufficient evidence of the provincial and territorial services that may or may not be available to these children and the needs they may have. Accordingly, the Tribunal was not in a position to find that they fell within the scope of Jordan's Principle. There was a similar lack of evidence on the experiences of individuals who self-identified as First Nations. In the absence of adequate evidence, the Tribunal is unable to make a finding that discrimination occurred and that remediation is required (2020 CHRT 20, paras. 274-290).

[34] Despite not making orders on this issue, the Tribunal issued guidance based on the evidence it had and the case law to which it was referred. The Tribunal recognized the "jurisdictional wasteland" considered in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 and the Supreme Court's conclusion that Canada had a responsibility to First Nations without *Indian Act* status. In this case, the Tribunal identified the particular obligation Canada had for First Nations who lost their *Indian Act* status and connection to their community as a result of the Indian Residential Schools System, the Sixties Scoop or the FNCFS Program (2020 CHRT 20, paras. 291-307).

[35] In its guidance, the Tribunal noted that Canada had an obligation to all First Nations children, regardless of whether they were eligible for *Indian Act* status or where they lived in Canada. While these children will presumptively receive provincial and territorial services, the Tribunal highlighted that discrimination such as in the Indian Residential Schools System, the Sixties Scoop, or the FNCFS Program may have created higher needs above provincial and territorial normative standards. Further, the TRC and the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* both support that Jordan's Principle should be interpreted broadly to include the needs of First Nations who do not have *Indian Act* status. Accordingly, it is appropriate for Canada to recognize that First Nations children who lost their connection to their communities as a result of policies such as the Indian Residential Schools System, the Sixties Scoop, or the FNCFS Program should not be excluded from Jordan's Principle (2020 CHRT 20, paras. 308-320).

[36] The Tribunal issues its orders in light of its analysis and findings. In recognition of First Nations right to self-determination, the Tribunal directed the AFN, the Caring Society,

the Nishnawbe Aski Nation (NAN), the Chiefs of Ontario (COO), the Commission and Canada to consult to generate potential eligibility criteria for Jordan's Principle in light of the Tribunal's analysis. The specific orders were as follows:

> 1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above in sections I and II and
>
> 2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.
>
> (2020 CHRT 20, para. 321)

[37] Separately, Canada was ordered "to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for Indian Act registration/status under S-3 implementation" (2020 CHRT 20, para. 323).

[38] The parties were directed to present their proposed eligibility criteria and mechanism for Jordan's Principle (2020 CHRT 20, para. 322). This current ruling reviews the proposal the parties have now presented to the Tribunal.

II. Joint Position of the Parties

[39] The parties provided a joint submission on a proposed eligibility process for Jordan's Principle. The parties request that the Tribunal approves the proposed eligibility criteria on the basis that they appropriately reflect the Tribunal's direction in 2020 CHRT 20. They submit that the document is timely, effective and considers the implementation concerns raised by all parties.

A. Proposed Jordan's Principle Eligibility Criteria

[40] The entirety of the proposed eligibility criteria is attached as Annex A. The key components are summarized here.

[41] Cases meeting any one of four criteria are eligible for consideration under Jordan's Principle. Those criteria are the following:

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

[42] The provisions establish a default process to confirm eligibility that is intended to facilitate substantive equality for First Nations children and not create a barrier. Individual First Nations and Provincial-Territorial Organizations are able to agree to a different process.

[43] Applicants relying on the criteria of recognition by their First Nation may obtain confirmation from the First Nation, through an appropriate individual, or provide Indigenous Services Canada (ISC) consent to seek the confirmation. While the process provides for a Confirmation of Recognition form to facilitate confirmation, it contemplates alternative processes such that failure to complete the form does not act as a barrier in accessing services. Similarly, there is a Consent to Communicate form designed to facilitate ISC seeking confirmation but there are processes to ensure that failure to complete that form is not a barrier to accessing services.

[44] For urgent cases relying on recognition by a First Nation, provisions are made for verbal confirmation of eligibility and for cases where a designated official is not able to be contacted. The determination of eligibility will not delay a substantive review of the request and an inability to confirm recognition will not delay measures to provide the child with urgent assistance or to address the reasonably foreseeable risk of irremediable harm. Requests related to children in end-of-life and palliative care are urgent.

[45] Once a First Nation confirms a child is eligible for Jordan's Principle, this recognition will be retained and used for subsequent Jordan's Principle requests.

[46] Cases will be examined and approved by Jordan's Principle Focal Points. If the Focal Point recommends denying a request based on eligibility, the case will be immediately escalated for review and determined by an official with the ADM delegated authority to deny requests. For urgent requests, this will occur as soon as the child's needs require it and no later than a 12-hour timeframe.

B. Proposal Regarding Funding

[47] The proposal regarding funding is attached to this ruling in Annex B.

[48] Canada will provide funding for First Nations communities for expenses incurred to recognize Jordan's Principle claimants as members of that community. These expenses include Jordan's Principle service coordination and navigation to carry out recognition functions. The list contemplates a non-exhaustive list of expenses and that an additional 10% administration fee can be added to the expenses:

- additional human resources costs (e.g. salary and benefits) specifically in association with confirming recognition of First Nations children for the purpose of Jordan's Principle;
- First Nation policy development and updating;
- internal First Nation governance/determination meetings
- communications - internal and external (social media; community newsletters; website development and maintenance; marketing)
- coordination processes – bringing multiple community sectors together;
- professional fees, including seeking advice and development of the recognition approach.

[49] The process contemplates working with a requester to address any outstanding issues before a request would be denied. In the event that a request is denied in full or in part, there would remain an opportunity to present new information and to have the decision reviewed. The criteria used to make a determination to deny a funding request are:

- whether the funding requested is aligned with the objective of the confirmation of recognition process;
- whether the request is a clear duplication of previously provided funding for the same purpose, such as an existing salary budget;
- whether the funding request is significantly disproportionate to the level of activity proposed;
- whether the funding was requested by organizations that do not have a mandate from any First Nation to work on confirmation of recognition.

[50] First Nations or First Nations organizations that engage in confirmation of recognition work may be eligible for funding regardless of whether they currently receive funding for Jordan's Principle service coordination or navigation.

III. Analysis

[51] The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[52] The Panel already considered the first step of the analysis and found it had the authority under section 53 (2) of the *CHRA* to make such an order in 2020 CHRT 20. Moreover, after careful consideration of the specifics of this consent order request, which is summarized above, the Panel finds it has the authority under section 53 of the *CHRA* and its previous rulings to make the consent order as detailed and attached as Annex A and Annex B.

[53] The Panel finds the consent order sought is thoughtful and in line with the spirit of the Tribunal's rulings and within the parameters established in 2020 CHRT 20. The consent order sought is a result of diligent work made by expert First Nations, who are parties in this case, in collaboration with Canada and also appears to account for many different situations that may be encountered by First Nations people under Jordan's Principle. The Panel is

mindful that the best eligibility criteria and mechanism must be designed by First Nations. This exercise was particularly positive given that all parties in this case came to an agreement. This carries hope. The Panel also agrees and makes a consent order as indicated below.

IV. Order

[54] Pursuant to section 53(2) of the *CHRA*, the Tribunal orders eligibility for Jordan's Principle to be determined in accordance with the "Jordan's Principle eligibility criteria following 2020 CHRT 20" as included in Annex A. Further, the Tribunal orders Canada to fund First Nations and First Nations organizations for confirmation of First Nations identity as outlined in "Jordan's Principle Eligibility – First Nations Citizenship Determination" as included in Annex B.

[55] For ease of reference, a few provisions of the order are summarized in the following paragraphs.

[56] Cases meeting any one of four criteria are eligible for consideration under Jordan's Principle. Those criteria are the following:

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

[57] The order contains default provisions to confirm that a child is recognized by a Nation for the purpose of Jordan's Principle. These provisions are designed to facilitate substantive equality, and not act as a barrier. The provisions contemplate a First Nation appointing appropriate individuals to confirm eligibility and officials who can be contacted should somebody else not be appointed or not be available. The provisions contemplate an expedited procedure in the case of urgency. The provisions contemplate forms that can assist in collecting information; however, failure to complete a form is not intended to be a

reason to delay or deny a request. ISC will maintain a record of confirmation to avoid the requirement to once again confirm eligibility should there be a subsequent request for that same child. The provisions stipulate a review process in the event a denial of eligibility is contemplated. The default provisions provide that a First Nation or Provincial-Territorial Organization may agree to a different process.

[58] Further, the funding provision sets out that eligible expenses for confirming Jordan's Principle eligibility will include human resources, policy development and updating, internal governance, communication, coordination, professional fees, and administrative fees. The funding provisions also stipulate the criteria that can be used to deny a request for funds and a review process for any denial.

V. Retention of Jurisdiction

[59] The Panel retains jurisdiction on all its Jordan's Principle orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the parties confirm the eligibility criteria and mechanism is implemented and effective. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
November 25, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: November 25, 2020

This part of the Motion was dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Kelly Peck, Max Binnie and Meg Jones, counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer, Molly Churchill and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

"Annex A"

Jordan's Principle eligibility criteria following 2020 CHRT 20

Cases meeting <u>any one</u> of the following criteria are eligible to be considered under Jordan's Principle:

1. The child is registered or eligible to be registered under the Indian Act, as amended from time to time1;

2. The child has one parent/guardian who is registered or eligible to be registered under the Indian Act;

3. The child is recognized by their Nation for the purposes of Jordan's Principle; or

4. The child is ordinarily resident on reserve.

The default process[2] through which families and organizations can submit a request under the eligibility criterion of "a child recognized by their Nation for the purposes of Jordan's Principle" is set out below. The process is intended to facilitate, not act as a barrier to, substantive equality for First Nations children.

1. Requirement for confirmation of recognition by a First Nation: Families and organizations who are preparing to submit a Jordan's Principle request under this eligibility criterion will be required to obtain confirmation of recognition from the First Nation (see point 3) – or the family may provide consent for Indigenous Services Canada ("ISC") to obtain confirmation of recognition (see point 4) – to ensure validation of recognition as an integral component of their request.

2. Identification of appropriate First Nation official: Confirmation of recognition must be obtained from an appropriate First Nation official.

Preferably, a First Nation will designate a person, or persons, as officials who can provide confirmation of recognition for the purposes of Jordan's Principle ("Designated Official") by passing a Band Council Resolution, or providing a letter on First Nation letterhead, or through another identified community governance mechanism.

The First Nation can designate a person or persons from the Chief and Council and/or from within the administration, or from another community entity, as its Designated Official.

---

[1] This includes *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada*, S.C. 2017, c. 25, and any future amendments.

[2] This process does not preclude a First Nation or Provincial-Territorial Organization ("PTO") subsequently agreeing in writing to a different process with Indigenous Services Canada specific to that First Nation or PTO.

Alternately, the First Nation may also designate a person or persons from another organization, such as a First Nation Health Authority or a First Nations Child and Family Well Being Agency as the Designated Official.

Alternatively, for First Nations that have not named a Designated Official, the First Nation may confirm recognition by communication in writing from the First Nation's Chief (or designate), Council member with the child welfare or health portfolio, or the First Nation's most senior administrative official (or that official's designate) ("Deemed Official(s)"). Where recognition is confirmed by a Deemed Official who is not the Chief, the Chief will be copied on the communication providing that confirmation of recognition to ISC.

Where ISC is confirming recognition, it may be done in writing, including by fax or email. It does not need to be provided on the Confirmation of Recognition form.

3. Confirmation of Recognition (non-urgent cases) – Where a child, family or organization or Jordan's Principle navigator /service coordinator makes a request and has not submitted a Confirmation of Recognition form but can easily obtain confirmation of recognition by their First Nation, the family, child or organization or Jordan's Principle navigator /service coordinator will work with a Designated or Deemed Official, the Jordan's Principle navigator /service coordinator, and ISC if required to complete the Confirmation of Recognition form.

When families, children, organizations or a Jordan's Principle navigator /service coordinator make an application and do not submit a completed Confirmation of Recognition form, they may provide consent from the family for ISC to communicate with the First Nation to determine if a First Nation recognizes the child as being eligible for Jordan's Principle Services. This is done by submitting a completed Consent to Communicate form signed by the family or child. Where applicable, the family or child may also consent to ISC contacting the relevant Jordan's Principle Navigator or service coordinator to assist ISC in obtaining confirmation of recognition from the First Nation. ISC must explicitly communicate to the family/organization that the proposed Jordan's Principle request is incomplete until confirmation of recognition is determined.

If the First Nation provides confirmation of recognition to ISC and the other essential information to reasonably determine the request has been provided, the CHRT-mandated timelines apply.

4. Communication – Where ISC receives a Consent to Communicate form instead of a Confirmation of Recognition form, the Focal Point will immediately contact the community's Designated or Deemed Official. If the initial request is made by a Jordan's Principle service coordinator or navigator to ISC, or if the family has provided consent to communicate with the Jordan's Principle service coordinator or navigator, ISC may contact the Jordan's Principle service coordinator or navigator to assist in obtaining either a Consent to Communicate form or confirmation of recognition.

5. Application – Family, child, organization or Jordan's Principle navigator and service coordinator will send in a request for services, supports and products to the Jordan's Principle Focal Point. Confirmation of Recognition or Consent to Communicate must accompany the request. Where the First Nation Designated or Deemed Official/Organization has confirmed recognition, the case can be adjudicated and approved by the applicable Jordan's Principle Focal Points.

6. Urgent cases – Where the child requires urgent assistance or the risk of irremediable harm is reasonably foreseeable, ISC will take positive measures to verbally confirm recognition with the First Nation's Designated Official/Organization. Where applicable, ISC may work with the Jordan's Principle navigator or service coordinator that submitted the request. Where no designation has been made, or where the designated official or organization is unavailable, the First Nation's Deemed Official(s) may provide verbal confirmation to be followed with written confirmation.

In an urgent case, ISC will consider the substantive request for services and products related to the urgency while it confirms recognition. Where recognition is not confirmed before ISC is prepared to make a determination, ISC will confirm recognition subsequent to a determination being made on interim measures to provide the child with the urgent assistance required or to address the reasonably foreseeable risk of irremediable harm. Services and products not related to the need for urgent assistance or the reasonably foreseeable risk of irremediable harm will be considered subject to the usual recognition process.

For greater certainty, requests related to children in end-of-life or palliative care are considered urgent.

7. Retention – Where a First Nation confirms recognition of a child for purposes of Jordan's Principle, ISC will keep confirmation of recognition on file for the child for use in considering future requests.

Operational Guidelines

8. Escalated to Authorized ISC Official –If the Focal Point recommends a denial on the basis of eligibility, the case will be immediately escalated to authorized ISC official for review and a determination rendered within the CHRT timelines.

Review – If the Focal Point recommends a denial, a case reviewer will review all the information and create a Case Summary for the designated official with the ADM delegated authority to deny requests (see **Annex D**). For urgent cases, this work is done within the 12-hour time frame, or sooner if the child's needs require.

9. Delegated Authority for Denials – The senior official delegated with authority by the ADM to deny requests will determine the request.

10. Notification – The requestor is notified of the decision.

"Annex B"

Jordan's Principle Eligibility – First Nations Recognition
List of Applicable Expenses for First Nations

Canada already has authority to fund First Nations for Jordan's Principle service coordination and navigation. Canada will leverage this authority to fund communities who incur expenses to recognize children under a CHRT order (2020 CHRT 20). This can be done by advancing funding where requests are submitted for activities under eligible expenses and these expenses can be reasonably estimated, or by reimbursement of expenses. Under reimbursement, it is recommended that First Nations recipients consult with ISC beforehand on eligible expenses noted below.

Canada will amend eligible expenses under Jordan's Principle service coordination and navigation to carry out recognition activities, including:

- additional human resources costs (e.g. salary and benefits) specifically in association with confirming recognition of First Nations children for the purpose of Jordan's Principle;
- First Nation policy development and updating;
- internal First Nation governance/determination meetings
- communications - internal and external (social media; community newsletters; website development and maintenance; marketing)
- coordination processes – bringing multiple community sectors together;
- professional fees, including seeking advice and development of the recognition approach.

An administrative fee of 10% will be added to account for related overhead expenses.

ISC will work with the requester to clarify any questions that arise before making a decision on approval. If despite these efforts, a denial or partial denial is recommended, the criteria we would use to make such a decision would be the following:

- whether the funding requested is aligned with the objective of the confirmation of recognition process;

- whether the request is a clear duplication of previously provided funding for the same purpose, such as an existing salary budget11;

- whether the funding request is significantly disproportionate to the level of activity proposed;

- whether the funding was requested by organizations that do not have a mandate from any First Nation to work on confirmation of recognition.[2]

In all cases involving a denial or partial denial of reimbursement of funding related to confirmation of recognition, the request would be brought for a decision to the Regional Executive. If new information was provided, it could be considered by the Regional Executive. If the denial is sustained, a second level review would be available with the ADM of Regional Operations.

Those who perform Jordan's Principle service coordination and navigation functions will be eligible for this funding. More specifically, this can include First Nations or First Nations organizations mandated by First Nations leaders to undertake support services under service coordination and/or navigation which would include confirmation of recognition. First Nations or First Nations organizations can receive funding for confirmation of recognition activities even if they are not currently funded for Jordan's Principle service coordination or navigation.

[1] To be clear, where the person's workload increases as a result of having to deal with these requests, additional funding may be provided.
[2] It is understood that the assistance of other organizations may be necessary in some circumstances.

TAB 10

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 6
Date: February 11, 2021
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

Table of Contents

Compensation Process Ruling on Four Outstanding Issues in Order to Finalize the *Draft Compensation Framework*

I. Context

[1] This ruling arises in the context of a complaint filed by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) that Canada provided inequitable and discriminatory funding for First Nations children living on reserve and in the Yukon. In particular, this discrimination is found in inadequate funding for child welfare services and inappropriate application of Jordan's Principle. The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory for reasons provided in *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 (the *Merit Decision*). The Tribunal retained jurisdiction to address the complex remedial matters in this case (see especially *Merit Decision*, paras. 493-94 and 2016 CHRT 10, paras. 1-5).

[2] The Tribunal found the complaint was substantiated. More specifically, the Tribunal found that Canada's conduct was systemic and discriminatory because its design, management and control of the First Nations Child and Family Services Program (FNCFS Program), along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves across Canada. The Tribunal identified a number of discriminatory harms from Canada's funding approach, management and control of the Program. Furthermore, the Tribunal found that Canada provided inadequate funding for a variety of child and family services provided to First Nations children. For example, Canada provided inadequate and fixed funding for operational costs and prevention services. Accordingly, First Nations Child and Family Services Agencies (FNCFS Agencies) were unable to provide provincially and territorially mandated levels of service. The funding formula further contained an incentive to remove children from their home rather than provide supports to promote their wellbeing in the care of their parents or existing caregivers. The failure to coordinate the FNCFS Program with other programs, whether federal, provincial or territorial, created gaps, delays and denials

of services for First Nations children. Moreover, the narrow definition and inadequate implementation of Jordan's Principle resulted in service gaps, delays and denials for First Nations children and families.

[3] The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory for reasons provided in *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 [the *Merit Decision*]. The Tribunal retained jurisdiction to address the complex remedial matters in this case (see especially *Merit Decision*, paras. 493-94 and 2016 CHRT 10, paras. 1-5).

[4] The Tribunal ordered Canada to pay compensation to the First Nations children who have experienced the pain and suffering of being separated from their homes, families and communities or have experienced gaps, delays and denials in services as a result of the discrimination found in the *Merit Decision* and their parents or grandparents caregivers who have experienced the pain and suffering of having their children unnecessarily removed from their homes, families and communities or have experienced gaps, delays and denials in services as a result of the discrimination found in the *Merit Decision* (see *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)*, 2019 CHRT 39 [the *Compensation Decision*]) In the *Compensation Decision*, the Tribunal directed the parties to negotiate a culturally sensitive and trauma informed process to compensate the victims of the discriminatory practice (para. 269). The Tribunal remained available to resolve any disagreements that arose in the process of drafting the compensation framework. The parties have engaged in a collaborative process to create the *Framework for the Payment of Compensation under 2019 CHRT 39* (the *Draft Compensation Framework*). The parties have requested direction from the Tribunal when they were unable to agree (e.g. 2020 CHRT 7, 2020 CHRT 15, and 2020 CHRT 20). The parties indicate they are close to finalizing the *Draft Compensation Framework* in order to submit it to the Tribunal for approval.

[5] This ruling addresses four issues that arise from the *Draft Compensation Framework* submitted by the parties on October 2, 2020. The parties specifically requested the Tribunal

to provide direction concerning a contested issue between the parties regarding the creation of a trust fund for some categories of beneficiaries. The AFN, the Caring Society and the NAN argue the *Canadian Human Rights Act*, RSC 1985 c H-6 [*CHRA* or the *Act*] provides jurisdiction to implement a trust fund for victims who were legally unable to manage their own finances. Second, Nishnawbe Aski Nation (NAN) requested an amendment to the *Draft Compensation Framework* to reflect its participatory rights as an intervening interested party in this case. Third, NAN requested an amendment to the *Draft Compensation Framework* to change the time period for which First Nations children would be eligible for Jordan's Principle compensation. Finally, the Tribunal requested submissions to ensure that the Tribunal's role in the *Draft Compensation Framework* was within the Tribunal's jurisdiction.

[6] The Tribunal issued a letter ruling dated December 14, 2020 to the parties with reasons to follow. This is analogous to an oral decision with reasons to follow, which the Panel used to expedite the process of finalizing the compensation framework. This ruling provides the reasons contemplated in the Panel's December 14, 2020 letter. Following this letter ruling, the parties were able to finalize the *Draft Compensation Framework* and, on December 23, 2020 they submitted the final version to obtain a final consent order on the issue of the compensation process.

II. Trust Provisions

(i) Context

[7] The *Compensation Decision* determined that compensation would be payable directly to the victims of the discriminatory practice instead of into a fund that would provide services for their benefit. However, the Tribunal recognized "that it is not appropriate to pay $40,000 to a 3-year-old" and that a process for paying funds to minor beneficiaries was required (para. 261). The Tribunal determined in 2020 CHRT 7 that the provincial or territorial age of majority would determine when First Nations children would receive direct control of their compensation funds (paras. 8-36).

[8] The *Draft Compensation Framework* contains provisions for payments for individuals who lack the legal capacity to manage their own finances. These provisions apply only to individuals who lack the legal capacity to manage their own finances:

> 10.1. Where the beneficiary has the legal capacity to manage their own financial affairs, the compensation shall be paid directly to the beneficiary.
>
> …
>
> 10.3. Where the beneficiary does not have the legal capacity to manage their own financial affairs, the compensation shall be held in trust for the beneficiary.

[9] Section 10.3 also stipulates that for these beneficiaries, their compensation shall be held in trust.

[10] Sections 10.4 and 10.5 provide for the appointment of up to three Appointed Trustees to manage the trust funds in accordance with a Trust Agreement:

> 10.4. The Parties will select up to three (3) business entities that specialize in holding, administering and distributing funds held in trust for the benefit of the beneficiaries who do not have the legal capacity to manage their own financial affairs (the "**Appointed Trustees**"). **The administration fees charged by the Appointed Trustees shall be paid for by Canada and shall not encroach on the beneficiaries' entitlement.**
>
> (emphasis added).
>
> 10.5. The Appointed Trustees shall hold the funds in trust pursuant to a trust agreement agreed to by the Parties (the "**Trust Agreement**"). The Trust Agreement shall outline the following requirements:
>
> a) The powers, responsibilities and requirements of the trustee to hold and manage the funds for the benefit of the beneficiaries;
> b) The distribution provisions for income and capital;
> c) The criteria for encroachment on capital;
> d) The removal and replacement of trustees;
> e) The accounting and report requirements; and
> f) Any other appropriate related provisions.

[11] Canada does not agree with the proposed appointment of Appointed Trustees pursuant to a Trust Agreement and accordingly the parties request the Tribunal's adjudication of these provisions in the *Draft Compensation Framework*.

A. Position of the Parties

(ii) Canada

[12] Canada objects to the provisions in the *Draft Compensation Framework* relating to paying funds into trust for children who do not have legal capacity to manage their own affairs. Canada acknowledges the advantages of the proposed measures but disputes that the Tribunal has the jurisdiction to implement them. Canada contends that the measures in the *Draft Compensation Framework* would inevitably cover ground fully covered by express provisions in the *Indian Act*, RSC 1985, c I-5 or provincial law relating to children's property.

[13] Canada argues that under the *Indian Act*, the Minister has exclusive authority to deal with the property of any beneficiary who lacks the legal capacity to manage their own property. For adults who lack legal capacity, that authority is found under section 51. For children, the authority is under section 52, with the additional stipulations in sections 52.1 and 52.2 that contemplate a role for Band Councils and parents.

[14] Canada cites Saskatchewan, British Columbia and Ontario legislation to identify who should have control of a child's property under provincial jurisdiction. It does not address any other provincial legislation. Section 45 of the *Children's Law Act 2020*, S.S. 2020, c. 2, gives authority over a child's property in Saskatchewan to the parents, unless otherwise ordered by a court. Sections 47 to 51 of the Ontario *Children's Law Reform Act*, RSO 1990, c. C-12 give preference to parents as the guardians of a child's property. The British Columbia *Family Law Act*, SBC 2011, c. 25 provides, at sections 175-181, that a trustee of a child's property must be appointed by a court.

[15] Canada argues that there are many specific laws dealing with the property of minors. Subsections 53(2) and (3) of the *CHRA* do not demonstrate an intention by Parliament to allow the Tribunal to impose the trust provisions in the *Draft Compensation Framework.* Furthermore, the provincial and *Indian Act* provisions demonstrate that it is not necessary for the Tribunal to impose a trust framework. Canada further adds that the Tribunal must respect the existing property laws applicable to beneficiaries.

(iii) The Caring Society

[16] The Caring Society supports the trust provisions in the *Draft Compensation Framework.* The Caring Society submits that these provisions provide a clear, uniform, and culturally and trauma informed approach that would be lacking if Canada's position is adopted.

[17] The Caring Society views beneficiaries who lack legal capacity as among the most vulnerable victims in this case. The proposed Appointed Trustee would protect compensation for this group. The centralized approach will create a predictable, clear and universal approach for all beneficiaries across Canada who lack legal capacity that is capable of clear oversight and protections.

[18] The Caring Society relies on the findings of the Youth in Care Canada report previously accepted by the Panel, that it is vital that persons who cannot manage their own financial affairs, receive culturally appropriate and trauma informed services to avoid further harm.

[19] The Caring Society outlines the burdens that would fall on families in the absence of the Appointed Trustee. The Caring Society agrees that compensation cannot be paid directly to those who lack legal capacity. The provincial, territorial and *Indian Act* regimes contemplate the appointment of a guardian of property as a default regime of last resort. The proposed Appointed Trustee provides an alternative to the default "last resort" statutory regimes in a manner that will more effectively implement the Tribunal's orders.

[20] The Appointed Trustee avoids four obstacles for beneficiaries who lack legal capacity. First, it avoids the challenge of determining the legislative provisions that apply to the individual under the provincial, territorial, or *Indian Act* legislative regimes, depending on which legislative framework applies to the individual. The complexity of engaging with the legislation may require beneficiaries to hire legal counsel that would in effect reduce their compensation. Second, the legislative regime within a jurisdiction is often different for adults and children who lack legal capacity. Third, the administrative steps imposed on families under the provincial, territorial and *Indian Act* regimes may result in some families not completing the necessary steps and beneficiaries therefore not receiving compensation.

Fourth, the default regimes do not contain provisions to ensure beneficiaries receive culturally appropriate and trauma informed services.

[21] The Caring Society further elaborates on some barriers potentially facing guardians of property for minors under the default regimes. These barriers undermine the principles of safeguarding the best interests of the child beneficiaries and making the payment process as simple as possible for beneficiaries. First, the application process is often burdensome. In most cases, the parent or guardian will be required to make an application to be appointed the guardian of property. This process may involve a court application, with associated court fees and the possible need to hire counsel. The process will vary between provinces and even in some cases within a province based on the amount of compensation a beneficiary will receive. Quebec in particular has different processes depending on whether the value of the property is above or below $25,000. Second, accounting processes are a significant administrative burden on a guardian of property. The specific accounting requirements vary between provinces and territories and, at least in Quebec, within the province based on the amount of compensation received. Third, guardians of property for a minor are often required to post a bond. The requirements again vary across Canada. The requirement to post a bond adds another burden to seeking compensation.

[22] The Caring Society identifies that there are also burdens for individuals seeking to be appointed a guardian of property for an adult who lacks legal capacity. First, there is an application process. While it involves many of the same challenges as processes involving minors, there is the further requirement of proving a lack of capacity. The requirement to demonstrate an absence of capacity increases the potential for contested litigation. There are similar provisions for financial security to be required by the guardian. In some cases, there is a requirement to present a plan for managing the property. The Caring Society notes that some legislation, such as the *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 7(1)(c), requires the court to be satisfied that appointing a guardian of property is the least restrictive measure. Secondly, the standards to which guardians of property are held are high. It requires appropriate judgement and record keeping. Guardians of property take on a legal risk that they would be held responsible if funds are mismanaged.

[23] Overall, the Caring Society submits that the proposed trust provisions are consistent with a broad interpretation of the *CHRA* that is aimed at effectively remedying the discrimination at issue. The proposed provisions best protect the specific interests of the particularly vulnerable group of beneficiaries who lack legal capacity to manage their own finances.

(iv) Assembly of First Nations

[24] The AFN supports the trust provisions in the *Draft Compensation Framework*. The provisions provide a national approach with clear rules and norms on how funds are to be distributed to beneficiaries.

[25] The AFN is aware of the risk that parents or guardians deplete the funds they hold in trust for a child. The proposed provisions protect vulnerable beneficiaries from this risk. The trust provisions contemplate that all of the funds will be preserved until a child beneficiary reaches the age of majority. These provisions contrast with provincial, territorial and the *Indian Act* regimes that contemplate that trust funds can be encroached upon so long as it is in the best interest of the beneficiary. In particular, there is a possibility under at least some provincial regimes to encroach on the trust funds to pay for some maintenance and support expenses. Similar encroachments are possible for activities that directly benefit the child such as healthcare, education and sports. These encroachments are particularly problematic when the guardian is the state. The AFN is concerned about a process that would likely see some beneficiaries not having any funds left when they reach the age of majority.

[26] The trust provisions provide a consistent national regime. This permits uniform direction on how the trust funds will be managed. It also alleviates the burden on individual guardians of property to navigate the process for managing funds themselves. The AFN notes, much as the Caring Society does, the different regimes that apply across Canada and even in some instances within a jurisdiction based on the amount of compensation at issue. The AFN raises concerns that the reporting requirements under existing legislation are inadequate to safeguard the compensation funds because, if there is an abuse of funds, it is difficult to seek to have it remedied until a minor beneficiary reaches the age of majority.

At that point, any remedy is likely to require expensive litigation. In relation to the *Indian Act* in particular, the funds are not invested in a manner that permits reasonable returns.

[27] The AFN submits that the Tribunal has jurisdiction to approve the trust provisions in the *Draft Compensation Framework*. The Tribunal's remedial jurisdiction stems from the quasi-constitutional nature of the *CHRA* and the broad remedial discretion provided under section 53 of the *CHRA*. The AFN relies on *Merrill Petroleums Ltd.* v. *Seaboard Oil Co.*, 1957 CanLII 631 (AB QB), 22 W.W.R. 529 at p 557 for the proposition that a trust instrument can supersede provincial law. The various provincial and territorial *Trustee Acts* reinforce the supremacy of trust deeds over general legislative provisions. For example, Manitoba's *The Trustee Act*, C.C.S.M. c. T160 provides at section 4 that

> Nothing in this Act authorizes a trustee to do anything that he is in express terms forbidden to do, or to omit to do anything that he is in express terms directed to do, by the instrument creating the trust.

Similarly, the Ontario *Trustee Act*, R.S.O. 1990, c T.23 provides, at section 68, that

> Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.

[28] The AFN believes that the trust provisions in the *Draft Compensation Framework* are within the scope of the remedies available to the Tribunal. Furthermore, these provisions will give effect to the Tribunal's direction that the parties establish a process that will ensure that minors have their compensation "secured in a fund that would be accessible upon reaching majority" (*Compensation Decision*, para. 261).

(v) Other Parties

[29] The NAN indicated it supports the Caring Society and the AFN's position on the trust provisions. The Commission and the Chiefs of Ontario (COO) take no position.

B. Analysis

[30] The Tribunal has the jurisdiction under section 53 of the *CHRA* to approve the trust provisions in the *Draft Compensation Framework*. This will be explained below.

(i) Scope of Trust Law and Guardianship Law

(a) General Principles

[31] The AFN correctly articulates the general principle that legislative regimes regarding trusts contemplate specific provisions in a trust deed that can take precedence over most aspects of the legislation. In particular, *Merrill Petroleums Limited v. Seaboard Oil Company,* 1957 CanLII 631 (AB QB), at page 557, aff'd 1958 CanLII 499 (AB CA) supports the proposition that while the common law and statutes might impose some duties on trustees, the specific provisions of the trust are governed by the trust agreement:

> While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust—in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument.

[32] Provincial and territorial legislation relating to trusts contemplates the existence of a separate trust instrument managed by another trustee that is different from the regimes contemplated in provincial or territorial guardianship legislation. Similarly, there is no provision in the *Indian Act* that ousts the ability of an individual lacking legal capacity from benefiting from a trust deed and having their property managed by a trustee in accordance with the trust deed.

[33] The Caring Society provided the Tribunal with *Whaley Estate Litigation on Guardianship* in which with Lionel J. Tupman states at page 85 that establishing a trust is an alternative to relying on the default provisions in Ontario legislation that contemplates the appointment of a guardian of property:

> *Trust Terms*
>
> Further alternatives may exist having some bearing on the appointment of a guardian under [Ontario's *Children's Law Reform Act*], including various trust arrangements which may provide authority for the property to be held in trust by a parent or other individual/trustee, a will that contains trust terms, the designation of a trustee or a trust or trust settlement (*inter vivos* trust).

> (Lionel J. Tupman, "Guardianship of Property" in *Whaley Estate Litigation on Guardianship*, Kimberley A. Whaley and WEL, edited by Laura Cardiff (2015), Available online at https://welpartners.com/resources/WEL-on-guardianship.pdf)

[34] The proposition that a specific trust agreement is an alternative to relying on the guardianship provisions of legislation is a general proposition not limited to the specifics of the Ontario legislation. It applies across provincial, territorial and *Indian Act* legislation and provisions on guardianship.

[35] A review of provincial legislation supports the proposition that trust law generally contemplates that a trust agreement can take precedence over provisions in trust legislation. For example, the Ontario *Trustee Act,* RSO 1990, c T.23 at s. 67 and 68 provides that the powers in the Act are in addition to those established in the trust agreement and that nothing in the Act authorizes a trustee to do anything they are prohibited from doing by the trust agreement. The Alberta *Trustee Act*, RSA 2000, c T-8 does not have a general provision explaining the relationship of the Act to trust agreements but has provisions such as s. 35(6) that confirm that specific provisions of the Act are limited by the terms of the trust agreement. Similarly, the British Columbia *Trustee Act*, RSBC 1996, c 464 has various provisions such as s. 27(5) that stipulates that the section only applies if a contrary intention is not expressed in the trust agreement. It is clear that, in general, provincial legislation contemplates operating harmoniously with a trust agreement. In fact, it appears that much of the legislation is written to provide a default set of rules in the event that a trust agreement does not address an issue. A reading of this legislation does not support Canada's assertion that provincial legislation ousts the Tribunal's ability to structure a remedy in the form of a trust. Rather, it provides a framework that would give full effect to any trust created.

(b) Indian Act Regime

[36] Canada raises concerns that the *Indian Act* provides a complete scheme to address the property of individuals within the scope of the Act who lack the legal capacity to manage their own property. Canada identifies sections 51, 52 and 52.1-52.5 as setting out the applicable *Indian Act* regime. Canada's submissions on this matter provide little analysis beyond identifying these statutory provisions.

[37] On an initial reading, the provisions of the *Indian Act* appear to support the proposition that only the Minister may manage the property of an individual with *Indian Act* status who lacks legal capacity. For example, section 51(1) provides that "[s]ubject to this section, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister." Similarly, for children, section 52 provides that "[t]he Minister may administer or provide for the administration of any property to which infant children of Indians are entitled, and may appoint guardians for that purpose." While there are provisions for appointing another individual to manage the property, the appointed guardian of property's powers flow from the Minister's approval (s. 51(2)(a) and s. 52.2).

[38] The *Indian Act* provisions are far sparser than the trust provisions in provincial and territorial legislation. They do not provide any explicit guidance on how the provisions interact with a trust agreement. However, some of the case law and general trust principles provide relevant insight and support a conclusion that the *Indian Act* does not preclude the Tribunal ordering the proposed trust provisions.

[39] First, a number of cases show how the Minister has broadly applied the provisions to enable others to manage property covered by the applicable *Indian Act* sections. In *Desmoulin (Committee of) v. Blair*, 1991 CanLII 8345 (ON SC) the Minister made an order under section 51(3) of the *Indian Act* that the individual's property would be managed in accordance with the laws of Ontario, and consequentially, by a guardian of property. In *Dickson (Estate of)*, 2012 YKSC 71, the facts highlight the Minister's efforts to find another appropriate individual to manage the property. In *Polchies v. Canada*, 2007 FC 493 monies payable to children were paid to parents. Some parents set up trust funds for their children. Furthermore, paragraph 62 confirms that the Minister does not have exclusive responsibility for the property of all children with *Indian Act* status living on reserve:

> since the discretion conferred on the Minister by section 52 can be triggered by the simple existence of two conditions (the existence of property to which infant children of Indians are entitled and the fact that they reside on a reserve), it would create an absurd result to say that the Minister must administer or provide for the administration of all property of all Indian children residing on reserves.

Similarly, *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 involves litigation about a trust that has child beneficiaries with *Indian Act* status. Collectively, these cases support an inference that the *Indian Act* regime is applied as a last resort, in a manner analogous to the default regimes under provincial legislation. The *Indian Act* does not preclude a trust agreement with a trustee acting on the authority of the trust agreement rather than the *Indian Act*.

[40] Second, the nature of a common law trust is to split title, or ownership, of property. The trustee has legal control of the property but not the right to benefit from the property. The beneficiary does not have legal control of the property but has the right to the benefits that flow from the property. There is a general principle in property law that one cannot give what one does not have. Under the proposed trust provisions, Canada would pay the compensation funds to the trustee. The trustee would receive legal control of the funds while the beneficiary would receive the right to benefit from the compensation funds. The property interest the trustee assumes over the property - the legal control of the compensation funds – has not yet passed to the beneficiary. Accordingly, the property does not come under the scope of the *Indian Act* because the legal control of the property has not yet passed to the beneficiary. The beneficiary who lacks legal capacity cannot give control of their compensation funds to the Minister under the *Indian Act* because they do not have the right to legally control their compensation funds until the funds are paid out in accordance with the terms of the trust agreement.

[41] Similarly, patrimony in a civil law trust would not come under the scope of the *Indian Act* because legal control of the property has not yet passed to the beneficiary. As explained by the SCC, “the trust in Quebec civil law does not result from the division of ownership but rather from the transfer of property in a patrimony created for a particular purpose and not held by anyone” (*Yared v Karam*, 2019 SCC 62 at para. 17).

[42] In conclusion, past practice and the nature of trust law both support that the *Indian Act* does not preclude the creation of the proposed trust provisions in the *Draft Compensation Framework*.

(c) Provincial Legislative Regimes

[43] Canada also argues that the provincial law provides a complete legislative regime that precludes the Tribunal imposing the proposed trust provisions. Canada specifically cites Saskatchewan's *Children's Law Act 2020*, S.S. 2020, c.2; Ontario's *Children's Law Reform Act*, RSO 1990, c. C-12; and British Columbia's *Family Law Act*, SBC 2011, c. 25. While the following analysis does not comprehensively review every provincial and territorial regime, it considers all the statutes referred to by Canada in its argument that the Tribunal lacks jurisdiction. Further, the generally similar structure of these common law statutes supports analogous reasoning that the role of trusts is largely similar in the provinces and territories not canvassed.

[44] The current legislation in force in Saskatchewan is *The Children's Law Act, 1997,* SS 1997, c C-8.2. *The Children's Law Act, 2020*, SS 2020, c 2 received royal assent on March 16, 2020 but, per s. 93, comes into force by order of the Lieutenant Governor in Council. That has not occurred as of the date of this ruling. Regardless, the relevant provisions of the legislation are the same as in the 1997 Act, subject only to being renumbered. References to the 2020 legislation are provided in brackets after the reference to the 1997 legislation that is currently in force.

[45] The key provision in Saskatchewan's 1997 legislation is section 32 [section 47]. The provision provides that "any moneys due and payable to the child" would be payable to the guardian of property under the Act. However, the establishment of the trust agreement would have the effect of not making money due and payable to the child until it is paid out from the trust fund in accordance with the provisions of the trust agreement. Accordingly, the provisions of the statute are not engaged. The analysis with respect to the *Indian Act* that the nature of the trust makes it so that the child cannot grant a property right they do not have applies equally under this legislation. While Canada is correct that section 30 [section 45] provides that the default provision is that the parents are the default guardians of property for a child, that does not displace the child's ability to benefit from a trust administered by a trustee other than the child's parents or other court appointed guardian.

[46] In Ontario, the pertinent legislation is the *Children's Law Reform Act*, RSO 1990, c C.12 and the *Trustee Act*, RSO 1990, c T.23. The *Children's Law Reform Act* does not specifically contemplate the child being the beneficiary of a separate trust agreement. The only provisions that specifically relate to the payment of compensation of over $10,000 to children are found in the *Trustee Act* which provides, at section 36(6), that compensation may be paid into the court. However, the Public Guardian and Trustee, whose office includes the Accountant of the Superior Court of Justice that is responsible for administering funds paid into court, indicates that a trust agreement is capable of directing that the appointed trustee manages the child's funds instead of having the money paid into court or paid to a court appointed guardian:

> 1. Why is children's money held in court?
>
> Ontario law requires children's assets to be held in court, unless:
>
> - a law or court order provides otherwise
> - a document such as a Will or trust instrument provides otherwise
> - a court has appointed a guardian of the child's property
>
> (Office of the Public Guardian and Trustee, "Accountant of the Superior Court of Justice", Question 1, p. 3 (p. 5 of the pdf), https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf).

[47] While Canada is again correct that sections 47-51 of the Ontario *Children's Law Reform Act* give priority to parents as the guardians of a child's property, it does not displace the possibility that the child is the beneficiary of a trust fund. Further, in the recent case of *Santella v. Bruneau (Litigation Guardian of)*, 2020 ONSC 2937 the court refused to appoint a parent as the guardian of property not because of any evidence the parent would abuse the trust but because payment of the inheritance into the court would better protect the funds in the unlikely event the parent lost capacity or became bankrupt. It is not clear that the current case law supports a preference for parents to manage large sums of money in trust for their children.

[48] In British Columbia, the governing legislation is the *Family Law Act*, SBC 2011, c. 25. Section 177 stipulates that "[a] person having a duty to deliver property to a child may discharge the duty by delivering the relevant property to a trustee who is authorized to

receive that property". The definitions in section 175 define a trustee to include a person authorized under a trust agreement. Accordingly, the legislation contemplates that Canada's compensation obligations arising from the Tribunal's orders can be discharged by making a payment to an authorized trustee. Furthermore, this analysis indicates that Canada is incorrect in its assertion that these provisions require that a trustee be appointed by a court order.

[49] The specific statutes referred to by Canada do not support the proposition that there is a preference, let alone a requirement, that compensation to minor beneficiaries must be in accordance with the provisions in the various common law Acts instead of through the proposed trust provisions in the *Draft Compensation Framework*.

(d) Conclusion

[50] The trusts and guardianship laws referred to by Canada do not preclude the Tribunal approving the trust provisions contained in the *Draft Compensation Framework*. First, the general structure of trust law contemplates that the statutory framework can exist harmoniously with a trust agreement. The statutory framework is not intended to preclude or limit the creation of trusts. Second, the *Indian Act* regime is capable of supporting separate trusts that exist with a structure outside the *Indian Act*. The *Indian Act* is best understood as providing provisions in the event that other structures are not in place to manage the property of an individual who lacks legal capacity. And finally, the provincial regimes contemplate, often explicitly, payments into trusts instead of the last resort appointment of guardians of property.

(ii) Scope of *CHRA* Remedial Provisions

[51] Section 53 of the *CHRA* reads as follows:

> 53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.
>
> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54,

make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> > (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> >
> > (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[52] At section 54, the legislator imposes limitations to the application of section 53 of the *CHRA*:

> 54 No order that is made under subsection 53(2) may contain a term
>
> > (a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or
> >
> > (b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.

[53] No other limitation to remedies is expressed in the *CHRA.*

[54] Therefore, the Panel uses the Driedger approach and a broad and purposive interpretation of the *Act*, as espoused by the Supreme Court of Canada, is warranted in any human rights analysis:

> According to the modern principle of statutory interpretation, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*, and the intention of Parliament: Elmer A. Driedger, *The Construction of Statutes*, (Toronto: Butterworths, 1974) at p. 67.
>
> (*Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21, at para. 58)

[55] The Tribunal elaborated on this approach in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14, at paras.12-13:

> [12] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21).
>
> [13] The special nature of human rights legislation is also taken into account in its interpretation:
>
> > Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and

> effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the *Federal Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.
>
> (*CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114, at p. 1134)

Similarly, in *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44, the Supreme Court reiterated:

> More generally, this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: see, for example, *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 120; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at pp. 157-58.
>
> (*B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44)

(emphasis added)

[56] Section 2 of the *CHRA* enunciates the purpose of the *Act*:

> 2 The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[57] Section 3 of the *CHRA* prohibits discrimination and sections 5 to 14.1 enunciate prohibited discriminatory practices.

[58] The Supreme Court of Canada described human rights legislation as “the final refuge of the disadvantaged and the disenfranchised” (see *Zurich Insurance v. O.H.R.C.*, 1992 CanLII 67 (SCC), [1992] 2 S.C.R. 321; see also 2018 CHRT 4 at para. 44).

[59] The wording of section 53(2) of the *CHRA* mentions that the Panel or member may “make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate” (emphasis added). This suggests that Parliament awarded considerable discretion to presiding members in order to remedy discrimination and prevent its reoccurrence. This is consistent with a case-by-case approach and special programs found at section 16 of the *CHRA* and discussed by the Supreme Court in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 (*Action Travail des femmes*), where the Appellant, *Action Travail des femmes*, alleged that CN was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *CHRA* by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal constituted under the *Act* adjudicated the complaint, found that the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs, and concluded that it was essential to impose upon CN a special employment program. The SCC was asked to determine whether the Tribunal has the power under s. 41(2)(a) (now 53(2)(a)) *CHRA* to impose upon an employer an "employment equity program" to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women.

[60] The SCC first ruled out the strict application of the grammatical method of interpretation in the case under examination:

> I do not think the answer to the question posed in this appeal will be found by applying strict grammatical construction to the last twelve words of s. 41(2)(a). (…) First, such an approach renders meaningless the specific reference back to s. 15(1) contained in s. 41(2)(a). Section 15(1) of the Act is designed to save employment equity programs from attack on the ground of "reverse discrimination". If s. 41(2)(a) is read to limit the scope of such programs, no effective mandatory employment equity program could be undertaken in any circumstances, and the legislative protection offered to the principle of

> employment equity would be nullified. Second, in focussing solely upon the limited purposive aspect of s. 41(2)(a) itself, the dominant purpose of the *Canadian Human Rights Act* is ignored"
>
> (*Action Travail des femmes*, at p 1133).

[61] To the contrary, in the interpretation of the *CHRA*, it is important to take into account the purpose of the *CHRA*, that is to extend the present laws in Canada as set forth in section 2 in order to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination (*Action Travail des femmes*, at p 1133). It should be recalled that human rights legislations are intended to give effect to rights of vital importance, ultimately enforceable by a court of law (*Action Travail des femmes*, at p 1134). As a result, while the meaning of the words of the *CHRA* is important, rights must be given full recognition and effect (*Action Travail des femmes*, at p 1134). This is also in line with the federal *Interpretation Act,* RSC 1985, c I-21, according to which statutes are deemed remedial and thus, must receive a fair, large and liberal interpretation with a view to give effect to their objects and purpose (*Action Travail des femmes*, at p 1134).

[62] This comprehensive method of interpretation of human rights legislation was first stated in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, where Justice Lamer acknowledged the fundamental nature of human rights legislation: they are "not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law" (*Action Travail des femmes*, at pp 1135-36, citing *Heerspink*, at p. 158). This principle of interpretation was later confirmed and further articulated in *Winnipeg School Division No. I v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156, where Justice McIntyre, writing for a unanimous Court, stated that:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement
>
> (cited in *Action Travail des femmes*, at 1136).

[63] The same year, in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.,* 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 [*O'Malley*], Justice McIntyre, again writing for a

unanimous Court, established the governing principles for the interpretation of human rights legislations:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment …, and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination
>
> (*O'Malley*, at pp 546-57, cited in *Action Travail des femmes*, at p 1136).

[64] The *CHRA*'s emphasis is placed on discriminatory practices and its effects (*Action Travail des femmes*, at p 1138, referring to *Bhinder v. Canadian National Railway Co.*, 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561and *O'Malley*).

[65] These principles must equally be applied when interpreting the remedial powers granted to the Tribunal under the *CHRA*. In *Action Travail des femmes*, the SCC was presented with evidence of systemic discrimination, the definition of which was established as follows:

> Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces.
>
> (*Action Travail des femmes*, at p 1139 referring to Abella, Rosalie S. Report of the Commission on Equality in Employment. Ottawa: Minister of Supply and Services Canada, 1984).

[66] For the SCC, paragraph 2 of the Special Temporary Measures Order, ordering the CN to implement a special employment program, was specifically designed to address and remedy the type of systemic discrimination against women in the case under examination. Therefore, the SCC addressed the specific issue of the scope of the remedial powers established under section 41(2)(a) (now 53(2)(a)) of the *CHRA*, taking into account the power granted to the Tribunal to order measures regarding the "adoption of a special

program, plan or arrangement referred to in subsection 15(1) (now 16(1)), to prevent the same or a similar practice occurring in the future" (*Action Travail des femmes*, at p. 1139).

[67] Concurring with the dissenting opinion of Justice MacGuigan of the Federal Court of Appeal in the case under appeal, the SCC held that section 41(2)(a) (now 53(2)(a)) is "designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups" (*Action Travail des femmes*, at p 1141). In cases of systemic discrimination, the prevention of reoccurrence of discriminatory practices often requires referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes*, at p. 1141). Furthermore, the SCC held that the type of measure ordered by the Tribunal in the case under examination may be the only means to achieve the purpose of the *CHRA*, that is to combat and prevent future discrimination (*Action Travail des femmes*, at p. 1141, 1145).

[68] In these cases, remedy and prevention cannot be dissociated, since "there is no prevention without some form of remedy" (*Action Travail des femmes*, at p. 1142). Thus, the remedies available under section 53(2)(a) *CHRA* are directed toward a specific protected group and are not only compensatory in nature, but also prospective. As a result, with a view to achieve the prevention objective of the *CHRA*, a "special program, plan or arrangement" as referred to in subsection 16 (1) *CHRA* serves three main purposes: (1) countering the effect of systemic discrimination; (2) addressing the attitudinal problem of stereotyping, and; (3) Creating a critical mass, which may have an impact on the "continuing self-correction of the system" (*Action Travail des femmes*, at pp 1143-44).

[69] In sum, while ruling that the Tribunal had the power to order such a special measure, the SCC summarized its findings as follows:

> For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention

> of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(a) of the *Canadian Human Rights Act*. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(a). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Lawrence Region by preventing "the same or a similar practice occurring in the future".
>
> (*Action Travail des femmes*, at pp 1145-46).

[70] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in *Action Travail des femmes*, see for example: 2016 CHRT 2 at para. 468; 2016 CHRT 10, at para. 12-18; 2018 CHRT 4, at para. 21-39; 2019 CHRT 39, at para. 97.

[71] In *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 [*Robichaud*], the SCC was asked to determine whether an employer was responsible for the unauthorized discriminatory acts of its employees in the course of their employment under the *CHRA*. For the SCC, in order to determine the legal regime of liability applicable under the *CHRA*, it was necessary to start by examining the *Act* itself, “the words of which, like those of other statutes, must be read in light of its nature and purpose” (*Robichaud*, at para. 7).

[72] As per *Robichaud*, at para. 8, the purpose of the *CHRA*, provided for under section 2, is to extend to the laws in Canada with a view to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination. As a result, the *CHRA* must be interpreted so as to advance the broad policy it underlies (*Robichaud*, at para. 8, referring to *O’Malley*). As the *CHRA* incorporates certain basic goals of the society, its interpretation must therefore follow a fair, large and liberal method with the aim of achieving its purpose (*Robichaud*, at para. 8 referring to *Action Travail des femmes*).

[73] The Tribunal also discussed section 16 of the *CHRA* relating to the adoption of a special program, plan or arrangement and prevention of future discrimination by relying on

National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare), 1997 CanLII 1433 (CHRT) in 2018 CHRT 4 at para. 34:

> Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease-and-desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA (see National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [Action Travail des Femmes]). In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:
>
> > ...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is **often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future.**..... (at page 1141).
> >
> > (emphasis added).

[74] Following these interpretative principles, remedies available under the *CHRA* must be effective and “consistent with the "almost constitutional" nature of the rights protected” (*Robichaud*, at para. 13). As a consequence, in the case under examination, the SCC concluded that the broad remedial powers under the *CHRA* must be available against the employer. A narrower interpretation of the *Act* would have the effect of nullifying its remedial powers:

> Who but the employer could order reinstatement? This is true as well of para. (c) which provides for compensation for lost wages and expenses. Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e., intentional). <u>In short, I have no doubt that if the Act is to achieve</u>

> its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.
>
> (*Robichaud*, at para. 15, emphasis added).

[75] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in *Robichaud*, see for example: 2016 CHRT 2 at para. 43, 468; 2016 CHRT 10, at para. 11-18; 2018 CHRT 4, at para. 26, 28; 2019 CHRT 39, at para. 94.

[76] Additionally, the wording in section 53(2)(e) and 53(3) of the *CHRA* is broad enough to include the compensation order to be paid in a trust fund. The idea here is that the *Act* allows a maximum of $20,000 under each heading 53 (2)(e) and 53(3) and the Panel has determined that the discrimination found in this case is of the worst kind justifying the maximum amount permissible in the *Act* (see 2019 CHRT 39 at paras. 242, 247, 249, 250 and 258).

[77] Ordering compensation to be paid into trust is not unprecedented and is within the scope of the broad remedial powers of the *CHRA*.

[78] There is precedent for a court ordering that a remedy be paid into trust instead of directly to a beneficiary where that arrangement is more advantageous to the beneficiary:

> I would also accede to S.A.'s request that MVHC pay the costs award into a trust on the same terms, for the same beneficiaries and with the same trustees as the Trust.
>
> (*S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4, para. 73)

[79] It is not a distinguishing feature that in that case the order was made by the Supreme Court of Canada on appeal from a Superior Court. The reasons do not indicate that the Court is relying on the inherent jurisdiction of Superior Courts to order that the costs be paid into the trust. Similar orders appear to have been made by Tribunals in *Otis Canada Inc. v International Union of Elevator Constructors*, 1991 CanLII 12578 (NS LA) and earlier in the proceeding prior to *Vermilion Resources Ltd. (Re)*, 2011 CanLII 95455 (AB SRB). More generally, compensation or damages are often paid to the successful party's lawyer in trust rather than directly to the successful party. This occurs even when the order does not expressly permit a payment into trust. Further, the Tribunal has jurisdiction to implement the

broad remedial power of the quasi-constitutional *CHRA* (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 SCR 789 at para. 26 and *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50). Section 53 also speaks more broadly of ordering that a person “compensate the victim” of a discriminatory practice. It does not limit compensation to a direct monetary payment to the victim. Benefiting from funds paid into trust and administered by a trustee is indisputably a form of compensation. Accordingly, a proper interpretation of the broad remedial powers under section 53 of the *CHRA* supports the Tribunal exercising similar remedial power and ordering that compensation be paid into a trust where that is in the beneficiary’s interests.

(iii) Application

[80] The Panel views the trust fund as a hybrid remedy. On one hand, compensation is paid. On the other hand, the preferred process to pay this compensation considers other relevant factors such as creating a culturally safe process in light of the specific circumstances of this case, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, protection of funds from administrative fees, etc. Therefore, this part of the remedy can be viewed as a “special program, plan or arrangement” provided for in the *CHRA* and explained by the Supreme Court and Tribunal in the decisions discussed above. In sum, the trust fund is also a remedy that accounts for the specific needs of the victims/survivors in a case where the legacy of colonialism, residential schools, the sixties' scoop and historical prejudices form part of the Tribunal's findings. For those reasons, the *CHRA* analysis and reasoning found in paras. 51-75 in the scope of *CHRA* remedial provisions section applies to the trust fund aspect of the compensation.

[81] The Panel agrees it is vital that persons who cannot manage their own financial affairs receive culturally appropriate and trauma informed services to avoid further harm. This is consistent with what the Supreme Court described, mentioned above, as referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes* at p.1141). This is also consistent with the approach taken in the Panel’s rulings.

[82] The Panel agrees with the Caring Society that burdens would fall on families in the absence of the Appointed Trustee. The Panel also agrees that the provincial and *Indian Act* regimes referred to by the parties contemplate the appointment of a guardian of property as a default regime of last resort. The proposed Appointed Trustee provides an alternative to the default "last resort" statutory regimes in a manner that will more effectively implement the Tribunal's orders. Accordingly, there is no conflict between the proposed Appointed Trustee and trust provisions in the *Draft Compensation Framework* approved under the *CHRA* and the trustee and guardianship law referred to by Canada.

[83] Finally, the Panel agrees with the Caring Society that the Appointed Trustee avoids the four obstacles for beneficiaries who lack legal capacity listed above. First, it avoids the challenge of determining the legislative provisions that apply to the individual under the provincial, territorial, or legislative regimes, depending on which legislative framework applies to the individual. The complexity of engaging with the legislation may require beneficiaries to hire legal counsel that would in effect reduce their compensation. Second, the legislative regime within a jurisdiction is often different for adults and children who lack legal capacity. Third, the administrative steps imposed on families under the provincial, territorial and *Indian Act* regimes may result in some families not completing the necessary steps and beneficiaries therefore not receiving compensation. Fourth, the default regimes do not contain provisions to ensure beneficiaries receive culturally appropriate and trauma informed services.

[84] The Panel's approach to resolving the alleged conflict between the quasi-constitutional *CHRA* and provincial legislation is informed in part by the analysis in *Thibodeau v. Air Canada*, 2014 SCC 67. The decision emphasizes that legislation is presumed to act as a coherent whole where legislators do not intend to enact conflicting statutory provisions:

> First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of

> the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other.
>
> (*Thibodeau* at para. 92).

[85] The court goes on to highlight that a conflict only occurs if the concurrent application of both pieces of legislation would create an absurd result or if there is a direct contradiction such as one enactment only permitting an extension of time before the time limit expired while another allowed extensions after it expired (*Thibodeau* at paras. 94-96).

[86] As indicated earlier, it is possible to read the provincial trustee and guardianship law harmoniously with the *CHRA*. The same is true for the *Indian Act* by drawing on the analogies to provincial common law statutes that highlight that the guardianship provisions in the legislation are intended to be a default regime capable of being supplemented through trusts. Following the analysis in *Thibodeau*, this is the correct approach.

[87] It is true that *Thibodeau* contemplates alleged conflicts between legislative provisions enacted by the same government. In this case, Canada alleges that some of the conflicts are between the federal *CHRA* and provincial laws relating to trusts and guardianship. The result is still the same.

[88] First, the analogous principle when considering whether laws enacted by provincial governments and the federal government conflict is cooperative federalism. The doctrine aims “to facilitate interlocking federal and provincial legislative schemes” (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 17). There is amble support for concluding that the provincial and federal legislation are capable of acting harmoniously.

[89] Second, even if there were merit to Canada’s claim that provincial legislation limited the remedial scope of the *CHRA*, the Tribunal would be constrained by section 57(1) of the *Federal Court Act*, RSC 1985, c F-7:

> **Constitutional questions**
>
> **57 (1)** If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal

> Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

[90] As Canada has not served a Notice of Constitutional Question, the Tribunal would be unable to find that the *CHRA* is inapplicable or inoperable in the face of the provincial legislation relied on by Canada. The Panel's analysis has clearly demonstrated that, on a proper interpretation of the *CHRA*, the proposed trust terms are within the scope of the *CHRA*'s remedial provisions.

[91] Agreeing with Canada to use provincial legislation to pay compensation to minors and adults who lack legal capacity is actually allowing other statutes to limit an order made by this Panel who has determined this amount owed to victims of the discriminatory practice is justified. As explained above, many provincial statutes allow for administrative and other expenses to be deducted from the beneficiary's funds. This could deplete the amount owed to the victims and would reduce the compensation determined to be appropriate by this Panel for the victims' pain and suffering as a result of racial discrimination. Such a result cannot be Parliament's intent. In fact, allowing provincial statutes to authorize a reduction of the amount ordered by this Panel to be paid to the victims/survivors would in fact allow the Provinces to exercise their jurisdiction in a manner that would hinder the Tribunal's orders. This is not permissible. The Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31, [2018] 2 SCR 230 [*Matson and Andrews*] did not remove the primacy of the *CHRA* over other general statutes in the presence of a finding of discrimination (see 2020 CHRT 20 at paras. 253-265).

[92] While Canada only directed the Panel to three provincial legislative schemes, it is appropriate to conclude that these legislative schemes are representative of trust law and guardianship law across Canada. In particular, no other provincial or territorial regimes are more favourable to Canada's position. If they were, Canada would have advanced them in its submissions. For the Panel to seek to comprehensively review the other provincial and territorial trustee and guardianship statutory regimes would deny the parties an opportunity to present their case in relation to those regimes and deny the Panel the benefit of any

assistance the parties' submissions would provide in considering any nuances that might arise under these regimes. Furthermore, the common law generally operates similarly across provinces and territories. If there were any material differences in other common law provincial and territorial legislation, it was incumbent on Canada to draw that to the Tribunal and other parties' attention. The trust provisions under the *Civil Code of Quebec,* CQLR c CCQ 1991 may not be directly analogous to the common law because Quebec uses civil law. However, if those provisions supported Canada's position that provincial law precluded the creation of a trust under the *CHRA*, Canada ought to have put forward an argument based on Quebec law. Again, absent that argument, the Panel can conclude that the outcome under Quebec law would be the same as in the common law provinces although the reasoning may differ under civil law.

[93] The Panel's jurisdiction to award remedies in the presence of a proven discriminatory practice is exercised under a quasi-constitutional statute that, in the event of a conflict, has primacy over other federal statutes. However, as demonstrated, a proper approach to statutory interpretation demonstrates that there is no conflict either between the *CHRA* and the guardianship provisions in the *Indian Act* or between the *CHRA* and provincial guardianship and trustee legislation referred to by Canada.

(iv) Perverse effect in using the *Indian Act* to award compensation

[94] In addition, the Panel believes there is a perverse effect in using the *Indian Act* in order to distribute compensation. The *Indian Act* for many First Nations peoples is an instrument of oppression and of racism that is aimed at eliminating First Nations over time (see 2020 CHRT 20 at paras. 167-169, 171). This is not the best course of action to foster reconciliation and to eliminate discrimination when there is a safer road that can be followed. The Panel is compensating children and families for pain and suffering of significant adverse effects such as being removed from their homes, communities and Nations as a result of Canada's systemic and racial discrimination. The Panel also found in the *Merit Decision* that this was a continuation of the residential schools' system, for which in 2008 the Prime Minister issued an apology. The Panel believes it is important to avoid additional pain and suffering to victims in forcing them to use the *Indian Act* to receive compensation. As

mentioned above, the regime under the *Indian Act* confers powers to the Minister to manage the property of an individual with *Indian Act* status who lacks legal capacity. In the Panel's view, it would be inappropriate to force victims/survivors that have suffered racial and systemic discrimination at the hands of Canada to require them to have their compensation funds managed by Canada and to seek Canada's approval in order to access funds. This is not culturally safe in light of this specific case.

[95] Nothing in the *CHRA* suggests that ordering compensation to be paid into a trust fund exceeds the Tribunal's jurisdiction under the *CHRA*. In fact, given the specific facts in this case, it may be the most permissible way to uphold a culturally appropriate and safe process for First Nations victim-survivors.

[96] Canada's proposed approach does not consider the importance of culturally appropriate processes in dealing with victims of discrimination, the complexity of communicating non-conflicting information to access compensation and the fact that most provincial legislations allow for the administrator to charge administration fees payable from the compensation funds. In the process elaborated by the First Nations parties, Canada would pay for those fees and this would ensure the funds would not be depleted by administration fees. This would be in line with the Tribunal's intentions when it ruled Canada's actions were of the worst form of racial and systemic discrimination and that this warranted for the maximum compensation under the *CHRA*. Allowing administration fees to be payable to administrators of the funds under provincial legislation would in fact lower the Tribunal's compensation awards. Moreover, it would also create inequalities amongst the minor and incapacitated adult beneficiaries as administration fees vary from one province to the other.

III. NAN's Role in the Compensation Process

A. Context

[97] NAN was granted interested party status in 2016 CHRT 11 that allowed NAN to participate in the proceedings as an intervenor. NAN's participation was limited to "the specific considerations of delivering child and family services to remote and Northern

Ontario communities and the factors required to successfully provide those services in those communities" (2016 CHRT 11, para. 5).

[98] In the *Compensation Decision*, the Tribunal directed the Caring Society, the AFN and Canada to consult with the interested parties:

> The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to.
>
> (*Compensation Decision*, para. 269).

[99] The *Draft Compensation Framework* contains a provision contemplating further development of tools to guide the implementation of the compensation framework. Section 13.2 contemplates consulting with NAN as part of that process:

> 13.2. The parties will discuss the development of these tools with the Commission and with the Interested Parties, as appropriate, in keeping with the scope of their status as Interested Parties in this proceeding.

[100] NAN proposes to remove section 13.2 and instead amend section 1.4 to add the underlined section 1.4.1:

> 1.4 Throughout this document, the word "**Parties**" is used to refer collectively to the complainants, the AFN and the Caring Society, and the respondent Canada.
>
> 1.4.1 When reference is made to the "Parties" further developing or changing any process, tools, or document relating to the Compensation Process, including but not limited to amending this Framework, the term refers collectively to the AFN, the Caring Society, and Canada, in consultation with the CHRC, COO, and NAN; however, the CHRC, COO, and NAN do not have to participate in such further development/change should they decide not to.

And the following footnote:

> In keeping with the Tribunal's order regarding development of the compensation process, at para 269 of 2019 CHRT 39.

B. Position of the Parties

[101] NAN is concerned that the current provisions in section 13.2 of the *Draft Compensation Framework* do not adequately protect its participatory rights as indicated in the *Compensation Decision*. NAN expresses the need to repeatedly and forcefully articulate its desire to be involved in developing the *Draft Compensation Framework*. NAN believes its advocacy has strengthened the provisions relating to remote First Nations. Furthermore, remoteness issues cannot be compartmentalized so NAN's involvement is important throughout all aspects of developing the compensation process.

[102] The AFN, the Caring Society and Canada provided joint submissions in response. While acknowledging the important contributions of NAN, the COO and the Commission, they oppose the amendment. They argue section 1.2 ensures NAN's participatory rights are fully respected because it stipulates that the *Draft Compensation Framework* is consistent with the Tribunal's orders and is unable to derogate from them. The parties note that section 13.2 provides that NAN will be consulted as appropriate "in keeping with the scope of their status ... in this proceeding" whereas NAN's amendment would grant it participatory rights that exceed what it was granted by the Tribunal.

C. Analysis

[103] The Panel agrees with the NAN that remoteness issues cannot be compartmentalized and acknowledges that NAN's contribution to these proceedings has been meaningful. The Panel is also convinced that the NAN's participation in this compensation process has strengthened the provisions relating to remote First Nations. Remoteness issues have always been present in this case and have a considerable impact on service delivery. The Panel understands this and appreciates the NAN's expertise on these issues. However, the Panel does not view section 13.2 of the *Draft Compensation Framework* as infringing on the NAN's participatory rights or at odds with the compensation ruling. The provision provides for the NAN to be consulted "as appropriate" which is a reasonable approach in order to move forward efficiently. The Panel understands the NAN's concern as section 13.2 provides a discretion to the AFN, the Caring Society and Canada to decide what is appropriate in order to reach out for consultation as opposed to reiterating

that the NAN ”should” be consulted, as provided for in the ruling. The Panel reiterates that the AFN, the Caring Society and Canada should consult with the NAN, the COO and the Commission on all important issues that concern them. Moreover, the Framework is intended to be consistent with the Tribunal’s Compensation Entitlement Order. Where there are discrepancies between this Framework and the Compensation Entitlement Order, or such further orders from the Tribunal as may be applicable, those orders will prevail and remain binding (see section 1.2 of the *Draft Compensation Framework*). The Panel believes this section is clear and protects the NAN’s participatory rights in this process.

[104] Furthermore, as mentioned in the December 14, 2020 decision letter, nothing in any of the Tribunal’s orders is intended to infringe on the inherent rights of self-determination and self-governance of First Nations in Canada. Canada has obligations to meaningfully consult with First Nations on all matters concerning them regardless of whether or not they are part of these proceedings.

IV. Jordan’s Principle Discrimination Eligibility Timeframe

A. Context

[105] The Tribunal addressed the period of discriminatory application of Jordan’s Principle for which compensation would be ordered in the *Compensation Decision*. Subsequently, in 2020 CHRT 7, the Tribunal realized that there were additional issues relating to the timeframe for which compensation was ordered. While the Tribunal addressed the issue of First Nations in care as of January 1, 2006 who were apprehended earlier, the Tribunal realized there were similar issues with respect to First Nations children awaiting Jordan’s Principle services as of December 12, 2007 or who were otherwise affected by discriminatory treatment as of that date. The Tribunal accordingly requested additional submissions on this issue (2020 CHRT 7, paras. 152-155). After receiving the parties’ submissions, the Tribunal confirmed the order from the *Compensation Decision* in 2020 CHRT 15 at paras. 7-11.

[106] Paragraphs 250 to 257 of the *Compensation Decision* set out entitlement to compensation for discrimination related to Jordan’s Principle:

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's [*Merit*] *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home and placed in care in order to access services and for each First Nations child who was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's [*Merit*] *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations parent or grandparent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grandparent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal,

between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nations child, parent or grandparent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a child from a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware of the discriminatory practices of its child welfare program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nations child and parent or grandparent identified in the orders above.

[254] Canada is ordered to pay $20,000 to each First Nations child and parent or grandparent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long-term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grandparent recognizes that some children may not have parents and were in the care of their grandparents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grandparent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grandparents are caring for the child, both grandparents are entitled to compensation as described above.

[256] For clarity, parents or grandparents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

> [257] A parent or grandparent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

[107] The Tribunal directed that the parties consult to determine how to identify First Nations children for the purpose of the compensation process (*Compensation Decision* Order, para. 269). The parties were unable to agree and requested further guidance from the Tribunal. The Tribunal provided the requested guidance on how to construct eligibility criteria in 2020 CHRT 20 and finally in 2020 CHRT 36, a consent order to which all parties participated and agreed to including the NAN. As noted earlier, this decision only addresses Jordan's Principle eligibility and does not define First Nations identity.

[108] Canada, the Caring Society and the AFN added Section 4.2.5 and its subsections to the *Draft Compensation Framework* in response to the Tribunal's guidance in 2020 CHRT 20. Those provisions are the following:

> 4.2.5. **"First Nations child"** means a child who:
>
> a) was registered or eligible to be registered under the *Indian Act;*
> b) had one parent/guardian who is registered or eligible to be registered under the *Indian Act*;
> c) was recognized by their Nation for the purposes of Jordan's Principle; or
> d) was ordinarily resident on reserve, or in a community with a self-government agreement.
>
> 4.2.5.1 Children referred to in section 4.2.5(d) (ordinarily resident on reserve or in a community with a self-government agreement ("First Nations community")) who do not meet any of the eligibility criteria in section 4.2.5(a) to (c) will only qualify for compensation if they had a **meaningful connection** to the First Nations community. The factors to be considered and carefully balanced include (without any single factor being determinative):
>
> a) Whether the child was born in a First Nations community or whose parents were residing in a First Nations community at the time of birth;
> b) How long the child has lived in a First Nations community;
> c) Whether the child's residence in a First Nations community was continuous;
> d) Whether the child was eligible to receive services and supports from the First Nation community while residing there

> (e.g. school, health services, social housing, bearing in mind that there may have been inadequate or non-existent services in the First Nations community at the time); and
> e) The extent of the connection of the child's parents and/or other caregivers to the First Nation community, excluding those non-status individuals working on a reserve (i.e., RCMP, teachers, medical professionals, and social workers)
>
> 4.2.5.2 The timeframe for children referred to in section 4.2.5(b) to (d) above are eligible for compensation in relation to denials, gaps and unreasonable delays with respect to essential services is January 26, 2016 to November 2, 2017.
>
> 4.2.5.3 Children referred to in section 4.2.5(b) to (d) as well as their parents (or caregiving grandparents) are eligible for compensation in the amount of $20,000 for pain and suffering pursuant to s. 53(2)(e) of the *Canadian Human Rights Act* for pain and suffering in relation to denials, gaps and unreasonable delays with respect to essential services, but are not eligible for compensation under s. 53(3) of the *Canadian Human Rights Act* for wilful and reckless discrimination.

B. Position of the Parties

[109] Canada, the AFN and the Caring Society provided joint initial submissions in support of the proposed provisions. They explain that section 4.2.5.1 ensures that any child without *Indian Act* status living in a First Nations community who is not recognized by their community for the purposes of Jordan's Principle but has a meaningful connection to the community is eligible for compensation. Section 4.2.5.2 defines the timeframe for compensation. The process follows the same end-date of November 2, 2017 established in the *Compensation Decision* while January 26, 2016 was selected as the start date based on the Tribunal's finding that "Jordan's Principle is meant to apply to all First Nations children" (*Merit Decision* at para. 382) and order that Canada "cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle" (*Merit Decision* at para. 481). The submission contends that the date of the *Merit Decision* constitutes a clear break from the past in accordance with *Canada (Attorney General) v Hislop*, 2007 SCC 10 at paras. 81-108 for the purpose of the children identified in sections 4.2.5(b) to (d). Section 4.2.5.3 reflects the Tribunal's finding in 2020 CHRT 20 at paragraph 115 that

> it would be unfair to make a finding of non-compliance of the Tribunal's orders against Canada given that while the Tribunal did not use the *Indian Act* registration provisions as an eligibility criteria and did not limit Jordan's Principle to children on reserve, it did not provide a definition of who is a First Nations child eligible under its Jordan's Principle orders.

[110] NAN opposes section 4.2.5.2 of the *Draft Compensation Framework's* restriction of the timeframe of discrimination for which First Nations children who are not eligible for *Indian Act* status are entitled to compensation and section 4.2.5.3's restriction of these children's eligibility for compensation for wilful and reckless discrimination under section 53(3) of the *CHRA*. NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries. NAN relies on its earlier submissions from March 20, 2019 on identifying First Nations children for the purpose of Jordan's Principle. NAN argues that it was always of the view that Jordan's Principle applied to all First Nations children and that Canada should have been of this view as well. NAN relies on evidence cited in *Daniels v. Canada*, 2013 FC 6 to demonstrate Canada's knowledge. Further, the treaty relationships, which Canada recognizes, do not allow Canada to unilaterally determine First Nations identity. Further, NAN does not find it persuasive for Canada to argue that Canada believed a provision designed to prevent jurisdictional gaps in services for First Nations children only applied to First Nations children eligible for *Indian Act* status. Accordingly, the *Merit Decision* cannot represent a clear break from the past as contemplated in *Hislop*. NAN argues that Canada's exclusion of First Nations children without *Indian Act* status was unreasonable according to the criteria established in *Hislop*, para. 107. In addition, NAN argues the different timeframes for which beneficiaries are entitled to compensation will complicate the process.

[111] Canada, the AFN and the Caring Society submitted a joint response opposing NAN's request to remove sections 4.2.5.2 and 4.2.5.3 from the *Draft Compensation Framework*. They note that the provisions were not drafted with the intent to deny compensation to any eligible beneficiaries and that, to the extent of any inconsistency with the Tribunal's orders, section 1.2 ensures the Tribunal's orders take precedence. They argue that while NAN would prefer an earlier start date for compensation than that provided in section 4.2.5.2, the issue has already been litigated and should not be reconsidered. Canada, the AFN and the Caring Society considered it unreasonable to award damages for wilful and reckless conduct while the eligibility criteria for Jordan's Principle were unclear. They submit that while

sections 4.2.5.2 and 4.2.5.3 do not precisely mirror specific language in the Tribunal's orders, any potential beneficiary who disagrees with the provisions will have an opportunity to contest them.

C. Analysis

[112] The Panel generally agrees with the merit of the NAN's additional submissions. Moreover, the Panel notes the NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries.

[113] However, as mentioned above, the eligibility for compensation under Jordan's Principle orders have already been argued and answered by this Tribunal. Furthermore, the Panel finds the joint response from the AFN, the Caring Society and Canada referred to in para. 111 above to be acceptable especially in light of sections 1.2 and 9.6 of the *Draft Compensation Framework*.

V. Retention of Jurisdiction and Tribunal's Role

A. Context

[114] Since the Tribunal issued the *Merit Decision*, the Tribunal has consistently retained jurisdiction to address the various remedial issues in this case. As noted by the Tribunal in its 2016 CHRT 10, the remedial process is complex with far-reaching consequences. The Tribunal structured the remedial process to implement a practical, meaningful and effective remedial process in accordance with the *CHRA*. In doing so, the Tribunal committed to first address immediate reforms to the FNCFS Program and the *1965 Agreement* while longer term program reform would be addressed subsequently. The Tribunal also retained jurisdiction to address requests for financial compensation for victims of the discriminatory practice. This ruling is part of the financial compensation process for which the Tribunal has continuously retained jurisdiction throughout its various rulings

[115] In its submissions that led to the *Compensation Decision*, the AFN requested that the distribution of compensation to victims be managed by an independent body. The AFN argued that this process would provide for the efficient and expeditious compensation of

victims (*Compensation Decision*, paras. 39-44). The Tribunal agreed that this approach was appropriate and the parties adopted it into the *Draft Compensation Framework* at section 9.

[116] Within the independent compensation process proposed in the *Draft Compensation Framework*, section 9.6 contemplates review of an individual compensation decision by the Tribunal:

> 9.6. Potential beneficiaries denied compensation can request the second-level review committee to reconsider the decision if new information that is relevant to the decision is provided, or appeal to an appeals body composed of individuals agreed to by the Parties and hosted by the Central Administrator. The appeals body will be non-political and independent of the federal public service. **The Parties agree that decisions of the appeals body may be subject to further review by the Tribunal.** The reconsideration and appeals process will be fully articulated in the Guide.
>
> (emphasis added)

[117] The *Draft Compensation Framework* does not provide any additional guidance in terms of what is contemplated by "further review by the Tribunal".

[118] The Panel, by letter dated October 20, 2020, requested submissions from the Commission on the Tribunal's authority to retain jurisdiction in accordance with the provisions of section 9.6 of the *Draft Compensation Framework*. The Panel welcomed any comments from other parties on this matter.

B. Commission's Submissions

[119] The Commission responded to the Panel's letter of October 20, 2020 requesting submissions on this issue. The other parties either agreed with the Commission's submissions or did not address this issue.

[120] The Commission argues that the *Draft Compensation Framework*, including the detailed appeals process and the involvement of third party adjudicators, is consistent with the purpose of the *CHRA* and similar to the approach taken in previous cases.

[121] The Commission frames the Tribunal's appellate role as part of the Tribunal's retained jurisdiction. The retained jurisdiction itself is part of the broad discretion section 53

of the *CHRA* provides to fashion remedies. It allows the Tribunal to direct the parties to attempt to implement a remedy while retaining the ability to step in if the parties fail to do so.

[122] The proposed structure of the Tribunal's supervision is analogous to prior cases such as *Grant v. Manitoba Telecom Services Inc*, 2012 CHRT 20; *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (CHRT) and *Walden et al. v. Attorney General of Canada*, Consent Order dated July 31, 2012. In all those cases, the Tribunal retained jurisdiction to decide the matter in the event that the parties were unable to agree. That is no different from the current case where the *Draft Compensation Framework* provides for procedures through which the parties will attempt to reach an agreement and, if they are unable to do so, the Tribunal has jurisdiction to determine any outstanding disputes. In particular, the Tribunal in *Walden* had and used its jurisdiction to determine requests brought by non-complainant individuals (*Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 and 2018 CHRT 20). The Commission does not see any legal distinction between *Walden* where the initial attempt at an agreement was between the government and the non-complainant and the *Draft Compensation Framework* that provides that an independent Claims Administrator will attempt to facilitate agreement, including through an appeals process.

[123] The Commission acknowledges that the Tribunal's retained jurisdiction may be called upon for approximately three and a half years after the compensation process is initiated. The Commission indicates that there is no statutory or case law limit to the length of the Tribunal's retained jurisdiction.

C. Analysis

[124] The Panel agrees with the Commission's characterization of the Tribunal's supervisory role as part of the Tribunal's retained jurisdiction. The retained jurisdiction itself is part of the broad discretion s. 53 of the *CHRA* provides to fashion effective remedies. It allows the Tribunal to direct the parties to attempt to implement a remedy while retaining the ability to step in if the parties fail to do so. The Panel in this case has exercised this authority on a number of occasions and has provided extensive reasons that were never challenged

in this case. The Panel relies on its previous rulings and will not echo them all here. As an example, in 2016, the Panel wrote:

> Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33),
>
> (see 2016 CHRT 10, at para. 36 and further analysis at paras. 12-18).

[125] Later in 2017, the Panel provided additional guidance:

> (…) Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the [*Merit*] *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the [*Merit*] *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.
>
> As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)*, (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the [*Merit*] *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the [*Merit*] *Decision.*
>
> (2017 CHRT 14, at paras. 31-32).

[126] In 2018, the Panel rendered an important decision that led to a Consultation Protocol signed by Canadian Ministers and the parties including the National Chief of the AFN. In this protocol, Canada fully accepted to implement the Tribunal's 2018 CHRT 4 ruling and previous rulings. Of note, the Panel relying on its previous rulings and consistent with its approach to remedies since the *Merit Decision* stated as follows:

> Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question:
>
> Despite occasional disagreements over the appropriate means of redress, the case law of this Court, (…), stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights (…) Thus, in the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*. (see at para. 26).
>
> (see 2018 CHRT 4, at. paras. 51-52).
>
> **As stated above, the *CHRA*'s objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.**
>
> (2018 CHRT 4, at para. 165).

[127] Section 9.6 of the *Draft Compensation Framework* reflects, but does not create, the Tribunal's authority to review decisions of the appeals body. Rather, the Tribunal's authority appropriately flows from its retained jurisdiction. This arrangement appropriately reflects the value in providing the parties an opportunity to resolve aspects of the dispute themselves while confirming the Tribunal's ultimate responsibility to ensure that the inquiry before the Tribunal is resolved in accordance with the provisions of the *CHRA*.

[128] Determining whether an individual complainant is entitled to compensation under the *CHRA* and, if so, how much compensation is a core aspect of determining a complaint before the Tribunal. That remains true in the unique circumstances of this case where the complaint was brought by the Caring Society and the AFN on behalf of a group of victims who were not identified by name (*CHRA*, s. 40(2)).

[129] The Tribunal has provided a number of decisions and rulings directly addressing the victims' entitlement to compensation for discriminatory conduct. Most notably, the *Merit Decision* found that Canada's programs and funding discriminated against First Nations

children and amounted to discriminatory conduct. In the *Compensation Decision*, the Tribunal found that the victims on whose behalf the complaint was brought were entitled to compensation. The Tribunal addressed the quantum of compensation and considered some general eligibility parameters such as which classes of family members were entitled to compensation. The Tribunal also recognized the value in directing the parties to negotiate further aspects of the compensation process. The Tribunal provided further guidance in subsequent rulings. In particular, the Tribunal addressed in 2020 CHRT 7 issues of the age at which First Nations child victims would be eligible to receive compensation funds, eligibility for compensation of children apprehended into care prior to January 1, 2006 but who remained in care as of that date, and compensation to the estates of deceased victims. In 2020 CHRT 15, the Tribunal addressed disputes between the parties relating to compensation for First Nation children living off-reserve, challenges specific to victims living in remote communities, the scope of family caregivers entitled to compensation, and definitions for terms relating to Jordan's Principle. In 2020 CHRT 20, the Tribunal assisted the parties in developing mechanisms to identify eligibility criteria for Jordan's Principle as it related to First Nations identity. Consistent with the principles of reconciliation and First Nations right to self-determination, the Tribunal preferred to provide the parties guidance in their discussions and avoid defining who is a First Nations child for eligibility purposes under Jordan's Principle.

[130] Consistently throughout its prior decisions and rulings, the Tribunal has resolved contested issues and encouraged the parties to negotiate issues on which they are able to make progress. Section 9.6 of the *Draft Compensation Framework* further reflects the Tribunal encouraging the parties to reach a negotiated settlement while retaining jurisdiction in the event negotiation is unsuccessful. The overall structure of the *CHRA* strongly encourages parties to resolve disputes through negotiation and the importance of negotiation is heightened in this case. However, there is always a possibility that negotiation is unsuccessful. The Tribunal is obliged to retain jurisdiction in order to resolve a dispute that negotiation fails to resolve. This is consistent with the Tribunal's approach in the *Grant, Public Service of Canada,* and *Walden* cases submitted by the Commission in which the Tribunal provided directions and a framework for negotiations but retained jurisdiction in the event that negotiations failed. It is also consistent with cases from other tribunals such as

the case of *Alberta (Labour Relations Board) v. International Woodworkers of America, Local 1-207*, 1989 ABCA 7 where, at paragraph 16, the court explained that it was appropriate for the Board to direct the parties to negotiate while the Board retained jurisdiction to impose a remedy if the parties could not agree and it was even acceptable for the Board to suggest that the parties engage third-party arbitration as part of their attempt to reach a settlement despite the fact that the Board did not have jurisdiction to order binding arbitration. The provision in section 9.6 that the Tribunal may review decisions of the appeals body simply reflects that, as a consequence of the Tribunal's retained jurisdiction, it is able to provide further direction or impose a remedy in the event that the parties, through the Central Administrator and the appeals body, are unable to agree with a potential beneficiary on that individual's entitlement to compensation. Section 9.6, and the parties' agreement, is not the source of the Tribunal's authority in this section.

[131] The remaining provisions in section 9, including aspects of section 9.6 not related to the Tribunal's jurisdiction, are a manifestation of the parties negotiating compensation with individual beneficiaries in accordance with the direction provided in the Tribunal's orders.

[132] In this particular case, the large volume of anticipated individual claims for compensation in this case would make it difficult, if not impossible, for the Tribunal to expeditiously adjudicate each claim. The parties would no doubt face similar challenges if they sought to review and negotiate each of the individual requests for compensation themselves. However, section 9 reflects the parties delegating their ability to negotiate individual beneficiary's entitlement to compensation to the Central Administrator who is capable of implementing a more expeditious process. While the merits of the independent process are obvious, the key observation is that the Central Administrator's authority comes from the parties' assignment of their ability to negotiate in order to resolve disputes in a human rights complaint.

[133] While providing agency for the parties to negotiate is important, the Tribunal is ultimately responsible for ensuring the *CHRA* is upheld. Accordingly the Tribunal may, in rare cases, decline to adopt a position negotiated by the parties (e.g. *Taylor (on behalf of Kevin Taylor) v. Aboriginal Affairs and Northern Development Canada and Health Canada*,

2020 CHRT 10). Section 9.6 reflects that the Tribunal may review a decision of the appeals body regardless of whether the parties and the potential beneficiary agree with the outcome.

[134] In conclusion, section 9.6 reflects two different sources of authority. The provision relating to the Tribunal's ability to review decisions of the appeals body does not create the Tribunal's authority. Rather, it appropriately reflects the Tribunal's retained jurisdiction. In contrast, the Central Administrator's authority is created in section 9. This authority comes from the parties' ability to negotiate aspects of a human rights complaint.

D. Conclusion

[135] The Tribunal retains jurisdiction on all its compensation orders including the approval and implementation of the Compensation Process. The Tribunal's retention of jurisdiction in relation to the compensation issue does not affect the Tribunal's retained jurisdiction on any other aspects of the case for which the Panel continues to retain jurisdiction.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 11, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: February 11, 2021

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Julie McGregor and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Max Binnie, Kelly Peck and Meg Jones , counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer, Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 11

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 41
Date: December 20, 2022
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Introduction

[1] The Panel congratulates the AFN and Canada for making important steps forward towards reconciliation and for their collaborative work on the Final Settlement Agreement on compensation for the class members in the class action (FSA). The FSA is outstanding in many ways, it promises prompt payment, it is a First Nations controlled distribution of funds, and it allows compensation in excess of what is permitted under the *CHRA* for many victims/survivors. The FSA aims to compensate a larger number of victims/survivors going back to 1991. The Panel wants to make clear that it recognizes First Nations inherent rights of self-government and the importance of First Nations making decisions that concern them. This should always be encouraged. The Panel believes this was the approach intended in the FSA which was First Nations-led.

II. Context

[2] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of

children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

[3] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

> Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the Charter, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

[6] The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

[7] The Tribunal encouraged the parties for years to resolve compensation issues.

[8] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

[9] The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make

challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Panel who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

[10] Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights. The same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions that are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the *CHRA* regime and the Tribunal's orders.

[11] In May 2022, the AFN and Canada advised the Tribunal that they needed a hearing in June to present the FSA. The Tribunal set aside all summer to deal with the matter expeditiously and to have sufficient time to properly consider over 3000 pages of documents but the AFN and Canada advised that class counsel were not yet ready to sign the FSA. The FSA was finally signed on July 4, 2022, and announced publicly but was only presented to the Tribunal on July 22, 2022. The motion to address the FSA was heard in September to afford fairness to all parties. The Panel agrees the victims/survivors have been waiting

long enough and emphasizes that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the *Compensation Decision* in 2019.

[12] The Panel appreciates the parties' work to prepare for this hearing on a short-time frame and the submissions they provided both in writing before the hearing and at the hearing. There were a few issues on which the Panel had outstanding questions after the hearing. The Panel Chair requested that the parties address these outstanding questions. Once again, the Panel thanks the parties for responding to these questions promptly.

[13] The Panel emphasizes that it acknowledges First Nations inherent rights to self-determination and self-governance. The Panel recognizes the that the Canadian legal system views this motion as balancing individual and collective rights, while First Nations may frame the dialogue around responsibilities. The Tribunal emphasizes that First Nations rights holders are best placed to make decisions for their own citizens in or outside the courts. The Tribunal stresses the important fact that First Nations are free to make agreements concerning their citizens. The Tribunal understands the difficult choices made by the AFN and why the AFN has made them. First Nations had to work with $20 billion when they were asking much more for all cases.

III. Summary of the Parties' Positions

A. AFN and Canada

(i) Initial Submissions

[14] On July 22, 2022, the AFN and Canada submitted a joint notice of motion and supporting materials.

[15] The AFN and Canada requested a declaration that the Final Settlement Agreement (FSA) fully satisfies the terms of the Panel's *Compensation Decision*, related compensation orders and the Compensation Framework. In the alternative, the AFN and Canada request the Tribunal to amend the various compensation orders and the Compensation Framework to conform to the FSA. In any event, the Tribunal's declaration or amendments would be conditional on the Federal Court approving the FSA.

[16] The AFN has the support of the Attorney General of Canada and the representative plaintiffs of the class actions before the Federal Court.

(a) Context

[17] The AFN outlines the context that led to this motion. It explains how Canada sought to engage in negotiations to provide compensation for children covered by the class action proceedings and the CHRT proceedings through a global compensation settlement. Simultaneously, Canada engaged in negotiations on long-term reform of the First Nations Child and Family Services Program (FNCFS Program) and Jordan's Principle. The FSA provides $20 billion in compensation to survivors.

[18] The AFN identifies its history of trying to address the discrimination in the FNCFS Program, dating back to 1998 and involving reports such as the National Policy Review and the Wen:de reports.

[19] The AFN indicates that it was the only party in these CHRT proceedings to advance a claim for individual compensation for children, parents and siblings affected by Canada's discrimination. The Tribunal ultimately awarded the maximum compensation available under the *CHRA* to affected First Nations children and caregiving parents and grandparents. This compensation was for children removed from their homes, families and communities and those who experienced a delay, denial or gap in the delivery of an essential service. The AFN notes that the Tribunal retained jurisdiction to address issues that arose in the compensation process. Furthermore, the Tribunal sought to promote a dialogic approach with discussions and negotiations between the parties. The AFN explains how the parties engaged in subsequent discussions and also came back to the Tribunal for further rulings on compensation. The Tribunal retained jurisdiction on all its compensation rulings, including retaining jurisdiction over the Compensation Framework.

[20] The AFN notes that the compensation decisions were upheld by the Federal Court on judicial review. During those arguments, the AFN and Caring Society argued that Canada should pay compensation to every child affected by the FNCFS Program that was taken into out-of-home care and to children affected by Canada's narrow interpretation of Jordan's

Principle. Compensation should be paid to both children and their parents or grandparents. The AFN highlights the comments in the Federal Court decision encouraging the parties to engage in good faith discussions to achieve a fair and just settlement.

[21] The AFN describes the class action suits brought in the Federal Court. The class actions provide compensation for victims of Canada's discrimination dating back to 1991. The classes of victims eligible for compensation under the class actions drew on the victims identified in the Compensation decision. It establishes six classes of victims:

A) Removed child class: First Nations children removed from their homes between 1991 and 2022 as minors while they or one of their parents was ordinarily resident on reserve.

B) Removed child family class: Parents, grandparents or siblings of members of the removed child class.

C) Jordan's Principle class: All First Nations minors living in Canada who between 2007 and 2017 had a confirmed need for an essential service and faced a denial, delay or service gap with respect to that needed essential service.

D) Trout child class: Similar to the Jordan's Principle class, but covering First Nations children between 1991 and 2007.

E) Jordan's Principle family class: Parents, grandparents or siblings of members of the Jordan's Principle class.

F) Trout family class: Parents, grandparents or siblings of members of the Trout child class.

[22] The AFN indicates its estimates on the size of each class. The Removed child class is estimated at 115,000 members. The Removed child family class is estimated to have 1.5 caregiving parents or grandparents eligible for compensation for each child, with some caregivers having multiple removed children. The other classes are harder to estimate. The Jordan's Principle class is estimated to be between 58,385 and 69,728 members. The Trout child class is estimated at 104,000. There is no estimate for the Jordan's Principle and Trout family class sizes.

[23] The AFN recounts the history of the negotiations that resulted in the FSA. Discussions first occurred through a mediator as part of the Federal Court process relating to the class actions. In addition to the parties to the class actions, the Caring Society

participated in these mediations. Following this, negotiations occurred under the supervision of the Honourable Murray Sinclair. These negotiations primarily involved the parties to the class actions, with some consultations with the Caring Society and other parties before the Tribunal. These negotiations led to an Agreement-in-Principle.

[24] The Agreement-in-Principle provided $20 billion to release Canada of all compensation claims under the Tribunal proceedings and class actions. Any unused compensation funds would not revert back to Canada. The parties acknowledged there was uncertainty on the number of victims eligible for compensation. The design of the distribution of the funds was up to the class action plaintiffs. The Agreement-in-Principle also addressed the opt-out period, the fact that the orders would satisfy the Tribunal compensation process, the tax treatment of compensation, notice, legal fees and a request for a public apology. The parties used the Agreement-in-Principle as the basis to develop the FSA.

[25] The AFN indicates that class counsel and the AFN had the following objectives when developing the FSA:

A) maintain and increase the awards under the Tribunal's Compensation Decision to the greatest extent possible;

B) ensure proportionality in compensation based on objective factors;

C) where compromises are required, compensation should favour children;

D) a trauma informed and culturally sensitive process;

E) no obligation for survivors to undergo an interview or cross-examination to receive compensation;

F) a claims process that is easy and simple enough not to require professional assistance to get compensation;

G) provide support to survivors through the compensation process; and

H) the entire settlement fund amounts go to survivors without deductions for counsel fees or payments to third parties.

(b) FSA Terms

[26] The AFN summarizes the terms of the FSA.

[27] The preamble codifies the objectives of the FSA. This includes administering the funds in an expeditious, cost-effective, user-friendly, culturally sensitive and trauma-informed manner. Overall, the objectives aim to ensure survivors are well supported in the process and do not experience barriers and re-traumatization.

[28] The $20 billion in settlement funds are to be paid into trust once all possibilities of appeal from the settlement order have been exhausted.

[29] The AFN summarizes the classes covered by the FSA as follows:

A) Removed child class: A First Nations individual who

   i. while under the age of majority;

   ii. while they or at least one of their caregivers were ordinarily resident on reserve or living in the Yukon;

   iii. were removed from their home by child welfare authorities or voluntarily placed into care between April 1, 1991 and March 31, 2022;

   iv. whose placement was funded by ISC.

B) Removed child family class: All brothers, sisters, mothers, fathers, grandmothers and grandfathers of a member of the removed child class at the time of removal.

C) Jordan's Principle class: First Nations individuals who, between December 12, 2007 and November 2, 2017, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on ground including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

D) Jordan's Principle family class: All brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Jordan's Principle Class at the time of the delay, denial or service gap.

E) Trout child class: First Nations individuals who, between April 1, 1991 and December 11, 2007, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on grounds including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

F) Trout family class: All brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Trout Child Class at the time of the delay, denial or service gap.

[30] First Nations individuals includes individuals registered pursuant to the *Indian Act*, those entitled to be registered under s. 6(1) or 6(2) of the *Indian Act* as it read on February 11, 2022, and those included on Band Membership lists and who met the Band Membership requirements under s. 10-12 of the *Indian Act* by February 11, 2022. For purposes of the Jordan's Principle class, it also includes individuals recognized by their First Nation by February 11, 2022.

[31] The AFN estimates that $7.25 billion will be used to compensate the removed child class, $5.75 billion for the removed child family class, $3 billion for the Jordan's Principle class, $2 billion to the Trout child class and $2 billion for the Jordan's Principle and Trout family classes.

[32] The AFN indicates that the parties will recommend an administrator to be appointed by the court. The administrator will be responsible for developing processes to compensate individual claimants and ensuring the funds flow in a trauma-informed manner. The administrator will be responsible for ensuring appropriate standards are maintained in how the funds are distributed to beneficiaries. This is consistent with the objectives of the claims process, that aims to minimize the administrative burden on survivors. The administrator will provide regular reports, which will assist a First Nations led Settlement Implementation Committee and ultimately the Federal Court in overseeing the process and addressing any systemic issues that arise.

[33] The AFN identifies that the FSA will have a comprehensive plan to provide notice to beneficiaries. There will be an opt-out period. Beneficiaries will have three years to make a claim once they reach the age of majority, with extensions possible for personal circumstances.

[34] A Cy-près fund will benefit beneficiaries who do not receive direct compensation. The fund will have an endowment of $50 million and support activities such as family reunification, access to cultural activities, access to transitional supports and facilitating access to services for Jordan's Principle beneficiaries who may lose access to services upon attaining the age of majority.

[35] The AFN highlights that the full $20 billion in compensation funds will benefit survivors because Canada has agreed to pay the costs of administering the settlement and counsel fees separately. In addition, the $20 billion will be invested and any interest will also benefit survivors.

[36] The AFN notes that Canada will make best efforts to ensure that the benefits are not taxable income and do not affect federal, provincial or territorial social assistance benefits.

[37] The AFN explains that the FSA provides wellness supports for beneficiaries. These include service coordination, bolstering the existing network of health and cultural supports, access to mental health counselling, and access to a youth specific support line.

[38] The AFN explains the process for compensating the estates of deceased children who are entitled to compensation. It also indicates that there is a process in place for individuals who lack legal capacity because of a disability.

[39] The FSA contemplates Canada proposing to the Office of the Prime Minister that the Prime Minister make an apology.

[40] The AFN notes that there are some areas where more work is required. These areas include finalizing the Jordan's Principle assessment methodology, approving the plan to give notice to beneficiaries, assembling data in Canada's control, appointing an administrator, and receiving approval of the FSA by the Federal Court.

(c) Arguments

[41] First, the AFN argues that the Tribunal should support the FSA because it has the support of the AFN, Canada and class action counsel. The AFN has their full support in its submissions. The AFN indicates it supports the FSA because it ensures the timely payment of compensation, significantly expands the number of survivors eligible for compensation, and provides that those who suffered the greatest harm will receive the greatest compensation. The AFN views the FSA as the most effective and efficient means of paying out the significant compensation for First Nation victims of Canada's discrimination. The AFN emphasises that it has pushed for individual compensation since the start of the

Tribunal's case and notes that, as the national political governing body for First Nations, it is best positioned to understand the impact of the compensation on First Nations across Canada.

[42] Second, the AFN argues that the Tribunal has the jurisdiction to endorse the FSA. The AFN highlights the broad remedial powers under the *CHRA*. It identifies how the Tribunal has used the broad remedial authority in this case to craft the existing orders in this case, including retaining jurisdiction that provides the Tribunal broad discretion to return to a matter. The AFN relies on the dialogic approach as endorsed by the Federal Court. The AFN views the dialogic approach as encouraging the parties to engage in negotiations and having sufficient flexibility to support the negotiations that occurred in this case. The *CHRA* supports the Tribunal being flexible and innovative in providing human rights remedies.

[43] Given this context of the Tribunal's remedial powers, the AFN argues the Tribunal's retained jurisdiction is sufficiently broad to permit it to consider the FSA as satisfying its compensation orders. The Tribunal has explicitly retained the jurisdiction on remedial issues which provides it jurisdiction to consider the AFN and Canada's proposal to endorse the FSA. The FSA is a product of negotiations as contemplated with the dialogic approach.

[44] Third, the AFN argues that the Tribunal has discretion in the manner in which it evaluates the FSA as satisfying the Tribunal's compensation orders. The AFN submits that there are no precedents directly on point for when the parties successfully negotiated a settlement outside the Tribunal's process that satisfies a compensation order. There are some parallels with the Compensation Framework negotiated by the parties but there are still differences in the circumstances. The AFN accordingly submits the Tribunal should interpret its broad remedial jurisdiction to consider whether the FSA satisfies the Tribunal's compensation orders.

[45] Generally speaking, the AFN contends that the Tribunal should apply a test of whether the FSA reasonably and in a principled manner satisfies the Tribunal's compensation orders and the underlying principle of promoting the rights of survivors. The AFN suggests specific factors that can help make this assessment. These include whether the FSA meets the Tribunal and *CHRA*'s compensation objectives, international human

rights principles, the results of the dialogic process, and reconciliation. The AFN also asks the Tribunal to draw on principles considered by the Federal Court in approving class action settlements compensating First Nations individuals for Canada's historic discrimination. In such circumstances, the Federal Court considers whether the settlement is fair and reasonable and whether it is in the best interests of the class as a whole. This can involve considering the settlement terms and conditions, the likelihood of success or recovery through litigation, the future expense and duration of further litigation, the dynamics of settlement negotiations and positions taken therein, the risks of not unconditionally approving the settlement, and the position of the representative plaintiffs. Of particular significance are the litigation risks of not approving the agreement and the view of the representative plaintiffs.

[46] Fourth, the AFN sets out how the different parts of the FSA align with and build on the Tribunal's compensation orders.

[47] The quantum of compensation is fair, reasonable and principled. The AFN argues it meets or exceeds the objectives of the Tribunal's orders. The total compensation of $20 billion is significant. The amounts payable to individuals will be meaningful and the total compensation is historic and reflects the magnitude of the harms.

[48] The AFN submits that the compensation mechanism is reasonable and takes advantage of experience gained from previous First Nations settlements. The mechanism minimizes re-traumatizing victims. It also prioritizes access to justice, efficiency and expediency. In order to achieve this, the FSA adopts an approach that is modeled on the Indian Residential School Settlement common experience payment. There is a presumption in favour of qualification for compensation with low burdens of proof and evidentiary requirements on survivors. Proportionality in compensation relies on objective factors whenever possible.

[49] The AFN explains that members of the removed child class would receive, at a minimum, the $40,000 in damages ordered by the Tribunal. The FSA expands compensation temporally to cover children affected by Canada's discriminatory funding back to April 1, 1991 when Directive 20-1 came into force. This expands the number of

children eligible for compensation by about 56,000. The AFN argues that the eligibility is also expanded to children who were removed from their home but were not removed from their community because they were placed in ISC funded care within their community. In addition to expanding eligibility, basing eligibility on ISC funded care links compensation to the discriminatory practice that incentivised removals and placements over preventative measures and it facilitates the identification of affected children. The AFN indicates that there is compensation for victims in this category who suffered exceptional harm based on objective proxies of harm such as a child's age and number of years in care. This allows the compensation to exceed the statutory maximum the Tribunal could order. The exact value of these enhancement payments is not yet known, both because the number of beneficiaries is not yet known and the relative weight of different factors is not yet known.

[50] The AFN indicates that compensation for the removed child family class is similarly based on ensuring a minimum payment of $40,000 to eligible beneficiaries. It also expands the eligible beneficiaries as the number of eligible children is increased. The AFN argues that the FSA expands the caregivers eligible for compensation beyond biological parents and grandparents as contemplated in the Tribunal's orders to now include adoptive and step caregivers.

[51] The AFN argues that the FSA expands the scope of eligible beneficiaries with the Trout child class and the Trout family class. These classes expand eligibility for Jordan's Principle to cover the period between 1991 and 2007 both for affected children and caregivers. The FSA will provide up to $20,000 for children who do not have objective aggravating factors and up to $40,000 for those children with objective aggravating factors. Caregivers of children who suffered the highest levels of impact may be entitled to some direct compensation. Including these beneficiaries is significant as their harm predates the recognition of Jordan's Principle.

[52] The AFN supports the establishment of a Cy-près fund that will primarily benefit class members who do not receive direct compensation. It will be endowed with $50 million. This includes siblings of affected children. The benefits of the Cy-près fund are consistent with the Tribunal's concern that this sort of fund be in addition to, rather than instead of, direct compensation.

[53] The AFN contends that the FSA supports the Tribunal's concern that any compensation process minimizes trauma to survivors. This is consistent with the objectives of the Tribunal's compensation orders. It does this both by requiring the administrator to take a trauma-informed approach and requiring the administrator to follow a presumption that claimants are acting in good faith and requiring the administrator to draw all reasonable inferences in favour of claimants. Some further examples include a guarantee that none of the child victims will be required to submit to an interview or examination and the Cy-près fund's objective of providing culturally sensitive and trauma-informed services. The supports during the compensation process include service coordination, bolstering existing health and cultural supports, access to mental health counselling, and enhanced helpline services.

[54] The AFN argues that the supports available to victims under the FSA supports and expands the initiatives contemplated under the Tribunal's compensation orders. The supports that are available are robust. They will also remain available until all beneficiaries have completed the claims process. In addition to the supports aimed at ensuring a culturally sensitive and trauma-informed approach, navigators will be available to help claimants navigate the process. Canada will provide further funding for five years to the AFN to implement First Nations-led supports. The Cy-près fund aims to provide benefits to class members who are not eligible for direct compensation.

[55] The AFN explains that it has a notice plan that aims to ensure every beneficiary will receive notice in order to submit a claim. Individuals who sign up will receive notice when they are eligible to make a claim for compensation.

[56] The AFN indicates that the FSA provides an opt-out period of six-months. Individuals may opt out of the compensation process during that time. If the Tribunal declares that the FSA satisfies its compensation orders, such individuals would not be able to pursue compensation under the Tribunal's orders.

[57] There are a number of further ways in which the FSA mirrors the Tribunal's compensation orders. These include the administrator in charge of distributing compensation, the distribution protocol, Canada funding supports to beneficiaries as they navigate the process, efforts to ensure the compensation is tax-free and does not affect

social assistance benefits, a right for survivors to appeal denials of benefits, and protections to ensure survivors are the ones who benefit from the compensation.

[58] Fifth, the AFN argues that while the FSA seeks alignment with the Tribunal's compensation orders, where there are necessary deviations, they are consistent with the principles underlying the Tribunal's compensation orders. The AFN argues that compromises were required because of the fixed amount of compensation available, the complexities and lack of data for Jordan's Principle and Trout class members, and expanding eligibility back to 1991. Compromises were designed to favour children who suffered substantial impacts.

[59] The AFN indicates there are two points where the removed child family class may deviate from the Tribunal's Compensation Framework. First, caregiving parents and grandparents will receive additional compensation up to $60,000 in the event they had multiple children removed rather than multiples of $40,000. The second change is that if there is an unexpected number of claimants, compensation may be reduced to ensure that all caregiving parent and grandparent victims receive compensation. The maximum compensation of $60,000 similarly ensures there are enough funds to compensate all eligible caregiving parents and grandparents. Further, family class members who are not eligible for direct compensation can still benefit from the Cy-près fund.

[60] The AFN contends that the process for compensating Jordan's Principle victims generally follows the principles identified by the Tribunal. The FSA aims to ensure that children who suffered discrimination and were objectively impacted are compensated through a process that is objective and efficient and the definition of essential services is reasonable. The process focuses on establishing a confirmed need for an essential service that was the subject of a delay, denial or service gap. Those claimants who are most impacted will receive at least $40,000 while those who are less seriously impacted will receive up to $40,000. This accounts for the significant uncertainty in the class size and is expected to result in children who were eligible for Jordan's Principle compensation under the Tribunal's orders receiving at least $40,000. The framework to determine what is an essential service will be developed with the assistance of experts. The starting point is the list of services currently eligible for Jordan's Principle funding. The process is designed to

be flexible so that it can consider services that are essential for a particular child but are not generally essential services. The process does not require interviews or examinations of claimants. There is a recognition that the type of documentation required to support a claim might vary.

[61] The AFN explains that only caregiving parents and grandparents of Jordan's Principle and Trout class children who suffered a significant impact will be eligible for compensation. This reduction in eligibility occurred because the number of caregiving parents and grandparents was unknown. Caregivers who do not receive a direct benefit would nonetheless benefit from the Cy-près fund.

[62] The AFN indicates that the exclusion for caregivers who committed abuse limits the definition of abuse to sexual abuse and serious physical abuse. In particular, it does not include neglect or emotional maltreatment that may qualify as psychological abuse. This limits the need to assess the reason for the child's removal. A caregiver who is denied compensation may challenge the denial but this will not involve the removed child.

[63] The AFN notes that compensation for estates is available to the estates of children and also to family class members who complete an application prior to their death. The FSA contemplates situations where there is no appointed estate executor and cases where beneficiaries are persons with a disability that prevents them from having the legal capacity to manage their own finances.

[64] The AFN acknowledges that a release from liability was not contemplated in the Tribunal's orders but submits that its limited nature, applying only to Canada and not other service providers or governments. The FSA also does not foreclose individuals seeking compensation above the FSA entitlements for personal harm suffered as a result of the child welfare system.

[65] Sixth, the AFN identifies a number of specific factors that support endorsing the FSA. These include international human rights, reconciliation, the dialogic approach, litigation risk, and participation of the representative plaintiffs.

[66] The AFN submits that international human rights law, and in particular the *UNDRIP*, support the FSA. In particular, articles 7 and 8 protect First Nations from the forced removal of their children and forced assimilation. The *United Nations Covenant on the Rights of the Child* recognizes the rights of children. While the Tribunal's orders were an effective means of redress for children affected by discrimination during a certain period, reconciliation measures also provide effective redress.

[67] The AFN views the FSA as promoting the goals of reconciliation. The words and intention of the FSA promote reconciliation. It will recommend an apology from the Prime Minister. The result was a product of negotiations instead of litigation. The FSA furthers the work of the Tribunal's compensation orders. Importantly, this process and the compensation process it will create are First Nations-led. The FSA reflects First Nations knowledge, experience and expertise. The AFN has consistently sought individual compensation, as the FSA achieves. The AFN represents First Nation rights-holders who endorsed the FSA through their representatives.

[68] The AFN argues that the FSA was ultimately the result of the dialogic approach. This is consistent with the Tribunal's desire for the compensation process to be defined by the parties. The AFN indicates that while the dialogue primarily involved the AFN, Canada and Moushoom class counsel, the involvement of the Caring Society and the representative plaintiffs enriched the discussions. These were First Nations lead negotiations. The Caring Society was kept informed at various points in the negotiations.

[69] The AFN contends that the threat of future litigation supports endorsing the FSA. Legal proceedings are fraught with uncertainty and Canada has filed an appeal of the Tribunal's compensation orders with the Federal Court of Appeal. The certainty of the settlement is preferable to proceeding with this continued litigation risk. Even if the class action litigation succeeds, there is no guarantee of receiving greater compensation. The Trout class members are particularly vulnerable if the case were to proceed to litigation, as Jordan's Principle had not yet been recognized. Members of the removed child class who experienced discrimination prior to 2005 are also vulnerable because they are not entitled to compensation under the Tribunal's orders. Even within the Tribunal proceedings, there are significant outstanding issues in the Compensation Framework that the parties have

solved in the FSA. Furthermore, the compensation would start flowing expeditiously under the FSA.

[70] The AFN highlights the representative plaintiffs' support for the FSA. This support is significant, as these individuals have been involved in the process from the outset. They provided their input. They recognize the need for a result that is fair and equitable and recognizes the need to expeditiously compensate survivors in a way that minimizes re-traumatizing victims.

[71] In conclusion, the AFN contends that the FSA satisfies the Tribunal's compensation orders. The $20 billion will effectively implement the Tribunal's orders and result in the expeditious financial compensation of survivors. The compensation quantum and process are designed to restore dignity to victims. It is not an implementation of the Tribunal's compensation decisions but reflects a negotiated settlement based on the same principles. This is the best resolution available for First Nations across Canada. It builds on the work done by the Tribunal.

(ii) Reply Submissions

[72] In its reply submissions, the AFN reiterates the significant quantum of the settlement agreement, both in direct compensation and in terms of program reform. The AFN also reiterates the significant encouragement from both the Tribunal and the Federal Court to engage in negotiations. The AFN contends that the Caring Society misunderstands the FSA and in fact participated in its development. Furthermore, the Caring Society opposed individual compensation to survivors and instead favoured payments into a trust fund. The Commission's technical arguments should also be rejected. The Commission's concern for precedent fails to consider that the FSA is unprecedented in scale and scope. Any individuals entitled to compensation under the Tribunal's orders who might not receive it under the FSA will nonetheless benefit from the Cy-près fund. The FSA was largely supported by First Nations leadership and was a First Nations-led process. Not accepting it will create significant litigation risk, delay and general uncertainty. The settlement funds are at risk if the Tribunal does not approve the FSA.

[73] First, the AFN indicates that it is following the direction from Justice Favel's decision to engage in good faith negotiations. The Federal Court decision should not be read as finding that the Tribunal's compensation orders are final and cannot be revisited.

[74] Second, the AFN submits that the compensation order is not final. The Panel explicitly stated that it retained jurisdiction and welcomed suggestions and clarification on the compensation process, wording, or content of the orders. The FSA clearly addresses the ambiguity of what is meant by children "in care." The AFN disagrees with the Commission's reading of *Hughes v. Elections Canada,* 2010 CHRT 4 and argues that instead demonstrates the latitude available to the Tribunal for remedial orders. The AFN contends that this case is distinguishable from cases about finality cited by the Commission and Caring Society as those cases were in an employment context that lack the complexity and need for reconciliation in the current case. Furthermore, the AFN is not asking the Tribunal to entirely revisit the remedies issues, as there are a number of uncertainties and outstanding issues with the Compensation Framework. The remedies in this case are not yet final. The AFN finds the Caring Society's arguments to include broad categories of beneficiaries as creating uncertainty.

[75] Third, the AFN argues that the Panel is not *functus officio* and that the principle of finality does not require the Tribunal to reject the FSA. The AFN argues that the FSA brings finality to the litigation, while rejecting it creates uncertainty, confusion and continued litigation. Tribunals have greater flexibility to retain jurisdiction than courts do and this is the sort of situation where tribunals should apply that flexibility. First, the lack of appeal rights in the *CHRA* means that the Tribunal should take a less formalistic and more flexible approach to reconsidering decisions. The availability of judicial review is not a right of appeal. The AFN relies on *Merham v Royal Bank of Canada*, 2009 FC 1127 for the proposition that the Tribunal can retain jurisdiction even after a judicial review. Second, the doctrine of finality applies more flexibly when a Tribunal is asked to consider whether a novel course of action complies with its orders. The AFN relies on *Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832*, 1999 CanLII 14235 (MB QB) for the proposition that a tribunal can answer questions about whether a course of action not contemplated at the time of the order complies with its order. None of the parties contemplated the more

advantageous FSA at the time of its compensation orders. The FSA has the overwhelming support of First Nations across the country and there should not be further delays in providing compensation.

[76] Fourth, the AFN contends that the Tribunal's retained jurisdiction enables it to grant the relief sought. The Panel is seized to determine whether the parties have satisfactorily settled the outstanding compensation issues. The Tribunal's continued jurisdiction is not limited to procedural matters. Contrary to the Commission's contention, *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 in fact supports the Tribunal's broad retained jurisdiction. Further, the Caring Society is incorrect that endorsing the FSA would overturn the Tribunal's earlier orders – those would remain as powerful precedents.

[77] Fifth, the AFN disputes that its motion is premature. The significant size of the FSA makes it unrealistic not to have a phased approach. The staged approach in this proceeding was designed to promote consultation with First Nations. The Jordan's Principle compensation in particular is complex, and the phased approach ensures that it can be implemented in trauma-informed and culturally relevant manner. Furthermore, the AFN disagrees that Jordan's Principle compensation remains vague and uncertain. The Federal Court evidence includes the AFN's impact assessment matrix for Jordan's Principle and an expert report. The existing detail on Jordan's Principle compensation represents an evolution and more detail on eligibility for compensation.

[78] Sixth, the AFN contends that the Caring Society second-guesses the terms of the FSA. The AFN argues that the Panel should focus on the benefits of the FSA – the 116,000 removed children who are expected to receive compensation. This expands the scope compared to the Tribunal's original orders. The AFN argues that the Jordan's Principle compensation will entitle children who have suffered physical, developmental, or lasting or permanent harm will receive a minimum of $40,000, with an intention to provide these children more than $40,000. The AFN indicates that the children who may receive less than $40,000 may not have been eligible for compensation under the Tribunal's orders. The AFN believes that the list of essential services, which differs from the list proposed by the Caring Society, is in the best interests of the class.

[79] The AFN also disputes the Caring Society's claim that the Tribunal has not distinguished between biological parents. The AFN relies on 2020 CHRT 15 at paras. 32, 44, and 45 for the proposition that the Tribunal limited compensation to caregivers who were biologically related to affected children. The AFN maintains that expanding the eligible list of caregivers would subject children to more intensive questioning to determine which caregiver could properly receive compensation.

[80] Given that the opt-out provisions from the Tribunal's Compensation Framework have not been finalized, it is impossible to conclude that the FSA does not conform to the Tribunal's opt out provisions.

[81] Seventh, tinkering with the FSA will unwind the careful construction of the agreement. All the provisions of the FSA are interconnected and changing any one provision may jeopardize the $20 billion settlement. The law on approval of class action settlements is clear that the settlement is either approved or rejected as a whole.

[82] Eighth, the AFN was the only party to request individual compensation and is the national representative organisation of First Nations. It is not precluded from seeking a variation of the Tribunal's compensation orders. Through its resolutions from the Chiefs in Assembly, the Tribunal has found that the AFN has the mandate to speak on behalf of affected children. Similarly, the AFN contends that the First Nation interested parties – the Chiefs of Ontario and Nishnawbe Aski Nation – provide their unqualified support for the FSA. The AFN argues that it is best positioned to speak on behalf of the First Nation victims in this case.

B. Canada

[83] Canada did not submit initial submissions in support of the motion and instead relied on the AFN's submissions. Canada did, however, submit reply submissions.

[84] Overall, Canada argues that the FSA is the product of negotiation and that endorsing it supports reconciliation. The Tribunal has the jurisdiction to significantly amend its compensation orders, if necessary, as it did this in 2022 CHRT 8. The support of representatives of First Nation rights holders favours approving the FSA.

[85] More specifically, Canada explains that the Tribunal can modify its earlier orders. The Tribunal has retained jurisdiction and can change a previous decision if new circumstances arise. The issue for the Tribunal is whether the FSA satisfies its previous orders. Some flexibility is required, as it would otherwise be impossible for the parties to negotiate a settlement which differed in any way from the Tribunal's orders. This would undermine the dialogic approach. This approach was endorsed by Justice Favel in the judicial review. Furthermore, the Federal Court's judicial review did not endorse the Tribunal's orders as the sole possible outcome but only as a reasonable outcome that allows space for other orders. The Tribunal's retained jurisdiction does not distinguish between substantive and clerical revisions of previous orders, as demonstrated with the substantive amendments in 2022 CHRT 8. The expressions of the Tribunal's retained jurisdiction to promote dialogue and the quasi-constitutional nature of the *CHRA* provide ample authority for the Tribunal to grant the requested orders. No settlement is perfect as they necessarily involve balancing benefits and compromises. This is not an attempt to undermine the Tribunal but instead an attempt to move forward with parties who represent the First Nations rights holders.

[86] Canada contends that the settlement should be approved because it is fair and reasonable. It does not perfectly match the compensation orders but some flexibility is required. The AFN and Moushoom class counsel have devised a method of compensating claimants proportional to the harm they suffered. The AFN consulted with First Nations leadership and the Caring Society in this process. The FSA extends compensation to cover an additional 15 years and provides some beneficiaries with compensation that will exceed what the Tribunal ordered.

[87] Canada indicates that the Caring Society's argument that the Tribunal's orders covered removed children placed in non-ISC funded placements is a new argument that should not be raised at this late stage in the proceedings. This is an attempt to add a new group of beneficiaries that would significantly alter the Tribunal's existing orders. This group has not been previously raised before the Tribunal so there is no evidence or argument relating to them.

[88] Canada denies that the motion is premature. The phased approach aims to ensure the final approach approved by the Federal Court has broad support from First Nations and

claimants. Individual claimants who are not satisfied by this approach will have the full information they need before choosing whether to opt out.

C. Amnesty International

[89] Amnesty International indicated it would not file submissions on this motion.

D. Chiefs of Ontario

[90] The Chiefs of Ontario (COO) indicated that its leadership council agreed that the FSA was fair, reasonable and for the most part satisfies the Tribunal's compensation orders. The COO clarified it did not accept the FSA ''without qualification'' as described by the AFN.

[91] The COO undertook a consultation process to ensure that the FSA had support throughout the regions and First Nations it represents. While settlements rarely give all parties exactly what they want, the COO ultimately accepted the FSA despite its difficulties and deficiencies. It presents a reasonable outcome that brings finality to the process and compensates survivors without further delays.

E. Nishnawbe Aski Nation

[92] The Nishnawbe Aski Nation (NAN) supports the motion as the FSA substantively satisfies the Tribunal's compensation orders. NAN recognises that the FSA is not perfect but it respects the rights of its citizens to receive meaningful compensation. The FSA provides safeguards to protect survivors in remote communities.

[93] NAN identified concerns that distributing large settlement funds in remote communities can have significant negative consequences for survivors. NAN is pleased that the current process builds on past experiences to address these challenges.

[94] NAN understands that the Tribunal made its awards of $40,000 considering the maximum compensation it could order. NAN also understands Canada would not agree to provide unlimited compensation funds for the FSA. Accordingly, NAN supports the concept of proportionality even if it means certain beneficiaries receive less than $40,000.

[95] Further, NAN supports finality. It recognizes that the parties want finality for the settlement agreement and that there are dispute resolution mechanisms built into the FSA such that the Tribunal's retained jurisdiction of compensation matters would not be necessary.

F. Caring Society

[96] The Caring Society opposes the motion.

[97] The Caring Society emphasises that this case involves children. It is important that the approach to the case recognises the particular circumstances of children and the harms that they suffered. The Tribunal's remedies were tailored to the established evidence of harms. Canada opposed this case throughout. Now, an outside class action would provide more compensation to some victims before the Tribunal but would significantly detract from the Tribunal's awards in other ways and oust the Tribunal's jurisdiction. While the Tribunal retains jurisdiction, the compensation orders themselves are final. The Tribunal must ensure all victims entitled to compensation under its orders receive it. The uncertainty on Jordan's Principle compensation also makes this motion premature. If the Tribunal nonetheless assesses the merits of the FSA, the Tribunal should still reject the FSA. It does not clearly satisfy the Tribunal's compensation orders.

(i) Facts

[98] The Caring Society provides an overview of pertinent facts, starting from the filing of the complaint to the substance of the FSA.

[99] The AFN and Caring Society filed the complaint in 2007 as a last resort after trying to address the underlying issues through negotiations with Canada. Canada continually obstructed the process. The Tribunal found that Canada retaliated against Dr. Blackstock and separately awarded abuse of process costs against Canada for delaying the process by failing to disclose a large number of highly relevant documents. The Tribunal heard and accepted largely uncontradicted evidence about the harm caused by Canada's discrimination. This evidence demonstrated the harm of both removals under the First

Nations Child and Family Services Program and from the narrow implementation of Jordan's Principle. The Tribunal recognized the suffering First Nations children experienced. The Tribunal found that Canada was aware of the discrimination and refused to act to rectify it.

[100] In terms of compensation, the Caring Society requested $20,000 plus interest for Canada's wilful and reckless conduct for each child affected by Canada's discrimination. The Caring Society requested that these funds be paid into a trust fund. The AFN strongly advocated for the maximum compensation available to be paid to every victim of Canada's discrimination and did not restrict this request to those in ISC-funded care. Canada argued there was insufficient evidence to justify the requested compensation.

[101] The Tribunal ordered $40,000 in compensation to defined categories of child victims and eligible caregiving parents and grandparents. The end date for compensation was still to be determined since the Tribunal found the discrimination was ongoing. The Tribunal emphasized that its remedies were based on the evidence presented. The orders did not make any distinctions between First Nations children placed in ISC-funded care and those in other care arrangements, as it was the removal itself that was the harm. These remedies are based on human rights principles, not tort principles. They apply regardless of the existence of a class action.

[102] The Caring Society reviews the development of the Compensation Framework and presents it as an example of the dialogic framework in action. It involved negotiations between the parties but required many issues to be adjudicated by the Tribunal. This process provided an opportunity for consultations and for the other parties to receive information from Canada. The dialogic approach where the parties could draw on the Tribunal's expertise to address disputes contributed to the success in developing the Compensation Framework. This process was upheld during the judicial review.

[103] The Compensation Framework established key aspects for compensating beneficiaries. It defines a "necessary/unnecessary removal" in s. 4.2.1. The definition focuses on the impact of the removal on the child and not the source of funding. Similarly, the definitions of "essential service," "service gap," and "unreasonable delay" focus on the experience of the child. An "essential service" captures substantive equality for First Nations

children seeking social services and that it is essential because the absence of the service would cause the child to suffer real harm. It would not cover all services eligible for funding under Jordan's Principle. A "service gap" evolved in response to Canada's arguments and requires that the child's need must be confirmed and the service must be recommended by a professional. While some objective confirmation of need was required, Canada was not required to be aware of the need. An "unreasonable delay" was a delay of more than 12 hours for an urgent request and 48 hours for non-urgent requests unless Canada could demonstrate that the delay did not prejudice the affected First Nations child.

[104] On the issue of compensating estates, the Tribunal found that it would be unfair not to compensate estates of victims who had passed away while waiting to receive compensation.

[105] The Caring Society is not a party to the class actions. The Caring Society did, however, participate in some discussions and set out its position that it would not support a settlement that reduced the compensation for affected children below the $40,000 the Tribunal ordered Canada to pay. The Caring Society was not invited to participate in drafting the FSA although it provided some feedback. There was no recourse to an adjudicator on points of disagreement while the FSA was being drafted.

[106] The Caring Society outlines three key departures from the Tribunal's orders and uncertainty about Jordan's Principle.

[107] First and most significantly in the Caring Society's view, the FSA excludes First Nations children removed from their home, family and community and placed into non-ISC funded care. The Caring Society contends that Canada's discriminatory conduct includes underfunding preventive services and least disruptive measures which incentivized children being unnecessarily taken into care. The focus was not on whether the placement was funded by Canada. Some First Nations children were placed in ISC funded care after they were removed, while others were not. In any event, they suffered harm from the removal. While funding actual costs for foster care placements exacerbated the harm, that was not Canada's only discriminatory conduct. Focusing on the funding source is contrary to the Tribunal's focus on the experiences of the affected children.

[108] The FSA disentitles the estates of deceased caregiving parents and grandparents. The Tribunal rejected this position as it would have allowed Canada to benefit from delaying compensation to victims of its discrimination. Excluding this category of beneficiaries is not consistent with the objectives of the *CHRA*.

[109] The FSA differs from the compensation the Tribunal ordered for caregiving parents and grandparents. The Tribunal ordered $40,000 in compensation to a parent or grandparent who was the primary caregiver for a First Nations child eligible for compensation unless the child was removed for reasons of sexual, physical or emotional abuse. The Tribunal made no distinction between biological and adoptive parents.

[110] The FSA does not guarantee the same compensation. The limited pot of funding does not guarantee all eligible caregiving parents and grandparents will receive $40,000 if they had a child removed. For Jordan's Principle parents and caregiving grandparents, only some classes are eligible for compensation. Reducing the compensation some caregiving parents and grandparents are entitled to and eliminating it for others is not in keeping with the human rights approach adopted in this case.

[111] The FSA does not provide certainty that Jordan's Principle and Trout class members will receive comparable compensation. Compensation will be based on a confirmed need for an eligible service. Only First Nations children who experienced a "significant impact" will be guaranteed to receive $40,000. This differs from the Tribunal's approach. As such, the definition of "significant impact" will be significant in determining whether children eligible for compensation under the Tribunal's orders would receive it under the FSA. The term is not currently defined.

[112] The Caring Society contends that the opt-out in the FSA replaces the opt-out in the Compensation Framework and is not clearly adapted to the circumstance where half the victims are still children. The AFN and Canada did not seek the Tribunal's approval for the opt out form despite the fact that it waives rights under both the class action and the Tribunal process. The FSA requires victims to decide if they will opt out of the FSA by February 2023, by which time they may not yet have a full picture of their rights under the FSA. The requirement to opt out of both the Tribunal process and the class action puts victims who

would receive less than $40,000 under the FSA in an untenable position. While this is a moot point if the Tribunal suspends its compensation process in favour of the FSA, it otherwise creates uncertainty.

[113] The release is also broadly worded. It is unclear if Canada would attempt to use it to limit the enforcement of a long-term reform order from the Tribunal.

(ii) Arguments

[114] The Caring Society identifies three issues. First, the Caring Society contends the Tribunal does not have the jurisdiction to modify its previous decisions as requested by the AFN and Canada. Second, the motion is premature given the details that have yet to be established in the FSA. Third, even if the Tribunal can revisit its earlier decisions, it should not approve the FSA.

[115] First, the Caring Society argues that the Tribunal does not have the jurisdiction to modify its previous decisions as requested. Vertical *stare decisis* obliges the Tribunal to follow the Federal Court's judicial review upholding the compensation orders. The Caring Society supports the Tribunal's retained jurisdiction to address outstanding compensation issues. This should not, however, extend to re-adjudicating final decisions. *Chandler v Alberta Association of Architects,* [1989] 2 SCR 848 does not empower a Tribunal to remain seized such that it decides a matter differently, which is what the AFN and Canada are seeking in this motion. Consistency and finality remain important, especially in this case where the Federal Court has decided a judicial review.

[116] The AFN and Canada have failed to specify the amendments they seek. This lack of specificity undermines procedural fairness, the rule of law and the principle of finality. Furthermore, the amendments cannot reduce compensation as parties cannot contract out of human rights obligations. It is contrary to the objectives of the *CHRA* to allow Canada to change venues to avoid human rights legislation by reaching an agreement with only certain parties to the Tribunal case.

[117] While the *CHRA* allows a complaint to be dismissed because it was adequately addressed elsewhere, it does not prevent the Tribunal from awarding compensation on the basis that other proceedings could award compensation.

[118] Second, the Caring Society contends that the motion is premature. The FSA does not provide certainty as to which victims eligible for compensation under the Tribunal's orders will be eligible for compensation. The eligibility for Jordan's Principle claimants is particularly vague, as there is no indication of the threshold required for materiality. Claimants cannot materially assess whether their circumstances will meet the eligibility criteria. There is no public guidance on how a significant impact will be determined, which may affect the quantity of compensation for Jordan's Principle and Trout class claimants. The definition of delay has also not yet been determined.

[119] The Caring Society contends that the eligibility for removed children to receive compensation is premised on a misconception about what triggers the eligibility for compensation. From the Caring Society's perspective, it was always clear that it was the act of removal that triggered eligibility for compensation because that effectively captured the harm from Canada's discriminatory conduct. If there is now a dispute about the meaning of "in care" in the Tribunal's orders, that is appropriately resolved through the dialogic approach and seeking clarification from the Tribunal if required.

[120] The final point of uncertainty is the potential impact of the release on the Tribunal's supervision of long-term reform initiatives.

[121] Third, the Tribunal ought to apply a human rights lens if it considers whether it should endorse the FSA.

[122] In applying the human rights framework, the Tribunal relied on evidence of harm to make its compensation orders. The AFN and Canada should have a corresponding obligation to lead evidence to establish why victims are no longer worthy of the compensation the Tribunal has awarded them.

[123] The Tribunal should apply a human rights lens rather than a class action or tort lens. The Tribunal therefore should not approach this motion as a court approving a class action

settlement. The Federal Court endorsed the Tribunal's dialogic approach. The dialogic approach does not, however, encompass modifying the Tribunal's compensation orders without evidence after they have been upheld on judicial review and over the objections of other parties. The Caring Society submits that it would create a problematic precedent for other cases if the Tribunal were to accept revoking compensation for victims who suffered the worst case of discrimination. Remedial orders from human rights tribunals must be final rather than a bargaining chip. The *CHRA* provides for the Commission to approve human rights settlement agreements but there is no comparable requirement for settlements outside the human rights regime. The Tribunal is the proper forum for resolving human rights claims and allowing another process to invalidate the Tribunal's orders undermines the human rights regime.

[124] This case is particularly significant because the former s. 67 created a presumption for many First Nation individuals that the human rights regime was not able to protect them. This case was instrumental in changing that but modifying the compensation orders could undermine trust in human rights among First Nations communities.

[125] The Tribunal has continuously emphasised the best interests of the First Nations children affected by this case. The Tribunal should continue to apply this lens. The Caring Society submits that the Tribunal process has never drawn compensation distinctions based on the type of placement. Children had no control over their placement once they were removed and who funded it. Furthermore, it does not reflect the reason for the child's removal from their home – namely, that Canada's discriminatory provision of the FNCFS Program meant that they were not adequately supported with the least disruptive measures and experienced the trauma of being removed from their homes.

[126] The Caring Society is concerned that granting the motion would be a dangerous precedent for the human rights regimes. Victims will be vulnerable if human rights damages can be set aside through a civil process. It is unfair to force victims to defend their entitlements against an outside process. It is particularly problematic to accept the federal government negotiating a reduction in the compensation it will pay victims.

G. Commission

[127] The Commission focuses its submissions on administrative law principles. It recognizes that the FSA would result in significant compensation for a large number of individuals if it were to be implemented. The Commission makes no submissions on whether the FSA is a good resolution for its intended beneficiaries.

[128] The Commission submits that the Tribunal has jurisdiction to consider whether the FSA will satisfy its compensation orders. However, the FSA does not satisfy the Tribunal's compensation orders.

[129] In terms of the AFN's alternative relief of amending the Tribunal's orders, the Commission submits that the Tribunal lacks the jurisdiction to substantively amend its compensation orders. The Tribunal's compensation orders are final. The Tribunal is *functus officio*. While tribunals should apply this principle flexibly, none of the exceptions justifying the Tribunal revisiting its earlier rulings applies in this motion. Finality is particularly important in this case given the duration of the case.

[130] The Commission reviews *Attorney General of Canada v. Canadian Human Rights Commission*, 2013 FC 921 (*Berberi*), *Canada (Attorney General) v. Grover*, 1994 CanLII 18487 (FC) and *Hughes v Transport Canada*, 2021 CHRT 34 to identify the sort of situation in which the Tribunal could retain jurisdiction and the limits on that ability.

[131] The Tribunal's retained jurisdiction relates to making additional orders to ensure its compensation orders are effectively implemented. It does not extend to changing the substance of its prior remedial orders. If it is broader, it is to add or specify categories of beneficiaries, not to reduce or narrow beneficiaries.

[132] Canada sought to review the compensation orders as final orders rather than as interim or interlocutory orders. The route to challenge or vary the orders is through judicial review, now at the Federal Court of Appeal. To simultaneously ask the Tribunal to revisit the orders challenges established principles and procedures of administrative law. The Federal Court of Appeal would not have the appropriate record before it if the Tribunal were to substantively vary its orders. There would also be a risk that both the Federal Court of

Appeal and the Tribunal are simultaneously reviewing the orders. If the Tribunal amended its orders first, the Federal Court of Appeal might find that the judicial review was moot, necessitating an entirely new judicial review if there was a desire to challenge the orders. Re-opening the case would also strain the Tribunal's resources as more litigants sought to challenge final Tribunal decisions.

[133] In the event that the Tribunal reconsiders its orders, the Commission contends that the Tribunal should apply a human rights lens based on the *CHRA*. The Tribunal's role under the *CHRA* is to provide redress for victims of a discriminatory practice, which requires examining the FSA to determine whether it provides appropriate compensation to victims based on a human rights lens. The Tribunal must apply principles of fairness and access to justice in balancing the expanded beneficiary list under the FSA with those individuals who will receive less compensation or be denied compensation. The Tribunal's focus needs to be on those individuals covered by its prior orders. The Tribunal should not apply a class actions framework.

H. Post-Hearing Submissions

[134] After the hearing, the Panel Chair requested further submissions on specific questions. The first question sought clarification on whether the parties negotiating the FSA negotiate it on the basis that the Tribunal's orders provided compensation for ISC-funded placements of First Nations children. The second question followed up and on the first and asked if a misapprehension of the scope of the Tribunal's orders affected First Nations' support for the FSA. The third question invited further comments from the parties on the issue of individual versus collective rights that the AFN raised in its reply submissions. These submissions are addressed in the reasons as they arise.

IV. Functus officio and Finality

A. Law on *functus officio* and finality

[135] The Panel has previously reviewed the principles of *functus officio* and finality in 2020 CHRT 7:

[54] Furthermore, the Federal Court in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 80 FTR 256, 28 Admin LR (2d) 231 (F.C.) [*Grover*], a case that this Panel relied on in previous decisions in this case (see for example, 2017 CHRT 14, at para. 32, see also 2018 CHRT 4 at para. 39), an application for judicial review of a Tribunal decision had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. *Grover* is summarized as follows in *Berberi v. Attorney General of Canada*, 2011 CHRT 23 [*Berberi*]:

> [13] …The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the Act does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:
>
> [14] It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in Chandler, supra. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)
>
> [15] Similarly, in *Canada (Attorney General) v. Moore*, 1998 CanLII 9085 (FC), [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal

made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

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

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal Court concluded that subsection 53(2) of the Act empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

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

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

[21] The application of the functus officio principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and change a remedial order, the Federal Court expanded on the reasoning

> in *Grover* and stated that "the Tribunal has broad discretion to return to a matter..." (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation" (*Chandler* at para. 22). This method of analyzing the Tribunal's discretion to return to a matter is consistent with the Federal Court's reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?
>
> [22] The primary focus of the *Act* is to "...identify and eliminate discrimination" (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the *Act* grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, "subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination" (*Grover* at para. 32). The Act does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: "The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy" (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to "...be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose" (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44).
>
> (*Berberi*, at paras. 21-22)

[55] The Panel agrees with the above reasoning outlined in *Berberi* on the retention of jurisdiction over remedial orders to ensure that they are effectively

implemented and has adopted and followed this approach from the *Merit Decision* and onward.

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

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

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

[136] The Tribunal continues to rely on its previous analysis outlined above and will now address the additional case law raised in the parties' submissions.

[137] *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 involved a review of the Practice Review Board of the Alberta Association of Architects (the Board) issuing an intention to resume its hearing to address remedies. The Board initially made findings of misconduct and issued related penalties. However, those findings and penalties were struck because the Board lacked the jurisdiction to issue them. The Board only had the power to issue recommendations. After the findings of misconduct and related penalties were overturned, the Board gave notice to the parties that it intended to reconvene to make recommendations that were within its jurisdiction.

[138] Broadly speaking, the majority of the Supreme Court concluded that the Board had never issued a valid remedy decision. It was therefore entitled to receive further submissions and issue a remedy within its jurisdiction.

[139] In reaching this conclusion, the majority commented that as a general rule, a tribunal cannot revisit a decision because it has changed its mind, made an error or there has been a change in circumstances. It may only alter a decision if authorized by statute, where the error is clerical or there was an error in expressing the manifest intention of the tribunal.

[140] Given that this general rule is based on the policy principle of finality, it must be applied flexibly. That flexibility was appropriate in this case where the Board had not granted any valid remedy. However, this flexibility would not allow a tribunal to alter its remedies once it has issued a valid remedial decision:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra*.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason, I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> …
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact

> that one is selected does not entitle it to reopen proceedings to make another or further selection.

[141] In its reply submissions, the AFN relies on *Canada (Attorney General) v. Symtron Systems Inc.*, 1999 CanLII 9343 (FCA) for the proposition that the availability of judicial review does not play a determinative role in the Tribunal's ability to revisit its earlier decisions. *Symtron Systems* involved a complaint under NAFTA to the Canadian International Trade Tribunal by an American company, Symtron, that the Department of Defence had not properly evaluated whether a competitor complied with the minimum RFP requirements. The CITT's initial decision directed the Department of Defence to review whether Symtron and the successful proponent met the RFP requirement. The review was silent on the main reason the competitor was alleged to not meet the requirements. Symtron brough the case back to the CITT, which concluded that the Department of Defence had not addressed whether the competitor, International Code Fire Services, met the RFP requirements. The Department of Defence and the competitor sought judicial review.

[142] On judicial review, the Federal Court of Appeal found that *functus officio* did not apply to the second complaint to the CITT because it was a new complaint. Nonetheless, the FCA commented that the CITT must allow "some latitude when faced with a new complaint which might, in other circumstances, be the subject of an appeal or an action for enforcement."

[143] Aside from the distinguishing feature that *Symtron Systems* involved a new complaint, *Symtron Systems* says little about the degree of flexibility a tribunal should have. The specific facts in *Symtron Systems* seem to contemplate approaching the tribunal's jurisdiction flexibly to ensure a remedy is effectively implemented. There was no suggestion in that case that the flexibility extends to revoking or narrowing an earlier remedial decision. Instead, the flexibility is more in line with how the Tribunal has previously interpreted its retained jurisdiction in this case to provide the flexibility to ensure that its remedies are effectively implemented.

[144] The AFN also relies on *Merham v. Royal Bank of Canada*, 2009 FC 1127 for the proposition that an administrative decision-maker can reconsider a decision even after it has been upheld on judicial review.

[145] *Merham* involved a human rights complaint to the Commission by Mr. Merham against his manager at RBC. The Commission dismissed the complaint when it was first submitted and the Commission's decision was upheld on a judicial review. Mr. Merham did not challenge the judicial review but successfully brought a small claims court action against his manager that called into question his manager's truthfulness during the Commission investigation. Mr. Merham asked the Commission to reconsider its decision in light of this new evidence. The Commission issued brief reasons indicating it had reviewed Mr. Merham's new evidence and declined to further investigate his complaint.

[146] The Court found that the Commission had jurisdiction to reconsider its decisions even though the decision was upheld on judicial review. However, this is "a discretionary power which must be used sparingly in exceptional and rare circumstances" (para. 25).

[147] Nonetheless, the Federal Court upheld the Commission's decision not to further investigate the complaint. The Commission was reasonable in concluding that Mr. Merham's new evidence would not affect the disposition of the case.

[148] *Merham* is of minimal assistance to the AFN. In some cases, if new information comes to light, it might be appropriate for the Tribunal to reconsider its earlier substantive decision. However, the nature of the new information in *Merham* is significantly different than in the current case. The new evidence in *Merham*, according to Mr. Merham's submissions, cast doubt on the evidentiary basis for the Commission's decision. By contrast, in the current decision, the AFN and Canada do not argue that there is new evidence that contradicts the Tribunal's factual findings that the First Nations children identified in the Tribunal's compensation decisions experienced discrimination. Instead, the AFN and Canada wish to replace the Tribunal's orders with a settlement they subsequently negotiated in a class action. That is distinguishable from the circumstances in *Merham* where the Commission was asked to reconsider its decision.

[149] The AFN also relies on *Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832*, 1999 CanLII 14235 (MB QB) for the proposition that a tribunal can answer questions about whether a course of action not contemplated at the time of the order complies with its order. None of the parties contemplated the more advantageous FSA at

the time of the Tribunal's compensation orders. The AFN contends that the FSA has the overwhelming support of First Nations across the country and there should not be further delays in providing compensation.

[150] In *Rogers Sugar*, the Court of Queen's Bench of Manitoba examined the arbitrator's decisions concerning the appropriate calculations and amounts for severance payments according to the collective agreement.

[151] Subsequent to the parties' receipt of the award, a dispute arose concerning the calculation of severance pay in the case of permanent employees. The parties asked the arbitrator if the company's method of calculating severance pay as represented by the company's spreadsheet was the appropriate method. The arbitrator confirmed that it was appropriate. No written ruling of this decision was received. The parties continued to disagree on the meaning of the arbitrator's ruling and consequently agreed to approach the arbitrator once more. On September 17, 1997, a letter was sent setting out both points of view. A written letter was sent to the arbitrator setting out the particular issue in dispute the second time, namely, whether the arbitrator's award was intended to completely replace the current language of the collective agreement, in particular the reference to "fraction of a year" set out in the collective agreement. On September 26, 1997, the arbitrator provided the parties with a written decision.

[152] The company submitted that the first consensual approach to the arbitrator to clarify the calculation of the severance pay provisions awarded was appropriate and within the arbitrator's reserved jurisdiction to implement his June 4th award. However, when the arbitrator was asked for a second clarification in September, his decision was not a clarification but rather a reversal of his clarification issued on August 15, 1997.

[153] The Court found the doctrine of *functus officio* applies even if the parties' consent since consent cannot clothe the arbitrator with jurisdiction he does not have. However, the Court cited *Chandler* for the need for flexibility when administrative tribunals apply this principle. The principle is based on the policy ground which favours finality of proceedings. The arbitrator was not *functus officio* and did not exceed his jurisdiction when it clarified its order on both occasions, he was within his retained jurisdiction of implementing his award

and was attempting to clarify his decision in response to specific questions asked. The Court wrote this “must be understood in the context of the question which was placed before him” (para. 33). In sum, “the arbitrator’s actions in both August and September of 1997 were in the nature of clarification and therefore he was not functus” (para. 33, emphasis added). Notably, the Court did not find the arbitrator to reverse a previous decision that he had made but rather clarified an unclear order.

[154] It also stands for the proposition that flexibility and a less formalistic approach must be applied by administrative tribunals when asked to reopen a matter: “Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal (in a court proceeding). (p. 862) (Chandler was followed in Canada Post Corp. v. C.U.P.W. (1991), 84 D.L.R. (4th) 574.)” (para. 31). The Court stated the principle of *functus officio* is subject to two exceptions. It does not apply where there has been a slip or a clerical error in drawing up the judgment. It also does not apply when there has been an error in expressing the manifest intention of the fact finder.

[155] This second case clarifying the manifest intention of the fact finder applies in the Tribunal’s current case should the parties request that the Tribunal clarify the non-ISC, categories of removed children further discussed below and also supports previous requests for clarification. This also supports the Tribunal's approach to retained jurisdiction and previous decisions that, for example, clarified that the estates of otherwise eligible victims were within the scope of the Tribunal’s initial *Compensation Decision* and are owed compensation. Similarly, the Tribunal is not precluded from approving the FSA because it includes beneficiaries that the Tribunal had not previously been asked to consider. However, the case does not support disentitlements for the purpose of compromise through negotiation and in light of a cap on compensation.

[156] In fact, in light of the parties' disagreements in *Rogers Sugar,* the arbitrator clarified that he had no intention to reduce entitlement. The written decision states: “It was not my intention to reduce in any way the existing entitlement for severance (permanent employees) while I was adding some additional entitlement for those with long service. Therefore, the “fraction of a year” was meant to remain,” (para. 9). The arbitrator later further clarified his order.

[157] *Rogers Sugar* supports the Tribunal's approach to considering the FSA, to reconvene for a hearing on the contested issue of non-ISC removed children and for further clarification of its orders. However, it does not support an amendment to its previous compensation orders to remove entitlements to victims/survivors when no errors were made concerning those victims/survivors.

[158] The AFN submits that *Zutter v. British Colombia (Council of Human Rights)*, [1995] 57 BCAC 241, 1995 CanLII 1234 (BC CA) applies here and that it stands for the proposition that a Human Rights Tribunal may reconsider its own decisions simply by virtue of the fact that it is a Human Rights Tribunal.

[159] The Panel disagrees with the AFN's interpretation of this decision and finds the facts and issues entirely different from the case at hand:

> [1] The issue on this appeal is whether the British Columbia Council of Human Rights (the "Council") has the jurisdiction to re-open a complaint which has been discontinued by the Council under s. 14(1)(a) of the *Human Rights Act*, S.B.C. 1984, c. 22 (the "Act").

[160] For unclear reasons, Mr. Zutter was not notified of the decision to discontinue the complaint until September 23, at which time he discovered that no written response to the investigation report summary had ever been received by the Council. He dismissed his solicitor and lodged a complaint with the Law Society. The Court was advised that the solicitor in question was subsequently disciplined for his failure to represent Mr. Zutter adequately (para. 12).

> [13] In the meantime, Zutter once again turned to the Coalition for assistance, and on 30 September 1991 the Coalition wrote asking the Council to re-open the matter and consider the submissions which, by reason of his solicitor's ineptitude, Zutter had been denied the opportunity to make before Council took its decision to discontinue his complaints. Relying on s. 15 of the Act, the Council responded by stating that it did not have the statutory authority to reconsider its decision:
>
> > 15. A determination under section 14(1)(a), an order under section 14(1)(d)(ii) or section 14(3) or the dismissal of a complaint under section 14(1)(d)(i) shall be communicated in writing to the complainant and the person who is alleged to have contravened this Act, and, where the proceedings are discontinued or the complaint is dismissed, no further

> proceedings under this Act shall be taken in relation to the subject matter of the discontinued proceedings or the dismissed complaint.

[14] A further request to re-open, made on Zutter's behalf by the B.C. Public Interest Advocacy Centre in December of 1991, was rejected by the Council in a letter dated 7 February, 1992, the relevant portions of which read as follows:

> The Council does not consider that, once notice of the investigation report and a reasonable opportunity for response have been provided, the principle of procedural fairness imposes a duty to enquire as to the status of a party's response, particularly where the party is represented by legal counsel. In the Council's view, the process of disclosure following completion of the investigation is dictated by the requirements of procedural fairness and is not part of the investigative process as such.
>
> For the above reasons, The Council concludes that the required standard of procedural fairness has been met. Therefore, your request that the Council reconsider its decision of July 25, 1991 is denied.

[161] The Court found:

> [23] … it cannot be doubted that from Zutter's point of view, and indeed from that of any reasonable person, the result to him is unfair in the ordinary sense of that word. Thus, it would be an unfortunate irony if the Council, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy that unfairness.
>
> …
>
> [31] I do not accept the argument of the appellants that the equitable jurisdiction described by Martland J. in *Grillas* must be viewed as subservient to the doctrine of functus officio, in the case of all administrative tribunals except those where such jurisdiction is expressly stated to exist, in order to give effect to the "sound policy" of finality in the proceedings of such tribunals. That policy will necessarily govern the manner in which the jurisdiction to reconsider is exercised by the Council, thus ensuring its restrictive application, just as the power of this Court to admit fresh evidence is carefully and restrictively exercised in deference to the same policy.
>
> [32] The equitable jurisdiction to reconsider was recognized to exist in, and found to have been properly exercised by, the administrative tribunals under consideration in *Re Lornex Mining Corporation Ltd*., 1976 CanLII 1123 (BC SC), [1976] 5 W.W.R. 554 (B.C.S.C.), in *Re Ombudsman of Ontario and the Minister of Housing* (1979), 1979 CanLII 1933 (ON SC), 103 D.L.R. (3d) 117

> (Ont.H.C.), aff'd, (1980), 1980 CanLII 1740 (ON CA), 117 D.L.R. (3d) 613 (Ont.C.A.), and more recently *in Attorney General of Canada v. Grover and Canadian Human Rights Commission* (4 July, 1994), T-1945-93 [reported 1994 CanLII 18487 (FC), 24 C.H.R.R. D/390] (F.C.T.D.). In each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute. The judge below applied the first two of these authorities when reaching his conclusion that the Council had jurisdiction to reconsider its decision to discontinue Zutter's complaints in the circumstances of this case, and I am of the view that he was right to do so.

[162] This paragraph citing *Grover*, supports the Tribunal's approach to retention of jurisdiction on remedial orders including on long-term reform and the orders requested from the parties in 2022 CHRT 8. However, it does not go as far as supporting removing compensation entitlements to victims/survivors that were vindicated in Tribunal orders subsequently affirmed by the Federal Court. Even in the absence of a Federal Court decision, once the Tribunal has made compensation entitlements orders to victims/survivors, it cannot disentitle them absent a Federal Court order to do so for unreasonableness.

B. The Tribunal's retained jurisdiction on the compensation issue and the issues of functus officio and finality of its orders

[163] **The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders and finds it substantially but not fully satisfies the Tribunal's orders.**

[164] As it will be demonstrated below, the Panel remained seized of all its compensation orders to ensure effective implementation of its orders.

[165] Further, the Panel is not barred by the Federal Court decision from reviewing the FSA in order to consider if the FSA fully satisfies the Tribunal's orders.

[166] From 2019 to 2022 the Tribunal issued a series of rulings on the issue of compensation. We will look at them in turn and highlight some portions that are relevant to this motion.

[167] The first compensation ruling also called by the parties as the *Compensation Entitlement Decision* is 2019 CHRT 39. This decision is extensive and focuses on the

evidence of harm, pain and suffering to First Nations children and families and the government's actions which were found to be devoid of caution. The *CHRA* is structured in a way where the remedies are at the discretion of the Tribunal Member(s) once the complaint is substantiated. There are many cases where discrimination has been found and no special compensation was awarded. This stems from the fact that the evidence of conduct that is devoid of caution must be established on a balance of probabilities. In some cases, this may not be found by the Tribunal. In this case, the Panel provided extensive reasons to support its findings of fact and legal conclusions. All the other compensation rulings follow the same reasoning found in the *Compensation Entitlement Decision*. The quantum of compensation awarded was also established at the Complainants' request, including the AFN who was mandated by the Chiefs-in-Assembly to seek the maximum compensation amounts under the *CHRA (*see AFN directed by the *Chiefs in Assembly resolution no.85/2018)*. The Tribunal agreed and also ensured that victims/survivors who desire to obtain more than the maximum amount of compensation under the *CHRA* could do so through other recourses. Of note, the AFN welcomed the *Compensation Entitlement Decision* and also defended it in Federal Court. The Federal Court agreed with the AFN, the Caring Society and the Commission. The decision was found to be reasonable. As will be evident in reviewing the compensation decisions, the quantum for compensation was established in the first compensation decision and was never revisited throughout the series of rulings. What was asked following the *Compensation Entitlement Decision* was to clarify and add entitlements, not remove them, based on the evidence and to clarify definitions. The balance of the requests was for the purpose of establishing a compensation process, trust funds and the approval of a framework for compensation.

[168] At the beginning, of the first compensation ruling, the Tribunal provided reasons and set the table for the compensation process:

> XV. Process for compensation
>
> [258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grandparent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In

recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grandparents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common Experience Payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language, culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para. 10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grandparents until the age of majority.

[263] For all the other children who have no parents, grandparents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

> [264] Special protections for mentally disabled children and parents or grandparents who abuse substances that may affect their judgment should be considered in the process.
>
> [265] It would be preferable that the social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.
>
> [266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.
>
> [267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nations child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.
>
> [268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.
>
> [269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grandparents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than December 10, 2019. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation. (emphasis added).
>
> [270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added. (2019 CHRT 39)

[169] This clearly indicates that the Tribunal did not recognize that it was *functus* on the issue of compensation or that all orders were complete. Notably, however, the question of quantum of compensation was never up for discussion and no suggestion was made by the

Tribunal or the parties to modify the quantum of compensation or to reduce or disentitle categories already recognized by the Tribunal in its compensation orders. In fact, this aspect was final and supported by findings and reasons and sent a strong deterrent message to Canada and a message of hope to the victims/survivors whose rights were vindicated by those findings and corresponding orders. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. The Tribunal noted the important purpose of individual compensation for victims of discrimination:

> was necessary to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.
>
> (2019 CHRT 39 at para 14).

[170] Indeed, in the *Compensation Entitlement Decision*, 2019 CHRT 39, at para. 206, the Tribunal also made clear that its obligations are to safeguard the human rights of the victims/survivors it identified, irrespective of any proposed class proceedings:

> The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy discrimination and if applicable, as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[171] More recently, the Nova Scotia Court of Appeal, made significant comments in *Disability Rights Coalition v. Nova Scotia (Attorney General),* 2021 NSCA 70, regarding the important societal purpose of deterrence in cases involving government behaviour:

> [254] In *Vancouver (City) v. Ward*, 2010 SCC 27 ("Ward") the Supreme Court of Canada cited the critical role that deterrence plays in arriving at damage awards against governments to compensate for rights violations. Deterrence is a real, necessary and significant factor:
>
> > [29] […] Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. […] Similarly, deterrence as an object of Charter damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the Charter in the future.
>
> […]

> [256] In *Walsh*, the Alberta Court of Appeal also commented on the importance of an award acting as a deterrent against future discriminatory conduct:
>
> > [31] Human rights legislation must be accorded a broad and purposive interpretation having regard to its fundamental purpose: to recognize and affirm that all persons are equal in dignity and rights and to protect against and compensate for discrimination. In addition to compensating victims of discrimination, the remedial authority under human rights legislation serves another important societal goal: to prevent future discrimination by acting as both a deterrent and an educational tool: *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (S.C.C.).
> >
> > [32] Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct.
> >
> > [33] Human rights tribunals recognize that both pecuniary and non-pecuniary, or general, damages can and should be awarded in appropriate cases.
>
> [257] We are of the view that the Board erred in failing to take into account the deterrent impact of any damage award that it might make, (emphasis added).

[172] The Panel also awarded interest on compensation in the *Compensation Entitlement Decision* which reinforces the finality of the quantum of compensation awarded.

> [274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.
>
> [275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:
>
> [276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past (see for example, *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20 at, para. 21).
>
> (2019 CHRT 39)

[173] This being said, the Panel agrees with Canada and the AFN that the Federal Court in affirming the Tribunal's orders found the Tribunal had made reasonable decisions within

the range of different reasonable outcomes. This is not to be understood that once final orders on compensation quantum and categories of victims/survivors have been made, they can later be changed to accommodate a settlement that reduces or removes some entitlements to include others within a fixed amount of money. This exercise may be reasonable when orders have not yet been made. The agreement occurred after the evidence-based findings and orders were made confirming compensation entitlement to categories of victims/survivors by this Tribunal. This important fact is determinative in considering the FSA. The Tribunal was open to adding people which is exactly what the FSA does and on this point the Tribunal is very pleased.

[174] However, the Tribunal never envisioned reducing compensation quantum or disentitling the victims/survivors who have already been recognized before the Tribunal through evidence-based findings in previous rulings. The difficulty would not have occurred but for the fixed amount of $20 billion that Canada offered, which forced First Nations to make difficult choices. We will return to this aspect below.

[175] The request that the Tribunal approve the FSA would have been entirely different and more appropriate if the FSA had been presented to the Tribunal before the Tribunal had issued its orders or if the FSA included all victims/survivors covered by the Tribunal's orders.

[176] The compensation process continues at this time and the Tribunal foresaw that the parties could appear before the Tribunal to seek clarifications and further orders on process and implementation. An example of seeking clarification is when the parties' different interpretation of the Tribunal's orders impacts the implementation of the orders.

[177] Now the Tribunal has made entitlement orders upheld by the Federal Court. The Tribunal's decision remains untouched at this time. It is open to the parties to come back before the Tribunal for the implementation phase.

[178] Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the *Merit Decision* to a finding that there never was racial discrimination and, therefore, no remedy is required. In the same vein, if evidence-based findings are made that victims/survivors have suffered and should be compensated, the parties cannot contract out

or ask the Tribunal to amend its previous evidence-based findings and related orders to a finding that certain victims/survivors entitled by this Tribunal have not suffered and should no longer receive compensation.

[179] This is significantly different than asking the Tribunal to make a finding based on new evidence presented that demonstrates that some aspects of the discrimination found by this Tribunal has ceased in compliance with the injunction-like order made by this Panel to cease the discriminatory practice or that some amendment requests may enhance the Tribunal's previous orders to eliminate discrimination (2022 CHRT 8). The Tribunal's retention of jurisdiction is to ensure its orders are effectively implemented. This includes not narrowing its orders (see for example Jordan's Principle definition in 2017 CHRT 14) and eliminating the discrimination found in a complex nation-wide case involving First Nations from all regions. This is done through reporting, motions, clarification requests, etc. and findings are made on the evidence.

[180] Moreover, in 2022 CHRT 8, the Tribunal accepted to make a finding based on the evidence, its previous findings and orders to amend its orders to establish an end date for compensation:

> Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents
>
> (2022 CHRT 8 at para. 172.9).

[181] Of note, this finding was made on the evidence presented that linked the increased sustainable prevention funding and community-based programs with the ceasing of removals of children from their homes, families and communities:

> [149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.
>
> [150] The elimination of the mass removal of children is achievable when a real shift is made from reactive services that bring children into care to preventive services, especially when prevention services are developed and delivered by the First Nations children's respective First Nations communities.

> The evidence provided by the parties demonstrates that this shift will be made possible with the April 1, 2022 implementation of increased prevention funds provided to First Nations and First Nations child and family service providers across Canada.
>
> [151] Finally, the consent orders discussed above are in line with the Panel's findings and orders. The Panel believes the full and timely implementation of those orders will significantly improve the lives of First Nations children, families and communities.
>
> (2022 CHRT 8)

[182] The Panel agrees with Canada that this is not the first time the Tribunal has significantly amended an order, as demonstrated by the order in 2022 CHRT 8 discussed above. Although consent is not a precondition to jurisdiction, both the Commission and the Caring Society agreed that the Tribunal had the authority to make that order. The 2022 CHRT 8 order made substantive changes to this Tribunal's previous orders. It ordered Canada to fund post-majority care at actual costs; fund additional research by the Institute of Fiscal Studies and Democracy; fund prevention measures on an ongoing basis at $2500, adjusted for inflation, per person for those persons on reserve and in the Yukon; and, finally, it set March 31, 2022, as the end date for compensation for removed children and their caregiving parents and grandparents.

[183] The Panel finds that the 2022 CHRT 8 amendments clearly are in line with the retained jurisdiction to ensure discrimination is eliminated and does not reoccur.

[184] The preceding example supports the fact that the Tribunal had retained jurisdiction to ensure effective implementation of its orders. The Tribunal expanded its orders and amended its orders to establish an end date for compensation based on the evidence provided that removals of children from their communities are being eliminated through sustainable and adequately funded community-led and developed programs.

[185] Moreover, to determine if the Tribunal can amend its orders, one needs to look at the nature of the amendments sought and the evidence supporting the amendments. Furthermore, a close look at the orders linked to the findings and reasons is necessary to determine if the nature of the amendments sought is permissible.

[186] Following the *Compensation Entitlement Decision*, the Tribunal issued another ruling, 2020 CHRT 7, explaining the nature and purpose of the Tribunal's retention of jurisdiction:

> [51] The Panel in its *Compensation Decision*, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of victims/survivors or wording amendments to the ruling similar to the process related to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35. While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders, (emphasis added).
>
> [52] The Panel explicitly retained jurisdiction over compensation (see *Compensation Decision* at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see *Compensation Decision* at para. 270), (emphasis added).
>
> [53] This is a clear indication that the Panel was open to suggestions for possible modifications of the *Compensation Decision* Order, welcoming comments and suggestions from any party. The Panel originally chose the January 1, 2006 and December 2007 cut-off dates following the Caring Society's requests in its last compensation submissions with the understanding that the evidence before the Tribunal supported those dates and also supported earlier dates as well. Considering this, instead of making orders above what was requested, the Panel opted for an order including the possibility of making amendments or further compensation orders. The Panel was mindful that parties upon discussion of the compensation orders and process may wish to add or further specify categories of compensation beneficiaries. This process is complex and requires flexibility, (emphasis added).
>
> …
>
> [74] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further orders:
>
> [75] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

> [76] Canada is also ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations parents or caregiving grandparents living on reserve and in the Yukon Territory of First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and were taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.
>
> …
>
> [151] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further order:
>
> [152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the Compensation Decision Order, including the referenced period in the Order above mentioned in Question 2.

[187] Again, none of the reasons above support a compensation disentitlement or a reduction of quantum. Rather, they support adding and clarifying orders, not removing entitlements. The quantum in the *Compensation Entitlement Decision* is also followed in the added orders. This reinforces the finality of the quantum orders. In adding more beneficiaries entitled to compensation, the amounts of compensation already ordered are applied to them in the same manner. No request was made by the AFN to reduce the amounts of compensation to those added categories. In fact, the AFN and the Caring Society argued to add them as forming part of the Tribunal's previous compensation orders. The Tribunal examined the evidence and submissions and made findings justifying the additional orders.

[188] Further, the Tribunal's willingness to clarify compensation entitlements and the possibility of adding, not removing, beneficiaries in light of the evidence presented is clear:

> [154] Furthermore, the Panel requests submissions on this point and, on whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The Panel also requests submissions on whether First Nations children living on reserve or off-reserve who were not removed from the home but experienced a gap, delay and/or denial of services, were deprived of essential

> services as a result of the discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.
>
> [155] The Panel will establish a schedule for parties to make submissions on the questions and comments identified in the two preceding paragraphs.
>
> [156] Additionally, the interested parties, the Chiefs of Ontario and the Nishnawbe Aski Nation have requested further amendments to the compensation orders to broaden the compensation orders to include off-reserve First Nations children and to include a broader class of caregivers reflecting caregiving practices in many First Nations communities including aunties, uncles, cousins, older siblings, or other family members/kin who were acting in a primary caregiving role, amongst other things. The Panel has questions for the interested parties and parties on these issues. The Panel will establish a schedule for parties to make submissions on the Panel's questions and will make a determination once the questions are fully answered. Depending on the outcome, the Panel may further amend the compensation orders. (emphasis added).
>
> [157] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.
>
> (2020 CHRT 7)

[189] In a subsequent ruling, 2020 CHRT 15, the Panel referred to its previous compensation orders and quantum when asked to broaden its order and provide clarifications:

> [2] In the *Compensation Decision*, Canada was ordered to pay compensation in the amount of $40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) and to consult with the Canadian Human Rights Commission (Commission) and the interested parties, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), to co-develop a culturally safe compensation process framework including a process to locate the victims/survivors identified in the Tribunal's decision, namely First Nations children and their parents or grandparents. The parties were given a mandate to explore possible options for the compensation process framework and return to the Tribunal. The AFN, the Caring Society and Canada have jointly indicated that many of the COO, the NAN and the Commission's suggestions were incorporated into the Draft Compensation Framework and Draft Notice Plan. The Panel believes that this is a positive outcome.

> [3] However, some elements of the Draft Compensation Framework are not agreed upon by all parties and interested parties. In particular the two interested parties, the COO and the NAN, made additional requests to broaden the scope of the Compensation Decision orders with which the other parties did not agree, as it will be explained below. Further, the COO and the NAN made a number of specific requests for amendments to the Draft Compensation Framework. The NAN's requests mainly focus on remote First Nations communities, some of which will be discussed below. This reflects the complexity of this case in many regards. The Panel is especially mindful that each First Nation is unique and has specific needs and expertise. The Panel's work is attentive to the inherent rights of self-determination and of self-governance of First Nations which are also important human rights. When First Nations parties and interested parties in this case present competing perspectives and ask this Tribunal to prefer their strategic views over those of their First Nations friends, it does add complexity in determining the matter. Nevertheless, the Panel believes that all the parties and interested parties' views are important, valuable and enrich the process. This being said, it is one thing for this Panel to make innovative decisions yet, it is another to choose between different First Nations' perspectives. However, a choice needs to be made and the Panel agrees with the joint Caring Society, AFN, and Canada submissions and the AFN's additional submissions on caregivers which will be explained below. At this point, the Panel's questions have now been answered and the Panel is satisfied with the proposed Draft Compensation Framework and Draft Notice Plan and will not address all of the interested parties' suggestions that were not accepted by the other parties (i.e. the Caring Society, the AFN and Canada) ordered to work on the Draft Compensation Framework. The Panel will address the contentious issue involving specific definitions including some suggestions from the NAN concerning remote First Nations communities and two substantial requests from the COO and the NAN to broaden the scope of compensation below. For the reasons set out below, the Panel agrees with the Caring Society, the AFN and Canada's position on the COO and the NAN's requests.

(Emphasis added)

[190] The Tribunal's retention of jurisdiction allowed it to address wording clarifications related to the compensation orders:

> [4] Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions resulting in the Draft Compensation Framework and Draft Notice Plan have been productive, and the parties have been able to agree on how to resolve most issues. At this point, there remains disagreement on three important definitions on which the parties cannot find common ground. These definitions are "essential service", "service gap" and "unreasonable delay". While the Panel is not imposing the specific wording for the definitions, the Panel

> provides reasons and guidance to assist the parties in finalizing those definitions as it will be explained below.
>
> (2020 CHRT 15)

[191] The compensation process was viewed by the parties as follows and the Tribunal agreed:

> [5] The Caring Society, the AFN and Canada wish to clarify the proposed process for the completion of the Tribunal's orders on compensation. As the AGC outlined in its April 30, 2020 letter, the Complainants and the Respondent are submitting the Draft Compensation Framework and Draft Notice Plan for the Tribunal's approval in principle. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the Draft Compensation Framework will be adjusted to reflect said orders and will undergo a final copy edit to ensure consistency in terms. The Complainants and the Respondent will then consider the document final and will provide a copy to the Tribunal to be incorporated into its final order. The Panel agrees with this proposed process.
>
> (2020 CHRT 15)

[192] In light of the above, the Tribunal approved the Draft Compensation Framework and Draft Notice Plan "in principle" and discussed the opt out provision:

> [12] The Panel has studied the Draft Compensation Framework and Draft Notice Plan alongside all the parties', including interested parties', submissions and requests. The Panel approves the Draft Compensation Framework and Draft Notice Plan "in principle", with the exception of the issues addressed below. The "in principle" approval should be understood in the context that this framework is not yet finalized and that the parties will modify this Draft Compensation Framework and Draft Notice Plan to reflect the Panel's reasons and orders on the outstanding issues regarding compensation. The Draft Compensation Framework, Draft Notice Plan and the accompanying explanations in the joint Caring Society, AFN and Canada submissions provide the foundation for a Nation-wide compensation process. The opt-out provision in the Draft Compensation Framework addresses the right of any beneficiary to renounce compensation under this process and pursue other recourses should they opt to do so. The opt-out provision protects the rights of people who disagree with this process and who prefer to follow other paths. The Panel expects that the parties will file a final Draft Compensation Framework and final Draft Notice Plan seeking a consent order from this Tribunal.
>
> (2020 CHRT 15)

[193] The Tribunal's orders in 2020 CHRT 20 and 2020 CHRT 36 have impacted the compensation entitlement in broadening the categories of victims once the Tribunal had clarified the First Nation children who are recognized by their Nation are eligible under Jordan's Principle.

[194] Again, none of the above findings support a reduction of quantum or a disentitlement of compensation for any category of victims/survivors recognized in the Tribunal's orders.

[195] None of the orders entertain or envision a disentitlement of compensation once orders have been made. On the contrary, the Tribunal ensured the victims/survivors could opt out and/or also pursue other recourses to obtain more compensation if they so desired. The Tribunal had discussions with parties on expanding, not removing, categories of beneficiaries. However, the parties submitted adding beneficiaries may jeopardize the entire compensation process:

> [10] The NAN also made submissions in favour of such broadened compensation orders as described above. However, upon consideration, the Panel does not want to jeopardize the compensation process as a whole.
>
> (2020 CHRT 15)

[196] The Tribunal was cautioned by the AFN to reject the NAN's requests to expand compensation. The AFN feared that it would jeopardize the compensation process. The Tribunal agreed with the AFN.

[197] Moreover, the Tribunal's retention of jurisdiction on compensation was necessary given the Tribunal's supervisory role in the compensation process. As it will be further demonstrated below, the same can be said about the compensation payment process under the Compensation Framework once the guide is finalized by the parties.

[198] Of note, Canada itself viewed the compensation orders as final and argued against reopening those orders:

> [9] Canada argues that their comments on the temporal scope above do not suggest a reopening of these compensation orders under Jordan's Principle. Additionally, Canada submits that the complaint mentioned Jordan's Principle and did not mention services prior to the adoption of Jordan's Principle in December 2007.

…

> [176] The Panel retains jurisdiction until the process for compensation issue has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.
>
> (2020 CHRT 15)

[199] In 2021 CHRT 6, the Tribunal addressed its retention of jurisdiction as follows:

> [135] The Tribunal retains jurisdiction on all its compensation orders including the approval and implementation of the Compensation Process. The Tribunal's retention of jurisdiction in relation to the compensation issue does not affect the Tribunal's retained jurisdiction on any other aspects of the case for which the Panel continues to retain jurisdiction.

[200] Further, the Tribunal also discussed the retention of jurisdiction on the compensation issue in 2021 CHRT 7:

> [41] The Panel retains jurisdiction on all its Compensation orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.
>
> (emphasis added)

[201] The retention of jurisdiction read with the reasons in 2021 CHRT 7 make clear that the retention of jurisdiction at this point is for the implementation of the compensation orders and processing of claims under the Framework for the Payment of Compensation (Compensation Framework) under 2019 CHRT 39 and accompanying schedules. This was necessary given the Tribunal's supervisory role in the payment of compensation:

> [27] The Draft Compensation Framework includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6).
>
> (2021 CHRT 7)

[202] Section 9.6 of the Compensation Framework reads as follows:

> 9.6. Potential beneficiaries denied compensation can request the second-level review committee to reconsider the decision if new information that is relevant to the decision is provided, or appeal to an appeals body composed of individuals agreed to by the Parties and hosted by the Central Administrator. The appeals body will be non-political and independent of the

> federal public service. The Parties agree that decisions of the appeals body may be subject to further review by the Tribunal. The reconsideration and appeals process will be fully articulated in the Guide.

[203] Under the Compensation Framework, the Tribunal may review the decision of the appeals body to ensure its compensation orders are properly interpreted and followed by the appeals body.

[204] In 2021 CHRT 7, the Panel examined the Framework for the Payment of Compensation under 2019 CHRT 39 and accompanying schedules as detailed in the Draft Compensation Framework filed on December 23, 2020.

[205] The Panel carefully examined the parties' Framework for the Payment of Compensation under 2019 CHRT 39 and accompanying schedules as detailed in the Draft Compensation Framework filed on December 23, 2020 to ensure this was in line with its orders. Otherwise, the Panel would have asked questions and requested adjustments. While the Panel's orders prevailed, the compensation process needed to reflect the Tribunal's reasons and orders in order to be approved by the Tribunal.

[206] The Panel found the Draft Compensation Framework to be in line with its previous orders which speaks to the analysis conducted by this Tribunal on the issue of compensation and the continuity of 2019 CHRT 39:

> [33] The Panel reviewed the Draft Compensation Framework submitted on December 23, 2020 and acknowledges it contains the appropriate changes reflecting the Panel's recent compensation rulings.
>
> (2021 CHRT 7, emphasis added).
>
> [37] After careful consideration of the specifics of this consent order request, which is summarized above, the Panel finds that the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.
>
> (2021 CHRT 7, emphasis added).

[207] The parties themselves understood the need for consistency with the Tribunal's orders and that they could not deviate from these orders even if on consent:

> 1.2. The Framework is intended to be consistent with the Tribunal's Compensation Entitlement Order. Where there are discrepancies between this Framework and the Compensation Entitlement Order, or such further

> orders from the Tribunal as may be applicable, those orders will prevail and remain binding.
>
> (Compensation Framework, emphasis added).

[208] The parties only completed the Compensation Framework once the Tribunal had made orders on contentious and outstanding questions on eligibility for compensation as explained above and other clarifications.

> 1.3. The Framework is intended to facilitate and expedite the payment of compensation to the beneficiaries described in the Compensation Entitlement Order, as amended by subsequent Tribunal decisions.
>
> (Compensation Framework, emphasis added).

[209] This is also reflected in the Framework for example, section 4.2.5.

> "First Nations child" means a child who:
>
> > a) was registered or eligible to be registered under the Indian Act;
> >
> > b) had one parent/guardian who is registered or eligible to be registered
> >
> > under the Indian Act;
> >
> > c) was recognized by their Nation for the purposes of Jordan's Principle; or
> >
> > d) was ordinarily resident on reserve, or in a community with a self-government
> >
> > agreement.
> >
> > (emphasis added).

[210] This reflects the Tribunal's orders in 2020 CHRT 20.

[211] The compensation orders are reflected in the Compensation Framework in many areas. For example, the parties requested the Tribunal's clarification on specific definitions such as "Essential service", "Service gap", "Unreasonable delay" and "confirmed need" prior to finalizing the Compensation Framework:

> 4.2.3.1. For purposes of s. 4.2.2. "confirmed needed" and "recommended by a professional" must be interpreted as per 4.2.2.2.
>
> (Compensation Framework)

[212] The Tribunal viewed the Compensation Framework as now forming part of its orders and agreed to issue a consent order. Consent orders, while more flexible given the parties' agreement, are still subject to section 53 of the *CHRA* and once issued are part of the Tribunal's orders. They must be implemented and are not recommendations or aspirational documents.

[213] Of note, the Tribunal analyzed and made findings on the Compensation Framework in 2021 CHRT 7 in order to approve it. This is made clear when reading the ruling. For example, 2021 CHRT 7 states:

> [22] Section 4 stipulates which First Nations children and caregivers are eligible for compensation. It addresses children who were necessarily or unnecessarily removed from their families (4.2.1). In relation to Jordan's Principle, it outlines what constitutes an essential service, service gap, and unreasonable delay (4.2.2). It defines the meaning of the term First Nations child in the context of compensation (4.2.5). Generally, a First Nations child includes a child who is registered or eligible to be registered under the *Indian Act*, has a parent who is registered or eligible to be registered under the *Indian Act*, is recognized by their First Nation for the purpose of Jordan's Principle, or was ordinarily resident on a reserve or in a community with a self-government agreement (4.2.5).
>
> [23] Section 5 outlines various provisions to locate and identify eligible beneficiaries.

[214] This is an example of the Tribunal reviewing the Compensation Framework and highlighting specific parts of the Compensation Framework. It is clear when reading all the compensation rulings in order including the last ruling approving the Compensation Framework that the approved Compensation Framework was found to be in line with the Tribunal's orders:

> 4. Definitions of Beneficiaries
>
> 4.1. A "beneficiary" of compensation is a person, living or deceased, described at paras. 245-257 of the Compensation Entitlement Order, as expanded by the Tribunal's decision in 2020 CHRT 7, at paras 125-129.
>
> (Compensation Framework)

[215] The parties themselves described the Tribunal's decision in 2019 CHRT 39 as the *Compensation Entitlement Decision* and acknowledged it was further expanded in 2020 CHRT 7.

[216] After its analysis, the Tribunal found:

> [19] The purpose of the *Draft Compensation Framework* is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be **consistent with**, and subordinate to, the Tribunal's orders (1.2).
>
> (2021 CHRT 7, emphasis added).
>
> …
>
> [40] Pursuant to section 53 of the *CHRA* and its previous rulings, the Tribunal approves the Framework for the Payment of Compensation under 2019 CHRT 39 along with accompanying schedules as submitted by the parties on December 23, 2020. The Tribunal will make the Framework available to the public upon request.
>
> (2021 CHRT 7, emphasis added)

[217] This is not the first time the Tribunal is being asked to challenge eligibility to previous compensation orders. NAN requested an amendment to the Draft Compensation Framework to change the time period for which First Nations children would be eligible for Jordan's Principle compensation. The Tribunal answered it could no longer do so:

> [16] In 2021 CHRT 6, released February 11, 2021, the Tribunal addressed the approach for compensating victims/survivors who are legally unable to manage their own finances. The Tribunal determined that it was appropriate and within the Tribunal's legal authority to approve a compensation regime where an Appointed Trustee, as defined in the Draft Compensation Framework, would manage the compensation funds for victims/survivors who lack the legal capacity to do so themselves. Further, the Tribunal rejected a request by NAN to challenge the eligibility criteria for compensation given the Tribunal had already ruled on the issue and upheld the scope of compensation payments set out in the Draft Compensation Framework.
>
> (2021 CHRT 7, emphasis added)

[218] Of note, the Tribunal's title in 2021 CHRT 6 explains the intent of the ruling: Compensation Process Ruling on Four Outstanding Issues in Order to Finalize the Draft Compensation Framework. (emphasis added).

[219] At paragraph [6], the Tribunal wrote:

> [6] … This ruling provides the reasons contemplated in the Panel's December 14, 2020 letter. Following this letter ruling, the parties were able to finalize the Draft Compensation Framework and, on December 23, 2020 they submitted

> the final version to obtain a final consent order on the issue of the compensation process.
>
> (2021 CHRT 6, emphasis added).

[220] A closer look to some of the submissions made by the parties and reasons from this Panel demonstrate the finality of the compensation eligibility orders:

> [110] NAN opposes section 4.2.5.2 of the Draft Compensation Framework's restriction of the timeframe of discrimination for which First Nations children who are not eligible for *Indian Act* status are entitled to compensation and section 4.2.5.3's restriction of these children's eligibility for compensation for wilful and reckless discrimination under section 53(3) of the *CHRA*. NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries. NAN relies on its earlier submissions from March 20, 2019 on identifying First Nations children for the purpose of Jordan's Principle. NAN argues that it was always of the view that Jordan's Principle applied to all First Nations children and that Canada should have been of this view as well. NAN relies on evidence cited in *Daniels v. Canada*, 2013 FC 6 to demonstrate Canada's knowledge. Further, the treaty relationships, which Canada recognizes, do not allow Canada to unilaterally determine First Nations identity. Further, NAN does not find it persuasive for Canada to argue that Canada believed a provision designed to prevent jurisdictional gaps in services for First Nations children only applied to First Nations children eligible for *Indian Act* status. Accordingly, the *Merit Decision* cannot represent a clear break from the past as contemplated in *Hislop*. NAN argues that Canada's exclusion of First Nations children without *Indian Act* status was unreasonable according to the criteria established in *Hislop*, para. 107. In addition, NAN argues the different timeframes for which beneficiaries are entitled to compensation will complicate the process.
>
> [111] Canada, the AFN and the Caring Society submitted a joint response opposing NAN's request to remove sections 4.2.5.2 and 4.2.5.3 from the Draft Compensation Framework. They note that the provisions were not drafted with the intent to deny compensation to any eligible beneficiaries and that, to the extent of any inconsistency with the Tribunal's orders, section 1.2 ensures the Tribunal's orders take precedence. They argue that while NAN would prefer an earlier start date for compensation than that provided in section 4.2.5.2, the issue has already been litigated and should not be reconsidered. Canada, the AFN and the Caring Society considered it unreasonable to award damages for wilful and reckless conduct while the eligibility criteria for Jordan's Principle were unclear. They submit that while sections 4.2.5.2 and 4.2.5.3 do not precisely mirror specific language in the Tribunal's orders, any potential beneficiary who disagrees with the provisions will have an opportunity to contest them.

> [112] The Panel generally agrees with the merit of the NAN's additional submissions. Moreover, the Panel notes the NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries.
>
> [113] However, as mentioned above, the eligibility for compensation under Jordan's Principle orders have already been argued and answered by this Tribunal. Furthermore, the Panel finds the joint response from the AFN, the Caring Society and Canada referred to in para. 111 above to be acceptable especially in light of sections 1.2 and 9.6 of the Draft Compensation Framework.
>
> [129] The Tribunal has provided a number of decisions and rulings directly addressing the victims' entitlement to compensation for discriminatory conduct. Most notably, the *Merit Decision* found that Canada's programs and funding discriminated against First Nations children and amounted to discriminatory conduct. In the Compensation Decision, the Tribunal found that the victims on whose behalf the complaint was brought were entitled to compensation. The Tribunal addressed the quantum of compensation and considered some general eligibility parameters such as which classes of family members were entitled to compensation. The Tribunal also recognized the value in directing the parties to negotiate further aspects of the compensation process.
>
> (2021 CHRT 6, emphasis added)

[221] The following paragraph also speaks to the Tribunal's view that the retention of jurisdiction on the compensation issue at this point was separate from the other issues in these proceedings:

> [42] This does not affect the Panel's retention of jurisdiction on other issues in this case.
>
> (2021 CHRT 7)

[222] Before the FSA was presented to the Tribunal for approval, the parties requested a number of consent orders and amendments to the Tribunal's previous orders.

[223] The Tribunal's ruling in 2022 CHRT 8 clearly demonstrates the analysis to determine if the requested orders are in line with the Tribunal's findings and orders and if such amendments can be made:

> **(viii) Amendment to 2021 CHRT 12**
>
> Order request # 8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

> [42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at $2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

[106] On March 7, 2022, Stephanie Wellman's provided a very helpful affidavit and evidence attached. Upon review of the evidence attached to the affidavit, the Panel finds the evidence to be consistent with the affirmed declaration. Stephanie Wellman indicates that:

> 70. First Nations have long advocated for adequate prevention funding for FNCFS. It has been well documented in reports, such as the Wen:de We are Coming to the Light of Day, Royal Commission on Aboriginal Peoples filed into the record as Exhibit HR-2, and the Joint National Policy Review (2000) filed into the record as Exhibit HR-1, that the current funding formula for the FNCFS Program inadequately invests in prevention.
>
> 71. Prevention within the FNCFS Program reform context must aim to ensure that children remain in their family and First Nation as a priority, with removal as a last resort. Prevention, including early intervention policies, must be adequately practiced and funded in each community.

[107] The Panel agrees and has considered the above-mentioned evidence and has made multiple findings in that regard, e.g. 2018 CHRT 4:

> [161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *[Merit] Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[108] Stephanie Wellman also affirms prevention "must be developed and mobilized to the standards that communities set and at the levels that communities decide" (March 7, 2022 Affidavit at para. 71).

[109] The Panel finds this is consistent with the spirit of its rulings requiring Canada to consider the unique and distinct needs of First Nations communities and to avoid a one-size fits-all top-down approach. In 2018 CHRT 4, the Panel wrote:

> [163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same

> time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance (emphasis added).

[110] Stephanie Wellman adds that:

> 72. Canada must consider prevention and reform within the context of First Nations social determinants of health and wellbeing, including environment, education, gender, economic opportunities, community safety, housing and infrastructure, meaningful access to culture and land, access to justice, and individual and community self-determination, among others.
>
> 73. Prevention must address the structural and systemic reasons for First Nations' higher rates of involvement with child and family services. For example, housing, water, racism, infrastructure inadequacies, poverty, etc. All these impact child and family wellbeing, and prevention must therefore encompass the systemic drivers of First Nations' overrepresentation in child and family services. Systemic change must also recognize the colonization of First Nations as a fundamental underlying health, social and economic determinant.
>
> 74. Prevention must include evidence-based primary, secondary, and tertiary culturally based programming situated in a life-course continuum: from pre-natal development to birthing, childhood, adolescence, adulthood, as Elders, and through death and post-death.

[111] The Panel entirely agrees with the above. This corroborates the evidence in this case and is in line with the Panel's findings in the Merit Decision and in 2018 CHRT 4:

> [166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the [*Merit*] *Decision* at paras. 341-347), (emphasis added).

[112] As explained above and in previous rulings, the Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue.

[113] For example, in 2018 CHRT 4, a prevention/least disruptive measures focused ruling by this Tribunal, found (emphasis omitted):

> [93] The fundamental core of Canada's systemic discrimination is that it fails to fund First Nation Child Welfare based on need, including addressing and redressing historical disadvantages. The Panel in its decision wrote that it's "...focus is whether funding is being determined based on an evaluation of the

> distinct needs and circumstances of First Nations children and families and the communities" (…).
>
> …
>
> [119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.
>
> …
>
> [150] Canada cannot justify paying enormous amounts of money for children in care when the cost is much higher than prevention programs to keep the child in the home. This is not an acceptable or sound fiscal or social policy. This is a decision made by Canada unilaterally and it is harming the children. (…), (see the *Decision* at paras. 262 and para. 297).
>
> …
>
> [180] The Panel reiterates that the best interest of the child is the primary concern in decisions that affect children. See, for instance, UNCRC, article 3 and article 2 which affirm that all children should be treated fairly and protected from discrimination. (see also the [Merit] Decision at paras.447-449). The Panel found that removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child. This is an important finding that was meant to inform reform and immediate relief (see the [Merit] Decision at paras 341-349).
>
> …
>
> [191] The United Nations CESCR recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 [Merit] Decision. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding observations on the sixth periodic report of Canada, March 4223, 2016, E/C.12/CAN/CO/6, paras.35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para. 33, Exhibit L).

[114] The Panel entirely agrees with this wise approach to prevention reform proposed by the parties in order to generate real and lasting systemic change. Moreover, the evidence filed supports this finding.

[115] As set out in Ms. Wellman's March 7, 2022 Affidavit:

> 76. The per capita costs are based on current prevention services and actual spending described in the case studies analyzed by the IFSD. For instance, the $2,500 per capita cost is based on a case study of K'wak'walat'si Child and Family Services (KCFS), which serves the 'Namgis First Nation and the village of Alert Bay on Cormorant Island off the coast of British Columbia. Since 2007, not a single child in 'Namgis First Nation has been placed in care. This success has been largely credited to the introduction of comprehensive prevention programming.

[116] This success story is referenced in Stephanie Wellman's affidavit and also included in the IFSD report #1, Enabling Children to Thrive filed in evidence. The report states that a case for prevention is clear from both FNCFS agency cases and from existing research. The unanimity from agencies and experts on the importance and need for a focus on prevention services and funding to match cannot be overemphasized (pp.93-94). This report is relevant and reliable especially given the methodology employed and the expert actors involved including the advisory role of the National Advisory Committee.

[117] Stephanie Wellman's affidavit continues:

> 77. These best practices in prevention are further modelled after Carrier Sekani Family Services (CSFS), a large prevention focused organization. The agency's life cycle model (from cradle to grave), informed by its own research, extends across health and social programs and services. From intensive family preservation to telehealth initiatives, CSFS has empowered its staff to innovate, try, fail, and succeed, in support of the people and communities they serve.
>
> 78. By providing a budget of $2,500 per capita for prevention, Canada would enable service providers and communities to deliver this best practice life cycle model of prevention.

[118] This is also consistent with previous findings by this Panel. In 2018 CHRT 4, the Panel said (emphasis omitted):

> [118] The orders are made in the best interests of children and are meant to reverse incentives to place children in care.
>
> [119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.
>
> [120] The best way to illustrate this is to reproduce Ms. Lang's answer to the AFN's question: AFN: So if every child in Ontario that's on First Nations was apprehended, INAC would pay costs for those apprehensions correct? (…) So my question is, it's kind of peculiar to me that the federal government has no

qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me that just does not make sense. Now as a Program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions? Ms. Lang: for eligible expenditures, yes.

[121] This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings.

…

[148] Of particular note, Wen:De Report Three recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, Wen:De Report Three indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

> Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are overrepresented amongst children in care and Aboriginal children in care; they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreaux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.), (see 2018 CHRT 4 at. paras. 148-149 citing the *Merit Decision*).

…

> [160] This is the time to move forward and to take giants steps to reverse the incentives that bring children into care using the findings in the *[Merit] Decision*, previous reports, the parties' expertise and also everything gathered by Canada through its discussions since the *[Merit] Decision*.

[119] The 2018 CHRT 4 immediate relief orders on actuals were made in 2018 after the Caring Society and the AFN, urged the Panel to order them. The parties made compelling arguments and brought evidence to support it. The Panel indicated that the orders could be amended as the quality of information increased. The Panel recognized "that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases." (see 2018 CHRT 4 at para. 237). This is the case here. The evidence in the record demonstrates that there is a need to amend the previous prevention orders given that a number of issues arose as part of the implementation phase of the 2018 CHRT 4 orders.

[120] Moreover, the parties were able to establish that the process for reimbursement to actuals was causing hardships for First Nations and First Nations Agencies. Dr. Blackstock has affirmed that:

> 19. … While the funding at actuals approach has been effective in ensuring more prevention services are provided to children, youth, and families, ISC determining eligible prevention expenses has been problematic particularly given the lack of social work expertise within the department.

[121] Further, Dr. Blackstock also affirmed that "the "request-based" nature of the actuals process has also posed an obstacle for some FNCFS Agencies, who may lack capacity to make the request." (March 4, 2022 affidavit at para. 19). The Tribunal finds this was previously demonstrated in these proceedings (see for example, 2020 CHRT 24 at. paras 34-36).

[122] Moreover, recent relevant and reliable evidence contained in the IFSD report #2, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being, July 31, 2020 found at p. 29 that:

> The significant 48% increase in FNCFS program spending in 2018–19 is attributed to the CHRT-mandated payments (the FNCFS program spending is projected to decrease by 9% in 2019–20) …. Case study analysis suggests that the CHRT payments have had immediate impacts on programming and operations. The supplementary investments, however, are one-time payments and not guaranteed beyond the next fiscal year. This reality puts progress on prevention programming and practices at risk.

[123] The above also supports the need for greater prevention funding as per the order requests including the eligibility for these funds to be carried forward by the First Nation and/or First Nations Child and Family Service providers(s).

[124] Furthermore, Dr. Blackstock affirms that "[g]reater "up-front" funding will allow FNCFS Agencies to focus their energies and resources on program development and delivery." (March 4, 2022 affidavit at para. 19).

[125] The Panel finds the evidence supports the need for a shift from the "request-based" nature of the actuals process where ISC determines eligible prevention expenses to a comprehensive community-level programming. The implementation of these orders will provide families with supports they need and in providing First Nations, FNCFS Agencies with greater resources "up front" to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. This will also provide greater funding to First Nations without FNCFS Agencies.

[126] The IFSD report also supports this shift.

[127] The Panel agrees and is really pleased with these order requests. The parties' hard work will generate real change for First Nations children and youth. This responds to the Tribunal's 2018 call for giant steps towards a shift.

[128] As indicated in Stephanie Wellman's March 7, 2022 Affidavit:

> 75. The $2,500 per capita level of prevention funding is based on the case studies conducted by the IFSD in its Phase 1 report, which resulted in two fundamentally different approaches to prevention programming. This ranged from a First Nation with minimal prevention programming ($800) to comprehensive community-level programming targeted to the entire community, operating on a prevention basis ($2,500). The $2,500 per capita amount is to be considered the level necessary for agencies or communities to reasonably deliver best practices in prevention.

[129] As noted in IFSD report # 2, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* at p. 248:

> … In its Phase 1 study, [*Enabling First Nations Children To Thrive*], December 15, 2018, that costed the FNCFS system, IFSD estimated (based on actual models) that per capita expenditures for prevention should range from $800 to $2,500 across the entire community. At $800, programming is principally youth-focused and may not be CFS focused. At $2,500 per person, a full lifecycle approach to programming can be possible with linkages between health, social and development programming. …
>
> The First Nation's current per capita CFS expenditure estimates align to previous findings for communities unaligned to an FNCFS agency (ranging from $500 to $1,000 based on the

> population source). As the First Nation contemplates its next steps in CFS, it may wish to consider increasing its per capita budget to expand its resources for program and service delivery. IFSD estimated that the average cost of a child in care to be $63,000 per year. With opportunities for prevention program that have demonstrated positive results, there are various options for supporting the well-being of children, families and communities through wrap-around holistic services.

[130] As noted in IFSD report #1, *Enabling First Nations Children To Thrive* these costs would be on-going in nature and subject to changes in population and inflation. Per person spending on prevention should range from $800–$2,500 with total annual costs of $224M to $708M (p. 10).

[131] The report provides further details at pages 87-88:

> Prevention was the focus of experts and agencies, and consistently defined as the most significant funding gap that agencies are facing. The gap in prevention funding is a challenge and is connected to the system's current funding structure that incentivizes the placement of children in care.
>
> Shifting to a prevention-focused approach will require increased investment and a change in funding structure, such that agencies have the ability to allocate resources to meet community need. To cost-estimate an increase in prevention funding for FNCFS agencies, benchmarks of current prevention spending were identified and a range of per capita investments in prevention were defined: $800, $2,000 and $2,500.
>
> The per capita costs are based on current prevention services and actual spending described in case studies. The prevention cost estimates are premised on the assumption that prevention should target the entire population in the agency's catchment and not only the child population served.

[132] Moreover, as defined in 2021 CHRT 12, Non-Agency communities also form part of the Tribunal's previous orders. The Panel agrees that they should also benefit from the increased ongoing prevention funding as detailed in order request # 8. As explained above, this will greatly benefit their communities.

[133] The parties were successful in demonstrating the need for the requested orders # 7 as modified and 8. The Panel entirely agrees with the order requests # 7 & 8 and finds they are justified and supported by the evidence. Furthermore, the Tribunal has the authority to make those orders as it will be explained below.

[224] Three important aspects can be drawn from this approach. First, the Tribunal always relies on evidence to support its findings and orders. Second, the Tribunal analyses if the requested orders are in line with its previous reasons, findings and orders. Third, the focus of the retention of jurisdiction is to achieve sustainable reform and long-term relief that build on short-term and long-term orders in the best interest of First Nations children and families as defined by First Nations themselves.

[225] This approach is consistent with the clearly expressed intent by the Tribunal to issue short-term, mid-term and long-term relief and for long-term relief to be informed by the short-term and mid-term phases.

[226] The Panel previously wrote in 2018 CHRT 4:

> [387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.
>
> …
>
> [415] The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

[227] The Tribunal has clearly expressed on a number of occasions that it will retain jurisdiction until sustainable long-term relief and reform has been addressed in a way that is responsive to the Tribunal's findings and role to eliminate the discrimination found and prevent its reoccurrence or similar discriminatory practices to arise. The Tribunal has always focused on the need to uphold the principle of substantive equality considering the specific needs of First Nations children, families, communities and Nations as an integral part of eliminating the systemic discrimination found. Those specific needs are accounted for in First Nations-led and designed prevention programs for example.

[228] The Tribunal recently discussed its retention of jurisdiction on all its orders in 2022 CHRT 8:

> [175] Pending a complete and final agreement on long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Consent Orders contained in this ruling. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief or as the Panel sees fit considering the upcoming evolution of this case.
>
> [176] This does not affect the Panel's retention of jurisdiction on other issues and orders in this case. The Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

[229] All the above support the conclusion that the Tribunal's retention of jurisdiction allows the Tribunal to examine the FSA in order to determine if it is in line with its orders and victims/survivors receive appropriate compensation. The Tribunal is not *functus officio* in that regard. Furthermore, the principle of *functus officio* and finality applies to the Tribunal and must be applied flexibly considering the factual matrix of the case, findings, reasons and orders already made in this case. This is a case-by-case exercise based on law, facts and the evidence that involves applying the case law to the matter at hand with a careful review of the Tribunal's retention of jurisdiction and the purpose for such retention of jurisdiction. In this case, as demonstrated above, the quantum for compensation is final. The categories of victims/survivors who are entitled to compensation is final in the sense that they cannot be reduced or disentitled unless their compensation is found unreasonable by a reviewing Court.

[230] The Tribunal considered the request for compensation by direct and specific reference to the evidence in this case. This fundamental tenet of justice was underscored by the Federal Court in its upholding of the Tribunals' orders, concluding that the Tribunal's jurisdiction to make the orders flowed not only from the parameters and objectives of the *CHRA*, but also from the evidentiary foundation upon which the Tribunal grounded its decisions:

> Ultimately, the Compensation Decision is reasonable because the *CHRA* provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify

> to establish individual harm. The Tribunal already had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada's knowledge of that harm. Further, the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. From the outset, First Nations children and families were the subject matter of the complaint and Canada always knew that the Respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding.
>
> (2021 FC 969 at para. 231, emphasis added).

[231] The Tribunal is responsible for applying the *CHRA* and the human rights framework reflected in that legislation. While the AFN and Canada have brought this motion to seek the Tribunal's approval for an agreement under the class actions that would settle both the class actions and the complaint before the CHRT, that does not change the fact that the Tribunal is tasked with applying the *CHRA*. It does not have jurisdiction to apply tort or class actions law, and has consistently throughout this case ensured that it does not do so.

[232] Given that its jurisdiction comes from the *CHRA*, the Tribunal's role is not duplicative of a court approving a class action settlement. The Tribunal does not have that power and it would be entirely duplicative of the court's role. Further, the Tribunal is not at the stage of the proceedings of deciding whether to approve an early-stage settlement, where liability and compensation are still contested. Instead, the Tribunal is assessing whether its existing orders are satisfied or, in the alternative, whether it should modify them. The Tribunal has consistently taken an evidence-based approach in assessing this case and considers whether the evidence demonstrates its existing orders are satisfied or justifies revisiting its previous orders trough the dialogic approach.

[233] The Tribunal notes that the Federal Court upheld the Tribunal's use of the dialogic approach to the compensation orders, noting that this provided flexibility so that the Tribunal could fulfil its statutory mandate to address discrimination:

> I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [Grover] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal…" (2016 CHRT 10 at para

> 15). Furthermore, I agree that "the [*CHRA*] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.
>
> (2021 FC 969 at para 138, citing to *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC).

[234] Justice Favel, in the Federal Court's judicial review, aptly captured the fact that compensation under the *CHRA* is not equivalent to tort damages:

> The *CHRA* is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim's loss of freedom from discrimination, experience of victimization, and harm to dignity.
>
> (2021 FC 969 at para 189).

[235] Further, the AFN's argument that the FSA provides finality is partly true and partly wrong. It is true in the literal sense that if not challenged, the FSA could end litigation and bring finality and promptly compensate most, but not all, recognized victims/survivors in the near future. This is the concept that certain disputes must achieve a resolution from which no further appeal may be taken, and from which no collateral proceedings may be permitted to disturb that resolution. The very fact this joint motion is opposed and if it is fully granted may lead to a judicial review of this ruling speaks to the risk of the FSA not achieving finality in that sense.

[236] It is wrong by ignoring another paramount aspect of the need for finality in human rights proceedings as correctly described by the Caring Society: the assurance that once rights have been recognized and vindicated (which is no small task for complainants and victims who often face powerful respondents challenging their claim at every turn), they are no longer up for debate by outside actors or respondents who may disagree with the orders made against them and therefore contract out of their human rights obligations under the *CHRA*.

[237] The AFN and Canada are so focused on the FSA that they ignore the grave injustice of reducing or disentitling victims/survivors once evidence-based findings and orders that

benefit victims have been made by a human rights tribunal. This more broadly sets a dangerous precedent for victims/survivors in Canada.

[238] Canada has consistently argued against the Tribunal's jurisdiction at every stage of this case, from the case's initial referral to the Tribunal, to the Tribunal's remedial jurisdiction to the Tribunal's ability to retain jurisdiction to use the dialogic approach to implement an effective remedy. Canada, in this motion, is proposing an even broader jurisdiction than the Tribunal has ever considered or found where the Tribunal would be able to alter its final compensation orders not because of any issue with the Tribunal's ruling but because Canada and the AFN have reached a tentative settlement of a separate class action.

[239] This question is also a question of the integrity of the human rights regime and of the Tribunal's.

(i) Human Rights Regime

[240] The Federal Court, in this case, addressed the Tribunal's specific role conferred by Parliament:

> Finally, given that Parliament tasked the Tribunal with the primary responsibility for remedying discrimination, I agree that the Court should show deference to the Tribunal in light of its statutory jurisdiction outlined above.
>
> (2021 FC 969 at para 139).

[241] Parliament's intention when it adopted the *CHRA* was to create a system particularly tailored to address the social wrong of discrimination.

[242] This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Merit Decision*, 2016 CHRT 2 at para. 346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII) at para. 9;

and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para. 346).

[243] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at para. 3):

> [179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.
>
> (2019 CHRT 39)

[244] The Tribunal agrees with the Caring Society who submits that the Tribunal ought to apply a human rights framework that centers the child and parent/caregiver experience of harm in determining this motion. The Tribunal agrees with the four criteria the Caring Society identifies as important to the analysis:

> (i) a critical examination of the evidence adduced in relation to the victims who will be impacted by the deviations in the Compensation FSA;
>
> (ii) the nature of compensation awarded as a quasi-constitutional right under the *CHRA* and the meaning of retracting that acknowledgement;
>
> (iii) the best interests of First Nations children and their families, particularly given the historical and intergenerational trauma experienced by the victims, as already acknowledged by the Tribunal; and
>
> (iv) the potential of creating a dangerous precedent where human rights compensation can be bargained for outside of the dialogic approach and outside of the protections that the human rights regime provides.

[245] The Tribunal is tasked with implementing the *CHRA* and must ensure the human rights regime is not cast aside in favour of civil claims. The process before the Tribunal has already awarded remedies to compensate for Canada's discrimination. To revisit or undermine those orders raises issues of finality on quantum and entitlements. There is not a legal basis for the sort of change to the Tribunal's existing entitlement orders being requested by Canada and the AFN.

[246] The Caring Society correctly recognizes that the Tribunal carefully crafted its remedies in this case to match the evidence of demonstrated harm to specific First Nations children and caregivers affected by Canada's systemic racial discrimination. These conclusions are based on applying evidence collected over the course of a decade to the legal framework of the *CHRA*.

[247] Canada challenged this process at every step in front of the Tribunal and sought to judicially review the Panel's compensation decisions. The judicial review has been dismissed, and so the Tribunal's orders are enforceable absent a successful appeal to the Federal Court of Appeal.

[248] The Tribunal also agrees with the Caring Society's concern that the FSA, unlike the Tribunal's orders, requires victims/survivors to give up the right to further recourse in order to accept compensation. This is particularly concerning for victims who are receiving less compensation under the FSA than they would be entitled to under the Tribunal's orders. Further, many of these victims are children whose human rights are particularly important to safeguard. It is not the victims/survivor's fault that Canada's extensive discrimination affected a large number of victims. The victims should not be required to give up their rights to compensation to shield Canada from further liability. The potential for other causes of action against Canada, including *Charter* claims, should not negate the victims/survivors' ability to access compensation under the *CHRA*.

[249] Denying entitlements once recognized in orders is an unfair and unjust outcome that the Tribunal cannot endorse given the *CHRA*'s objectives and mandate. The Tribunal's authority flows from its quasi-constitutional legislation and the Tribunal is, according to the Supreme Court, the "final refuge of the disadvantaged and the disenfranchised."

[250] Furthermore, a perpetrator cannot circumvent the Tribunal and Courts by contracting out its human rights obligations in the effort of derogating to existing orders. Canada opposed the compensation requests and then the Tribunal orders and challenged them at the Federal Court and now the Federal Court of Appeal. While it is noble to try to resolve the issues and stop litigation in the interest of reconciliation, this nobility is tarnished when vulnerable victims/survivors who are children or are caregiving parents or grandparents who suffered multiple losses of their children or are deceased are now disentitled by Canada who signed the FSA. This is not healthy reconciliation. This is also the opposite of what the Tribunal intended when it encouraged the parties to negotiate and resolve outstanding matters. The Tribunal did not envision that progress and negotiation would derogate from its binding orders in a way that reduces compensation or disentitles some victims/survivors who were recognized in the Tribunal's orders.

[251] Throughout these proceedings, Canada opposed the complaint and tried to shield itself by arguing that it did not provide the services directly, it opposed remedies, it narrowed the interpretations of the orders on multiple occasions, etc. Now it tries to shield itself from some Tribunal orders by hiding behind the fact the First Nations made those difficult decisions to compromise and carve out victims/survivors from the FSA to add others from the class actions. This is only occurring because Canada placed a cap on compensation. While the amount of compensation is impressive, what is more impressive is the length and breadth of Canada's systemic racial discrimination over decades impacting hundreds of thousands of victims who deserve compensation.

[252] Canada remains responsible for fulfilling its human rights obligations, both in general and the specific orders from the Tribunal. Canada is not absolved of this responsibility by putting the FSA forward as a First Nations-led process. First Nations were constrained by the fixed amount of compensation Canada was willing to provide, which did not ensure all victims/survivors identified through the Tribunal process would be compensated in line with the Tribunal's orders.

[253] Moreover, it would undermine the *CHRA*'s ability to protect human rights if respondents were able to avoid liability by reaching an agreement with only certain parties to a human rights case to remove the case from the Tribunal's jurisdiction in favour of an

alternative forum. It would reduce the ability of victims to receive a remedy that acknowledges that their human rights have been violated.

[254] The potential for setting a dangerous precedent is significant and could have widespread impacts on the human rights system. The AFN acknowledges in its submissions that there does not appear to be a precedent along the lines of what the AFN and Canada are requesting. While the AFN contends that this case is unique and unlikely to be replicated, the Tribunal is not convinced that it should sacrifice human rights principles on the assumption that this case is unique. To that end, the Caring Society urges the Tribunal to consider the broader and precedential implications of this motion on the integrity of the human rights regimes throughout Canada, including its specific impact on other First Nations human rights cases. The Tribunal agrees with the Caring Society that setting aside human rights remedies in an alternative forum would leave victims of discrimination vulnerable. The Caring Society is particularly concerned about the implications this has for the human rights regime when the federal government is responsible for the discrimination. The Tribunal has consistently sought to address the systemic discrimination in this case by holding Canada accountable:

> Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.
>
> (2020 CHRT 7 at para 130).

[255] It is not appropriate that victims/survivors of discrimination should be required to defend their entitlement to compensation from a collateral attack seeking to remove the Tribunal's jurisdiction and override the orders entitling them to compensation. This is particularly concerning where successful complainants are not entitled to legal fees from successfully advancing their case before the Tribunal, making hiring counsel more challenging (see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, [2011] 3 SCR 471).

[256] It is well established that “contracting out of” a human right is not permissible. As emphasized by the Supreme Court:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy….The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.
>
> (*Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202).

[257] Further, it would be an absurd interpretation of the *CHRA* to allow an outside process to which not all parties have agreed to participate to usurp the role of the Tribunal to order compensation to victims/survivors of discrimination as identified in a Tribunal process. The Tribunal agrees with the Caring Society that public trust in the human rights system is likely to be eroded if orders to compensate victims of discrimination are not binding on respondents and can be bargained away. The Tribunal process allows for the public affirmation of human rights that the current motion would, if granted, undermine. This is particularly true in the current case where the parties have returned to the Tribunal multiple times to compel Canada to remedy its discriminatory conduct. In those rulings, the Tribunal had to confirm that its orders were legally binding on Canada and that Canada was obliged to address the systemic racial discrimination.

[258] Granting the AFN and Canada’s motion now would contradict the Tribunal’s previous rulings that indicated that its remedial orders required implementation. The Caring Society urges the Tribunal to once again reassert the important principle that human rights orders are binding and that compliance is not negotiable. Human rights regimes are meant to offer comprehensive protection over discrimination complaints. Allowing settlement agreements reached in the context of a civil claim to invalidate a ruling made by human rights tribunals could have a series of unintended negative consequences on human rights regimes. The

Supreme Court of Canada in *Honda Canada Inc. v. Keays,* 2008 SCC 39, [2008] 2 SCR 362 distinguished common law remedy from human rights remedies:

> [63] In this case, the trial judge awarded punitive damages on the basis of discriminatory conduct by Honda. Honda argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181. In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend — namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself. Moreover, the recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect. In this respect, they confirm the Code's remedial thrust.

[259] More importantly, the Tribunal frowns on reducing compensation or disentitling victims/survivors once they have been vindicated at the Tribunal and upheld by the Federal Court. This dangerous precedent would send a very negative message to victims/survivors in this case and other human rights cases in Canada and could potentially become a powerful deterrent to pursue human rights recourses under the *CHRA*. Victims/survivors would never have the peace of mind that their substantiated complaints and awarded remedies would be forthcoming to them if, at any time before remedies are implemented, these remedies can be taken away from them without the need for a successful judicial review.

[260] This is even more troubling when we consider the nature of the complaints before the Tribunal in this case. The very nature of human rights rests upon the protection of vulnerable groups. From the beginning the Tribunal found and wrote that this case is about children and the Tribunal's mandate to eliminate discrimination and prevent similar practices from arising. Permitting reductions or disentitlements of compensation for victims/survivors

who have been recognized in evidence-based findings and corresponding orders does not breathe life into human rights. Rather, it takes its breath away.

[261] This cannot be how the human rights regime is administered in Canada.

[262] The Tribunal also agrees with the following Commission arguments that explain the human rights regime under the *CHRA*:

> 42. The *CHRA* does not expressly address the issue of finality. However, section 57 explains that a Tribunal order to award compensation under section 53(2)(e) or section 53(3) may be made an order of the Federal Court for the purpose of enforcement.
>
> 43. While this Tribunal has broad remedial discretion, this authority is constrained by the *CHRA* framework and by the evidence presented.
>
> 44. The *CHRA* requires this Tribunal to balance flexibility and innovation in remedies with natural justice principles.
>
> 45. The dialogic approach does not mean this Tribunal can reconsider its orders in perpetuity. It is meant to facilitate the implementation of orders. It is not intended to be used to negotiate out of binding legal obligations.

[263] Substantive variations of this Tribunal's orders may lead to new litigation or proceedings that disturb established legal principles. If courts and tribunals could continuously revisit and vary their decisions, the administration of justice would not work the way it was meant to, and it would be procedurally unfair to the parties. When a party is not satisfied with a decision of this Tribunal, it can bring an application for judicial review at the Federal Court. It is only in very limited situations that a court or a tribunal can vary, amend, or reconsider an order or a decision, (see *Hughes v Transport Canada*, 2021 CHRT 34 at paras 61-62).

[264] The Tribunal further agrees with the Commission that simultaneously seeking recourse through the judicial review or appellate processes while also returning to this Tribunal for the same outcome (i.e., to re-litigate or change the remedies ordered) creates a problematic precedent and challenges established principles and procedures of administrative law.

[265] The Tribunal agrees with the Commission and "acknowledges the AFN's submission that "the FSA will significantly expand the number of survivors who would otherwise not be

entitled to compensation" by including classes of beneficiaries that go beyond the scope of the Tribunal inquiry. Equally, some people who are entitled to a remedy under this Tribunal's compensation orders will not receive one under the FSA. In taking these factors into account, this Tribunal must apply principles of fairness and access to justice" (Commission Submissions, para. 65).

[266] The *CHRA* provides this Tribunal with a specialized framework and statutory mandate purposely designed to meet the unique needs of victims/survivors of discrimination. It is the proper framework to apply when considering how this Tribunal may exercise its discretion. It contemplates the adjudication and remediation of group complaints such as this. Class actions are judicial proceedings that are governed by separate objectives, legal principles, case law, and rules of procedure. All of this is distinguishable from the case at hand. It is not necessary for this Tribunal to apply class action governing factors and jurisprudence to decide whether to vary its orders to conform to the FSA. Expanding or reducing the scope of the groups of complainants included in this Tribunal's compensation orders to mirror the class action groups would require new evidence and a hearing on the merits of these issues. Further, the groups of complainants this Tribunal ordered to be paid compensation are protected from alteration by the principle of finality of quantum and of categories.

[267] The Tribunal must be allowed to complete its task to ensure victims/survivors of the discrimination are compensated. This task cannot involve reducing or removing some victims/survivors' rights to entitlement.

[268] Furthermore, in determining if the victims/survivors will be compensated, the Tribunal cannot divorce the task from the evidence and findings that warrant the remedy. In the same way, in performing an analysis of if victims/survivors will be compensated, the Tribunal must first have found liability under the *CHRA,* then determine who the victims/survivors are, if they have suffered and what is the appropriate remedy. This is an exercise based on evidence and precedes the implementation phase where the Tribunal examines if the remedy is owed to the victims/survivors. This is not to say that both analyses cannot be done at the same time in a ruling. Rather, this is to highlight the adjudicative process one must follow under the *CHRA.*

[269] This being said, to make findings on the effectiveness of implementation or if the remedy is forthcoming, the Tribunal must first know what it is that needs to be forthcoming. Consequently, the Tribunal looks at its orders and the evidence on implementation to make findings on their effectiveness. This is not an open door to reduce or remove entitlements. It is a door to improve, refine, clarify orders if need be to ensure they effectively compensate the victims.

[270] One main argument raised in this motion is that the negotiation requires compromise and compromises needed to be made given the fixed amount provided. This is an exercise that is best done at earlier stages of proceedings and prior to orders being made.

[271] Another important argument is the one made on reconciliation. If victims/survivors who have been recognized by a human rights Tribunal and the Federal Court are later removed for the greater good of making a final deal to serve others is this a good example of reconciliation? We think not. On the contrary, it is quite concerning. This is even more concerning when the voices of those excluded are the deceased and children.

[272] Canada and the AFN also highlight that this FSA is First Nations-led. The Tribunal appreciates this important fact. However, sovereign nations who are members of the AFN are not exempt from international human rights scrutiny in regards of their citizens. Moreover, states like Canada cannot contract out of their human rights obligations by invoking the sovereignty of First Nations especially when some First Nations call upon Canada to indicate that they have not provided their consent on the FSA.

[273] The AFN and Canada removed the finality aspect of the Tribunal's orders on quantum and recognized categories of victims/survivors in order to achieve finality in the FSA. This benefits Canada in many ways at the expense of some victims/survivors but may create another problem.

[274] The Panel is concerned that the AFN and Canada may have opened themselves to potential liability if the disentitled victims under the Tribunal's orders opt out of the FSA and seek to pursue a recourse against the AFN and/or Canada for removing them from the FSA and changing their opting out options. This point is more of a comment for reflection and is not determinative on this motion.

[275] The parties have not addressed how First Nations governments who are the rights holders will have to deal with victims/survivors once recognized and now disentitled by their own First Nations who may seek justice. The AFN submits that few First Nations peoples avail themselves of the Commission and Tribunal's proceedings. While it is true that First Nations face barriers advancing human rights claims, during the course of the last decade, the Tribunal's experience is that there has been an increase of First Nations cases referred to the Tribunal by the Commission. The Members of this Panel have travelled across the country and heard numerous First Nations cases that often resolve through mediation. The Panel chair had the privilege of hearing a case in a NAN community in a northern and remote area and others in British Columbia and Nova Scotia. Member Lustig chairs a number of First Nations cases and is the adjudicator who ruled in *Beattie v Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1.

[276] Moreover, the results for First Nations as a result of these proceedings and the parties collective work cannot be understated. For example, since the Tribunal's 2016 ruling, **2.13 million** services have been approved under Jordan's Principle according to Indigenous Services Canada's Jordan's Principle webpage. This is one of the many examples of real change beginning to address the systemic discrimination in this case. The fact the AFN's new executive now changed its mind cannot undo the evidence of change in this case which is a result of the parties' work before this Tribunal to hold Canada accountable. Further, the Tribunal recently relied on this case in a complaint from a rights-holding First Nation concerning the discriminatory underfunding of policing services and substantiated the complaint (see *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4 (CanLII)). So far, the *Merit Decision* is cited in over 50 cases by Tribunals and Courts involving First Nations cases and Non-First Nations cases in Canada.

[277] Furthermore, the *Compensation Entitlement Decision* was relied upon in other recent human rights cases where the principles of compensation for infringements of human dignity and egregious cases have been discussed: *RR v. Vancouver Aboriginal Child and Family Services Society* (No. 6), 2022 BCHRT 116 (CanLII); *R.L. v. Canadian National Railway*

Company, 2021 CHRT 33; *Hugie v. T-Lane Transportation and Logistics*, 2021 CHRT 27; *André v. Matimekush-Lac John Nation Innu*, 2021 CHRT 8.

[278] The Tribunal agrees with the Caring Society that it should consider the legacy of the now repealed section 67 of the *CHRA* that was seen in many First Nation communities as excluding them from the protections of the *CHRA*. This case has changed that perception and the results of this case, in particular the compensation orders, were greeted with celebration in many First Nations communities. In addition to validating the experiences of victims/survivors of Canada's discrimination, this built confidence in the human rights process as an option for First Nations to seek redress. Reversing the Tribunal's compensation orders would undermine this progress and faith in the human rights system. It would send a message that the human rights of First Nations People are negotiable.

[279] The Tribunal remains open to ensure the compensation remedy is forthcoming to the victims/survivors and may require further action however, this is not to say it is fair, just and acceptable to reduce entitlements or disentitle victims/survivors who have been vindicated in the Tribunal's findings.

[280] On this point the Tribunal answers two specific questions as follows:

> 1. Are all the categories of victims/survivors in the Tribunal's orders covered by the FSA?
>
> a. No.
>
> 2. If the answer to question 1 is no, can the Tribunal find that the FSA fully satisfies the Tribunal's orders if categories of victims/survivors have been removed from the Tribunal's orders?
>
> a. No.

V. The FSA and the Specific derogations from the Tribunal's Compensation Orders

[281] The parties addressed four potential derogations from the Tribunal's compensation orders in the FSA:

> 1) Entitlement for First Nations children removed and placed in non-ISC funded placements

2) Estates of deceased caregiving parents and grandparents are not entitled to compensation

3) Certain caregiving parents and grandparents will receive less compensation

4) Some Jordan's Principle victims/survivors may receive less compensation

[282] The Tribunal will address them in turn here. Furthermore, the Tribunal reviewed the FSA in its entirety and finds it substantially satisfies the Tribunal's compensation orders. Given the FSA does not fully satisfy the Tribunal's compensation orders and consequently, cannot be fully approved in its current form, the Tribunal will only focus on the main derogations from the Tribunal's orders given this is the reason for the denial of part of this motion. In sum, the Tribunal will not conduct a clause-by-clause analysis of the FSA in this ruling as it is not necessary or determinative to discuss where the FSA is in line with the Tribunal's orders or where it does vary in an acceptable way (not reducing or removing entitlements to victims/survivors).

A. Entitlement for children removed and placed in non-ISC funded placements

[283] The FSA adds another requirement in order to award compensation to First Nations children. The Tribunal decisions provide compensation for children removed from their homes, families and communities as a result of the FNCFS Program's systemic discrimination. The FSA narrows it to removed children who were also placed in ISC-funded care. In light of the evidence presented throughout this case, the Tribunal ordered the maximum compensation available under the *CHRA* for the great harms caused by the removal of First Nations children rather than the number of years in care or the other harms that occurred in care. The Tribunal explained that a removed child or caregiving parent or grandparent had other recourses in addition to this maximum compensation that they could pursue to obtain higher amounts of compensation for the additional harms they suffered. The FSA and class actions focus on these additional harms and the Tribunal agrees this is an appropriate focus for the FSA and the class actions. However, the requirement of removal and placement in care in an ISC-funded location cannot be considered a proper interpretation of the Tribunal's findings and orders. The Panel disagrees with the AFN and

Canada's interpretation of the Tribunal's orders on this point. The Caring Society properly characterized the Tribunal's findings and orders in that regard.

[284] Moreover, the AFN's interpretation of the children eligible for compensation because of their removal by child and family services was raised for the first time in this motion. The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's Compensation Orders. However, the manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion. The AFN's arguments about the ambiguity in which children are covered by the Tribunal's orders and the challenges in providing compensation to certain children are better addressed in a separate motion where the parties have sufficient notice to lead evidence on this point. The Tribunal is open to further clarifying and addressing implementation challenges for these victims/survivors. In fact, if there is ambiguity or outstanding challenges that will delay compensation, those issues should be resolved now so that the parties are able to implement the Compensation Framework promptly. There appears to be a dispute about what the Tribunal meant by the term in ''in care'' and this could have been clarified earlier or at least during the time the parties to the FSA were negotiating. This category called by the parties as Non-ISC children is viewed by the AFN and Canada as a new category and the Caring Society views this as a category already included in the scope of the Tribunal's orders.

[285] The parties now disagree on the interpretation of the Tribunal's orders on who are the removed children and if only ISC funded placements are to be considered for the purpose of removed children.

[286] Instead of seeking clarification with the Tribunal as was done on a number of occasions in the past, as part of the compensation process, the AFN and Canada went with their own interpretation which was incorporated in the FSA. The Tribunal addressed clarifications on compensation motions, on average, in two months, except for the very complex issue of First Nations eligibility under Jordan's Principle which took much longer. The Caring Society, recognized by this Tribunal for their expertise in child welfare, disagrees

with the AFN and Canada's interpretation and shares the same views as this Panel on this point.

[287] The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's compensation orders. This is not an issue that the Tribunal was asked to address at the time it made its compensation orders or when asked to add the estates or clarify other aspects such as the children in care as of January 1, 2006 or the definitions of essential services, etc.

[288] The appropriate manner to address this was by way of a motion for clarification of the Tribunal's orders and not by way of this motion. The manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion.

[289] However, the FSA's attempt to unilaterally remove these victims from the scope of the Tribunal's compensation through the class action proceeding is close to being a collateral attack on the Tribunal's decisions. This being said, the Tribunal has considered the AFN's new submissions on this point and finds that determining whether using ISC-funded placements as a measure of eligibility is appropriate would require a notice of motion clearly raising the issue and allowing an opportunity to fully assess relevant evidence. This motion is not the appropriate manner to do so as it would be procedurally unfair with the tight timelines on this motion that prevent those who oppose the AFN and Canada's views on this point from leading contrary evidence and properly challenging the AFN's evidence.

[290] The Tribunal will now turn to a brief review of its previous rulings.

[291] In the *Merit Decision*, the Panel discussed the term "in care":

> [117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child "in care". The first choice for a caregiver in this

> situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.
>
> …
>
> [119] There are circumstances, however, when the risk to the child's safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

(i) Removed children and the parties' differing interpretations post Federal Court ruling

[292] The Panel provided compensation for the removals of children from their homes, families and communities based on the strong evidence that established the link between Canada's discriminatory practice and the evidence of harm for pain and suffering and wilful and reckless conduct. It is not the goal here to be reexplaining what was already explained at length in previous decisions now upheld by the Federal Court as reasonable. The parties now disagree on the interpretation of the Tribunal's orders on who are the removed children and if only ISC funded placements are to be considered for the purpose of removed children.

[293] The Tribunal's decision in 2019 CHRT 39, addressed the link between the evidence and the harms it was compensating. The Tribunal focused on harms to dignity and the Tribunal also ordered a critical and unprecedented human rights remedy that directly impacts the victims/survivors in this case: human rights compensation for the infringement of dignity, pain and suffering and acknowledgement of the federal government's wilful and reckless conduct.

(ii) Non-ISC Removed children

[294] The Panel's summary reasons and views on the issue of compensation were outlined in 2019 CHRT 39 as follows:

> [13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its [*Merit*] *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.
>
> [14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.
>
> [15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the

> hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group, namely First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the Attorney General of Canada's (AGC's) position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

[295] Later, in the *Compensation Entitlement Decision*, the Tribunal further described the harm done to First Nations children and their families which is linked to the removal of the child:

> [147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.
>
> [148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation.
>
> [149] The use of the "words unnecessarily removed" account for a distinction between two categories of children: those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.
>
> [150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the

abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the Decision. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

…

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial discrimination. The Panel also made numerous findings of adverse impacts toward First Nations children and families, adverse impacts that cause serious harm and suffering to children: the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people**, in particular as a result of the

> Residential Schools system (see 2016 CHRT 2 at, para. 459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves** (see 2016 CHRT 2 at, para. 467).

[296] The Panel focused on the effects of the systemic discrimination and how those effects caused harms and led to removals of First Nations children. A number of findings were made in the *Compensation Entitlement Decision*. Some important findings are reproduced below to highlight the Tribunal's focus on removals:

> [164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.
>
> [165] The Wen:de report goes on to say that:
>
> > (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First**

Nations families to care for their children emerges (see Wen:de at, pp.13-14) (emphasis ours).

Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see Wen:de pp.13-14).

The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples (…)

Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting effect. - Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility**.

The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see Wen:de at, pp.90-91).

The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for**

> **provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families**. In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see Wen:de at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil*, La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
>
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered a **strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services**.
>
> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see Wen:de at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:

> Moreover, it was held that the loss of a child constitutes the kind of psychological harm which may found a claim for breach of s.7. Lamer J., for the majority, held: I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the government's failure to provide adequate funding and services (see Wen:de at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (Wen:de at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discusses the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself**…. The effects of

> apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart. Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:
>
> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life.** I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law**.
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**
>
> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[171] More recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing

> and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard. (see 2018 CHRT 4 at, para. 122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para. 123).
>
> Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system. (see 2018 CHRT 4 at, para. 124).

[…]

[184] The evidence is ample and sufficient to make a finding that each First Nations child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grandparent who had one or more children under her or his care who was unnecessarily removed from their home, family and community has suffered. Any parent or grandparent if the parents were not caring for the child who had one or more children removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grandparents, the grandparents caring for the children should be compensated. While the

> Panel does not want to diminish the pain experienced by other family members such as other grandparents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grandparents.
>
> [186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.
>
> [187] The Panel addressed the adverse impacts to children throughout the Decision. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged Decision. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the Decision and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[297] The Tribunal cannot reproduce all its lengthy findings in the *Compensation Entitlement Decision*, 2019 CHRT 39, and subsequent compensation process rulings. The above excerpts are to emphasize the point that, given the evidence before it, the Tribunal compensated removals of First Nations children as opposed to the time they spent in care. While the Tribunal agrees the systemic and racial discrimination is focused on how the Federal FNCFS Program adversely impacted First Nations children and families on reserve and in the Yukon, the Tribunal did not focus on ISC funded placements. This motion is the first time that the Tribunal heard of this narrower interpretation.

[298] Further, the AFN's submissions in this motion show that they were considered and then removed for reasons that the Tribunal was not able to consider at the time it made its compensation orders. The AFN argues in its supplementary written submissions that the only children entitled to compensation under the Tribunal's orders but not entitled to compensation under the FSA are those children placed into kith placements, being placements with friends. The AFN contends that this was a principled exclusion on the basis that kinship placements were already excluded from the scope of compensation and, to the AFN's mind, there was not a significant difference for First Nations between a kith and

kinship placement. Given that the AFN did not see a significant difference between kith and kinship placements, the AFN maintains that it was a principled compromise during the negotiations to exclude kith placements from the scope of compensation under the FSA. The AFN also contends that expert evidence subsequent to the Tribunal approving the Compensation Framework indicates that it is not practical to collect data to enable compensation for children in kith and kinship placements. Using other methods to identify these children would result in retraumatizing them.

[299] The Tribunal does not have sufficient evidence before it to accept the AFN's contention that restricting the scope of compensation to children placed in ISC-funded care would only exclude children placed in kith and kinship care and not other First Nations children removed from their homes, families and communities. The Caring Society correctly indicates that the terminology for different types of placements varies across Canada as different provincial legislation uses different terms.

[300] The Caring Society's interpretation is correct when it submits that the Compensation Framework itself also indicates a broad-based approach. Contrary to the class action Final Settlement Agreement, which privileges using ISC records to determine eligibility, the CHRT Compensation Framework contemplates ISC proactively reaching out to professionals, service providers and provincial/territorial governments to identify beneficiaries (sections 5.3-5.5) and specifically contemplates obtaining assistance from child and family service agencies across the country (section 5.6(c)) and from provincial and territorial governments (section 5.7(a)). The CHRT Compensation Framework further states that the work required for service providers to bring this information forward will be funded by Canada (sections 5.4 and 5.6(b)). The CHRT Compensation Framework stated that the result of the information gathering efforts by ISC, FNCFS Agencies and provincial/territorial governments would be a "Compensation List", being a list of individuals on which there was agreement regarding eligibility for compensation (section 8.3). Individuals not on the Compensation List would still be able to apply to have their claim considered (section 8.7).

[301] The Caring Society's assertion is correct that the detailed process outlined in sections 5.3 to 5.8 to generate section 8.3's CHRT Compensation List, as well as the residual ability to apply for compensation included in section 8.7, would not have been required if

compensation was limited to ISC-funded placements. As the AFN has made clear in its submissions, ISC-funded placements can be identified by ISC data alone, and do not require access to the wide array of sources identified in the CHRT Compensation Framework. The Tribunal agrees this in and of itself is evidence of the Compensation Framework's broad approach to implementing the Tribunal's orders. This approach was agreed to by the Caring Society and the AFN, and by Canada subject to its objections in its judicial review.

[302] Further, the Tribunal has insufficient evidence to understand how many children would be excluded by limiting compensation to those First Nations children placed in ISC-funded care. While the Tribunal would be concerned even if it is a small number of children who would be excluded, the Tribunal did not have an opportunity to assess how many children were at risk of being excluded.

[303] The AFN and Canada support their request to use ISC-funded placements as a measure of eligibility because of the challenges identifying First Nations children in other types of placements. As noted consistently in its retention of jurisdiction, the Tribunal is open to addressing issues that arise in implementing its orders. However, the nature of this motion did not allow the Tribunal to test the evidence relating to the challenges asserted by the AFN. The timelines required for this motion to meet the AFN and Canada's deadlines in the Federal Court were such that procedural fairness did not allow the other parties to test the AFN's assertion that it would not be feasible to identify affected First Nations children outside of ISC-funded placements. There was not enough time for the other parties to conduct a detailed cross-examination of the AFN's witnesses and for the other parties to call their own evidence, which may have included expert evidence. This is particularly true given that the more detailed information provided by the AFN was filed as a result of the Panel's follow-up questions after the hearing.

[304] As such, the Tribunal is not in a position based on the current evidentiary record to make a determination of how significant the challenges are in compensating First Nations children who were in non-ISC funded placements.

[305] It is unfair to those victims/survivors whose rights are now advocated by the Caring Society to remove compensation from them without adjudication and findings of the

difficulties in locating them. The evidence raised in response to the Panel Chair's questions do not allow the Panel to make the appropriate findings at this time. The Panel welcomes a further consideration by way of a motion of this discrete issue and any other interpretation issues, such as the issue of biological parents, that appear to be contentious.

[306] Of note, at the time of the compensation hearing that led to the *Compensation Decision*, 2019 CHRT 39, the AFN, joined by other First Nations parties, urged the Tribunal demonstrate courage and to order compensation even if it could be difficult to locate beneficiaries. The First Nations parties argued that the difficulty of identifying victims should not prevent the Tribunal from making orders. This is what the Tribunal did:

> [188] The Panel need not hear from every First Nations child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not (see section 50 (3) (c) of the *CHRA*). We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47, 62, 66, 121, and 133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[307] As it will be explained below, the Tribunal did not have any indication the parties would adopt this interpretation. This is confirmed by the finalization of the Draft Compensation Framework which will be further addressed below.

[308] Moreover, the question of other factors that play a role in removals was addressed by this Panel in the *Compensation Entitlement Decision*, 2019 CHRT 39:

> [177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues

> are multifaceted and may involve the interplay of numerous underlying factors (see for example, 2016 CHRT 2 [*Merit*] *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[309] The Tribunal focused on the adverse impacts of the Federal Program causing harm to First Nations children and families and not whether the First Nations child was placed in ISC funded care. What happens if as a result of the Federal Program, a First Nations child is removed and placed in care but not funded by ISC? The Tribunal was not confronted with this question until now and, therefore, could not have made any order with this rationale in mind.

[310] The Tribunal confirms the proper characterization of the Tribunal's orders is held by the Caring Society as summarized below. Notably, the Caring Society's accurate understanding of the Tribunal's rulings and the absence of a disagreement on the interpretation until now even when the parties were working collaboratively on the compensation process suggests the issue became one when choices were made on who should be removed under the FSA to ensure sufficient funds were there for the other categories of victims/survivors and regardless of binding orders from this Tribunal.

[311] In January 2022, the Caring Society wrote to the AFN and advised the AFN it would not agree to a reduction of compensation for children victims/survivors who were entitled to the maximum compensation under the Tribunal's orders. The Caring Society also wrote that any adult victims (i.e., parents and caregiving grandparents) eligible to receive $40,000 in compensation per 2019 CHRT 39 and 2021 CHRT 7 shall not have their entitlement unduly infringed save and except in circumstances where class action counsel and Canada can demonstrate that lower amounts are just compensation for the infringement of dignity and wilful and reckless discrimination found by the Tribunal, (see letter of January 21, 2022, exhibit A, to the affidavit of Jasmine Kaur, dated August 5, 2022).

[312] The AFN and Canada did not seek prior clarification from the Tribunal on this point even though the parties came back to the Tribunal to request an amendment to the end date for compensation and other long-term reform orders.

[313] However, the Tribunal has indicated in its letter-decision that it is open to clarify this order should the parties wish to obtain clarification and if changes are needed. This should be dealt with after a motion with proper notice and new evidence is provided in order to ensure fairness to the victims/survivors.

[314] The Panel agrees with the Caring Society that there appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the Tribunal ordered compensation for Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivizing children being unnecessarily moved from their home, family and community during child welfare involvement. The case did not address whether a child was placed in care funded by ISC after their removal.

The Tribunal never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC. Canada's funding of actual maintenance costs contributed to the systemic racial discrimination by creating an incentive to place children in care but did not limit discrimination to those children placed in care funded by ISC. The Panel's experience throughout has been to focus on the harm experienced by the affected children based on Canada's discriminatory and underfunded provision of child and family services.

[315] This was addressed in 2019 CHRT 39:

> [180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 [*Merit*] *Decision* at, paras. 111; 113; 349).
>
> [181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: "Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care." (see 2016 CHRT 2 Decision at, para. 197).

[316] In 2019 CHRT 39 at para. 168, the Tribunal found “experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging in and of itself […] The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.”

[317] The Tribunal recognized that removing a child from their family is always a harmful event and particularly problematic when it could have been prevented with appropriate services. The Tribunal found that the discriminatory underfunding of prevention services increased the likelihood of children being unnecessarily removed from their homes (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177). This initial removal was discriminatory regardless of whether the child’s subsequent placement was funded by ISC.

[318] The Tribunal agrees with the Caring Society, the insidious nature of the discrimination spread throughout the continuum of child and family services: from the moment a referral was received to the long-term placement of a child, and all the services (or lack of services) in between. One of the critical findings of the Tribunal was its determination that the failure to equitably fund prevention services and least disruptive measures led to higher rates of children having to unnecessarily leave their homes, (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177).

[319] The Tribunal agrees with the Caring Society that it never squarely defined the meaning of “in care” in its reasons because such a definition was never needed, as the systemic discrimination acutely arose from the discriminatory underfunding and lack of preventative services and least disruptive measures that led to the removal. This discrimination was further exacerbated by Canada’s funding models that covered the actual costs of maintenance, further incentivizing the removal of First Nations children to be placed in foster care and other state funded placements. But the systemic discrimination was never confined in the way that is now being suggested in this motion – First Nations children who were removed were harmed and experienced an infringement of their human rights and dignity when they were deprived to receive preventative services and least disruptive measures due to Canada’s discriminatory conduct.

[320] The Tribunal will not revisit all its findings as this is not a review of its previous decisions nor should a collateral attack occur as part of this motion. The appropriate way is to bring a motion to allow the Tribunal to consider new information and evidence and determine if an amendment is warranted in light of the legal analysis provided above and continued below.

[321] The Tribunal will now turn to the parties' work on the Compensation Framework and how the Tribunal interpreted such work.

[322] As explained above, the Tribunal in order to issue the consent order in 2021 CHRT 7 considered the Compensation Framework and accompanying schedules. This included schedule B: Taxonomy of compensation categories for First Nations Children, Youth and Families: Canadian Human Rights Tribunal Ruling 2019 CHRT 39 (the Taxonomy). The Compensation Framework references the Taxonomy and explains its role in the compensation process and in locating the potential beneficiaries:

> a) The Taxonomy was designed for child and family services providers to assist in the process of identifying and locating potential beneficiaries; however, a feasibility investigation is underway to determine if, and how, it can assist other service providers to identify beneficiaries.
>
> b) Canada will fund any adaptations required to apply this Taxonomy to meet the needs of specific service provider communities, as determined by the independent experts who drafted the taxonomy in Schedule "B".
>
> c) Identifying children who were necessarily and unnecessarily removed will likely require assistance from child and family service agencies across the country. The Taxonomy is intended to guide their review of individual records in their possession so as to expedite the process of identifying and locating potential beneficiaries and ultimately validation of claims for compensation.
>
> 5.6 The report entitled "Canadian Human Rights Tribunal (CHRT) Ruling 2019 CHRT 39: Taxonomy of compensation categories for First Nations children, youth and families" dated November 2019 and authored by Marina Sistovaris, PhD, Professor Barbara Fallon, PhD, Marie Saint Girons, MSW and Meghan Sangster, Med, MSW of the Policy Bench: Fraser Mustard Institute for Human Development will assist in the identification of potential beneficiaries (the "Taxonomy"). The Taxonomy is attached as Schedule "B".

[323] The Taxonomy was also found to be in line with the Tribunal's reasons and orders and therefore was accepted by the Tribunal before it rendered its last ruling on compensation in 2021 CHRT 7.

[324] The Taxonomy is informative in many aspects and supports the Tribunal's reasons and orders. The Taxonomy's purpose is as follows:

> The purpose of this briefing note is to: (1) develop a taxonomy of compensation categories; and (2) frame questions that will help guide individuals appointed by the Canadian Human Right Tribunal (CHRT) to carry out the process of identifying individuals eligible to receive compensation according to the conditions set out by 2019 CHRT 39. The development of compensation categories and framing of questions involved:
>
> a) a content review of the 2019 CHRT 39 ruling;
>
> b) mapping out the compensation categories, identifying common themes and defining key terms and concepts;
>
> c) reviewing provincial and territorial child welfare legislation, identifying and defining key terms and concepts;
>
> d) analyzing and synthesizing information concerning the 2019 CHRT 39 ruling and child welfare legislation in Canada; and
>
> e) framing questions corresponding to the compensation categories.

[325] The Taxonomy clearly follows the Tribunal's reasons and orders and takes into account the subsequent compensation rulings that were issued as clarification:

> 2.0 Background
>
> On September 6, 2019, the CHRT issued the eighth non-compliance order—2019 CHRT 39—concerning compensation for First Nations children, youth and families negatively impacted by Canada's child welfare system. The CHRT found that Canada's "willful and reckless conduct" and discriminatory child welfare practices have contributed to the ongoing pain and suffering of First Nations children, families and communities. According to the Tribunal's ruling, the Government of Canada is required to pay First Nations children, youth and families the maximum amount of compensation permitted under the 1985 *Canadian Human Rights Act* (*CHRA*) who were: unnecessarily placed in care since January 1, 2006; necessarily placed in care but outside of their extended families since January 1, 2006 or denied or delayed receiving services between December 12, 2007 and November 2, 2017 as a result of the Government of Canada's discriminatory application of Jordan's Principle.

(emphasis added).

[326] The Taxonomy document is also instructive on the categories of beneficiaries covered under the Tribunal's orders. Again, the Tribunal upon review of the taxonomy document did not identify discrepancies, contradictions or concerns:

> 4.0 Compensation Categories
>
> Three central compensation categories are extrapolated from the 2019 CHRT 39 ruling:
>
> > Category 1: Compensation for First Nations Children and their Parents or Grandparents in Cases of Unnecessary Removal of a Child in the Child Welfare System;
> >
> > Category 2: Compensation for First Nations Children in Cases of Necessary Removal of a Child in the Child Welfare System
> >
> > Category 3: First Nations Children and their Parents or Grandparents in Cases of Unnecessary Removal of a Child to Obtain Essential Services and/or Experienced Gaps, Delays and Denials of Services that Would Have Been Available under Jordan's Principle.
>
> These have been further divided into subcategories, for which the eligibility requirements are explained below. Each category is detailed in the taxonomy document.

[327] Further, the taxonomy document also describes out-of-home care placements and includes kinship care and a variety of placements:

> 5.9 Out-of-Home Care/Placement
>
> Out-of-Home Care/Placement: "[E]ncompasses the placements and services provided to children and families when children are removed from their home due to abuse and/or neglect" (Child Welfare Information Gateway, n.d.: Overview Out-of-Home Care). Placement outcomes include:
>
> > a) "Kinship Out of Care: An informal placement has been arranged within the family support network; the child welfare authority does not have temporary custody.
> >
> > b) Customary Care: [A] model of Indigenous child welfare service that is culturally relevant and incorporates the unique traditions and customs of each First Nation.
> >
> > c) Kinship in Care: A formal placement has been arranged within the family support network; the child welfare authority has temporary or full custody and is paying for the placement.

> d) Foster Care (Non-Kinship): Include any family-based care, including foster homes, specialized treatment foster homes, and assessment homes.
>
> e) Group Home: Out-of-home placement required in a structured group living setting.
>
> f) Residential/Secure Treatment: Placement required in a therapeutic residential treatment centre to address the needs of the child." (Fallon et al., 2015, p. 105).

Out-of-home placement can sometimes lead to reunification, adoption, or legal guardianship:

> Reunification: "[T]he return of children to their family following placement in out-of-home care" (Canadian Child Welfare Research Portal, n.d., Reunification).
>
> Adoption: "The social, emotional, and legal process through which children who will not be raised by their birth parents become full and permanent legal members of another family while maintaining genetic and psychological connections to their birth family" (Child Welfare Information Gateway, n.d., Glossary).
>
> Legal guardianship: "Guardianship is most frequently used when relative caregivers wish to provide a permanent home for the child and maintain the child's relationships with extended family members without a termination of parental rights. Caregivers can assume legal guardianship of a child in out-of-home care without termination of parental rights, as is required for an adoption." (Child Welfare Information Gateway, n.d., Guardianship).

[328] The Tribunal agrees with the parties who submit the Compensation Framework is more akin to a reference document and, therefore, the Tribunal's orders prevail. However, the Tribunal made its orders in 2021 CHRT 7 and incorporated the Compensation Framework in its orders after finding it was in line with its findings and orders. The Compensation Framework is therefore highly relevant to determine if the non-ISC funded placements were included in the Tribunal's orders. While the Compensation Framework can be further amended and is less static than the formal entitlement and quantum orders made by this Tribunal, it is a clear indication of what the Tribunal considered at the time it made its orders. The fact that the AFN and Canada now limit its meaning and value to support carving out certain children does not change what the Tribunal considered at the time it made its compensation orders. Moreover, if the Compensation Framework referring to the taxonomy

document ought to be set aside for the purposes of analyzing the compensation and related beneficiaries, there was no need for the parties to wait for its finalization after the Tribunal clarified definitions and categories. This is not the logic that was followed in this case regardless of what the AFN and Canada are now stating. The Tribunal was asked to clarify a number of orders and definitions for the parties to be able to finalize the Compensation Framework. The parties requested those clarifications and advised the Tribunal this would assist in finalizing the Compensation Framework. The Tribunal ordered the parties to develop a compensation process. The Compensation Framework is part of that process. Denying it now to justify the FSA is of no help. The Compensation Framework needed to be finalized before developing a guide for compensation distribution which is one of the final stages of the compensation process. This guide was not developed given that Canada judicially reviewed the Tribunal's compensation rulings. Back-peddling to erase this to support disentitlements is of no use and is completely rejected here. A better view of this, is if new evidence which is properly tested demonstrates impossibilities or serious impracticalities for this category of beneficiaries, then, further order requests in keeping with the best interests of those children, could potentially be made given this evidence was not available at the time the Tribunal made its orders.

[329] Further, the Tribunal considered the Framework and how it described removals of children in broad and non-exhaustive terms. This was found in line with the Tribunal's findings and orders:

> 4.2.1. "Necessary/Unnecessary Removal" includes:
>
> > a) children removed from their families and placed in alternative care pursuant to provincial/territorial child and family services legislation, including, but not limited to, kinship and various custody agreements entered into between authorized child and family services officials and the parent(s) or caregiving grandparent(s);
> >
> > b) children removed due to substantiated maltreatment and substantiated risks for maltreatment; and
> >
> > c) children removed prior to January 1, 2006, but who were in care as of that date.

[330] The Framework explains how the description above applies to the compensation process and identification of potential beneficiaries of the Tribunal's compensation:

> 4.2. For greater certainty, the following definitions apply for the purpose of identifying beneficiaries:

[331] To be clear, the Panel agrees with the AFN that compensation is linked to the systemic discrimination found by this Tribunal in the provision of services through the Federal FNCFS Program. However, the nuance newly made by the AFN and Canada does not reflect the spirit of the Tribunal's rulings. It transforms the focus from what led to the removals to once removed who pays for this child's care.

B. Estates of caregiving parents and grandparents

[332] Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.

[333] This is a clear derogation from the Tribunal's orders. As such, the key consideration is whether the Tribunal is prepared to accept this derogation, either by amending its orders or granting the AFN and Canada's request to find the FSA satisfies the Tribunal's orders notwithstanding this clear derogation.

[334] The parties to the FSA indicate that they are seeking to achieve proportional compensation commensurate to harm suffered within a historically large, but fixed settlement amount. To achieve this, one area where the parties have taken a more limited approach to compensation than what was ordered by the Tribunal is with respect to the estates of deceased class members: only the deceased members of the Removed Child, Jordan's Principle and Trout Child classes as described in the FSA are entitled to compensation. The AFN and Canada submit in the joint motion that the fundamental principles guiding the parties was that, where compromise is necessary, compensation for children must be given priority. The parties are mindful of the Panel's observation that "the discriminatory practices at stake involved the forced separation of families and communities,

and could therefore have intergenerational impacts." Although there are limits on which estates of class members will be eligible for compensation, safeguarding compensation for deceased members of the child classes allows compensation to still flow through to the heirs of those children who were the youngest victims of the discriminatory practices.

[335] The FSA establishes a mechanism for those who do not receive direct compensation to benefit from the terms of the FSA by way of the establishment of a Cy-près fund of $50 million. The First Nations-led Cy-près Fund will be endowed with $50 million.

[336] The FSA contemplates that some members of the various family classes may not receive direct compensation but will benefit from the Cy-près Fund.

[337] The Tribunal, encouraged by the AFN, already rejected in its *Compensation Decision* that compensation be paid into a support fund in lieu of direct financial compensation and found this should be paid in addition to financial compensation.

[338] The FSA disentitles the estates of deceased caregiving parents and grandparents to direct financial compensation.

[339] Canada opposed paying compensation to estates. The Tribunal rejected this position as part of its *Compensation Decision* as it would have allowed Canada to benefit from delaying compensation to victims of its discrimination which is not consistent with the objectives of the *CHRA.*

[340] The Tribunal understands why the AFN made this choice and that this choice is a possible option when negotiating a settlement. However, entitlement orders were already made by this Tribunal after evidence-based findings and orders. Agreeing with the AFN's choice would collaterally attack the Tribunal's findings and orders that granted compensation to the estates of deceased parents or grandparents. When the Tribunal entitled those estates to compensation, it did so in light of the evidence and found the orders were warranted under the *CHRA*, quasi-constitutional legislation that confers discretion to Tribunal members to order compensation if justified. This is made even stronger when those orders were found reasonable by the Federal Court. The fact that a cap has now been placed for compensation by Canada and the need to include class action victims/survivors

who were outside these proceedings to allow Canada to settle all claims related to its widespread systemic discrimination does not trump the Tribunal's orders. Canada cannot contract out from its obligations under the *CHRA* and Tribunal orders by simply stating this is the AFN's choice. Allowing this would transform the human rights regime and usurp the Tribunal and reviewing Court's roles. Moreover, this is the AFN's choice because of the added class actions and the fixed funds. Notably, the AFN requested compensation for estates of deceased parents and grandparents. The Tribunal considered their submissions alongside the other parties' submissions and considered the evidence and found this was warranted.

[341] The AFN and Canada have not convinced the Tribunal that its previous orders can be amended to reduce compensation or disentitle victims. Since orders are not simple recommendations, they cannot be disregarded. This could undermine the human rights process and the previous orders made in this case including the orders made in March 2022 that support an end date for compensation. There is a fundamental difference between settlements which may require compromise for financial or other reasons and the Tribunal proceedings. At the Tribunal, when a respondent advances financial hardship, it is allowed to present such arguments and supporting evidence as part of an undue hardship defence under section 15 (2) of the *CHRA*. The Tribunal considers the evidence and arguments of all parties and determines if the complaint is substantiated or if the respondent's defences stand and the complaint is dismissed. This is done through tested and weighed evidence and thorough consideration of the law, the arguments and all materials. Such a defence is not easy to make since it has to be demonstrated with the evidence. This goes to say that the Tribunal makes decisions based on facts, law and evidence. Of note, the Tribunal already found that Canada did not advance such a defence in this case.

[342] This is an important reason why the Tribunal is not convinced by the AFN and Canada's arguments on this point. Canada cannot indirectly do what it could not do before the Tribunal.

[343] Furthermore, settlements often occur prior to orders being made and if orders have already been made, settlements must not find ways to evade the orders.

[344] While estates are not people, the heirs of those estates are and they were signaled by the Tribunal's decision subsequently upheld by the Federal Court that they were entitled to compensation. It is unfair to now remove this from them because of financial choices resulting from merging proceedings and imposing a financial cap. These arguments are insufficient to justify an amendment to the Tribunal's orders on this point. As it will be revisited below, the Tribunal cannot amend its orders to reduce compensation or to disentitle victims/survivors. The Tribunal could accept variations of its orders if it does not remove gains for victims/survivors or a different compensation process and if supported by the evidence, which is a key consideration for this Tribunal for any order.

[345] Finally, while the Tribunal recognizes the importance of respecting the inherent rights of self-governing First Nations who decide for themselves, which has been honored for the reform aspect of these proceedings and also reflected as part of the Tribunal in 2018 CHRT 4 orders, in terms of compensation, the Tribunal would have more latitude if it was not asked to reduce or revoke individual rights of victims/survivors.

[346] There is a real difficulty to have a complainant requesting orders, leading evidence and then changing its mind in part because a respondent controls the process in limiting the amounts of funds for multiple proceedings against it without regard for previous orders.

[347] When the AFN requested the Tribunal's compensation orders it did so on behalf of self-governing First Nations supported by evidence and resolutions.

[348] The Tribunal found it had resolutions and were mandated to request the orders. The Tribunal notes that the AFN also brought these complaints and actively advocated for the individual compensation the Tribunal ordered. It did this on the basis of resolutions by the Chiefs-in-Assembly. Now the AFN changed its mind and now asks this Tribunal to honor a First Nations-led process that rescinds some First Nations Peoples rights because of compromise.

[349] If honoring the inherent right of self-government of First Nations under the *CHRA* means that we must honour the First Nations who change their minds after orders are made with disregard to the evidence that led to those orders, the Tribunal believes it should be clearly expressed in legislative amendments because it is counterintuitive to the current

human rights regime and the legitimacy of the Tribunal's mandate. Otherwise, Tribunal orders must be seen as binding and victims/survivors regardless of their national origin must be able to rely on these orders once they are made. Again, changing one's mind in this case after orders are made is less an issue if rights are not infringed upon and if the evidence supports it and the retention of jurisdiction allows it.

[350] For the above reasons, the Tribunal cannot find the FSA fully satisfies the Tribunal's orders for this category of victims. Moreover, the Tribunal cannot amend its orders to reflect the FSA as it would be rescinding its findings and orders making them meaningless, non-authoritative and fleeting. Further, the arguments in support of the amendments have not convinced the Tribunal that these amendments are justified or that they can be done in this human rights framework.

C. Certain caregiving parents and grandparents will receive less compensation

[351] The AFN indicates there are two points where the removed child family class may deviate from the Tribunal's Compensation Framework. First, caregiving parents and grandparents will receive additional compensation up to $60,000 in the event they had multiple children removed rather than multiples of $40,000.

[352] The second change is that if there is an unexpected number of claimants, compensation may be reduced to ensure that all caregiving parent and grandparent victims receive compensation.

[353] The maximum compensation of $60,000 similarly ensures there are enough funds to compensate all eligible caregiving parents and grandparents.

[354] Further, family class members who are not eligible for direct compensation can still benefit from the Cy-près fund.

[355] Again, the AFN clearly admits a derogation from the Tribunal's orders and the main reason is to ensure there are sufficient funds available for everyone in light of the fixed amount of funds for compensation in the FSA.

[356] The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims/survivors who were retraumatized and suffered greatly. Losing more than one child heightens the presence of a willful and reckless behavior; it does not reduce it. The Tribunal emphasized that, given this was the worst-case scenario, maximum compensation should be paid for the removal of each child. While the harm suffered warrants more than $40,000 per child removed, the *CHRA* places a cap on compensation. The FSA chips away at the heart of the willful and reckless discriminatory practice found and the orders that signal to Canada that its behavior was devoid of caution and caused compounded harm to parents and grandparents in removing more than one child.

[357] Those findings were made after carefully considering the evidence and submissions and nothing in this joint motion changes this. While the Tribunal understands the need for compromise as part of the settlement negotiations, the result is that the Tribunal orders that recognized this category of victims/survivors will be significantly reduced not based on evidence but rather to ensure everyone can receive some compensation within the fixed pot of compensation funds.

[358] The Tribunal appreciates that the AFN wanted to prioritize children in the FSA. However, this choice between parent or grandparent and child does not form part of the Tribunal's compensation orders. Under the Tribunal compensation process no one needs to yield compensation to the other. Moreover, the FSA needed to adopt such an approach given the broader number of victims/survivors and the fixed pot of compensation funds. This was not a consideration before the Tribunal when it made its compensation orders. Again, Canada did not make an undue hardship cost defence to limit compensation.

[359] This is the equivalent of asking the Tribunal to change its findings concerning the harms suffered by the parents and grandparents who saw multiple children removed. Similar to the reasons stated above, this is akin to a collateral attack to the Tribunal's compensation decisions. Furthermore, as it will be explained below, amendments cannot be made to reduce the entitlements that were made by this Tribunal based on evidence and

the law. Even if we were wrong on this point, no convincing evidence was presented to justify such an amendment.

[360] Again, for the above reasons, the Tribunal cannot find the FSA fully satisfies the Tribunal's orders for this category of victims/survivors.

D. Some Jordan's Principle victims/survivors may receive less compensation

[361] The AFN contends that the process for compensating Jordan's Principle victims generally follows the principles identified by the Tribunal. The FSA aims to ensure that children who suffered discrimination and were objectively impacted are compensated through a process that is objective and efficient and the definition of essential services is reasonable. The process focuses on establishing a confirmed need for an essential service that was the subject of a delay, denial or service gap. Those claimants who are most impacted will receive at least $40,000 while those who are less seriously impacted will receive up to $40,000. The FSA dedicates a budget of $3 billion to the Jordan's Principle child class. The larger budget estimated for the Jordan's Principle class despite the smaller projected size of that class accounts for the intention to ensure—to the extent possible in a class of unknown size—payment of $40,000 to those Jordan's Principle survivors who would have benefitted from a $40,000 payment under the Tribunal's Compensation Order.

[362] The AFN also submits the FSA and the claims process described therein which is to be developed by the parties generally follow the principles established by the Tribunal and set criteria that are amenable to objective implementation. The goal in the FSA is to ensure that those children who suffered discrimination and were objectively impacted are compensated consistent with the Tribunal's reasoning that the compensation process should be objective and efficient, and the definition of essential services must be reasonable. The process primarily focuses on a confirmed need for an essential service that was the subject of a delay, denial or service gap within the bounds of reasonableness.

[363] Notably, the AFN submits this accounts for the significant uncertainty in the class size and is expected to result in children who were eligible for Jordan's Principle compensation under the Tribunal's orders receiving at least $40,000.

[364] The framework to determine what is an essential service will be developed with the assistance of experts.

[365] The starting point is the list of services currently eligible for Jordan's Principle funding. The process aims to treat children as significantly impacted if there is evidence to support such a conclusion. The process is designed to be flexible so that it can consider services that are essential for a particular child but are not generally essential services. The process does not require interviews or examinations of claimants. There is a recognition that the type of documentation required to support a claim might vary.

[366] The AFN explains that only caregiving parents and grandparents of Jordan's Principle and Trout class children who suffered a significant impact will receive compensation. This narrowed eligibility occurred because the number of caregiving parents and grandparents was unknown. Caregivers who do not receive a direct benefit would nonetheless benefit from the Cy-près fund.

[367] There is no dispute on the fact that this also is a derogation from the Tribunal's orders. The AFN clearly submits this approach departs from the Tribunal's orders.

[368] There are outstanding items in the FSA to be determined on which the plaintiffs are actively in conversations with a First Nations-led Circle of Experts. These include finalizing the Jordan's Principle assessment methodology. Members of the Jordan's Principle Class and the Trout Child Class will be determined based on their "Confirmed Need" for an "Essential Service."

[369] Under the Tribunal's approach, all First Nations children eligible for compensation related to Jordan's Principle are entitled to $40,000 in compensation. However, under the FSA, only children who experienced a "Significant Impact" will be guaranteed to receive $40,000, although they may receive more than this. The concept of a "Significant Impact" is set out in the Framework of Essential Services.

[370] The definition of a "Significant Impact" will evidently determine whether First Nations children will be guaranteed at least $40,000 under the FSA or whether they may be in a category that could receive less than $40,000. "Significant Impact" is defined in the

Framework of Essential Services, which was developed after the FSA and made public on August 19, 2022. The Framework of Essential Services defines a service as “essential” if the claimant’s condition or circumstances required it and the delay in receiving it, or not receiving it at all, caused material impact on the child.

[371] Canada disagrees with the Caring Society that this motion is premature because there are steps yet to be taken leading to the implementation of the settlement, primarily dealing with the details of the Jordan’s Principle assessment methodology and the distribution protocol, which is scheduled to be reviewed by the Federal Court on December 20, 2022.

[372] Canada submits that it is clear from the explanation set out in the September 6, affidavit of Janice Ciavaglia and attached report that the parties are proceeding on a phased basis that includes ongoing consultation with experts, rights holders and claimants in order to ensure that when finalized and approved by the Court, there will be broad acceptance by First Nations and claimants of the process. Canada supports this approach and submits that the motion is not premature as the interests of potential claimants will be adequately considered by the Federal Court in its review of the methodology and protocol.

[373] The Tribunal agrees with the Caring Society that it is impossible at the current point in time to know whether the implementation of Jordan’s Principle under the FSA will result in the First Nations children identified under the Tribunal’s orders receiving $40,000 under the FSA. This remains a source of uncertainty and there is little evidence of whether Jordan’s Principle eligibility under the FSA will be interpreted in such a manner that it provides the victims/survivors under the Tribunal’s orders the full entitlement they would have received under those orders.

[374] While the Tribunal understands the rationale for the FSA’s phased approach on this aspect, the Tribunal is at a very different stage in the proceedings and has a different mandate and uses a different approach under the *CHRA*. The Tribunal makes findings based on the evidence before it. The Tribunal ensured it remained seized of the compensation aspects that are not finalized which required additional evidence. For the compensation process as a whole under the Compensation Framework, the Tribunal

remains seized of all its compensation decisions, including to ensure the implementation of the Compensation Framework.

[375] The FSA sets out future work that is required before there can be certainty regarding which victims/survivors under the Tribunal compensation orders will be eligible under the FSA. While the way the parties to the FSA are proceeding may be appropriate under the Federal Court process, the Tribunal is asked to accept the end of its jurisdiction on the compensation issue without having the full picture or evidence on this point as opposed to the Federal Court who will supervise the implementation of the FSA.

[376] Further, the Tribunal's role includes making findings on the evidence presented and, on this point, it is difficult to make proper findings to fully assess this important category which indicates that the request may be premature for this Tribunal for this category.

[377] In order to be eligible for a guaranteed $40,000 Jordan's Principle compensation under the FSA, First Nations children must have both experienced a denial or delay in receiving an essential service and have experienced a "significant impact" because of the delay or denial. Article 6.06(3) of the FSA indicates that a "significant impact" will be defined in the Framework of Essential Services:

> 3) The Framework of Essential Services will establish a method to assess two categories of Essential Services based on advice from experts relating to objective criteria:
>
> > (a) Essential Services relating to Children whose circumstances, based on an Essential Service that they are confirmed to have needed, are expected to have included significant impact ("Significant Impact Essential Service"); and
> >
> > (b) Essential Services that are not expected to have necessarily related to significant impact ("Other Essential Service").

[378] Nonetheless, the Framework on Essential Services does not provide further guidance on a "significant impact" and what is required to engage the higher level of compensation. Neither is "Significant Impact" a defined term in the FSA. Without this information, individual claimants cannot determine whether they could be entitled to more or less compensation under the FSA than they would be eligible to obtain under the Tribunal's orders.

[379] The uncertainties in benefits from the outstanding definition of an “essential service” reflects the early stages of a negotiated settlement. That is appropriate for an attempt to settle a class action in the early stages but it is not appropriate for the current Tribunal process where entitlements to compensation have already been determined based on the evidence. Moreover, this does not harmonize well with a Tribunal that has already made findings on evidence and corresponding orders. Further, as mentioned above, this may depart from the Tribunal’s orders for this category and therefore cannot be considered to fully satisfy the Tribunal’s orders. As for the request for amendment of the Tribunal’s orders to reflect this departure, the request is premature since there are uncertainties at this time, the amendments are understandably not well defined by the AFN and Canada given the uncertainties and, finally, there is a real potential for reduction in compensation for some victims and disentitlements for others which is not permissible.

E. Conclusion on Derogations

[380] While it is obvious that one of the reasons the AFN and Canada are proposing compromising the compensation ordered to victims/survivors in this case is the fixed amount of funds Canada provided to resolve this issue, the Tribunal is not suggesting that Canada should provide unlimited funding. The compensation orders require finite compensation to a finite class of victims/survivors. While the exact number of victims/survivors eligible for compensation is not known, it is not an unlimited number.

[381] The Tribunal’s intent was never to allow parties to bargain away the compensation. Given the serious discrimination in this case, the Tribunal intended to provide the maximum compensation to recognized victims/survivors under the Tribunal’s orders and allow them to avail themselves of other recourses should they wish to do so, which would potentially allow them to obtain more than what is possible under the *CHRA* limit of $40,000 in compensation. The FSA, while advantageous for the majority of victims/survivors, it reduces this already low amount for other victims. The core message of the Tribunal’s *Compensation Decision* was received by the AFN and Canada for most children but not for the caregiving parent and grandparent victims, including their estates. Nevertheless, the Tribunal found they are entitled to the maximum compensation permissible under the *CHRA*.

[382] Finally, once the evidence before the Tribunal establishes pain and suffering, remedies must follow. Compromises and caps on fixed funds in negotiations do not change this proposition.

[383] This Tribunal previously found "when evidence establishes pain and suffering, an attempt to compensate for it must be made'' (see *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, at para. 115, emphasis added). In 2015 CHRT 14 at para. 124, the Tribunal relying on this principle found that

> Dr. Blackstock experienced feelings of shame and humiliation resulting from this public professional rejection, in front of the Chiefs of Ontario whom she was seeking to advise, are understandable and warrants some form of compensation. … $10,000 constitutes a reasonable award for the prejudice Dr. Blackstock experienced.

[384] Overall, the Tribunal awarded $20,000 in compensation to Dr. Blackstock for being retaliated against by Canada in this very case. This must be kept in perspective when assessing compensation when parents or grandparents, living or deceased, experienced the painful experience of having children removed from their homes when they could have remained with appropriate prevention services in place and the application of appropriate measures. This is what the Tribunal has done in its compensation decisions.

VI. Opting-out provision

[385] Article 11 of the FSA does not specify the opting out deadline, however, Canada in its submissions indicated the opt out process approved by the Federal Court gives claimants until February 19, 2023, to opt out. Claimants will have the ability to become aware of the full details of the methodology approved by the Court before making the decision as to whether to opt out.

[386] Canada further submits that since acceptance by the Tribunal of the settlement as satisfying its order is a pre-condition to implementation of the settlement, claimants will also be aware of the decision made by the Tribunal before they must determine whether to opt out of the settlement.

[387] The Tribunal finds this point raised by Canada reinforces the importance of victims/survivors having adequate time to consider the FSA and the Tribunal's decision on this motion and previous compensation decisions with the benefit of an appropriate opt-out period.

[388] The Tribunal agrees with the Caring Society that under the FSA, victims/survivors will need to opt-out of the class action within a short time frame. Further, the short time to make an opt out decision, particularly for child victims, is made more challenging because the FSA has incomplete definitions of terms and criteria that will directly affect compensation entitlements. This situation places some victims/survivors in an unfair position wherein they are being forced to make a decision to opt out without knowing what they can receive under the FSA versus their entitlement to human rights compensation pursuant to the Tribunal's orders. The unfairness deepens as the FSA seems to force victims/survivors to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims/survivors who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims/survivors and may revictimize them and is therefore inconsistent with a human rights approach. This is concerning.

[389] Moreover, the evidence in these proceedings has demonstrated many times that some First Nations often lack capacity by no fault of their own to respond rapidly to deadlines. For example, in 2020 CHRT 24, the Chiefs of Ontario objected to a firm, 13-month, deadline imposed by Canada to submit claims for retroactive reimbursement of Band Representative Services and a firm deadline for current-year claims for Band Representative Services. COO argued this period was too short. This Tribunal agreed with the COO.

[390] This is even more of an issue for individual victims/survivors given the incomplete information provided to the public by the AFN and Canada on the Tribunal's compensation orders.

VII. Informing the public about the FSA

[391] As part of its answers to the Caring Society's cross-examination questions, the AFN provided a link to its website and compensation information page on at least two occasions: August 23, 2022 and August 29, 2022.

[392] On August 23, 2022, the AFN provided Ms. Janice Ciavaglia's answers to the First Nations Child and Family Caring Society of Canada's cross-examination questions in relation to her affidavit affirmed on July 22, 2022. The AFN organized the questions and answers in a clear chart and in item number 36, the AFN wrote as follows:

> Question 36: What will AFN's messaging be to those removed children who are eligible under the Tribunal's Compensation Entitlement Order and Compensation Framework Order but are not eligible for direct compensation under the FSA?
>
> Answer: I object to this question on the basis of relevance. However, in the interest of moving this motion along, I will answer it.
>
> The AFN has taken active steps to keep its constituents, including potential class members, aware of the class action proceeding to date, including through traditional media, the AFN's social media, and through the AFN-led website www.fnchildcompensation.ca.

[393] On August 29, 2022, the AFN provided a response to the Caring Society's follow-up questions to Ms. Ciavaglia. The AFN's response is reproduced below:

> Question 1: In response to your answers to Questions #50 and #51, can you confirm whether the FSA's eligibility for Jordan's Principle includes "products and supports" as set out by the Tribunal in 2020 CHRT 15 and the Compensation Framework Order or whether eligibility will be restricted to "a service" as set out in the FSA definition of "Essential Service"?
>
> Answer: "Essential Service" includes the provision of a product or service, and is not restrictive. The examples listed in the appendix to the parties' agreed upon Framework of Essential Services, for example # 2 and 3, illustrate the breadth of the term (http://www.fnchildcompensation.ca/wp-content/uploads/2022/08/Framework-of-Essential-Services-August-19-2022.pdf).

[394] The above made the AFN compensation webpage and information part of the evidence before the Tribunal. The Panel consulted this webpage as part of its deliberations

for the Federation of Sovereign Indigenous Nations' interested party status request motion. The Tribunal referred to the link and contents in 2022 CHRT 26.

[395] The Panel printed the information on the compensation webpage at the time it made its letter-decision in case the contents would be modified and updated later. For ease of reference, the relevant information is reproduced below.

[396] The Panel understands that these public communications solely advise the public how the FSA improves the Tribunal's orders and not where deviations or, more importantly, disentitlements are made in the FSA. The Panel has underlined important sections of the AFN's public message below.

> Background
>
> Since 1998, the AFN has engaged with Canada to address significant deficiencies and inequities inherent in the funding from the Government of Canada for the FNCFS Program, and the adverse impacts on the First Nations children and families involved with the FNCFS Program. The AFN has also been advocating for the full and proper application of Jordan's Principle to ensure that all First Nations children have access to the supports and services they need, no matter where they live.
>
> The AFN and First Nations Child and Family Caring Society of Canada (Caring Society) filed a human rights complaint with the CHRT in 2007. The complaint was substantiated by the CHRT in 2016 and Canada was ordered to reform the FNCFS Program and fully implement Jordan's Principle to eliminate its discriminatory practices.
>
> The AFN was the only Party to the CHRT litigation who requested that compensation be paid directly to survivors. The CHRT agreed with the AFN that compensation was required and ultimately awarded $40,000, the maximum amount for pain and suffering under the Canadian Human Rights Act (CHRA), to First Nations who faced discrimination in Canada's underfunding of the FNCFS Program and the narrow application of Jordan's Principle. The Government of Canada issued an appeal of the CHRT's Compensation Order, which remains active.
>
> On January 28, 2020, the AFN and the representative plaintiffs, including Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, and Dick Eugene Jackson, filed a proposed class action, dating back to 1991 ("AFN Class Action"). The AFN Class Action sought compensation for First Nations children and family members harmed by Canada's discrimination under the FNCFS Program and narrow application of Jordan's Principle. The AFN, Moushoom class counsel and Canada have engaged in negotiations over the last two years.

While the CHRT's compensation orders were profound, the maximum amount of compensation under the CHRA is limited to $40,000. The AFN sought to increase both the number of survivors eligible for compensation and the amount of compensation that they may receive, and achieved this by expanding on the CHRT's compensation orders in a number of ways.

First, the CHRT imposed a cut-off point at which a child must have been in care to be eligible for compensation, which is January 1, 2006. The eligibility period under the Class Action begins on the date at which the discriminatory funding system was implemented by Canada: April 1, 1991. It also extends the date of eligibility for Jordan's Principle claimants to the same date, in recognition of the longstanding and persistent gaps in services and supports for First Nations children. This extends the period for compensation by an additional 15 years.

The second extension relates to the whether a child was placed outside of their community. The CHRT compensation order required that a child had to be "placed outside their homes, families and communities" in order to be eligible for compensation. The Final Settlement Agreement includes all First Nations children who were removed under the FNCFS Program, regardless if they were placed within or outside of their community.

The third expansion is the inclusion of enhancement factors to ensure that individuals who experienced the greatest harm as a result of Canada's discrimination are provided with additional compensation. Under the Final Settlement Agreement, Survivors will be entitled to a **$40,000 base payment** and additional monetary enhancements based on their individual circumstances, which include:

- the age when an individual was removed from their home
- the age at which they exited care
- the amount of time an individual spent in care
- the number of times they were placed in care
- if an individual was removed to receive an essential service
- if an individual was removed from a northern or remote community
- if an individual was subjected to a delay, denial or service gap that resulted in significant harm

Finally, the AFN advocated for additional supports for survivors that are not contemplated under the CHRT's Compensation Order, including mental wellness supports for Survivors, financial literacy and coaching, family and community unification supports, and more. The Final Settlement Agreement is the first of its kind as it is First Nations driven, and First Nations will oversee the implementation of the agreement.

> The AFN will continue to provide updates at fnchildcompensation.ca. The AFN has also established an Information Desk which can be reached at 1-888-718-6496 or fnchildcompensation@afn.ca.
>
> We acknowledge that this process may bring up strong emotional responses; support from the Hope for Wellness Helpline is available now at 1-855-242-3310.

[397] This public information available on the AFN's website does not inform the victims/survivors or their families that they may see their compensation reduced or completely removed. For some under Jordan's Principle, there are uncertainties that remain at the time the Tribunal makes this ruling.

[398] Any reasonable person reading this information would think they are entitled to $40 thousand as a minimum and that the FSA ONLY improves on the Tribunal's orders. This is clearly misleading and lacking in transparency. This could also mean that no one would oppose the FSA.

[399] The Tribunal found no information on the AFN website or filed in evidence that clearly informed members of the public that some of the compromises led to reductions or disentitlements of compensation for some victims/survivors recognized in the Tribunal's orders. The Tribunal was provided with insufficient information as part of this motion that would provide insurances that those who would disagree could opt-out and would have sufficient time to do so.

[400] This is even more concerning when the opt out provision ends as early as February 2023 as per the FSA and, if the Tribunal declares that the FSA satisfies its compensation orders, such individuals would not be able to pursue compensation under the Tribunal's orders.

[401] Further, a media article was filed by the Caring Society as part of the evidence: "Ottawa releases early details of landmark $40B First Nations child welfare agreement, reports on Canada's statement on the FSA", (see Exhibit B to Dr. Blackstock's affidavit dated August 30, 2022). The Tribunal may consider this information given section 50(3)(c) of the *CHRA*.

[402] Notably, there is no indication Indigenous Services Minister Patty Hadju advised the public that compromises were made and compromises that led to compensation reductions or disentitlements had to be done to achieve a settlement.

[403] The Minister stated: "Our expectation is that $40,000 is the floor and there may be circumstances where people are entitled to more," said Indigenous Services Minister Patty Hajdu.

[404] Any reasonable person reading her statement may think the FSA ONLY enhances the compensation ordered by this Tribunal, not that it diminishes it for some.

[405] Nowhere does the Minister say this may not be the case for all the victims/survivors who form part of the Tribunal's orders. This is still a misleading statement even when setting aside the contested non-ISC funded removed children category.

[406] This information and the Caring Society's arguments on this point were not successfully challenged by Canada as part of this motion.

[407] Media and public information displayed on websites for the purposes of public information on compensation need to inform on the whole truth including how the FSA deviates from the Tribunal's orders to allow the victims/survivors and those who assist them to make an informed decision. There is no issue with highlighting the improvements. The concerning part is omitting that some of the people who are entitled to compensation under this Tribunal's orders may see their compensation reduced or taken away under the FSA.

[408] Given the large number of victims/survivors who were disentitled by the AFN and Canada are children or are deceased, proceeding with speed does not ensure fairness to those victims/survivors. The Tribunal under the *CHRA* must balance expeditiousness with the principles of fairness and natural justice therefore this is a concern for the Tribunal. This justifies an extension of the opt-out period beyond February 2023.

[409] Furthermore, the Tribunal considered the letter from Windsor Law Class Action Clinic (the Clinic), filed in evidence as exhibit E to Dr. Blackstock's affidavit dated August 30, 2022.

[410] The Class Action Clinic has relevant Expertise in terms of class actions:

> The Class Action Clinic's central mission is to serve the needs of class members across Canada. Launched in October 2019, we are the first not-for-profit organization designed to provide class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is also dedicated to creating greater awareness about class actions through public education, outreach, and research. The Clinic does not initiate or conduct class actions, and it is not funded by either the plaintiffs' or defence bar, or any industry group. Its sole purpose is to help individual class members, and in doing so, better fulfill the access to justice promise of the class action regime. A more complete description of our services can be found on the Clinic's website: www.classactionclinic.com.
>
> The Clinic is directed by Jasminka Kalajdzic, an Associate Professor of Law at the University of Windsor, and one of Canada's leading class action scholars. She was co-lead researcher with Prof. Catherine Piché of the Law Commission of Ontario's Class Action Project. Andrew Eckart, formerly a class action litigator, serves as the full-time Staff Lawyer and oversees the work of law student case workers. Mr. Eckart also represents Clinic clients in court proceedings.
>
> Since 2021, the Clinic has represented objecting class members in several class action settlements. Justice Belobaba described the Clinic as making a "valuable contribution" in settlement approval hearings and encouraged the Clinic, on the record, to continue this work.

[411] The Clinic provided wise points for consideration which were not accepted by class action counsel:

> Class members are entitled to sufficient time to review a proposed settlement of this complexity and magnitude, to seek advice and clarification regarding its contents, and to make an informed decision about participating in settlement approval hearings. Class members also need the additional time to adequately prepare their objections (if any) and present their views to the court. This right of review is not perfunctory; besides the right to opt-out of a class action, the right to object to a proposed settlement is the only other participatory right a class member has in a class action. *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 at para 3.
>
> A review of a few other class actions highlights the importance of class member participation in and notification of a settlement approval hearing. The parties in the Indian Residential School Settlement Agreement, for example, held nine settlement approval hearings, Canada-wide from late August 2006 to mid-October 2006 (over a period of two and a half months). In the Sixties Scoop Class Action, notice of the settlement approval hearings was disseminated as early as mid-January 2018 in advance of the mid-May 2018 hearings (five months).

Unlike these examples, we understand that the current make-up of the class in this case includes people who are still minors, making the issue of timing critical. In our view, this aspect alone necessitates more, not less, time for class members to seek assistance, review, and assess the provisions of the FSA before the Settlement Approval Hearing.

The right to adequate notice is even more important in class actions involving trauma survivors. Tight timelines have the potential to place unnecessary stresses on an already marginalized and vulnerable population. Class members in this case, First Nations youth subjected to trauma, are highly vulnerable to re-victimization and re-traumatization.

Class members reviewing and then deciding whether to object to the FSA must process traumatic experiences perpetuated by government systems. Asking survivors of trauma to do this in the very short time of one month or to not object at all disregards their healing and needs. To systemically disadvantage traumatized class members runs counter to the broader narrative of reconciliation at the heart of the First Nations Youth Class Action.

Our concerns regarding re-traumatization are heightened given that the majority of the class is made up of people who suffered while they were, or still are, minors. Survivors of childhood trauma are at the highest risk of developing complex trauma. Moreover, minors likely need significant support throughout the process that could further interfere with their ability to object in the 31 days between the issuance of Notice and the Settlement Approval Hearing.

While we recognize that the six-month opt-out period in this case greatly benefits class members, allowing for objections to the FSA for only a small fraction of that time impedes class members' ability to meaningfully flag areas of concern, particularly with respect to the claims process.

…

We have significant concerns that the FSA may fall short of providing access to justice that is so highly deserved for these class members who have suffered from decades of discriminatory and shameful underfunding of services by Canada. The size of the settlement and its impact on so many people who have been systematically marginalized and traumatized requires us all to analyze the FSA thoroughly and with a critical lens.

We commend the parties for crafting an FSA that includes the participation of Indigenous consultants in developing the claims process; provides a lengthy claims period; provides rights of appeal; institutes a system of "navigators" to provide assistance with claims; and does not revert any of the $20 billion to the defendant. Yet we remain concerned that claims of efficiency, expediency, and cost-effectiveness will prevent some class members from receiving their entitlement to compensation. The purpose of a class action settlement like this is not to achieve rough justice, but rather to ensure that all those who are entitled to compensation are able to ***access it.***

(emphasis ours).

[412] The Tribunal agrees with the Clinic's comments above. The Tribunal recognizes that AFN class counsel stated at the hearing that everywhere in Canada people have told them to move forward with compensation now, to get it done now. While this is not evidence, the Tribunal does not doubt it's true. What the Tribunal is more concerned about is how the message is communicated to those who were considered beneficiaries of the Tribunal's orders who have now been removed from the FSA. Moreover, it is ideal if compensation moves ahead in the near future, however, as mentioned above, akin to the *CHRA* analysis, expeditiousness must be exercised alongside rules of fairness and natural justice. This is the Tribunal's focus as per its quasi-constitutional statute.

VIII. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC), Self-government, AFN resolutions

[413] As previously said in the letter-decision, FPIC is not determinative in disposing of this motion. The AFN also commented on the issue of FPIC and, in response to the Panel's follow-up questions, clarified that this was in response to the Caring Society's comments and encouraged the Panel not to get distracted by this question as it was not necessary to embark on such an analysis. Further, the parties did not provide extensive submissions and supporting documentation to allow the Tribunal to settle this complex question. Upon consideration the Panel agrees with the AFN and finds it is not central to determining the essential aspects of this motion.

[414] While the Tribunal requested further submissions on FPIC and *UNDRIP* after the hearing in light of the AFN raising collective rights during oral submissions, the Tribunal ultimately concludes that it is not necessary to address this issue to dispose of this motion.

[415] Given these aspects are not determinative of this motion, the Tribunal will not embark in a full discussion on FPIC's application in Canada or the AFN's governance. Rather, it will elaborate on the contextual and noteworthy elements to explain why it does not find these elements determinative of this motion except for the opting out portion.

[416] Nevertheless, the Tribunal considered the issues and will elaborate on the reasons provided in the letter-decision here.

[417] The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) is an international instrument adopted by the United Nations on September 13, 2007, to enshrine the existing inherent rights that "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." (Article 43). The *UNDRIP* protects collective rights that may not be addressed in other human rights legislation that emphasize individual rights, and it also safeguards the individual rights of Indigenous People.

[418] The *UNDRIP* stipulates that all Peoples have the right to self-determination, this is partly expressed in the principle known as Free, Prior and Informed Consent (FPIC).

[419] Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination,* (see, A/HRC/39/62, para.3). The provisions of the *UNDRIP*, including those referring to free, prior and informed consent, do not create new rights for Indigenous Peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous Peoples (see A/HRC/9/9, para. 86). Free, prior and informed consent is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against Indigenous Peoples, (see, A/HRC/39/62, para.9).

[420] According to section 32 of *UNDRIP*, free, prior and informed consent (FPIC) is required prior to the approval and/or commencement of any project that may affect the lands, territories and resources that Indigenous Peoples customarily own, occupy or otherwise use in view of their collective rights to self-determination and to their lands, territories, natural resources and related properties.

[421] UN human rights bodies have recognized that FPIC is essential to protect a wide range of Indigenous Peoples' fundamental rights, including the right to culture, the right to food and the right to health.

[422] *UNDRIP* contains five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply.

[423] Free, prior and informed consent may be required for adoption and implementation of legislative or administrative measures (See, A/HRC/39/62) and also Article 19 which states:

> States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[424] *UNDRIP* states that any limitations on rights, including FPIC, must be "determined by law and in accordance with international human rights obligations," "non-discriminatory" and "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society" (art. 46(2) of *UNDRIP*).

[425] Moreover, the Tribunal has relied on *UNDRIP* in past rulings and found it is an important instrument to consider in a human rights analysis in First Nations cases especially in this one involving mass removals of First Nations children from their homes, communities and Nations. The Tribunal found that national legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the *UNDRIP*, (2018 CHRT 4 at para. 81).

[426] Canada has moved forward from only accepting the *UNDRIP* without reserve to adopting the *UNDRIP* into domestic law by way of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. There is no doubt that *UNDRIP* and *FPIC* apply to the state of Canada. Canada cannot shield its responsibilities to First Nations rights holders especially when rights holders voice their disagreements on issues affecting them. On this point, the Tribunal agrees with the Caring Society.

[427] The above demonstrates the evolving views on the application of FPIC from strictly land and natural resources issues to a broader spectrum of issues concerning Indigenous Peoples and their involvement and participation in important decisions that concern them. Therefore, the Tribunal agrees with the Caring Society that FPIC is not strictly a lands and natural resources process and therefore rejects the AFN's argument on this point.

[428] The Tribunal agrees with the AFN that FPIC is not entirely settled in Canadian law and finds that, even between different First Nations, perspectives vary on this issue. This is also exemplified in these proceedings where BC Chiefs signatories at the First Nations Summit Chiefs in Assembly adopted resolutions #0622.22 and #0622.23 have expressed that:

> Chiefs in British Columbia have not seen the Final Agreement on Compensation and are therefore unable to exercise free, prior, and informed consent on any changes to the compensation orders. Their right to FPIC was not respected in the FSA and That the First Nations Summit Chiefs in Assembly call upon the AFN to conduct any negotiations with Canada on any matters arising from 2016 CHRT 2 and subsequent orders affecting First Nations children, youth, and families in British Columbia in an open and transparent manner consistent with free, prior and informed consent of First Nations in British Columbia.

[429] The AFN does not view FPIC as applying here. The Tribunal does not propose to resolve this complex issue here.

[430] Further, the Tribunal agrees that the AFN is not a state and that FPIC does not impose these obligations on the organization but rather on Canada as a state. The Tribunal also agrees with *UNDRIP* that Indigenous Peoples have the right to make their own decisions, and to engage with other governments and processes through the systems of governance and decision-making that they have freely chosen for themselves. Such essential dimensions of self-determination are clearly affirmed in *UNDRIP* (see e.g., articles 3, 5, 18 and 19). Federal, provincial and territorial governments cannot ignore the decisions made by Indigenous Peoples. Neither can they tell Indigenous Peoples how these decisions should be made.

[431] Furthermore, consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other

polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land, even if they have often been dishonoured. Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world, (See, A/HRC/39/62, para. 4).

[432] The Tribunal agrees with these principles and believes they apply to Canada in its dealings with First Nations. The Tribunal therefore agrees with the Caring Society's argument on this point.

[433] "States are obligated not just to respect, but also to protect, promote and fulfil human rights, and this obligation applies with respect to the rights of indigenous peoples." (See, Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples, U.N. Doc A/HRC/24/41 (1 July 2013), at para. 44, online: Human Rights Council https://www.refworld.org/docid/522db2b54.html

[434] The Tribunal also has recognized Indigenous rights as human rights in previous rulings.

[435] Taking into consideration the specific needs of First Nations children, families and communities were core findings made by this Tribunal. Further, the Tribunal has continually emphasized in its findings and orders the principle of substantive equality and the importance of taking into account the specific needs of children, families, communities and Nations to give full meaning to this principle. This is an obligation for Canada.

[436] However, the Tribunal's understanding of the AFN's mandate has always been to advance the rights and interests of their members who are First Nations rights holders who provide direction to the Assembly by way of Chiefs-in-Assembly resolutions. This ensures the views of rights-holders and the specific needs of communities are respected and expressed. In a previous hearing, counsel for the AFN explained that he viewed the AFN

like the United Nations. The Panel liked the analogy of sovereign nations meeting to make decisions that concern them. The Panel understood that the Chiefs-in-Assembly resolutions adequately reflect this and ensure an effective process to express their consent after meaningful consultation. Chiefs-in-Assembly resolutions are referenced in previous decisions. This was given considerable weight by the Panel when accepting the AFN's past submissions given the representativity of First Nations through the resolutions made by Chiefs-in-Assembly. In all of the previous rulings made by the Panel, there never was a situation where the Tribunal received evidence of other First Nations disagreeing with the AFN's requested orders. Usually, the AFN provides Chiefs-in-Assembly resolutions which bring assurances to the Panel that the rights-holders agree with the requested orders. This is an efficient way to proceed instead of hearing from each of the over 600 First Nations in Canada who are members of the AFN, which could paralyze the Tribunal's proceedings. Further, the AFN Resolutions are the essential mechanism by which First Nations provide specific mandates and direction to the AFN.

[437] Furthermore, the Tribunal's *Compensation Decision* (2019 CHRT 39), at paragraph 34 clearly relies on the Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System. Moreover, the Tribunal's finding that, pursuant to AFN resolution 85/201, the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada was upheld by the Federal Court (2021 FC 969 at para. 160).

[438] The Tribunal accepts the AFN's explanation that the AFN Executive are "First Nations leadership", being comprised of Regional Chiefs duly elected by the First Nations in each region across Canada and the National Chief who is elected by all the First Nations across Canada. Under the AFN's Charter, the Executive Committee is empowered to take positions on behalf of First Nations consistent with their properly delegated mandates from the Chiefs-in-Assembly. The approval of the FSA was within their delegated purview.

[439] A question remains as to why an important question such as compensation and the FSA was not addressed in a resolution from the Chiefs-in-Assembly. While the AFN indicates the Chiefs-in-Assembly were presented with the FSA and that no objection to the

FSA was raised by the Chiefs-in-Assembly at the annual general assembly which immediately followed the FSA's execution, the FSA was already signed at the time that it was presented. Paragraph 52 makes it clear that the FSA was executed on June 30, 2022, prior to the annual general assembly.

[440] The AFN states that the Chiefs-in-Assembly did not object to the FSA. However, little is said on the absence of a resolution from the Chiefs-in-Assembly or the resolutions signed by the BC Chiefs. While the Panel agrees with the AFN that requiring all First Nations to agree may jeopardize any agreement, a resolution from the Chiefs-in-Assembly recognizes this reality and provides some assurances to the Panel on such important questions.

[441] In this case, the Panel does not have a resolution on the FSA from the AFN in the evidence and the Panel has resolutions voted on by some First Nations who have expressed concerns about the FSA to the AFN. Upon a full consideration of the issues since the recent interested party request ruling and, given that the Tribunal's approval of the FSA could result in ceasing the Tribunal's supervision of the financial compensation aspect of the case if the Tribunal later declares the FSA fully satisfies the Tribunal's orders, the opting-out process for First Nations at the Federal Court does not assist the Tribunal in making a determination in this motion. While the Tribunal recognizes the AFN's right to proceed via executive committee decisions and that First Nations rights-holders may agree with this process as part of the AFN charter and rules, the BC resolutions filed in evidence suggest otherwise for some rights-holders. If the AFN now proceeds by way of executive resolutions for important decisions such as the FSA with the agreement of rights holders, the Tribunal would appreciate having a better understanding of this process and how the AFN proposes the Tribunal should deal with those concerns raised by First Nations rights-holders. In this motion, the AFN did not provide a comprehensive response to assist the Tribunal on this issue.

[442] Over the last decade, no First Nations non-party has opposed the AFN decisions as part of these proceedings. Moreover, many resolutions from the Chiefs-in-Assembly were filed in evidence for the Panel to consider. Therefore, the need to question what rights-holders' views were on important issues such as the FSA was not present before this motion

and may not reoccur after it. In sum, the Tribunal's questions and concerns arose out of the new evidence presented in this motion, the arguments presented and the change in the AFN's process in front of this Tribunal to not provide resolutions from Chiefs-in-Assembly for such a major issue. Moreover, some compromises in the FSA do not align with the previous Chiefs-in-Assembly resolution no.85/2018 seeking the maximum compensation under the *CHRA*. Given this resolution, it is reasonable to expect a new or an amended resolution supporting the compromises, namely reductions and disentitlements for some victims/survivors.

[443] The Tribunal also had First Nations rights holders in mind when it wrote in 2018 CHRT 4:

> [443] The Panel encourages Canada in the future to provide evidence to the Tribunal if a province, territory or First Nation resists or acts as a roadblock to Canada's implementation of the Panel's rulings. This will assist the Panel in understanding their views and Canada's efforts to comply with our orders and, will provide context and may refrain us to make orders against Canada. Absent this evidence, the Panel makes orders to eliminate the discrimination in the short term while understanding the importance of the Nation-to-Nation relationship.

[444] A Nation-to-Nation relationship is not solely the relationship between the AFN and Canada; it is a relationship between First Nations and Canada.

[445] Further, the evidence that some First Nations were calling upon Canada to immediately pay the compensation owed to eligible victims/survivors and provide necessary supports pursuant to Canadian Human Rights Tribunal orders did not come as a result of Canada or the AFN's evidence to inform the Tribunal that not all were in agreement with the FSA but rather it was advanced by the Caring Society:

> That the First Nations Summit Chiefs in Assembly affirm that:
>
> > a. the Assembly of First Nations (AFN) and Canada are not authorized to seek a reduction in the compensation amounts for eligible victims who are members of First Nations in British Columbia or modify the compensation framework agreement and compensation entitlement order as set out in 2019 CHRT 39 and 2021 CHRT 7 without the free, prior, and informed consent of First Nations in British Columbia;

> b. the AFN and Canada are not authorized to make representations to the Tribunal or any other body implying the consent of First Nations in British Columbia without our free, prior, and informed consent on the Final Agreement and any motions, or any relief made to the Canadian Human Rights Tribunal or Federal Court.

[446] This Tribunal ensured the different perspectives of First Nations rights-holders would be respected and also discussed this in 2018 CHRT 4:

> [66] This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other.
>
> (emphasis changed)

[447] Moreover, the orders in this same ruling reflect the Tribunal's desire to respect First Nations self-governance and self-determination.

[448] Canada also has a duty to consult and must act honorably in all its dealings with First Nations, Inuit and Metis Peoples (Aboriginal Peoples). Those principles were discussed in the *Merit Decision* and will not be revisited here. Suffice is to say that Canada has many legal obligations in Canadian law to ensure it consults First Nations who are affected by its actions and decisions.

[449] The evidence in this motion includes resolutions from BC First Nations who disagreed with some aspects of the FSA as discussed above and were requiring further consultation which Canada cannot ignore.

[450] Moreover, after the motion hearing, in response to follow-up questions from the Tribunal, further resolutions were filed as Exhibit "C" to the affidavit of Doreen Navarro with the Tribunal and accepted into the evidentiary record. The BC Assembly of First Nations

had their Annual General Meeting on September 21, 22, & 23, 2022 and adopted Resolution 33/2022 that was signed by First Nations Chiefs. The subject of the resolution was Compensation For Children And Families Who Suffered Discrimination In The Delivery Of First Nations Child & Family Services And Jordan's Principle Services.

[451] Notably, the context leading to the resolution is summarized as follows by the BCAFN:

> Canada and counsel for both class actions announced an Agreement in Principle on the compensation on December 31, 2021, with an intent to develop a Final Settlement Agreement to resolve the compensation issue for both the human rights damages and the class actions; The AFN Chiefs did not pass any resolutions supporting the Agreement in Principle on compensation or authorizing negotiators the deviate from the CHRT orders on compensation or from the AFN's resolution calling for the maximum allowable amount for every victim of discrimination under the FNCFS program; The First Nations Summit passed a resolution on June 16, 2022 (FNS Resolution #0622.23) affirming that the AFN and Canada are not authorized to modify the CHRT's compensation entitlement order without the free, prior and informed consent of First Nations in British Columbia; On June 30, the AFN, class action parties and the Government of Canada reached a Final Settlement Agreement on compensation and immediately (without seeking the free, prior and informed consent of First Nations or their chiefs) filed a motion with the Canadian Human Rights Tribunal seeking an expedited hearing regarding the Tribunal's compensation orders; Article 10 of the Final Settlement Agreement on compensation requires the AFN, among other things, "to take all reasonable steps to publicly promote and defend the Agreement"; At the Tribunal hearing, which took place on September 15 and 16, 2022, the Caring Society argued that the Final Settlement Agreement negatively impacts the rights of a number of children and families by reducing or eliminating their right to CHRT compensation and by waiving their rights to litigate against Canada for the harms they experienced flowing from Canada's discrimination—even if they receive no financial compensation under the Final Settlement Agreement; During the Tribunal hearing on September 16, 2022, AFN legal counsel was asked by the Tribunal if there were any objections to the Final Settlement Agreement by First Nations or others, and though they were in possession of the FNS resolution the AFN counsel did not disclose the FNS's objections in answer to the question. Chiefs in British Columbia have not been consulted on the Final Settlement Agreement and are therefore unable to exercise free, prior, and informed consent on any changes to the CHRT compensation orders.

[452] This led to the resolution that reads as follows:

THEREFORE BE IT RESOLVED THAT:

> 1. The BCAFN Chiefs-in-Assembly call upon Canada to immediately pay the CHRT-ordered compensation in the amount of $40,000 plus interest owed to eligible victims and provide necessary supports pursuant to the CHRT orders;
>
> 2. The BCAFN Chiefs-in-Assembly affirm that AFN negotiators are not authorized to seek a reduction in the compensation amounts for eligible victims who are members of BC First Nations and must respect the compensation framework agreement and compensation entitlement order as set out in 2019 CHRT 39 and 2021 CHRT 7;
>
> 3. The BCAFN Chiefs-in-Assembly express concern regarding the AFN's agreement to Article 10 in the Final Settlement Agreement as it abrogates the AFN's duty to represent the interests of First Nations as authorized by the AFN Chiefs in Assembly and direct that the AFN:
>
> > a. withdraw its consent to this section of the agreement or in the alternative
> >
> > b. fully disclose this obligation to First Nations governments, First Nations experts, the Courts and Tribunal, and the public and that an independent panel of experts and lawyers be appointed by the BCAFN to examine the Final Settlement Agreement and inform positions arising from it; The BCAFN Chiefs-in-Assembly affirm that the AFN is not authorized to sign provisions such as Article 10 of the Final Settlement Agreement on behalf of BCAFN Chiefs-in-Assembly without their free, prior, and informed consent;
>
> […]
>
> 5. The BCAFN Chiefs-in-Assembly direct the AFN negotiators to seek the free, prior and informed consent of BC First Nations Chiefs before making any legal representations on any Final Agreement on Compensation that may have an impact on First Nations children, youth and families in British Columbia; and The BCAFN Chiefs-in-Assembly direct that any negotiations with Canada or class action counsel on any matters arising from 2016 CHRT 2 and subsequent orders or legal proceedings affecting BC First Nations children, youth, and families must be conducted in an open and transparent manner consistent with free, prior and informed consent of First Nations.

[453] Of note, the resolution is signed by Terry Teegee, who is a BC Regional Chief who is also part of the AFN Executive Committee. While the BC Chiefs did not testify at the

hearing, the Tribunal finds this official resolution signed by a Regional Chief carries weight and is relevant and reliable evidence. Moreover, the resolution is attached to an affidavit filed in evidence.

[454] The Tribunal heard extensive evidence at the hearing on the merits about the FNCFS Program in British Colombia and made findings that will not be revisited here. However, this is to say that the Tribunal is aware of the fact there are a large number of First Nations and First Nations agencies in BC that benefit from the Tribunal's findings and orders.

[455] Finally on this point, the Panel does not believe that this ruling should be interpreted to preclude self-government or other agreements in the future or as a refusal of this motion based on an AFN executive decision rather than a Chiefs-in-Assembly resolution. While the Tribunal had questions in light of what is explained above, this is not determinative in this motion.

[456] The real difficulty in this joint motion is the fact that entitlements orders were already made for victims/survivors by this Tribunal, the orders were upheld by the Federal Court and the compromises were made subsequently.

A. Individual rights versus collective rights

[457] The Tribunal understood that the AFN was arguing that the Tribunal should consider First Nation collective rights in preference to individual rights at the oral hearing prompting follow-up questions from the Tribunal. However, the AFN subsequently clarified its comments and the Tribunal does not believe that this issue must be resolved as part of these proceedings and, more importantly, while the Tribunal agrees these rights must be balanced, the issue is not determinative of this motion. Further, the parties post-hearing submissions on this issue were brief and, given this was not determinative of this motion, the Tribunal did not require additional submissions.

[458] The *UNDRIP* recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of Indigenous rights is inherent in Indigenous culture and serves as a rampart against disappearance by forced assimilation.

[459] Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of Indigenous Peoples. Therefore, it cannot be held or exercised by individual members of an Indigenous community. *UNDRIP* provides for both individual and collective rights of Indigenous Peoples. Where *UNDRIP* deals with both individual and collective rights, it uses language that clearly distinguishes “indigenous peoples” from “individuals.” Understandably, however, none of the provisions of *UNDRIP* dealing with free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32) make any reference to individuals. To “individualize” these rights would frustrate the purpose they are supposed to achieve, (see, A/HRC/39/62, para.13).

[460] The AFN submits that First Nations collective rights arise from the fact that they are Peoples under customary international law. The criteria defining what constitutes “a people” in customary international law are as follows: first, a group must be a social unit with a clear identity and characteristics of their own; second, the group must have a relationship with a territory and, finally, the group must claim to be something more than simply an ethnic, linguistic or religious minority.

[461] Current international law operates on two levels. On the first level, international law influences how the states of the world interact. Similar to domestic law, the second level of international law is concerned with the relationship between a state and persons within its territory. International law with respect to the second level focuses on human rights abuses and the mistreatment of individuals. The Tribunal agrees with this characterization.

[462] The Tribunal also agrees with the AFN that the status of First Nations collective rights ought to be determined in other fora, where the full scope and context of the nature and source of First Nation rights can be weighed and determined. Much is at stake and the AFN urges this Panel to restrict its ruling to the issue before it – whether the FSA satisfies this Panel’s compensation orders.

[463] However, the Tribunal disagrees with the assertion from the AFN that by solely focusing on the rights of First Nations through a human rights lens, the Caring Society demotes the status of First Nations as Peoples to that of a minority population within the Canadian state.

[464] The Tribunal agrees with the Caring Society's views that Individual and collective rights are not mutually exclusive in nature. Individual human rights (including the right to effective remedies) and a collectivity's rights can and should co-exist.

[465] One of the most compelling arguments on this point was advanced by the Caring Society in explaining the Tribunal's approach in this case. Individuals experienced widespread and deep levels of discrimination by Canada, which also had an impact on rights-holding collectives. In approaching remedies, the Tribunal broadened the consultation required of Canada beyond the Commission, to ensure that the voices of First Nations and those with significant expertise could be heard via representative organizations in order to inform immediate and long-term relief. The Tribunal has also created provisions in its orders for individual First Nations to negotiate more specific arrangements with Canada. Importantly, the Tribunal has created space for particular First Nations interests to participate on discrete questions through its use of the "interested party" mechanism in the Tribunal's Rules. The Tribunal believes this is an accurate interpretation of what has occurred in these proceedings.

[466] Finally, this issue will not be resolved as part of this motion and as previously said, is not determinative of this motion.

IX. The request to amend the Tribunal's compensation orders to reflect the terms of the FSA is denied

[467] **The request to amend the Tribunal's compensation orders to reflect the terms of the FSA is denied.**

[468] The Tribunal found this decision very difficult since it was given the hard choice to approve the FSA as it is or amend its orders to reflect the changes in the FSA or reject it and deny timely compensation to a large number of victims/survivors which is not the Tribunal's goal or desire. Some of those changes improve, enhance and broaden the Tribunal's orders above what is permitted under the *CHRA* and the Tribunal is pleased with this outcome. The Tribunal is in favor of compensation being distributed sooner rather than

later. However, some of those changes are detrimental for some and undermine the Tribunal's orders.

[469] Canada argues that if the excessively formalistic and limited interpretation of the authority of the Tribunal argued for by the Caring Society and the Canadian Human Rights Commission were accepted by the Tribunal, it would arguably become impossible for parties to negotiate a settlement which differed in any particular way from a prior Tribunal order. This would leave the Tribunal hamstrung and unable to endorse the very thing the dialogic approach and Justice Favel's reasons seek to encourage.

[470] The Tribunal understands this legitimate preoccupation and can confirm this is not the case here. There are other major differences between the FSA and the Tribunal's orders that the Tribunal is willing to accept if all recognized victims/survivors in the Tribunal's orders are included in the FSA. For example, ending the Tribunal's jurisdiction on compensation by changing who exercises the supervisory role of the compensation process for a single process supervised by the Federal Court. There are other differences in the FSA that the Tribunal also accepts such as the broadened categories of entitled victims/survivors and the increased quantum of compensation above the $40,000 statutory limit. While the *CHRA* does not allow the Tribunal to amend its orders to reflect this change, the Tribunal can declare/find the FSA fully satisfies the Tribunal's orders on this point. The Tribunal does not insist on an exact copy of its rulings. Rather, it insists on the respect of final orders on quantum and categories of victims/survivors eligible to compensation under the Tribunal's orders.

[471] If all the legally recognized victims/survivors as part of the Tribunal's orders who are the only ones who currently benefit from evidence-based Tribunal findings following adjudication were included in the FSA, the Tribunal could have granted this motion and recognized it fully satisfies the Tribunal's orders.

[472] The Tribunal's main reason not to endorse the FSA is that it derogates from the Tribunal's existing orders in reducing compensation to some victims/survivors to accommodate the fixed quantity of funds under the FSA and the much larger number of victims/survivors in the class actions competing for these funds. No substantive findings or

orders have been made concerning the victims in the class actions, yet in the FSA some displace some of the victims/survivors whose rights have been vindicated in these proceedings.

[473] If this is permitted, what message would be sent by the very Tribunal who has a mandate to ensure the protection of the most vulnerable victims/survivors who have now been recognized? Further, how is this a reasonable and legal outcome?

[474] The Tribunal is not a political body in charge of making financial and political choices between people. Once it has reviewed the evidence and made findings and found that orders are warranted, the Tribunal cannot change its mind and rescind this unless it made an error, a reviewing Court overturns a finding or new and compelling evidence justifies it. Consistent with the reasons and case law analyzed above, the AFN and Canada must not be allowed to reopen a final order on quantum in the context of this motion. The Tribunal has not been presented with any evidence of any error in concluding that the victims/survivors in this case suffered the most egregious harms and are entitled to the $40,000 in recognition of their pain and suffering and Canada's willful and reckless conduct, this being the maximum that the Tribunal is allowed to award under the *CHRA*.

[475] Even if the Tribunal were to leave aside the question of the non-isc children and Jordan's Principle categories, the Tribunal cannot find that the FSA fully satisfies its orders given the other 2 derogations explained above. Moreover, the Tribunal cannot amend its orders to reduce or disentitle the victims/survivors to account for the reasons put forward by the AFN and Canada.

[476] The AFN and Canada provided meaningful arguments imported from the class action process; some have been addressed above. The Tribunal will address other important ones in turn here.

A. The Compromise factor in reaching the FSA and human rights lens

[477] The parties to the FSA submit that every settlement requires compromise. The Tribunal does not dispute that.

[478] The AFN submits that this Panel has jurisdiction to accept all compromises made by the parties to the negotiations, provided any given compromise was made on a principled and rational basis. The Tribunal agrees that the compromises were made on a principled and rational basis for First Nations. The issue is Canada and the AFN's decision to proceed in negotiations with the assumption that it was acceptable to reduce and disentitle victims/survivors already recognized by the Tribunal in its orders. While it is a practical reality of negotiations that they require compromise, that does not elevate the obligation to compromise in settlement negotiations to the same legal force as binding orders issued pursuant to the *CHRA*.

[479] The AFN and Canada rely on a recent Federal Court decision and submit that no settlement is perfect, (see *Tk'emlúps te Secwépemc First Nation v. Canada*, 2021 FC 988 at para. 64). The Tribunal accepts this assertion. Further, the AFN and Canada add that this settlement, however, represents the significant efforts of the parties to engage in the dialogic approach, as encouraged by the Federal Court. Settlements necessarily include balancing of benefits and compromises, and in this case the benefits are clear.

[480] That the FSA has clear benefits is generally true. However, the Tribunal finds whether it is more advantageous depends on which side of the fence you are on as a victim/survivor. For some of the victims/survivors whose rights were recognized by the Tribunal's findings and orders who may now see their compensation reduced or taken away, unfortunately, this is not true and the FSA provides no benefit. The Tribunal's first duty is to the victims/survivors it already recognized and their best interests.

[481] The Tribunal agrees with the AFN that the amounts payable to individuals will be meaningful and the total compensation is historic and reflects the magnitude of the harms. The nuance here for this Tribunal is the fact that some compromises to entitlements were made to account for the fixed amount of compensation agreed to by Canada which suggests the magnitude of the harms may be greater than the impressive $20 billion amount of compensation.

[482] Furthermore, the AFN and Canada have not convinced the Tribunal that compromise is part of the human rights analysis here once orders have been made or that compromise

outweighs the need to preserve the victims/survivors' rights recognized in orders in the Tribunal's proceedings. In other words, the role of compromise in litigation does not extend to derogating from binding Tribunal orders.

[483] If Canada had struck an agreement with the Caring Society and disregarded pleas from the AFN to not reduce compensation to the victims/survivors and disregard hard-fought gains, the AFN could raise this injustice and would be right to do so.

B. New information namely the FSA since the Tribunal rendered its orders

[484] The AFN submits the Tribunal can consider the FSA and can amend its orders to reflect the FSA. The Tribunal for the above-mentioned reasons partly agrees. Again, the Tribunal does not believe it can modify final orders on quantum for the categories already recognized in its orders. Moreover, insufficient evidence was led or submissions provided in terms of what those amendments should look like. The Tribunal agrees with the Caring Society that the AFN and Canada failed to specify the amendments they seek. This lack of specificity undermines procedural fairness. Moreover, this does not allow the Tribunal to reduce or disentitle compensation to victims/survivors already included in the Tribunal's orders.

C. The remedy is forthcoming to the victims

[485] The FSA would proceed more expeditiously if no one judicially reviews this ruling, which is unlikely given the opposing views. Furthermore, the expeditiousness is at the expense of fairness for the victims/survivors in these proceedings. The parties decided to put on hold the last elements of the Tribunal's compensation process to develop the FSA. While the Tribunal understands this, it is not a delay attributable to the Tribunal. The parties can develop the guide for compensation distribution in a short timeframe and submit it to the Tribunal for approval. This could expedite compensation. In terms of Canada's appeal of the compensation decisions and the potential for years before the remedy is forthcoming, the Tribunal notes that this could have been avoided in not removing victims/survivors recognized in the Tribunal's orders from the FSA. Second, there is no guarantee that further

delays would not occur with the FSA given the parties who oppose it in these proceedings and the risk of judicial review on either side.

D. The broader scope and enhanced compensation for some victims/survivors

[486] The broader scope and enhanced compensation for some victims/survivors is the most compelling rationale for endorsing the FSA. The Tribunal is entirely in favour of this expansion and recognizes its advantages. This is why the Tribunal seriously considered approving the FSA and found this decision to be a challenging one.

[487] While all compelling and important factors to consider, the Tribunal has a human rights focus. It cannot support reduced or eliminated compensation to victims already recognized in the Tribunal's orders. This negative message is contrary to the Tribunal's function under the *CHRA* to ensure the discrimination found is eliminated and does not reoccur and ensuring the victims/survivors are made whole. These enhancements, no matter how laudable and desirable, do not give the Tribunal authority to reduce or eliminate compensation to victims/survivors currently recognized under the Tribunal's orders.

[488] The AFN and Canada submit that in such circumstances, the Federal Court considers whether the settlement is fair and reasonable and whether it is in the best interests of the class as a whole. This can involve considering the settlement terms and conditions, the likelihood of success or recovery through litigation, the future expense and duration of further litigation, the dynamics of settlement negotiations and positions taken therein, the risks of not unconditionally approving the settlement, and the position of the representative plaintiffs. Of particular significance are the litigation risks of not approving the agreement and the view of the representative plaintiffs.

[489] The Tribunal mentioned above that it is not bound by a class action analysis. While some of the criteria above may be instructive, the Tribunal is governed by the legal framework explained in this ruling.

[490] Further, the AFN's request to proceed expeditiously did not allow the parties or the Tribunal in these proceedings to ask questions to the adult representative plaintiffs to understand their perspective and for this Tribunal to make findings. The AFN offered to

introduce the representative plaintiffs at the hearing once the evidence had closed and confirmed it had no intention of having the representative plaintiffs testify at the hearing. The Tribunal enquired if their testimony was requested and offered to schedule hearing dates if this was needed however, the AFN said that it was not.

[491] Further, the AFN and Canada add that this FSA was First Nations led and fosters reconciliation. The Tribunal accepts this and, as explained in this ruling, did consider this in making its decision.

[492] The Tribunal is not stating that it cannot amend its orders if the FSA does not mirror the Tribunal's orders. The Tribunal can amend its orders to clarify, enhance, or reflect the parties' wishes if they consent and do not remove recognized rights.

[493] The Tribunal emphasizes that the *CHRA* is a restorative piece of legislation.

[494] In fact, special programs are permitted in the *CHRA* when it has the policy goal to provide equity for some segments of society who are the subject of discrimination (see section 16 of the *CHRA*). This was discussed in *Action travail des femmes* and relied upon in the Tribunal's *Compensation Decision* in 2021 CHRT 6:

> [66] For the SCC, paragraph 2 of the Special Temporary Measures Order, ordering the CN to implement a special employment program, was specifically designed to address and remedy the type of systemic discrimination against women in the case under examination. Therefore, the SCC addressed the specific issue of the scope of the remedial powers established under section 41(2)(a) (now 53(2)(a)) of the *CHRA*, taking into account the power granted to the Tribunal to order measures regarding the "adoption of a special program, plan or arrangement referred to in subsection 15(1) (now 16(1)), to prevent the same or a similar practice occurring in the future" (*Action Travail des femmes*, at p. 1139).
>
> [67] Concurring with the dissenting opinion of Justice MacGuigan of the Federal Court of Appeal in the case under appeal, the SCC held that section 41(2)(a) (now 53(2)(a)) is "designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups" (*Action Travail des femmes,* at p 1141). In cases of systemic discrimination, the prevention of reoccurrence of discriminatory practices often requires referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes*, at p. 1141). Furthermore, the SCC held that the type of measure ordered by the Tribunal in the case under examination may be the only means to achieve the purpose of the *CHRA*, that

is to combat and prevent future discrimination (*Action Travail des femmes*, at p. 1141, 1145), (emphasis added).

[68] In these cases, remedy and prevention cannot be dissociated, since "there is no prevention without some form of remedy" (Action Travail des femmes, at p. 1142). Thus, the remedies available under section 53(2)(a) CHRA are directed toward a specific protected group and are not only *compensatory in nature, but also prospective*. As a result, with a view to achieve the prevention objective of the *CHRA*, a "special program, plan or arrangement" as referred to in subsection 16 (1) *CHRA* serves three main purposes: (1) countering the effect of systemic discrimination; (2) addressing the attitudinal problem of stereotyping, and; (3) Creating a critical mass, which may have an impact on the "continuing self-correction of the system" (*Action Travail des femmes*, at pp 1143-44), (emphasis added).

[69] In sum, while ruling that the Tribunal had the power to order such a special measure, the SCC summarized its findings as follows:

> For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(a) of the Canadian Human Rights Act. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(a). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Lawrence Region by preventing "the same or a similar practice occurring in the future".
>
> (*Action Travail des femmes*, at pp 1145-46).

[70] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in Action Travail des femmes, see for

example: 2016 CHRT 2 at para. 468; 2016 CHRT 10, at para. 12-18; 2018 CHRT 4, at para. 21-39; 2019 CHRT 39, at para. 97.

[495] Furthermore, no concept of removing ordered entitlements suggested by the AFN and Canada is found in the *CHRA* itself, the spirit of the *CHRA* or a proper human rights analysis. A careful consideration of the Panel's work in this case makes clear the Panel views its role under the *CHRA* as proactive to eliminate and prevent discrimination, not make orders and take them away.

[496] In 2021 CHRT 6, the Tribunal wrote:

> [61] To the contrary, in the interpretation of the *CHRA*, it is important to take into account the purpose of the *CHRA*, that is to extend the present laws in Canada as set forth in section 2 in order to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination (*Action Travail des femmes*, at p 1133). It should be recalled that human rights legislations are intended to give effect to rights of vital importance, **ultimately enforceable by a court of law** (*Action Travail des femmes*, at p 1134). As a result, while the meaning of the words of the *CHRA* is important, rights must be given full recognition and effect (Action Travail des femmes, at p 1134). This is also in line with the federal Interpretation Act, RSC 1985, c I-21, according to which statutes are deemed remedial and thus, must receive a fair, large and liberal interpretation with a view to give effect to their objects and purpose (*Action Travail des femmes*, at p 1134).
>
> [62] This comprehensive method of interpretation of human rights legislation was first stated in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, where Justice Lamer acknowledged the fundamental nature of human rights legislation: they are "not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law" (Action Travail des femmes, at pp 1135-36, citing *Heerspink*, at p. 158). This principle of interpretation was later confirmed and further articulated in *Winnipeg School Division No. I* v. *Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156, where Justice McIntyre, writing for a unanimous Court, stated that:
>
> > Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.
> >
> > (cited in Action Travail des femmes, at 1136).

> [65] These principles must equally be applied when interpreting the remedial powers granted to the Tribunal under the *CHRA*.

[497] An analysis of section 53 of the *CHRA* where the Tribunal has recognized victims/survivors in its orders and can change its mind later for the reasons advanced in this motion including unproven financial constraints is not appropriate and does not keep with the SCC's reasons in *Action Travail des femmes*.

[498] The Tribunal cannot make the alternative order requested to amend its previous orders to conform to the FSA or to elevate the FSA over the Tribunal's orders in case of conflict. The Tribunal reaches this conclusion after considering the applicable case law discussed, the *CHRA* and human rights regime all discussed above, its previous findings and its previous orders.

[499] Moreover, the FSA's legal framework is driven by the current class actions. Canada did not ensure that an appropriate human rights lens respecting its current human rights obligations and binding orders against it in this case was applied to allow it to agree to the FSA.

[500] The Tribunal is fully aware that applying a human rights lens and its statutory powers to the issue does not provide statutory authority to change or amend the Tribunal's orders in removing rights to categories of victims/survivors so that the Tribunal's orders conform to the FSA. This is not permissible by law. The Tribunal is not a political body, it is an adjudicative body deriving its authority from statute and it cannot disturb the legal recourses under the *CHRA* regime to deny quasi-constitutional rights.

[501] The AFN's argument that this would result in parties never being able to settle litigation outside of the Courts is not accurate. The issue here is this was done after orders were made and resulted in contracting out some of the victims/survivors' human rights to compensation who were already recognized in legal orders amounting to a collateral attack of the Tribunal's quantum and eligibility orders.

[502] The Tribunal cannot overstate the importance of securing victims/survivors' rights across Canada. This requires the Tribunal to ensure that first the victims/survivors in this case and other victims who may include Indigenous Peoples and Nations, can pursue a

human rights case under the *CHRA* through to a final resolution with fair recourse. Victims/survivors must be able to rely on the finality of findings of discrimination and compensation ordered by the Tribunal. Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative proceeding.

[503] The case is quite different with long-term reform where not all issues have been adjudicated by the Tribunal. The Tribunal supports First Nations-led solutions to eliminate discrimination if the evidence advanced proves to eliminate the systemic discrimination found in an effective and sustainable manner that responds to the specific needs of First Nations children, families and also communities. The Tribunal reminds the parties that it is a Tribunal created by statute with a mandate to eliminate discrimination in Canada once findings are made, always based on evidence and not opinion. The Tribunal is still seized of the matter and will need to make findings before ending its jurisdiction to ensure the racial and systemic discrimination is eliminated and does not reoccur. The First Nations parties' expertise is key in this important task.

[504] Moreover, the *CHRA* does not grant fleeting rights: once entitlements are recognized under the *CHRA*, they cannot be removed. Once a finding and a compensation order is made to vindicate rights, they may not be revoked absent an order from a reviewing court**.**

[505] The Tribunal does not believe it has a legal basis for granting all the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would disentitle certain victims/survivors from compensation under the Tribunal's orders.

[506] The Tribunal is nonetheless urged to accept the FSA even if it is not identical to the Tribunal's orders because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, this is subject to the Tribunal's conditions below on the opt-out provision and the FSA including all the victims/survivors recognized in the Tribunal's orders.

X. Conclusion

[507] The Tribunal finds as follows:

[508] The Tribunal is not *functus* to consider if the FSA fully satisfies the Tribunal's orders.

[509] The Tribunal finds the FSA substantially satisfies the Tribunal's orders. The FSA can potentially fully satisfy the Tribunal's orders if it is amended to include all the categories of victims/survivors and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is fully responsive and rectifies the areas of concerns mentioned above.

[510] The Tribunal cannot declare or find the FSA fully satisfies the Tribunal's orders given that some victims/survivors who were recognized by and awarded compensation by this Tribunal have been removed or provided with reduced compensation. The Tribunal's orders were upheld by the Federal Court. The evidence currently before the Tribunal does not permit a finding that the FSA fully satisfies the Tribunal's orders. This difficulty is more than technical; it is a real legal one.

[511] The Tribunal finds the FSA respects numerous and many important components of the Tribunal's compensation orders such as not retraumatizing victims, avoiding children testifying and using a culturally appropriate process. The Panel generally accepts the FSA and finds it more advantageous on many aspects and understands the principled choices made by First Nations. The Panel also sees great value in having one process supervised by the Federal Court for the compensation issue. The Panel would likely have approved a settlement along the lines of the FSA if it had been asked to do so prior to issuing its *Compensation Entitlement Decision* or if all victims/survivors already recognized by the Tribunal's orders were included.

[512] The Tribunal always contemplated adding more categories of compensable victims and was open to doing so if it was needed and supported by the evidence but the AFN declined this option in its submissions given that they had concerns that the compensation process with Canada would reach an impasse. The compensation orders were still judicially reviewed. The Tribunal never envisioned removing recognized categories of

victims/survivors after it made its findings and orders based on evidence of harm. After the Tribunal makes an order entitling a category of victims/survivors to compensation, those orders have finality and the only options for removing the entitlement is through judicial review. While the Tribunal agrees it did not have the FSA before it at the time it made its orders, the Tribunal finds no legal basis justifying the denial of compensation to categories of victims/survivors recognized by this Tribunal. Moreover, the Tribunal would review the victims/survivors' eligibility for compensation if directed by the reviewing court.

[513] The Tribunal stresses this context to emphasize that it urged the parties to negotiate an agreement on compensation to avoid making very specific orders that First Nations later argue against. This can easily be avoided with deals in earlier stages of proceedings where no compensation has been ordered. The purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders. A careful reading of the Tribunal's decisions makes this clear.

[514] The FSA is driven both by the class action cases and class action law. It does not apply a human rights lens and does not uphold Canada's human rights obligations under the Tribunal's orders. While the AFN in its submissions urges the Tribunal to consider a class action lens, the AFN has not persuaded the Tribunal why the Tribunal should apply this lens instead of an assessment based on existing human rights jurisprudence, especially as articulated in earlier decisions in this case. Even if the Tribunal were to use a class action lens, the AFN and Canada have not sufficiently explained how the factors that apply to a class action analysis would be applicable in the current context where many of the beneficiaries of the class action have an existing entitlement to compensation under valid Tribunal orders. While these orders are under judicial review, this is considerably different from the most typical class action context where none of the class action beneficiaries have any legal entitlement to compensation at the time of a settlement approval hearing. Further, the AFN does not sufficiently address how the class action framework applies when considering victims/survivors who would lose entitlement to compensation that they are currently owed by Canada.

[515] Furthermore, the Tribunal believes that Justice Favel's comments on reconciliation cannot be interpreted to disentitle victims/survivors who were recognized by this Tribunal.

[516] The Tribunal does not believe it has a legal basis for granting the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would reduce or disentitle certain victims/survivors from compensation under the Tribunal's orders. In addition, in requesting an amendment, Canada and the AFN have not addressed how the Tribunal would proceed given that it is being asked to amend its orders to reflect the FSA which includes, laudably, compensation in excess of what the Tribunal can order under the *CHRA*. The Tribunal is nonetheless urged to accept this position because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, the Tribunal is not persuaded the expedited compensation would actually occur given the possibility of challenging the Tribunal's decision on this joint motion by way of judicial review and the possibility the FSA class action settlement is not approved in the Federal Court. Therefore, there is a risk of providing a false hope to those entitled to compensation under the FSA about the timeframe in which they would receive compensation.

[517] This does not dispose of the Tribunal's retained jurisdiction to ensure systemic discrimination is eliminated. Canada cannot contract out the Tribunal's quasi-constitutional responsibility to eliminate the discrimination found and prevent similar discriminatory practices from arising. It has to occur after an evidence-based finding that satisfies the Tribunal that discrimination is eliminated and prevented from reoccurring or on consent of all, not just some, parties in the Tribunal proceedings and based on compelling evidence that the systemic racial discrimination will be eliminated. The Tribunal urges Canada in the spirit of reconciliation to remove the pressure on victims/survivors and First Nations and extend its December 30, 2022, deadline to the agreements to at least March 2023. The Tribunal has requested a minimum of 60 business days to consider outstanding aspects of the long-term reform and will take the appropriate time needed to consider the matter.

[518] The AFN in its oral arguments at the September 2022 hearing submitted that discrimination continues. This can be revisited in the long-term issue.

XI. Order

A. The Tribunal grants the motion in part and Declares/Finds

[519] The FSA substantially satisfies the Tribunal's orders and, given that the Tribunal cannot order non-parties to negotiate or amend the FSA, recommends:

A. Canada negotiates with the class action and Tribunal parties and allocates funds to cover all victims entitled to compensation under the Tribunal decisions. The amounts already ordered by the Tribunal should be the floor.

B. For example, Canada can pay compensation funds of $20 billion or more if insufficient into a trust within 21 days following the letter-decision in order to generate interest until the time it is ready to roll out compensation in order to compensate human rights victims who were included in the Tribunal's orders but excluded under the FSA.

C. If the Federal Court does not approve the FSA, the funds could revert to Canada.

D. This may not be sufficient to cover the excluded categories. The parties to the FSA may need to consider other options.

E. If all the victims/survivors identified and the compensation amounts in the Tribunal's orders are accounted for in the FSA and there is a possibility for them to opt-out of the FSA in a manner that rectifies the areas of concern mentioned above, the Tribunal will be able to find the FSA fully satisfies the Tribunal's orders.

[520] Alternatively:

A. Given the real potential for delaying compensation from additional litigation and judicial reviews that may arise from either side as a result of this joint motion, the Tribunal recommends removing the Tribunal approval from the FSA and make the necessary amendments to settle all three class actions and move forward at the Federal Court for approval and pay compensation in early 2023 to victims/survivors covered in the class actions. The parties to these proceedings can finalize their unfinished work in a timely manner and come back before the Tribunal to start distributing compensation to victims/survivors in the near future. Again, the Federal Court approved the Panel's compensation decisions and determined that they were reasonable, this is a compelling reason supporting our reasons in this decision. This alternative can be achieved regardless of Canada's judicial review at the Federal Court of Appeal.

B. Furthermore, the Tribunal notes the comments from the parties during the hearing that they are not yet in a position to distribute compensation under the Tribunal's orders and the Compensation Framework. The Tribunal reminds the parties that,

> absent a stay of the orders, the parties have an obligation to continue to address outstanding compensation issues so that they are in a position to set the earliest implementation date possible.

[521] The Tribunal's role includes all Peoples in Canada and must protect victims/survivors especially children. The Tribunal signals to all victims/survivors in Canada that once your rights have been recognized and vindicated, they cannot be taken from you by respondents, third parties or the same Tribunal who has vindicated your rights unless ordered by higher Courts.

[522] The Tribunal believes that the great work accomplished by the parties in these proceedings and the parties to the FSA can be kept alive and move forward if all victims/survivors are included or if the Tribunal's full approval is no longer required.

XII. Retention of jurisdiction

[523] The Tribunal retains jurisdiction on the compensation issue within the scope explained in this ruling and will revisit its retention of jurisdiction as the Tribunal sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.

[524] This does not modify the Tribunal's previous decisions/rulings and orders or the retention of jurisdiction on long-term relief, reform or other previous decisions/rulings and orders in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
December 20, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: December 20, 2022

Date and Place of Hearing: September 15 and 16, 2022
Ottawa, Ontario and videoconference

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Anshumala Juyal, Jessica Walsh and Brian Smith, counsel for the Canadian Human Rights Commission

Paul Vickery and Christopher Rupar, counsel for the Respondent

Maggie Wente and Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Christopher Rapson, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 12

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 44
Date: September 26, 2023
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

Decision

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Introduction

[1] This is a good day for human rights, First Nations children and families in Canada and a significant step towards reconciliation. The Panel congratulates the parties and all people involved in reaching this milestone and more importantly, the Panel recognizes the First Nations children and families who were harmed as a result of Canada's discriminatory practices and whose lives are paving the way for justice. This is the largest settlement of its kind in Canadian history. Sadly, this stems from the magnitude of harms that were inflicted upon First Nations children, families, communities and Nations. Canada ought to bear this in mind as an important reminder so as to never repeat history. The cycle of harm must be broken.

> "History will judge us by the difference we make in the everyday lives of children."
>
> — Nelson Mandela

[2] The Panel honors the First Nations leadership in Canada who voiced the importance of not leaving anyone behind and the First Nations parties' courage for leading further negotiations. It took great leadership for the Assembly of First Nations (AFN) and Canada to collaborate and arrive at the previous historic Final Settlement Agreement (FSA). It took even greater leadership from the AFN and Canada's Ministers and their teams to receive the Tribunal's criticism of some aspects of the FSA (for example, leaving out some of the victims/survivors already recognized by this Tribunal), consult the Chiefs-in-Assembly, bring the Caring Society back to the negotiation table and arrive at this transformative and unprecedented Revised Settlement Agreement.

[3] The Tribunal declined to fully endorse the previous FSA because it did not fully satisfy the compensation orders the Tribunal found the victims/survivors were entitled to under the *Canadian Human Rights Act*, RSC 1985 c H-6. The Tribunal in rejecting the previous FSA was really hoping for a better outcome as a result of further negotiations. The Tribunal believes that even if this took many additional months to arrive to this Revised Settlement, it was well worth it for the victims/survivors of human rights violations.

[4] According to the parties, this is the largest compensation settlement in Canadian history so far and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister. The Tribunal believes this was an example of grace under pressure and commends the parties to the Revised Agreement and everyone involved for this outstanding achievement that will provide some measure of justice to First Nations children and families who have unjustly suffered because of their race instead of being treated honorably and justly.

[5] First Nations children ought to be honored for who they are - beautiful, valuable, strong and precious First Nations persons. Governments, leaders and adults in any Nation have the sacred responsibility to honor, protect and value children and youth, not harm them.

[6] Complete justice will be achieved when First Nations children will have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have when systemic racial discrimination no longer exists. The compensation in this case is only one component. The Tribunal, assisted meaningfully by the parties, has always focused on the elimination of the systemic racial discrimination found and the need to prevent similar practices from arising. The Tribunal has found this requires a complete reform. Making available to First Nations children and communities the rights, opportunities and privileges they have been denied and ensuring Canada ceases the discriminatory practices at issue in this case requires a transformation that will protect generations to come. This continues to be the Tribunal's focus.

[7] The Panel is grateful for the Commissions' human rights centered contributions and for the Caring Society's courageous leadership ensuring that no child is left behind and that no one loses entitlement to compensation ordered by the Tribunal. The Panel also commends the First Nations Chiefs-in-Assembly at the AFN for their leadership in adopting a resolution in the spirit of reconciliation and prompting further negotiations on compensation to ensure that no child is left behind.

[8] The Panel recognizes the valuable contributions of the Chiefs of Ontario and the Nishnawbe Aski Nation.

[9] The Panel also recognizes Amnesty International's past contributions on this important issue of compensation.

[10] Finally, the Panel recognizes the AFN's and the Caring Society's instrumental role in an effort to obtain meaningful compensation for First Nations children and families.

[11] The Panel wishes to recognize and honor the true overcomers and heroes in this case, the First Nations children and families.

[12] The Panel Chair speaks **peace** to every First Nations child, youth and young adult's heart in Turtle Island (Canada) and, to all First Nations individuals and their Communities and Nations.

[13] The Panel is pleased that Canada demonstrated effective leadership in going back to negotiations and for doing the right thing in reincluding the victims/survivors that were left out of the previous settlement agreement (2022 FSA).

[14] The work is not finished, there is much more to do. Compensation is but one aspect of this case. Racial and systemic discrimination must be eliminated and similar practices must not arise or be perpetuated.

[15] Finally, while there is more to do, this milestone deserves to be celebrated as it will be transformative for thousands of First Nations children and families.

A. Context

[16] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that

the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

[17] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

> **Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Canadian Charter of Rights and Freedoms*, the *Convention on the***

> ***Rights of the Child*** **and the** ***UNDRIP*** **to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.** (emphasis changed)

[18] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[19] The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

[20] The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

[21] The Tribunal encouraged the parties for years to resolve compensation issues.

[22] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than

adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

[23] The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Tribunal who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

[24] Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights.

[25] Indeed, on September 6, 2019, the Tribunal rendered its decision on compensation (2019 CHRT 39), wherein it ordered Canada to compensate and pay interest to: (i) certain victims of discrimination under the FNCFS Program who were removed from their homes, families and communities; (ii) their parents or caregiving grandparents and, (iii) certain victims of Canada's discriminatory application of Jordan's Principle. Included in the decision were First Nations children on-reserve and in the Yukon who were unnecessarily removed from their homes and communities from 2006 onwards (later confirmed to include children

in out-of-home placements on January 1, 2006), and First Nations children who were denied the essential services needed, or received the essential services after an unreasonable delay, because the Government of Canada failed to meet the legal requirements of Jordan's Principle (the "Compensation Entitlement Order").

[26] The Tribunal ordered Canada to consult with the Caring Society and the AFN to develop a compensation distribution framework to arrive at a final order for the distribution of the compensation ordered.

[27] On October 4, 2019, Canada applied for judicial review of the Compensation Entitlement Decision and sought a stay of the Tribunal's proceedings. After the Federal Court dismissed the stay motion on November 27, 2019, Canada agreed to work with the Caring Society and the AFN on the framework.

[28] On February 21, 2020, the Caring Society, the AFN, and Canada submitted a first draft compensation framework to the Tribunal (the "Compensation Framework"). From February 2020 to December 2020, the Caring Society, the AFN and Canada worked to finalize the Compensation Framework. While many aspects of the compensation framework were the result of negotiation and consensus, certain issues were resolved through adjudication before the Tribunal.

[29] The Tribunal ultimately addressed the issues raised before it by the parties and issued further orders clarifying various elements of its Compensation Entitlement Order, including: the age of majority, eligibility for those who remained in care as at Jan 1, 2006 and the eligibility for the estates of deceased victims (2020 CHRT 7); the definitions of "service gap", "essential service" and "unreasonable delay" for the purpose of Jordan's Principle compensation (2020 CHRT 15); the definition of a "First Nations child" in relation to eligibility under Jordan's Principle (2020 CHRT 20); and that compensation owing to minor beneficiaries and those without legal capacity be held in trust (2021 CHRT 6).

[30] On February 12, 2021, the Tribunal approved the final Compensation Framework as revised by the parties (2021 CHRT 7). While this Order substantively addressed aspects of the distribution process for compensation, the parties understood that a significant amount of future work would be required by the parties to address items which included, but were

not limited to, how eligibility would be determined, the operation of the implementation process and the continued role of the Tribunal. This work remained subject to Canada's judicial review of the Compensation Entitlement Order and the Tribunal's orders regarding eligibility under Jordan's Principle (2020 CHRT 20 and 2020 CHRT 36), as addressed in Federal Court File Nos. T-1621-19 and T-1559-20.

[31] The judicial reviews were heard on June 14-18, 2021. On September 29, 2021, the Federal Court dismissed Canada's applications in their entirety (2021 FC 969).

[32] On October 29, 2021, Canada appealed the Federal Court's order (2021 FC 969) upholding the Compensation Entitlement Decision to the Federal Court of Appeal (Federal Court of Appeal File No. A-290-21).

The Class Actions and Procedural History of the Revised Final Settlement Agreement

[33] On March 4, 2019, a class action was commenced in the Federal Court seeking compensation for First Nations children who suffered comparable discrimination related to a lack of prevention services leading to the placement of First Nations children in out-of-home care as well as the discriminatory application of Jordan's Principle, beginning on April 1, 1991 (Federal Court File No. T-402-19) ("Moushoom Class Action").

[34] On January 28, 2020, a proposed class action was filed by the AFN and other representative plaintiffs seeking compensation for removed First Nations children and those who experienced discrimination under Jordan's Principle (Federal Court File No. T-141-20) ("AFN Class Action"). A separate class action involving Canada's discrimination in the provision of essential services, products and supports prior to December 2007 was commenced on July 16, 2021 by the AFN and the representative plaintiff Zacheus Trout (Federal Court File No. T-141-20) ("Trout Class Action").

[35] The Moushoom Class Action and the AFN Class Action were consolidated on July 7, 2021 and certified on November 26, 2021 (2021 FC 1225). The Trout Class Action was certified on February 11, 2022 (together, the three class actions are referred to as the "Federal Court Class Actions").

[36] On December 31, 2021, the parties to the to the Federal Court Class Actions concluded an Agreement-in-Principle ("AIP") addressing compensation. On June 30, 2022, a final settlement agreement was reached (the "2022 FSA") and in July 2022, the AFN and Canada brought a motion to the Tribunal seeking a declaration that the 2022 FSA was fair, reasonable, and satisfied the Compensation Entitlement Order and all related clarifying orders (the "Joint Motion"). In the alternative, AFN and Canada sought an order varying the Compensation Entitlement Order, the Compensation Framework Order and other compensation orders, to conform to the 2022 FSA.

[37] The Panel agreed the victims/survivors have been waiting long enough and emphasized that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the *Compensation Decision* in 2019.

[38] The Tribunal heard the Joint Motion in September 2022 and dismissed the Joint Motion by letter decision on October 25, 2022, with full reasons set out in 2022 CHRT 41 and can be accessed online at: https://canlii.ca/t/k08tm.

[39] The Tribunal in 2022 CHRT 41 on the Joint Motion found that the 2022 FSA substantially satisfied the Compensation Entitlement Order. However, the Tribunal identified three (3) key areas where the 2022 FSA departed from the compensation orders, disentitled or reduced entitlements for certain victims already entitled to compensation which, as it will be explained below, was contrary to human rights principles carefully applied in the Tribunal's findings on compensation and corresponding orders. These derogations included the following:

> (a) children removed from their homes, families and communities and placed in non-ISC funded placements were improperly excluded from receiving compensation (2022 CHRT 41 at paras. 283-331);
>
> (b) the estates of deceased caregiving parents and grandparents were excluded from receiving compensation, which was not in keeping with 2020 CHRT 7 (2022 CHRT 41 at paras. 332-350);
>
> (c) certain caregiving parents and grandparents would receive less compensation either in circumstances of multiple removals or if there was an unexpected number of claimants which required a reduction in compensation

> to the class to ensure that all caregiving parent and grandparent victims received compensation (2022 CHRT 41 at paras. 351-360).

[40] The Tribunal also raised concerns regarding eligibility under Jordan's Principle and the uncertainties introduced in the 2022 FSA regarding the class action approach, with questions around the meaning of "significant impact" and the definition of "essential service". The Tribunal determined that uncertainty existed with respect to whether the implementation of Jordan's Principle under the 2022 FSA would result in the victims identified by the Tribunal receiving $40,000.

[41] The Tribunal also expressed concern about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390).

[42] The Tribunal said in 2022 CHRT 41 at paragraph 10:

> that the same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure in its compensation decision they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions that are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the CHRA regime and the Tribunal's orders.

[43] Notably, in 2022 CHRT 41 at paragraph 169, the Tribunal stated the question of quantum of compensation was never up for discussion and no suggestion was made by the Tribunal or the parties to modify the quantum of compensation or to reduce or disentitle categories already recognized by the Tribunal in its compensation orders. In fact, this aspect was final and supported by findings and reasons and sent a strong deterrent message to Canada and a message of hope to the victims/survivors whose rights were vindicated by those findings and corresponding orders. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. The Tribunal noted the important purpose of individual compensation for victims of discrimination:

> was necessary to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.
> (2019 CHRT 39 at para 14).

[44] The Tribunal reiterated that in the Compensation Entitlement Decision, 2019 CHRT 39, at para. 206, the Tribunal also made clear that its obligations are to safeguard the human rights of the victims/survivors it identified, irrespective of any proposed class proceedings:

> The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy discrimination and if applicable, as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[45] The Tribunal in its reasons rejecting the 2022 FSA, the Tribunal mentioned that it is responsible for applying the *CHRA* and the human rights framework reflected in that legislation.

[46] Moreover, in 2022 CHRT 41, the Tribunal reasoned as follows:

> More importantly, the Tribunal frowns on reducing compensation or disentitling victims/survivors once they have been vindicated at the Tribunal and upheld by the Federal Court. This dangerous precedent would send a very negative message to victims/survivors in this case and other human rights cases in Canada and could potentially become a powerful deterrent to pursue human rights recourses under the *CHRA*. Victims/survivors would never have the peace of mind that their substantiated complaints and awarded remedies would be forthcoming to them if, at any time before remedies are implemented, these remedies can be taken away from them without the need for a successful judicial review (See at, para. 259).
>
> This is even more troubling when we consider the nature of the complaints before the Tribunal in this case. The very nature of human rights rests upon the protection of vulnerable groups. From the beginning the Tribunal found and wrote that this case is about children and the Tribunal's mandate to eliminate discrimination and prevent similar practices from arising. Permitting reductions or disentitlements of compensation for victims/survivors who have been recognized in evidence-based findings and corresponding orders does not breathe life into human rights. Rather, it takes its breath away, (See at, para. 260).
>
> This cannot be how the human rights regime is administered in Canada (See at, para. 261).

> Once rights have been recognized and vindicated (which is no small task for complainants and victims who often face powerful respondents challenging their claim at every turn), they
>
> are no longer up for debate by outside actors or respondents who may disagree with the orders made against them and therefore cannot contract out of their human rights obligations under the *CHRA* (See 2022 CHRT 41. at, para. 236).
>
> The Tribunal cannot overstate the importance of securing victims/survivors' rights across Canada. […] Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights
>
> legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative
>
> Proceeding, (See 2022 CHRT 41, at, para. 502).

[47] The Tribunal urged the parties to this proceeding and the parties to the Federal Court Class Actions to work together to allocate additional funds to cover all victims/survivors entitled to compensation as already ordered by the Tribunal and to uphold the human rights regime in a manner that respects and acknowledges those orders and the pain and suffering of all victims/survivors identified by the Tribunal in its previous reasons and orders.

[48] On December 7, 2022, the First Nations-in-Assembly unanimously adopted Resolution 28/2022 regarding compensation for the victims of Canada's discrimination. Resolution 28/2022 included the following critical direction:

> Support compensation for victims covered by the 2022 FSA on compensation and those already legally entitled to $40,000 plus interest under the Canadian Human Rights Tribunal (CHRT) compensation orders to ensure that all victims receive compensation for Canada's wilful and reckless discrimination.
>
> Support the principles on which the FSA is built, including taking a trauma-informed approach, employing objective and non-invasive criteria, and ensuring a First Nations-driven and culturally informed approach to compensation individuals.
>
> Continue to support the Representative Plaintiffs and all victims of Canada's discrimination by ensuring that compensation is paid out as quickly as

> possible to all those who can be immediately identified and to continue to work efficiently to compensate those who may need more time.

[49] With the guidance set out by the Tribunal in 2022 CHRT 41 and the direction and support provided by First Nations leadership, the parties to the Federal Court Class Actions and the Caring Society engaged in negotiations resulting in the Revised Agreement. The Revised Agreement was approved by the First Nations-in-Assembly on April 4, 2023, and executed by the parties to the Federal Court Class Actions on April 19, 2023. As the Caring Society was not a party to the Federal Court Class Actions, the AFN, the Caring Society and Canada executed Minutes of Settlement in this proceeding on April 19, 2023.

B. Issue to be decided by this Tribunal

[50] The parties submitted the following notice of motion to the Tribunal:

> **MOTION FOR APPROVAL OF THE REVISED COMPENSATION FINAL SETTLEMENT AGREEMENT and CONSENT RELIEF OF THE ASSEMBLY OF FIRST NATIONS, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ATTORNEY GENERAL OF CANADA**
>
> **THIS CONSENT MOTION IS MADE** under Rule 3 of the *Tribunal's Rules of Procedure (Proceedings Prior to July 11, 2021)* and is for orders under paragraph 53(2)(b) of the *Canadian Human Rights Act* (the "CHRA") and under Rule 1(6) and 3(2)(d) and pursuant to the Tribunal's continuing jurisdiction in this matter. …
>
> **AND TAKE NOTICE THAT THIS CONSENT MOTION IS FOR** orders confirming that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Final Settlement Agreement (the "**Revised Agreement**"), made respecting Federal Court File Nos. T-402-19 (*Moushoom et al v Attorney General of Canada*), T-141-20 (*Assembly of First Nations et al v His Majesty the King)* and T-1120-21 *(Trout et al v Attorney General of Canada)* dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding.

[51] The parties jointly submit that the Revised Agreement presented to the Tribunal on this motion heeds the Tribunal's guidance and the direction from the First Nations-in-Assembly: the derogations have been remedied; the uncertainties in relation to eligibility under Jordan's Principle have been addressed; the approach to compensation in relation to

the estates of parents/caregiving grandparents has been varied to ensure a better outcome for children impacted by Canada's discrimination; and compensation to parents and caregiving grandparents under Jordan's Principle has been aligned with the spirit and intent of the Tribunal's finding in this case. The Assembly of First Nations, the Caring Society, the Human Rights Commission, the Chiefs of Ontario, the Nishnawbe Aski Nation and Canada consent to this motion. The Revised Agreement can be consulted online at: https://afn.bynder.com/m/21fa33f66e9b73d1/original/04-2023-Compensation-Final-Settlement-Agreement-April-17-with-schedule

C. Decision

[52] After careful consideration, the Panel agrees.

The joint motion is allowed.

D. Legal framework

[53] The Tribunal relies on the same legal framework detailed in length in its reasons in 2022 CHRT 41 to support the finding that it has jurisdiction to determine if the Revised Settlement fully satisfies the Tribunal's compensation orders. The Panel outlined the proper approach to reviewing a request for a consent order in 2020 CHRT 36 at para. 51:

> The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[54] Moreover, the legal framework pertaining to the requested orders will be addressed in turn in the analysis below.

E. Analysis

(i) Has the Revised Agreement addressed the Tribunal's concerns raised in 2022 CHRT 41 and does it now fully satisfy the Tribunal's orders?

[55] The Tribunal will not embark on a clause-by-clause comment of a very voluminous document. The Tribunal has carefully reviewed the Revised Agreement and will comment only on the parts that it had found problematic in 2022 CHRT 41 and that needed changes in order to fully satisfy the Tribunal's orders. In sum, the Tribunal agrees that the rest of the Settlement Agreement and claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. The Revised Agreement does not require children to testify and will be culturally appropriate and safe. This formed part of the Tribunal's compensation orders. Indeed, the Tribunal stressed the importance of avoiding the retraumatizing of children in its compensation orders. The Revised Agreement adopts a trauma informed approach best suited in this case. Further, subject to the Federal Court's approval, a Settlement Implementation Committee composed of five members will be established and will include two First Nations members and three Counsel members. As per the Tribunal's orders, subject to some exceptions, the compensation will be paid directly to the victims/survivors or in a trust fund until they have reached the age of majority as determined by law and administered by a Court appointed independent Trustee. Upon careful consideration and, in applying a human rights lens, the Tribunal finds the Revised Agreement in the best interests of First Nations children and families who are entitled to compensation under the Tribunal's orders.

[56] For the above reasons, the Tribunal only needs to focus on the sections that will be discussed below.

[57] Of note, the Revised agreement now includes a request for an apology from the Prime Minister, standing in Federal Court for the Caring Society, a longer opt-out deadline for victims/survivors and interest on compensation as per the Tribunal's compensation orders. The Tribunal will also discuss these in turn below.

[58] While the Tribunal ruled that a settlement need not mirror all the Tribunal's compensation orders as long as the spirit of its orders is honoured, it cannot disentitle, reduce or strip away the victims/survivors' compensation guaranteed in the Tribunal's orders. Therefore, ensuring this is remedied in the Revised Agreement is the focus and the framework in the Tribunal's analysis of the Revised Agreement.

[59] A summary of joint submissions from the parties is reproduced below. The Tribunal decided that it was wise to use the parties' own description of how they consider having addressed the Tribunal's concerns instead of rewording them. The Tribunal will address them in turn and provide its reasons under each of the parties' descriptions.

(ii) The Derogations Regarding Kith Placements and Multiple Removals Have Been Remedied

[60] In 2022 CHRT 41, the Tribunal found that the 2022 FSA settlement amount of $20,000,000,000 did not include a budget to compensate First Nations children removed from their homes, families and communities who were placed in placements not funded by Canada ("Non-ISC Funded Placements").

[61] The joint parties submit that the Revised Agreement now includes compensation for First Nations children removed from their homes, families and communities and placed in alternative non-ISC funded placements and compensation for their parents/caregiving grandparents. These placements are referred to as "Kith Placements" in the Revised Agreement. Children placed in Kith Placements, as well as their parents/caregiving grandparents, are entitled to $40,000 plus applicable interest.

[62] Article 7 of the Revised Agreement sets out the principal eligibility requirements for First Nations children removed from their homes, families and communities, and placed in Kith Placements. Given the challenges with the available documentation for Kith Placements, the parties will craft a separate and unique approach for the verification of eligible class members under this category. The approach will involve the participation of the Caring Society, as well as input from youth in care and youth formerly in care and First Nations Child and Family Services Agencies ("FNCFS Agencies"), (See, Article 7.01(8),

Revised Agreement, Exhibit “F” to the AFN Affidavit). No member of the Kith Child Class will be required to submit to any form of interview or *viva voce* (oral) evidence taking and the claims process will be designed with the goal of minimizing risk of causing harm. Further, the joint parties state that compensation in relation to Kith Placements will require a specific approach given that data relevant to Kith Placements is often collected in a different manner than those in ISC-funded placements. The process for determining eligibility will be structured with guidance from records management experts, youth in care and youth formerly in care, and input from the Caring Society. The Revised Agreement fully satisfies the Compensation Entitlement Order in relation to these victims (See, Article 7.01(1) and (2), Revised Agreement, Exhibit “F” to the AFN Affidavit).

[63] The Revised Agreement provides for a budget of $600 million for the Kith Child Class and $702 million for the Kith Family Class, (See, Article 7.02 (5) and 7.04(2), Revised Agreement, Exhibit “F” to the AFN Affidavit). These are new amounts being committed by Canada and are not a redistribution of funding under the 2022 FSA. These amounts meet or exceed the Caring Society’s estimates of the budget required to compensate the likely number of victims in each category, (See Annex A).

[64] As set out in Annex A, the Caring Society based its estimates on data obtained from iterations of the Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS-2019) providing information on placements for First Nations children. The Caring Society reviewed existing data from the Canadian Incidence Study on Reported Child Abuse and Neglect (2019 FN-CIS) to extrapolate the number of First Nations children in Non-ISC Funded Placements.

[65] This data was used to extrapolate population sizes based on information available regarding children in “ISC-funded” placements, provided by the Parliamentary Budget Officer and experts retained by the class action parties. Recognizing the ongoing gaps in child welfare data, the evidence used for these calculations is the best available. The data is valid and reliable and the Caring Society’s calculation assumptions are conservative, in order to avoid underestimating the number of potential victims.

[66] Table 16 of the 2019 FN-CIS attached to Dr. Blackstock's affidavit dated, June 30, 2023, as Exhibit "F", notes that 2,365 First Nations children were removed to placements not funded by Canada in 2019. This amounted to roughly 40% of all placements made in 2019.

[67] The Caring Society also verified the proportion of placements not funded by Canada in the 2003 report Understanding Overrepresentation of First Nations Children in Canada's Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003) (also known as Mesnmimk Wasatek: catching a drop of light) ("2003 FNCIS"), which estimated 1,554 First Nations children being removed to placements not funded by Canada in 2003. This amounted to roughly 45% of all placements made in 2003. A true copy of Table 7-6 from the 2003 FN-CIS is attached to Dr. Blackstock's affidavit dated, June 30, 2023, as Exhibit "G".

[68] Using these two figures, the Caring Society assessed that the estimated number of children removed to placements funded by ISC under the FNCFS Program from January 1, 2006 to March 31, 2022 (including children already in care on January 1, 2006) would represent roughly 57.5% of all First Nations children living on-reserve who had been removed from their homes.

[69] The Caring Society is of the view that the budgeted amounts for the Kith Child Class and the Kith Family Class are fair and reasonable. These amounts reflect the Caring Society's own work to extrapolate, based on existing data, the number of First Nations children likely in the Kith Child Class in order to evaluate the sufficiency of proposed budgets, (See Dr. Blackstock' s Affidavit dated, June 30, 2023, at para 40). As a result, the Caring Society is comfortable and confident that the budgets in relation to Kith Placements will fully satisfy the Tribunal's orders in relation to these children and families.

[70] The Caring Society also received analysis of the 2019 FN-CIS data from Dr. Fallon regarding the proportion of First Nations children resident on-reserve who were removed in 2019 and placed in Non-ISC Funded Placements located more than a 30-minute drive from their residence. A true copy of this analysis is attached to Dr. Blackstock's affidavit dated, June 30, 2023, as, Exhibit "H". This data was used to serve as a proxy for children placed

outside of their communities. Data regarding unfunded placements with “kith” (adults who do not have a blood relationship to the child, also referred to as “fictive kin”) as opposed to “kin” (a child’s relatives) are unclear. A 2017 Policy Brief from the Children’s Advocacy Alliance in Nevada estimated that 20-30% of children in “kinship” places are placed with “fictive kin” (i.e., individuals to whom the child is not related, but with whom there is a relationship of trust with the family). A true copy of the Children’s Advocacy Alliance Policy Brief is attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as Exhibit “I”.

[71] Furthermore, data in a 2017 report produced by researchers at the University of Melbourne noted that 17.5% of children in statutory kinship care in Australia were placed with non-relatives. A true copy of Table 2 from this report is attached to Dr. Blackstock’s affidavit, dated, June 30, 2023, as Exhibit “J”.

[72] The Attorney General submits that during the negotiations that followed the Tribunal’s rejection of the 2022 FSA, Canada agreed to add an additional $3.34394 billion to the $20 billion already committed to in the Agreement-in-Principle and June 2022 Final Settlement Agreement. This amount includes additional funds to ensure that: a. Non-ISC funded or “kith” placements are compensated, including children and their caregivers, (See Dr. Valerie Gideon’s affidavit dated June 30, 2023, at para. 10).

[73] The victims/survivors forming the Kith Child Class are First Nations children placed with a Kith Caregiver (an adult who is not a member of the Child’s Family who lived off reserve and cared for the child without receiving funding in terms of the placement), in a Kith Placement (a First Nations Child residing with Kith Caregiver and the placement was associated with a child welfare authority) during the period between April 1, 1991, and March 31, 2022, thus extending the compensation for these children contemplated by the Tribunal back to the advent of the Direction 20-1, in line with the timeline for compensation for the Removed Child Class. Members of the Kith Child Class are not eligible for enhancements, but will receive the full compensation they would have received under their CHRT entitlement plus Tribunal-directed interest, which has been preserved in the Revised Agreement by way of an Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2), 7.02(2)). The amount of $600 million with respect to the budget for the Kith Child Class was drawn from the Caring Society’s evidence-based consideration of the potential class size for

children between 2006-2022. The AFN defers and relies upon the Caring Society's submissions as to the 2006-2022 class size.

[74] With respect to the caregiving parents or in their absence, caregiving grandparents of Kith Child Class members, compensation has been limited to the period of the Tribunal's Compensation Orders, being from January 1, 2006 to March 31, 2022, (See, Revised Agreement art. 7.03(1)). These Kith Family Class Members, (See, Revised Agreement art. 1.01 definition "Kith Family Class"), similar to the Removed Child Family Class, are not eligible for compensation if they abused an eligible child in alignment with the Tribunal Compensation Orders, (See, Revised Agreement art. 7.03(2)). The Kith Family Class members may also receive multiples of compensation where multiple children were removed and placed in a Kith Placement between January 1, 2006 and March 31, 2022, (See, Revised Agreement art. 7.03 (4)). The budget for the Kith Family Class was set at $702 million in compensation, which was extrapolated from the projected size of the Kith Child Class over the period covered by the Tribunal's compensation orders, (See Dr. Gideon's affidavit dated June 30, 2023, at. para. 55). The AFN again defers to the Caring Society in this regard.

[75] The AFN submits that the collective efforts on addressing the payment of compensation for non-ISC funded placements by way of the establishment of the Kith Child Class and Kith Family Class have resulted in the effective implementation of the Tribunal Compensation Orders. Compensation under the Revised Agreement is predicated on compensating those whose removal was a result of the discriminatory FNCFS Program, not who funded the removal. Thus, the Revised Agreement accounts for the harms these victims/survivors experienced as a result of the infringement of their human rights and dignity when they or their children were deprived of the opportunity for preventative services and least disruptive measures due to Canada's discriminatory conduct. The Kith Class entitlements entirely align with and provide for the effective implementation of the Compensation Orders in relation to these victims/survivors, in a manner which is in the best interests of First Nations children and families. The AFN submits that Revised Agreement fully satisfies the Tribunal's Compensation Orders in relation to these victims/survivors.

[76] Given this category of beneficiaries was found to have been excluded completely under the 2022 FSA, the Tribunal needs to determine 1) Does the Revised agreement now include this category of beneficiaries previously excluded under the 2022 FSA? 2) If the answer is yes, is this category of beneficiaries included in a fair and equitable manner ensuring there are sufficient compensation funds set aside for the compensation ordered by this Tribunal. In order to make this finding, the Tribunal must also look at the evidence provided and determine if the process to locate the beneficiaries is fair and, if this process is reasonable and supported by reliable evidence.

[77] Further, the Tribunal explained its jurisdiction to analyse the 2022 FSA in order to determine if it fully satisfies the Tribunal's orders in 2022 CHRT 41. The Tribunal continues to rely on those legal findings and framework. Briefly, the Tribunal found that it was not functus officio to consider if the 2022 FSA fully satisfies the Tribunal's orders. The same reasoning applies here for the Revised Agreement. In sum, the purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders. A careful reading of the Tribunal's decisions makes this clear (See, para. 513). The Tribunal detailed its reasons at length in the 2022 CHRT 41 and they will not all be repeated here. The Tribunal found this category of victims and survivors was excluded from the 2022 FSA and did not reflect the Tribunal's compensation orders.

[78] The Tribunal stated at para. 297:

> (…) the systemic and racial discrimination is focused on how the Federal FNCFS Program adversely impacted First Nations children and families on reserve and in the Yukon, the Tribunal did not focus on ISC funded placements.
> (emphasis omitted)

[79] Further, at paragraph 314, the Tribunal found that:

> The Panel agrees with the Caring Society that there appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the Tribunal ordered compensation for Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivizing children being unnecessarily moved from their home, family and community during child welfare involvement. The

> case did not address whether a child was placed in care funded by ISC after their removal. The Tribunal never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC. Canada's funding of actual maintenance costs contributed to the systemic racial discrimination by creating an incentive to place children in care but did not limit discrimination to those children placed in care funded by ISC. The Panel's experience throughout has been to focus on the harm experienced by the affected children based on Canada's discriminatory an underfunded provision of child and family services.

[80] Moreover, at paragraph 317, the Tribunal found:

> [317] The Tribunal recognized that removing a child from their family is always a harmful event and particularly problematic when it could have been prevented with appropriate services. The Tribunal found that the discriminatory underfunding of prevention services increased the likelihood of children being unnecessarily removed from their homes (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177). This initial removal was discriminatory regardless of whether the child's subsequent placement was funded by ISC.

[81] Furthermore, at paragraph 472 The Tribunal found that the:

> Tribunal's main reason not to endorse the FSA is that it derogates from the Tribunal's existing orders in reducing compensation to some victims/survivors to accommodate the fixed quantity of funds under the FSA and the much larger number of victims/survivors in the class actions competing for these funds. No substantive findings or orders have been made concerning the victims in the class actions, yet in the FSA some displace some of the victims/survivors whose rights have been vindicated in these proceedings. In others, those victims/survivors had to be included for the Tribunal to make a finding that the FSA fully complied with the Tribunal's orders.

[82] Moreover, the Panel agreed with the AFN that compensation is linked to the systemic discrimination found by this Tribunal in the provision of services through the Federal FNCFS Program. However, the Tribunal found that the nuance newly made by the AFN and Canada did not reflect the spirit of the Tribunal's rulings. It transformed the focus from what led to the removals to who pays for a removed child's care (See, 2022 CHRT 41 at, para. 331).

[83] Upon consideration, the Tribunal accepts the joint parties' uncontested evidence. The data analysis and process to identify this category of beneficiaries is fair and reasonable and while this is untested evidence, all parties consent on this point. Moreover, the Tribunal finds the evidence provided is relevant and reliable and supports a finding on a balance of

probabilities in favour of this process adopted on consent of the parties. The Tribunal finds the evidence demonstrates that it is more probable than not that the compensation funds will cover all the victims/survivors included in this category of beneficiaries that is now aligned with the Tribunal's compensation orders.

[84] For these reasons, the Tribunal finds the victims/survivors in this category of beneficiaries have now been included in the Revised Agreement in full compliance with this Tribunal's orders under section 53(2) of the *CHRA* and as identified in 2019 CHRT 39 and further clarified in 2022 CHRT 41. Furthermore, the Tribunal has jurisdiction to make the requested order and finds this fully satisfies the Tribunal's compensation orders on this category of victims/survivors.

(iii) The Revised Agreement now provides compensation in relation to multiple removals as set out in the Compensation Entitlement Order

[85] In 2022 CHRT 41, the Tribunal found the 2022 FSA fell short in terms of the quantum of compensation ordered by this Tribunal for this category of victims/survivors. The Tribunal reasoned as follows:

> [356] The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims/survivors who were retraumatized and suffered greatly. Losing more than one child heightens the presence of a willful and reckless behavior; it does not reduce it. The Tribunal emphasized that, given this was the worst-case scenario, maximum compensation should be paid for the removal of each child. While the harm suffered warrants more than $40,000 per child removed, the *CHRA* places a cap on compensation. The FSA chips away at the heart of the willful and reckless discriminatory practice found and the orders that signal to Canada that its behavior was devoid of caution and caused compounded harm to parents and grandparents in removing more than one child.
>
> [357] Those findings were made after carefully considering the evidence and submissions and nothing in this joint motion changes this. While the Tribunal understands the need for compromise as part of the settlement negotiations, the result is that the Tribunal orders that recognized this category of victims/survivors will be significantly reduced not based on evidence but rather

> to ensure everyone can receive some compensation within the fixed pot of compensation funds.

[86] Therefore, the Tribunal made orders to ensure that parents or grandparents who had children in their care who were removed as a result of the systemic racial discrimination found would receive the maximum compensation of $40,000 under the *CHRA* per child removed. This means one child removed: $40,000, two children removed: $80,000, three children removed: $120,000, etc. In the 2022 FSA, there was an amount of maximum $ 60,000 for multiple removals of children which did not comply with the Tribunal's orders.

[87] In response, the class action parties, with the assistance of the Caring Society, contemplated the number of claimants who could potentially be able to claim for multiple removals and developed a budget in the amount of $997 million for same, which was accepted by Canada and incorporated into the settlement funds of the Revised Agreement (See Dr. Valerie Gideon's Affidavit dated June 30, 2023, at paras. 57-59 and Revised Agreement art. 6.06(6)). While the Revised Agreement provides for the payment for multiplications for all members of the Removed Child Family Class, it does place some restrictions on those members who do not have an existing entitlement under the Tribunal's Compensation Orders. This does not impact upon those with an existing CHRT entitlement. The restriction for non-CHRT compensation includes a cap of $80,000 in compensation for those who had two or more children removed between the period of April 1, 1991 and December 31, 2005 (and who were no longer in care on January 1, 2006) and Stepparents, (See, Revised Agreement 6.06(1)-(4)). These are not deviations from the Compensation Orders as these members of the Removed Child Family Class have no pre-existing Tribunal entitlements. The Revised Agreement also contemplates the potential adjustment of eligibility and compensation for these specific members of the Removed Child Family Class who have no existing Tribunal entitlements, including the potential for increases to the $80,000 cap.

[88] Whether to include stepparents and the appropriate limitations upon eligibility to align with First Nations conceptions of family structures was the subject of a mediation between the Parties to the Revised Agreement in 2022. For clarity:

> a) The Revised Agreement requires that Stepparents, who are not entitled to compensation under the Compensation Orders, be First Nations in order to be eligible for compensation.
>
> b) The requirement that individuals are First Nations does not apply to caregiving parents and/or grandparents who are entitled to compensation under the Compensation Orders.
>
> c) Step-grandparents are not eligible for compensation under the Revised Agreement or under the Compensation Orders, regardless of their First Nations status.

[89] The Revised Agreement also places an $80,000 cap on sequential removals and the potential for adjustment of this compensation on caregiving grandparents where a caregiving parent (not a stepparent) has been approved for compensation under the Revised Agreement with respect to the affected child, (See, Revised Agreement 6.06(4)(c)). The AFN submits that this cap does not amount to a divergence from the Compensation Decision or the Tribunal's related Compensation Orders, but instead acts as a clarification of the Tribunal's intentions, the scope of which was developed by the parties to the Revised Agreement and Minutes of Settlement further to the dialogic process. A minor clarification to the Compensation Framework is required in the following scenario: where a caregiving parent has claimed compensation for the removal of a child, and the child is subsequently removed from the care of a caregiving grandparent, the Revised Agreement limits the multiplication of compensation to $80,000.

[90] In sum, the joint parties submit that a First Nations parent/caregiving grandparent will receive multiple base compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from their family and placed off-reserve with a non-family member. The multiplication of the base compensation payment will correspond to the number of children who were removed from the First Nations parent/caregiving grandparent and placed off-reserve. The parties are of the view that the Revised Agreement now fully addresses this derogation.

[91] The parties to the Tribunal proceedings considered the development of compensation in line with the Tribunals direction, ultimately developing the following text in the Compensation Framework as endorsed by the Tribunal in 2021 CHRT 7 at s. 4.4:

> Where a child was removed more than once, the parents (or one set of caregiving grandparents) **shall** be paid compensation for a removal at the first instance. A different grandparent or set of grandparent(s) (or the child's parents where they were not the primary caregivers at the time of the first or prior removal) **may** be entitled to compensation for a subsequent removal where they assumed the primary caregiving role where the parents (or the other grandparents) were not caring for the child,
> (emphasis added).

[92] The joint parties submit that what is clear upon an examination of the provisions related to the payment for sequential removals is the fact that the Tribunal, via its endorsement of the Compensation Framework, expected that the parents, or one set of caregiving parents, would be entitled to for the removal at first instance, as illustrated by the use of **"shall".** This entitlement for removal at first instance is mirrored in the context of the Revised Agreement, (See, Revised Agreement art. 6.06(1)). The Compensation Framework thereafter establishes the potential for different caregiving grandparent(s) or parents, where not the caregiver at the removal of first instance, to claim compensation for a subsequent removal. To be clear, this provision did not establish an entitlement, but merely the possibility by way of the use of **"may".**

[93] The AFN submits that limiting compensation for caregiving grandparents where a caregiving parent has already advanced a claim for compensation to the affected child is a reasonable clarification of the Tribunal's Compensation Orders, providing certainty to scope of entitlement where none previously existed in the context of the Tribunal's proceedings, as well as reflecting the wishes and efforts of all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly.

[94] The class action parties' and the Caring Society's efforts to address the payment of compensation for multiple removals for the Removed Child Family Class results in the effective implementation of the Tribunal Compensation Orders in this regard. While a clarification by the Tribunal is required, it is supported by the approach as endorsed by the Tribunal in the Compensation Framework and substantially aligns with the Tribunal's previous orders/reasons. Finally, the provisions in relation to multiple removals amount to relief that builds upon the Tribunal's Compensation Orders in a manner that ensures clarity with respect to the entitlement to compensation for victims/survivors and that those with an

existing Tribunal entitlement will receive their full due. The Revised Agreement therefore fully satisfies the Compensation Orders in relation to these victims/survivors.

[95] The Tribunal confirms that the joint parties' interpretation of the Tribunal's orders is correct. The Tribunal in its compensation orders envisioned the payment of the maximum compensation amount for each child removed at the first instance. The Tribunal did not envision multiple payments if the same child was removed multiple times. The Compensation Framework adopted by the Tribunal offers this as a possibility however, the parties are correct in their interpretation of the terms "shall" and "may". The Tribunal views the term "shall" as an obligation while the term "may" is only a possibility depending on the specific circumstances that had to be further developed and determined by the parties. The final decision in the event of a disagreement and after the appeal process falls upon this Tribunal under the Compensation Framework in light of the evidence before it. Furthermore, the Draft Compensation Framework includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6). The Tribunal's orders take precedence over the Compensation Framework in the event of any inconsistency.

[96] Moreover, the purpose of the Draft Compensation Framework is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be consistent with, and subordinate to, the Tribunal's orders (1.2).

[97] Further, the AFN submits the Revised Agreement directly ameliorates this derogation. A parent/caregiving grandparent is now entitled under the Revised Agreement to receive multiple base compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from the family home and placed off-reserve with a non-family member, (See, Article 6.06(1), Revised Agreement, Exhibit "F" to the AFN Affidavit). The Revised Agreement sets out that multiplication of the base compensation payment will correspond directly to the number of First Nations children removed and placed off-reserve with non-family, (See, Article 6.06(2), Revised Agreement, Exhibit "F" to the AFN Affidavit).

[98] Again, all parties consent. Consequently, the evidence provided was not refuted or tested. Upon careful consideration of the Revised Agreement and all related materials, the Tribunal finds the available data analysis, calculations and estimates to be fair and reasonable. Moreover, the Tribunal finds the evidence and arguments relevant and reliable and support a finding that the Revised Agreement fully satisfies the Tribunal's orders in this category of victims/survivors entitled to compensation.

[99] For example, the Revised Agreement now budgets $997 million specifically to ensure that parents/caregiving grandparents who have experienced multiple losses of First Nations children from their care will be compensated, (See, Article 6.06(6), Revised Agreement, Exhibit "F" to the AFN Affidavit). Recognizing the limitations of available data, the Caring Society has used the best available evidence to calculate a budget that ought to provide sufficient funds to fully compensate parents/caregiving grandparents for all instances in which their children were removed from their homes, families and communities, (See, Dr. Blackstock's Affidavit dated June 30, 2023, at para 32). As set out in Annex A, the Caring Society's calculations are based on estimates of the number of children impacted by the FNCFS Program provided by the Parliamentary Budget Officer and by experts retained by the class action parties, and on Census data noting the approximate overall number of caregivers per First Nations child.

[100] As mentioned above, the estimates were provided by the Parliamentary Budget Officer and experts and on Census data and accepted by the joint parties. The Tribunal finds this information reliable. Section 50 (3) (c) of the *CHRA* allows the Tribunal to consider other information as part of its consideration of matters. This is particularly useful when the evidence is untested and provided on consent and may have a lesser probative value than when the evidence has been tested in a hearing.

[101] This being said, the Tribunal is satisfied that sufficient evidence and other information support the requested orders for a finding that the Revised Settlement Agreement fully satisfies the Tribunal's compensation orders in this category.

[102] Furthermore, as already mentioned above and in previous rulings, the Tribunal has the authority to clarify its orders. The Tribunal continues to rely on its legal findings and reasons as discussed in previous rulings and further detailed in 2022 CHRT 41.

[103] The Tribunal agrees with the clarification request from the joint parties and in light of the above, finds that it is helpful to provide this further clarification. Therefore, the Tribunal clarifies its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

[104] The Tribunal finds that parents/caregiving grandparents are now entitled under the Revised Agreement to receive multiple compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from their home. Therefore, the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(iv) Estates of Caregiving Parents and Grandparents

[105] The Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (2020 CHRT 7, at paras. 77-151).

[106] The spirit of this order also highlights the important public interest and deterrent components included in the remedy:

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

[107] In 2022 CHRT 41, the Tribunal found that the 2022 FSA fell short of the compensation ordered by this Tribunal:

> [332] Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.
>
> [333] This is a clear derogation from the Tribunal's orders.

[108] In response to the Tribunal's concerns regarding the estates of deceased caregiving parents and caregiving grandparents, the Revised Agreement at, section 14.03(1)-(2), provides for claims to be made on behalf of Removed Child Family Class Members (of a child placed off-Reserve with non-family as of and after January 1, 2006), Kith Family Members, or Jordan's Principle Family Class Members. Specifically for these caregiving parents and grandparents, the Revised Agreement provides that where a claim has been approved, base compensation in the amount of $40,000 and interest will be paid directly to their living child or children on a pro rata basis. The AFN submits that this entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[109] The Revised Agreement now includes the estates of deceased First Nations caregiving parents and grandparents and specifically provides for $40,000 in relation to those victims who have passed away while waiting for compensation to be resolved. The joint parties submit this fully aligns with the Tribunal's orders.

[110] However, the Revised Agreement sets out a mechanism to pay compensation owing to the estates of First Nations parents/caregiving grandparents directly to the child(ren) of the deceased. Instead of the $40,000 flowing into the estates of the deceased First Nations parent/caregiving grandparent, the compensation will be paid directly to the children – a variation that puts children at the centre of this process. If there are no surviving children, the compensation will flow to the estate of the deceased First Nations parent/caregiving grandparent.

[111] Therefore, the joint parties seek a variation of 2020 CHRT 7. All parties in this case consent.

[112] This variation achieves multiple benefits: (i) it acknowledges the compounded harm and suffering experienced by a child victim who has lost a parent/caregiving grandparent by providing additional compensation; (ii) it avoids the complex and lengthy procedural requirements related to estates; (iii) it ensures that the full benefit of the compensation for which the estate is eligible is directed to the surviving children of that First Nations parent/caregiving grandparent; and (iv) ensures that the compensation funds will not be subject to potential estate administration taxes.

[113] The AFN submits that the approach is principled, as it effectively prioritizes the children/grandchildren heirs of these deceased caregiving parents and grandparents at least one of whom would be victims/survivors themselves, and thus the basis for the deceased caregiving parent's or grandparent's claim for compensation. Effectively, the settlement funds to which the deceased's estate would be entitled under the Tribunal's compensation orders would be treated akin to life insurance, allowing it to bypass the estate and be paid directly to the named beneficiary of same (children/grandchildren) with the commensurate benefits. This includes the expedited delivery of compensation, avoiding the potential diminishment of the benefit of settlement funds to surviving First Nations children/grandchildren as a result of the deceased's estate being indebted, as well as the potential levy of estate administration taxes, (See Dr. Valerie Gideon' Affidavit dated June 30, 2023, at para. 64).

[114] This directly accords with the principles enumerated both in the Compensation Framework which sought to avoid the diminishment of victims/survivors' compensation as a result of tax consequences, as well as the efforts of the Revised Agreement to ensure that any compensation payable would remain tax exempt and not negatively impact any social benefits that victims/survivors are receiving (consistent with the Tribunal's guidance in 2019 CHRT 39 at para 265, see also, Compensation Framework at s. 10.9, Revised Agreement art. 10.03).

[115] The AFN submits that this evidence supports the relief sought with respect to varying the compensation entitlement of estates of deceased caregiving parents and grandparents who have an existing entitlement under 2020 CHRT 7, and that it also substantially aligns with the Tribunal's reasons within the context of the related Compensation Orders. It is also in the best interest of the First Nations children and families who are the victims/survivors of Canada's discrimination by ensuring that the children/grandchildren heirs of same receive their undiminished compensation. For the AFN, this amounts to a reasonable variation which has been supported by all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly. The AFN submits that with the adoption of this principled and evidence informed variation of the Tribunal's Compensation Order, which is in the best interest of First Nations class members, the Revised Agreement fully satisfies the Tribunal's Compensation Orders by ensuring that the Tribunal's compensation entitlement for these deceased caregiving parents and grandparents effectively flows to their children or grandchildren.

[116] In addition to providing further compensation to the children of deceased parents/caregiving grandparents, the proposed amendment would facilitate victims' ability to access compensation. Distributing money to beneficiaries when someone passes away can be a complex undertaking, with certain procedural requirements varying across the country. This process can be particularly complex when the deceased fails to leave directions, the deceased lived on reserve, or when the estate that receives the compensation has not already been through the court process of probate. Stringent bank rules and regulations for access to and distribution of the Estate funds add to these procedural hurdles, sometimes making distribution to beneficiaries frustrating, costly, and lengthy, (See, Alberta Law Reform Institute, Estate Administration: Final Report (Edmonton: August 2013), at paras. 188-212 (Alberta); Law Commission of Ontario, Simplified Procedures for Small Estates: Final Report (Toronto: August 2015), at pp. 16-17, 25-28 and 48-61 (Ontario). See for example *Wills, Estates and Succession Act*, SBC 2009, c 13, s 144 (British Columbia); *Trustee Act*, RSO 1990, c T.23, s 49 (Ontario); *Estate Administration Act*, RSY 2002, c 77, ss 97 (Yukon)).

[117] There are also concerns regarding who the compensation will benefit if directed to the estates of parents/caregiving grandparents. Pursuant to estate laws across the country, creditors take precedence over beneficiaries, (See, for example *Trustee Act*, RSO 1990, c T.23, ss 53, 57-59 (Ontario); *Civil Code of Québec*, CQLR c CCQ-1991, ss 2644-2659 (Quebec); *Estate Administration Act*, RSY 2002, c 77, ss 96-104 (Yukon). Where an estate is bankrupt, section 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, applies to determine the priority of creditors). For example, in Ontario, an estate trustee is required to pay the debts of the estate in the following order before any distribution can be made to beneficiaries: (i) reasonable funeral expenses; (ii) expenses related to the administration of the estates, including probate fees, professional fees and compensation for the executor/estate trustee; (iii) secured creditors; (iv) taxes; and (v) unsecured creditors, (See, *Trustee Act*, RSO 1990, c T.23, ss 48-59).

[118] The AFN submits that paying compensation directly to the children of the deceased parent/caregiving grandparent avoids many of the complications, costs and delays associated with estate administration. It avoids the complex requirements of probate, circumvents the payment of compensation to creditors, reduces expenses and thus maintains the entirety of the compensation payment and gives control over the compensation directly to the children of deceased parents/caregiving grandparents. It is also entirely in line with the approach taken by Quebec's Tribunal des droits de la personne in *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, in which Quebec's Commission des droits de la personne sought an order that compensation be paid directly to the deceased complainant's children, (See*, Commission des droits de la personne (Succession de Poirier) c. Bradette Gauthier*, 2010 QCTDP 10 at paras 6 and 130).

[119] The Caring Society notes that the Commission’s submission of March 9, 2020, suggesting that payments to estates would be appropriate in the context where it was difficult to locate proper beneficiaries does not apply in this context. There is an unquestionable link between the compensation payable to a deceased parent/caregiving grandparent and the lived experience of that person’s surviving child(ren).

[120] The Caring Society submits that First Nations children and youth in this case have suffered egregious harms as a result of Canada's discriminatory conduct. This harm is compounded by the loss of a parent/caregiving grandparent, (See Dr. Blackstock's Affidavit dated June 30, 2023 at para 55). Thus, distributing the Tribunal's compensation directly to the children and youth of the deceased parent/caregiving grandparent acknowledges this compound harm, allowing the Tribunal to make an order reflective of the suffering experienced by these victims/survivors.

[121] First Nations children who have lost a parent face compounded harms: the harm inflicted by Canada's discriminatory conduct and the harm of losing a parent. Evidence from the National Inquiry into Missing and Murdered Indigenous Women and Girls (the MMIW Inquiry) and academic literature demonstrates that bereaved children face significant challenges, (See, Dr. Blackstock's Affidavit dated, June 30, 2023, at paras 56-58). The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations who have lost a parent.

[122] In 2019 CHRT 39, at paras 13 and 258, the Tribunal acknowledged that the cap under the *CHRA* may not correspond to the level of suffering experienced by the victims in this case. The variation sought on this motion is a meaningful way that First Nations children and youth who have been impacted by Canada's discrimination along with the compounded harm of losing a parent may be compensated in excess of $40,000 plus interest. This is in the best interests of the child victims/survivors in this case and is an amendment that reflects both the spirit and scope of the Tribunal's previous compensation orders.

[123] This variation also reflects the spirit and intent of the *Merit Decision*, the Compensation Entitlement Order and the Tribunal's general approach in putting children first.

[124] A consent order sought as part of a Settlement Agreement provides more flexibility for the Tribunal to approve it as long as the orders sought are within the Tribunal's broad – but not unlimited - powers. In other words, the Tribunal cannot issue a consent order if it does not have the power under the *CHRA*. Further, as already said many times in 2022

CHRT 41, settlements and or consent orders are not a means to disentitle or reduce compensation already ordered. They are a firm foundation to be built upon.

[125] The Tribunal finds this consent order is not a mere clarification request. It is a variation of an order made by this Tribunal. This Tribunal already explained at length in 2022 CHRT 41 why it was not prepared to disentitle compensation to victims who had passed away waiting for the discrimination to be remedied. However, the consent order request does not propose to disentitle or reduce the compensation ordered by the Tribunal. The Tribunal finds the request does not propose a fundamental change of the order. Rather, it proposes a different first step in the process.

[126] The criteria to vary an order were discussed in 2022 CHRT 41:

> [344] While estates are not people, the heirs of those estates are and they were signaled by the Tribunal's decision subsequently upheld by the Federal Court that they were entitled to compensation. It is unfair to now remove this from them because of financial choices resulting from merging proceedings and imposing a financial cap. These arguments are insufficient to justify an amendment to the Tribunal's orders on this point. As it will be revisited below, the Tribunal cannot amend its orders to reduce compensation or to disentitle victims/survivors. The Tribunal could accept variations of its orders if it does not remove gains for victims/survivors or a different compensation process and if supported by the evidence, which is a key consideration for this Tribunal for any order.
> (emphasis added)

[127] The Tribunal continues to rely on this legal finding and other legal findings discussed in 2022 CHRT 41, at paras. 155-201 and in all its other compensation orders.

[128] For example, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. This analysis and factors continue to apply here:

> [36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc.

(emphasis added).

[129] Furthermore, the main points gravitate around the following questions: Is there new evidence and compelling argument to consider that would support a finding to vary an order or a new process that would add and/or help refine the orders? Will this void the previous order and/or reduce the quantum of compensation or disentitle victims or simply add and refine the order in light of the new evidence, information and arguments provided in the best interest of First Nations children and families? The Tribunal believes it is the latter.

[130] Dr. Blackstock affirms in her affidavit that parental estates are now included in the Revised Agreement. The Caring Society set out to extrapolate, based on existing data, the number of parents whose children were removed from their homes, families, and communities, who would not have survived to the date of settlement approval.

[131] The Caring Society selected April 1, 2006 to March 31, 2023 as the date range over which it would estimate the number of parents whose children were removed from their homes, families and communities who passed away prior to the date of settlement approval. The Caring Society selected this period, as the First Nations-specific mortality information that it had access to was based on annualized statistics, making it difficult to select “partial year” periods to reflect deaths between January 1, 2006, and March 31, 2006, or from April 1, 2023 to settlement approval.

[132] More specifically, Dr. Blackstock affirms that the Caring Society’s estimation of the number of parents of First Nations children removed from their homes, families and communities who passed away between January 1, 2006 and March 31, 2023 was based on a 2018 paper authored by Randall Akee, of the University of California, Los Angeles’ Department of Public Policy and by Donna Feir, of the University of Victoria’s Department of Economics, titled First People Lost: Determining the State of Status First Nations Mortality in Canada Using Administrative Data. A copy of Professor Akee and Professor Feir’s paper is attached to Dr. Blackstock’s Affidavit, dated June 30, 2023, as Exhibit “K”.

[133] The Caring Society did not conduct similar estimates for parents of children who experienced discrimination related to Jordan’s Principle who themselves experienced a “worst case scenario” of compensation. Given that the piloting exercise has not yet been

conducted, there is insufficient information to establish the “cohort” of parents from which to calculate the number of parents who would not have passed away prior to settlement approval. However, the Caring Society’s view is that mortality within this cohort can be considered by the Federal Court, on submissions from all parties including the Caring Society, as one of the factors in determining the reasonableness of the claims process proposed to distribute the $2,000,000,000 budget established for compensation to the parents of victims falling within the Jordan’s Principle and Trout Classes.

[134] For the Caring Society, an important aspect of the Revised Agreement (which we acknowledge is a deviation from the Tribunal’s order in 2020 CHRT 7) includes the provision that compensation that would otherwise be paid to the estates of deceased parents will be paid directly to the children of those deceased parents.

[135] Dr. Blackstock affirms that privileging children as beneficiaries of parental estates is an important and sacred component of the Revised Agreement.

[136] Dr. Blackstock’s evidence refers to the National Inquiry into Missing and Murdered Indigenous Women and Girls (the “MMIWG Inquiry”), where she served as an expert witness, where evidence was shared regarding the harmful impacts on First Nations children who lose a parent, particularly when that loss is the result of a violent death. Experiencing loss of a parent or caregiver, particularly to violence, can result in children and youth harbouring intense feelings of loss and anger, unresolved trauma, depression and, at times, suicide.

[137] The MMIWG Inquiry also noted these children can face an increased risk of experiencing mental health challenges, substance misuse, involvement in the criminal justice system, becoming a young parent, and dying while young. Additional harmful impacts include weakened or permanently ruptured ties with siblings, extended family, and home communities; loss of culture, language, and sense of identity; risks of abuse of neglect; and an increased risk of homeless and poverty. The relevant sections of the MMIW Inquiry Report are attached to Dr. Blackstock’s Affidavit dated June 30, 2023, as Exhibit “L”.

[138] Dr. Blackstock affirms that academic literature also demonstrates that bereaved children face significant challenges.

[139] Evidence suggests that bereaved children are vulnerable for increased risk for social impairment – not only during the immediate post bereavement period but extending into adulthood. They also face educational challenges, social challenges, and mental health challenges. Moreover, depending on the family's circumstances at the time of the death, children and youth may face housing instability, family instability and a significant loss of love and nurturing required for healthy development. A selection of academic literature on this topic is attached to Dr. Blackstock's Affidavit dated June 30, 2023, as Exhibit "M".

[140] Throughout this case, the Caring Society's primary focus has been on supporting and advocating for the rights of First Nations children, youth and families harmed by Canada's discrimination. The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations children and youth who have lost a parent – a traumatic experience for all children but an experience compounded by their experiences of discrimination in this case.

[141] In Dr. Blackstock's view, taking a child centered approach to directly compensating these children aligns with the spirit of the Tribunal's work and honours the memories of the children and youth who have passed on. Most children and youth who died during the long history of this case were surrounded by loving families and the child's estate ought to benefit those left behind.

[142] The Tribunal has carefully considered all evidence and arguments and it finds the MMIWG report relevant to this question. As found in previous rulings, the MMIWG Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls vol. 1a and vol. b, report is reliable. This National inquiry heard hundreds of witnesses and experts and this led to calls to justice in the form of recommendations that were accepted by Canada.

[143] The MMIWG report also found that when failure to find continuity or a sense of belonging can lead youth to adopt addictive lifestyles or to adopt unhealthy self-images leading to suicidal thoughts or attempts, (See MMIWG report at page 426). Importantly, the same analysis also showed that the strongest protective influence against Indigenous youth suicide was "high support, whether social or familial, (See MMIWG report at page 427).

[144] Further, Dr. Blackstock was recognized as an expert in child welfare before this Tribunal, she testified and/or provided affidavits for the Tribunal multiple times and her evidence was of great assistance to the Tribunal. Her resume filed in evidence has 50 pages of relevant experience and expertise. In other words, her evidence is reliable. More importantly, Dr. Blackstock has demonstrated throughout this case her quest for the best interest of children and her child-centric approach which is in line with the Tribunal's focus.

[145] The Tribunal finds the process, estimations and calculations part of the evidence and referred to above to be reasonable and accepts this evidence.

[146] Further, on a principled basis, the Tribunal finds it is more probable than not that First Nations children harmed by the systemic racial discrimination found by this Tribunal who lose a parent, experience compound harm - even if the scientific articles filed in evidence as part of this joint motion - are inconclusive and do not support such a finding. The Tribunal agrees with Dr. Blackstock's position on compound harm and her evidence. However, the Tribunal prefers the MMIWG report and other evidence in the record than the scientific articles provided. The Tribunal does arrive at the same conclusion as Dr. Blackstock without the articles. The Tribunal has already made findings of harms linked to the separation between a child and a parent. In 2019 CHRT 39:

> [147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case. (emphasis added)
>
> [155] […]
>
> > […]
> > As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people, (see 2016 CHRT 2 at, para. 394. 2019 CHRT 39, at para. 155),
> > (emphasis changed).

[147] The trauma of losing a parent or grandparent through separation was found by this Tribunal to cause serious harm and suffering to a child and, as found by the Tribunal above, is in addition to the other aspects of the systemic racial discrimination. The Tribunal finds this also applies to the death of a parent or grandparent or family member. Moreover, Mary Wilson, former Truth and Reconciliation Commissioner, provided affidavit evidence on the harm of separating a child and a parent that was considered by this Tribunal:

> She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.
> (see 2018 CHRT 4 at para. 122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system.
> (see 2018 CHRT 4 at para. 123).

[148] Moreover, losing the hope of an opportunity of reunification with a deceased parent or grandparent for example, can add further suffering to the child. Another example would be of a child who was removed and later finally reunited with a parent or grandparent who then passes away. It is reasonable to find that it is more probable than not that these situations would add further harm and trauma to a child's soul.

[149] The Tribunal made findings on the MMIWG report in previous rulings. Therefore, the full MMIWG report is part of the Tribunal's record. This supports Dr. Blackstock's evidence discussed above:

> Noting the inequities, participants across all four Guided Dialogues also emphasized the negative impact that foster care experiences have on the long-term safety and well-being of Indigenous women, girls, 2SLGBTQQIA people, and families as a whole. These impacts include:

> • weakened or permanently ruptured ties with parents, siblings, extended family, and home communities, (See MMIWG report vol. 1 b at page 113).
>
> (…) allow parents and children to remain together throughout the healing process, and provide specialized support for children experiencing trauma, violence, or neglect in their family home;
>
> "Keep the families together during times of healing and a transition. Provide them with the support they need to work out their issues and rebuild their life.", (See MMIWG report vol. 1 b at page 115).

[150] Furthermore, the evidence and findings discussed above demonstrate the suffering and negative consequences associated with the separation between children and their parents. Therefore, it is reasonable to find that permanent separation caused by the death of a parent or of a grand parent can amount to compound harm for their children.

[151] Moreover, the administrative burdens referred to by the AFN are a factor to be considered by the Tribunal in the compensation process as explained above. The evidence supports the AFN's position and qualifies as a refinement of the order for an optimal implementation of the compensation orders. However, the Tribunal does not view the evidence as new evidence that was unavailable at the time the Tribunal heard the compensation matter and that now arises justifying a reopening of a final matter. This would be an incorrect characterization of the facts and of the evidence. This qualifies more appropriately as new considerations and examples of hardship forming part of the process and the implementation of the order. The Tribunal has remained seized of the implementation of its compensation orders and has made clear that refinements and additions during the compensation process and its implementation could be made if justified. This is the case here.

[152] In other words, the authority to vary the Tribunal's order as found in 2022 CHRT 41 flows from its ongoing supervisory role of the implementation of its orders and its retained jurisdiction. Moreover, this consent order request does not remove gains for victims/survivors which is in line with the Tribunal's 2022 CHRT 41 ruling.

[153] The Tribunal finds the quantum and spirit of the order honouring deceased victims of Canada's systemic racial discrimination remains unchanged under the Revised Agreement.

Rather, it is a different compensation process at the first step that is requested here and placing the living First Nations children of the deceased victims at the forefront. Further, the compensation payment to estates remains as a second step when the deceased victims do not have living children.

[154] This important information on the administrative burdens and the compound harm was not put before the Tribunal when it arrived at its findings and orders regarding estates. While this is not sufficient to reopen a final matter according to the case law, it is sufficient according to the Tribunal's previous orders, its retained jurisdiction on the compensation process and implementation and the Tribunal's clear intent to leave the door open for possible improvements, refinements and additions to further the implementation of its orders in the best interest of First Nations children and families.

[155] The requested order does not modify final orders on quantum. Moreover, the requested order does not deny, reduce or disentitle compensation to the deceased victims rather it provides a priority rank for their living child or children to receive compensation on a pro rata basis. The Tribunal finds this recognizes both the harms borne by the deceased and their living children and avoids unnecessary administrative burdens and costs.

[156] Moreover, as seen above, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. The Tribunal also specified that the compensation process ought to be informed by the First Nations parties in this case. The full paragraph is reproduced below:

> [36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc. Consequently, the Panel finds the compensation process remedy in this case can be viewed as a "special program, plan or arrangement" that is informed by First Nations parties in this case and a broad and liberal interpretation of sections 16 (1), 53(2)(a), 53 (2)(e) and 53 (3) of the *CHRA* and Supreme Court and Tribunal decisions discussed in 2021 CHRT 6 at paras. 51-79. Finally, on this point, the Panel determined that the *CHRA* analysis and reasoning found

> in the scope of *CHRA* remedial provisions section in 2021 CHRT 6 at paras. 51-79 and 80 applies to the *Draft Compensation Framework* as a whole and supports the Panel's approval of the *Draft Compensation Framework* dated December 23, 2020,
> (emphasis added).

[157] Both the AFN and the Caring Society refer to some of the above factors to be considered by the Tribunal namely, administrative burdens and the vulnerability of victims/survivors who are minors.

[158] For the above reasons, the Tribunal finds the Revised Agreement provides a base compensation in the amount of $40,000 and interest to be paid directly to the living child or children on a pro rata basis. When there are no living children, the compensation is to be paid to the victims' estate similar to the Tribunal's original order. This entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[159] In the case at hand, focusing on the children's compound harms first, is in line with a human rights approach and, the spirit of the Tribunal's views in this case.

[160] The same reasoning can be applied here to justify the variation requested.

[161] Moreover, the Tribunal discussed compensation flowing to the heirs of the victims in 2020 CHRT 7 at para. 140:

> In these circumstances, it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[162] Adopting a priority rank that focuses on children who are heirs of the deceased victims is a reasonable variation of the Tribunal's order justifying such an amendment.

[163] For the above reasons, the Tribunal finds there is compelling evidence and arguments in support of the variation in the best interest of First Nations children and families. The requested variation will remove many administrative burdens resulting in an

effective implementation of the Tribunal's compensation orders for this category of victims. The Tribunal finds that it has the jurisdiction to vary the order found in 2020 CHRT 7:

> [152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision Order*, including the referenced period in the Order above mentioned in Question 2.

[164] The order varying 2020 CHRT 7 in the order below now provides that compensation of $40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under 2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent.

[165] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(v) The Uncertainties Regarding Jordan's Principle Have Been Addressed

[166] The Tribunal in assessing the 2022 FSA in 2022 CHRT 41 made a number of findings that highlighted some uncertainties for the Jordan's Principle compensation category:

> [373] … it is impossible at the current point in time to know whether the implementation of Jordan's Principle under the FSA will result in the First Nations children identified under the Tribunal's orders receiving $40,000 under the FSA. […] there is little evidence of whether Jordan's Principle eligibility under the FSA will be interpreted in such a manner that it provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders.
>
> […]
>
> [375] The FSA sets out future work that is required before there can be certainty regarding which victims/survivors under the Tribunal compensation orders will be eligible under the FSA.
>
> […]

> [377] In order to be eligible for a guaranteed $40,000 Jordan's Principle compensation under the FSA, First Nations children must have both experienced a denial or delay in receiving an essential service and have experienced a "significant impact" because of the delay or denial. Article 6.06(3) of the FSA indicates that a "significant impact" will be defined in the Framework of Essential Services:
>
> […]
>
> [378] … the Framework on Essential Services does not provide further guidance on a "significant impact" and what is required to engage the higher level of compensation. Neither is "Significant Impact" a defined term in the FSA. Without this information, individual claimants cannot determine whether they could be entitled to more or less compensation under the FSA than they would be eligible to obtain under the Tribunal's orders.
>
> [379] The uncertainties in benefits from the outstanding definition of an "essential service" reflects the early stages of a negotiated settlement. … there is a real potential for reduction in compensation for some victims and disentitlements for others which is not permissible.

[167] The Tribunal found this may depart from the Tribunal's orders for this category and therefore cannot be considered to fully satisfy the Tribunal's orders and the request is premature since there are uncertainties at this time (See 2022 CHRT 41 at para. 379).

[168] This differed from the Tribunal's approach, which awarded $40,000 plus interest to a First Nations child who experienced a denial, gap, or unreasonable delay in the delivery of "essential services" that would have been available pursuant to a non-discriminatory definition and approach to Jordan's Principle.

[169] Moreover, the definition of "Delay" did not accord with the requirements of the Compensation Framework and instead were to be defined as "a timeline to be agreed to by the Parties and specified in the Claims Process''.

[170] The joint parties submit the Revised Agreement addresses these uncertainties and the overall approach to Jordan's Principle has been refined in harmony with the Tribunal's orders.

[171] The joint parties submit that the 2022 FSA did not include final criteria for determining eligibility for Jordan's Principle compensation. The parameters for determining eligibility for Jordan's Principle compensation in the Revised Agreement now more clearly reflect the

Tribunal's approach pursuant to Jordan's Principle. The approach for determining eligibility for Jordan's Principle in keeping with this approach is to be subject to robust piloting before implementation.

[172] The definition of Jordan's Principle Class Member has been revised and now states: "Jordan's Principle Class Member" means an Essential Service Class Member who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the Delay, Denial, or Service Gap of an Essential Service that was the subject of a Confirmed Need. The Parties intend that the way that the highest level of impact is defined, and the associated threshold set for membership in the Jordan's Principle Class fully overlap with the First Nations children entitled to compensation under the Compensation Orders who will receive a minimum of $40,000 in addition to interest." (See, Revised Agreement, Article 1.01, Exhibit "F" to the AFN Affidavit). This aligns with the Tribunal's language in the Compensation Decision, specifically accounting for the harms and the impacts of Canada's discrimination.

[173] The definition of the Jordan's Principle Class explicitly provides for the class action parties' and the Caring Society's intention that those with a Tribunal entitlement will receive it. Based on the estimate of 65,000 approved claimants for Essential Services Class and the Jordan's Principle Class, all members of the Jordan's Principle Class would be able to receive at least $40,000. The Jordan's Principle Class is also entitled to interest in accordance with the Tribunal's orders, which has been ring-fenced in the Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2)).

[174] If the number of claimants was unexpectedly higher, the Revised Agreement provides that Jordan's Principle Class Members (those who suffered the highest level of impact, which is intended to overlap with all the Jordan's Principle children entitled to compensation under the Tribunal's Compensation Orders) will receive a minimum of $40,000, in addition to interest. The remaining funds in the budget would be shared pro rata by the lesser impacted Essential Service Class Members, (See, Revised Agreement, Art. 6.08(10)-(12)). Conversely, if the number of claimants is lower, upon the advice from the Federal Court-appointed Actuary, Jordan's Principle Class Members may be entitled to enhancement payments, (See, Revised Agreement, art. 6.08(15)). The Revised

Agreement's primary focus in relation to the Essential Service Class is to ensure that Jordan's Principle Class members receive their entitlements as directed by the Tribunal.

[175] The term "Compensation Orders" is defined in the Preamble of the Revised Agreement as 2019 CHRT 39, 2020 CHRT 15, and 2020 CHRT 7, thus encompassing the terminology, guidance and approaches set out by the Tribunal in those orders. The Caring Society agrees with the AFN's submission on Jordan's Principle that there is no intention or requirement for a "jurisdictional dispute" in order for compensation to be paid to victims.

[176] The joint parties submit the definition of "Delay" has been amended to reflect the 12-hour and 48-hour timeframes ordered by the Tribunal in the Compensation Framework Order. While the 2022 FSA had left the definition of "Delay" as something to be determined in the future, the Revised Agreement is now directly in line with the Tribunal's orders, (See, Article Revised Agreement, 1.01, Exhibit "F" to the AFN Affidavit).

[177] The AFN submits that while the Revised Agreement still provides for the need to develop the threshold by which the highest level of impact with be objectively determined, it now specifies that the underlying basis for developing this threshold necessary for inclusion in the Jordan's Principle Class is ensuring full overlap with those children entitled to compensation under the Tribunals Compensation Orders, which is set out within the definition of the Jordan's Principle Class, (See Revised Agreement art 1.01 Definition "Jordan's Principle Class").

[178] This underlying principle informs each element of the means by which the threshold of impact level shall be determined under the Revised Agreement, and thereby whether an individual falls under the Essential Services Class or the Jordan's Principle Class, including the framework for essential services, accompanying instruments, such as the claims forms and questionnaire, as well as the associated robust and broad piloting, (See, Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3), 6.08(10)(a)-(b)).

[179] The "framework of essential services", as developed with the assistance of experts, facilitates the streamlining of the compensation process and facilitates professional confirmation of the individual's need for an essential service. The framework is designed to

allow claimants to identify whether they had a confirmed need for a service that was essential for the purposes of compensation. These objective criteria allow for the expedient administration of claims, avoiding the need for case-by-case individual and subjective inquiry for inclusion in the Essential Service Class, (See, Revised Agreement arts. 1.01 Definitions “Framework of Essential Services”, “Essential Services”, “Schedule F: Framework of Essential Services”, 6.08(2)-(3).33).

[180] The Revised Agreement continues to provide for instruments such as culturally sensitive claims forms and a questionnaire, which will assist the Administrator at the second stage of the analysis, being a determination of whether a child’s circumstances indicate the highest level of impact and thereby eligibility for inclusion into the Jordan’s Principle Class, with the accompanying minimum compensation of $40,000 and interest, in alignment with their Tribunal entitlement under the Compensation Orders, (See, Revised Agreement, art. 6.08(10)(a)). Critically, these instruments and questionnaire remain subject to Jordan’s Principle expert consultations, which are First Nations-led and continue to be facilitated by the AFN.

[181] The AFN states that the Revised Agreement also provides that the threshold of impact for qualification as a member of the Jordan’s Principle Class is subject to the results of piloting of the method developed in accordance with the framework of essential services. The AFN is currently involved with advancing these piloting efforts, which will include a number of potential Essential Service Class and Jordan’s Principle Class members, in a manner that respects the need for full overlap with those with an existing entitlement under the Tribunal’s compensation orders, and which minimizes any burdens on the victims/survivors. The piloting efforts will also assist in refining the framework of essential services, as well as the supporting instruments, such as the claims forms and questionnaire, (See Dr. Valerie Gideon’s affidavit dated June 30, 2023, at paras. 73-75).

[182] Further, the pilot is to be evidence-based, premised on the efforts of the AFN’s circle of experts, as well as additional independent researchers. All are of the view that the finalization of an effective approach premised on the framework of essential services, as well as the development of the threshold for inclusion in the Jordan’s Principle Class premised on the highest level of harm, requires piloting. This pilot is intended to gauge the

quality and efficiency of the approach to compensation established for Jordan's Principle in the Revised Agreement, allowing for the refinement of each component of the claims assessment process and ensuring that it is in alignment with the Tribunal's Compensation Orders. This is the central component of these efforts, and is the primary outcome measured. The pilot will also assist in other important aspects of the compensation process, including gauging the effectiveness of the cultural and trauma-informed supports. All of these efforts and the ultimate determination remain subject to Federal Court approval and oversight.

[183] Finally, the Caring Society submits that with respect to the budget of $3,000,000,000 for compensation to children eligible for compensation under the Tribunal's orders regarding discrimination related to Canada's implementation of Jordan's Principle, the Caring Society's view is that, based on available evidence, this budget is sufficient. As detailed in Annex A, the Caring Society's best estimate of the number of children eligible for compensation under the Tribunal's Jordan's Principle orders is approximately 61,500 (based on demographic data from ISC regarding the number of individual children accessing services through Jordan's Principle in FY 21-22). However, there is significant uncertainty regarding that number, such that the $3 billion budget is an essential element of the Revised Agreement's ability to satisfy the Tribunal's compensation orders. This budget allows for base compensation for up to 75,000 First Nations children, and possibly more with growth on the portion of the settlement funds that will remain in trust.

[184] The Tribunal finds the evidence supports the joint parties' methodology described above. The Tribunal finds the calculations to set aside sufficient compensation funds for all eligible claimants to be thoughtful, reasonable and fair. Consequently, the Tribunal accepts those calculations and this methodology.

[185] Furthermore, the Revised Agreement ensures that those who suffered a worst-case scenario of discrimination in relation to Jordan's Principle receive $40,000 plus interest. This is directly in keeping with the guidance of the Tribunal in the Compensation Entitlement Order and the Eligibility Decision.

[186] The Tribunal finds that all the uncertainties described above have now been carefully addressed in the Revised Agreement in a manner that fully satisfies this Tribunal. There is now a clear methodology, clear definitions and clear criteria. There is no reduction in compensation for any victims/survivors, nor any disentitlements. There will be sufficient funds set aside to cover all eligible claimants. There is evidence that Jordan's Principle eligibility under the Revised Agreement will be interpreted in a manner that provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders. The future work that is required is clearly identified and accompanied by a defined and reasonable process and oversight by the Federal Court if the Revised Agreement is approved by the Federal Court.

(vi) Need for Clarification regarding Parents/Caregiving Grandparents under Jordan's Principle

[187] The AFN, the Caring Society and Canada seek a clarification of the Compensation Entitlement Order in relation to parents/caregiving grandparents under Jordan's Principle.

[188] In the case of a removed child, both the First Nations child and First Nations parent/caregiving grandparent are directly impacted by the lack of equitable FNCFS services available to the family. When a child is removed from a parent/caregiving grandparent, both experience direct discrimination, pain and suffering of the worst kind.

[189] Conversely, where a child experienced discrimination as a result of Canada's failure to fully implement Jordan's Principle, the First Nations parent/caregiving grandparent may not have a derivative experience of harm that equates to their child's experience. The parties are of the view that the Tribunal intended to compensate adults who were directly impacted at the highest level by Canada's discriminatory conduct.

[190] In order to capture the true intention of the Tribunal, the Revised Agreement provides that parents/caregiving grandparents of a child eligible for compensation pursuant to Jordan's Principle will receive compensation if they experienced the highest level of impact, including pain, suffering, or harm of the worst kind. The Revised Agreement contemplates

different measures of impact to parents and the child who experienced a Jordan's Principle delay, denial or service gap.

[191] This approach is consistent with the Tribunal's overall approach in its Compensation Orders, which target the worst-case scenarios of discrimination in this case. Removals, by their very nature affect a parent's individual dignity in a fundamental way. Denials, service gaps, and the impact of unreasonable delays with respect to essential services are not necessarily interchangeable as between parents and children. To be sure, many First Nations parents (or caregiving grandparents) of a Jordan's Principle child have experienced worst-case scenarios resulting from discrimination against their children, such as: the death or removal of a child, and a family's forced relocation off-reserve. Therefore, the Revised Agreement contemplates differential criteria for assessing impacts to parents as opposed to those experienced by the impacted child.

[192] The impact that Caregiving Parents or Caregiving Grandparents have experienced will be assessed through objective criteria and expert advice, as developed through Schedule F: Framework of Essential Services and through piloting. These criteria will be subject to the Federal Court's approval, wherein the Caring Society will have standing.

[193] The Tribunal has already explained its authority to clarify its orders above. In sum, this flows from the Tribunal's retained jurisdiction and supervisory role for the effective implementation of its orders.

[194] The Tribunal finds that providing clarity as requested by the joint parties would be helpful.

[195] In a previous ruling, the Tribunal determined that some measure of reasonableness is acceptable:

> [147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. The Panel also agrees that a 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 only when it had an adverse impact on the health or safety of a First Nations child.
>
> [148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.
> (2020 CHRT 15 at paras. 147-48).

[196] The Tribunal further explained that compensation should accord with a reasonable interpretation of what is "essential":

> The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.
> (2020 CHRT 15 at para. 151).

[197] The Tribunal agrees that some measure of reasonableness is also acceptable in the eligibility criteria applicable for caregiver parents/grandparents. The Tribunal agrees to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest

level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation ($40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps. This is in line with the Tribunal's reasoning and orders, *(see Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para.115 recently cited in *Jane Doe v. Canada (Attorney General),* 2018 FCA 183*,* at para. 29.). The reasoning above continues to apply and applies to caregiving parents (or caregiving grandparents).

[198] The Tribunal cautions parties not to import the stricter criteria of causal link/connection in human rights cases which was rejected by the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 (CanLII), [2015] 2 SCR 789, at paras 50-51*.* Indeed, the Supreme Court wrote*: "*It is therefore neither appropriate nor accurate to use the expression "causal connection" in the discrimination context" (para. 51*).* This legal criteria has a different connotation than the terms used in other disciplines such as social work. The legal term causal link or causal connection is applied in medical malpractice and many litigation cases. Further, it is applied often in considering wage loss under the *CHRA*. For the Tribunal, the balance of probabilities and analysis to assess harm evaluates whether it is more probable than not that there exists a connection between the discrimination and the pain and suffering. In terms of assessing the pain and suffering (and Canada's wilful and reckless conduct), the Tribunal performs a principled and purposive analysis keeping in mind that the maximum compensation is reserved for the worst-case scenarios.

[199] The Tribunal believes that it is more probable than not that a parent or grandparent witnessing the child in their care suffering greatly would also suffer greatly. Perhaps not to the same degree as the child - sometimes less and sometimes more. The Tribunal believes this does not discount the parent or grandparent's resilience, courage, and dignity. They often are heroes who are so focused on the well-being of their child that they often discount their own feelings in order to be strong for that child. For example, a young child with terminal cancer who receives pain medication that effectively controls the pain and who does not comprehend the concept of death, suffers on many levels but not because of the concept of permanence attached to death. Their parents or grandparent's while not physically suffering,

have to watch their child suffer and have this added moral and psychological pain of losing their child. It this situation, it is reasonable that both have experienced similar levels of pain and suffering.

[200] While this differs a little from the parties' arguments on this point, it is not in complete contradiction. The Tribunal also accepts that many caregiving parents/grandparents will not experience the same level of pain and suffering as their children. The approach adopted by the parties to the Revised Agreement includes flexibility to consider who has experienced the highest amount of suffering.

[201] The Tribunal accepts to clarify its order. However, the Tribunal does not rely on the articles filed in evidence to do so given they were not particularly helpful or conclusive. Moreover, there seems to be a disconnect between a reasonable understanding of human behaviour and what is found in some scientific studies. Further, the Tribunal is often asked to make compensation orders without the benefit of scientific evidence to support harms. If this were required, many complainants would not get justice.

[202] The Tribunal agrees that not all caregiving parents and grandparents under this category have suffered harm in the worst-case scenario akin to when a child has been removed from their care. In this category, there are some that suffered immensely and others who have suffered less. Not applying reasonableness here could result in some measure of unfairness and discount tremendous harm experienced by some parents/grandparents who, for example, lost children that died versus some parents/grandparents who did not obtain sporting equipment when their children needed it. Such evidence forms part of the Tribunal's record. Further, some of the tremendous harms mentioned above were discussed in previous rulings.

[203] Moreover, the Tribunal is satisfied that the process, explained by the parties above, will ensure that a reasonableness criterion is applied for this category of claimants in a fair manner, ensuring that those who suffered the most receive fair compensation.

[204] For those reasons, and given the Tribunal's previous orders and reasons, the clarification request aligns completely with the Tribunal's approach to the compensation remedies.

[205] Furthermore, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(vii) Opt-out provision

[206] The Tribunal was clear in the 2022 FSA Motion Decision on the importance of ensuring that victims/survivors have adequate time to consider the 2022 FSA and the Tribunal's 2022 FSA Motion Decision and previous Compensation Orders with the benefit of an appropriate opt-out period. It was of the view that the initial opt-out date of February 19, 2023, as described within the AFN's and Canada's materials on the 2022 FSA Motion Decision was too short and placed the victims/survivors in an untenable situation:

> The unfairness deepens as the FSA seems to force victims/survivors to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims/survivors who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims/survivors and may revictimize them and is therefore inconsistent with a human rights approach. This is concerning. (See 2022 CHRT 41, at para. 388).

[207] The Tribunal's concerns about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390) have now been addressed. The parties to the Federal Court Class Actions have addressed the Tribunal's comments regarding the opt-out deadline. The opt-out deadline has already been extended to August 23, 2023 by the Federal Court (See, Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit and February 23, 2023, order of Justice Aylen in T-402-19), and, in the Minutes of Settlement, the AFN and Canada have agreed to seek a further extension to October 6, 2023, subject to Federal Court approval. Therefore, the Tribunal is now satisfied with this outcome.

[208] The Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(viii) Interest

[209] The Tribunal's Compensation Entitlement Order directed victims to receive interest to the date of judgment pursuant to subsection 53(4) of the *CHRA* at the Bank of Canada rate in keeping with the approach in *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20. The 2022 FSA did not contemplate the payment of interest to the victims identified by the Tribunal. The Tribunal finds that this has been addressed in the Revised Agreement and now all victims/survivors identified by the Tribunal are entitled to receive interest to the date the settlement approval order is final in addition to their base compensation of $40,000.

[210] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(ix) Caring Society's standing in Federal Court proceedings concerning the Revised Agreement

[211] The Caring Society will have standing at the Claims Process hearing and therefore, should an issue arise with the applicability of the eligibility criteria, the Caring Society will have the opportunity to provide submissions to the Federal Court regarding the parameters of pain, suffering or harm of the worst kind for Jordan's Principle parents.

[212] The Caring Society will have ongoing involvement in the Federal Court proceedings (in which it will have standing on matters related to the Tribunal's orders, pursuant to the Revised Agreement). The Caring Society will be entitled to notice of proceedings before the Federal Court related to matters impacting the rights of the beneficiaries of the Tribunal's compensation orders, as well as the standing to make submissions on any applications pertaining to the administration and implementation of the Revised Agreement on compensation as it relates to those matters, (See, Article 22.05, Revised Agreement, Exhibit "F" to the AFN Affidavit).

[213] The Revised Agreement also provides for the Caring Society's involvement and participation following the end of the Tribunal's jurisdiction. Specifically, the Caring Society will have standing to make submissions to the Federal Court regarding the administration and implementation of the Revised Agreement after the Settlement Approval hearing,

including approval of the Claims Process and distribution protocol, to the extent that issues impact the rights of the victims identified by the Tribunal. The Tribunal finds this provision provides for the ongoing role the Caring Society would have had under the Compensation Framework Order.

(x) Apology from the Prime Minister

[214] As mentioned above, according to the parties, this is the largest compensation settlement in Canadian history and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister.

[215] The terms of the Revised Agreement continue to call for an apology by the Prime Minister, (See, Revised Agreement at art. 24). The Tribunal cannot order apologies. However, the Tribunal completely agrees with this approach included in the Revised Agreement. The Tribunal also agrees with the Caring Society that the best apology Canada can offer is changed behaviour, so that this may be the last generation of First Nations children and youth that have to recover from their childhoods. This Tribunal believes this is true measurable reconciliation and the very reason as to why the Tribunal has remained, and continues to remain, seized of the implementation phase of its orders, and to monitor the reform ensuring the systemic racial discrimination is eliminated.

(xi) Role of the Federal Court

[216] The Revised Agreement is subject to the Supervisory role of the Federal Court should the Federal Court approve the Revised Settlement. This is an optimal approach given the class actions and the representative plaintiffs who are parties to the Revised Agreement. The Tribunal does not have jurisdiction over those class actions - the Federal Court does. This is why the Federal Court is asked to approve the Revised Agreement. Otherwise, the Tribunal alone could not approve it. Federal Court approval of the Revised Settlement would end the Tribunal's jurisdiction on the compensation orders. The Tribunal agrees with this outcome. The details are included in the order below.

(xii) Tribunal's interpretation of specific points in the Revised Agreements

[217] The Panel also wishes to address two points about its interpretation of the Revised Agreement.

[218] First, the Tribunal notes that Canadians cannot prospectively renounce their rights under the *CHRA*. Accordingly, the release in s. 10.01 of the Revised Agreement cannot release Canada from human rights violations for subsequent actions. The Tribunal wishes to explicitly note its observation that any human rights complaints for events post-dating the end of the Revised Agreement (2017 for Jordan's Principle; 2022 for removed children) are not precluded by the releases. The Tribunal understands the releases to intend to prevent Class Members who have not opted-out – as well as their estates, heirs, Estate Executors, estate Claimants, and Personal Representatives – from the Revised Agreement from claiming further compensation from Canada for harms described in the Revised Agreement even after 2017 and 2022.

[219] For non-class members, the Tribunal does not view the release as limiting liability for any discrimination that may occur subsequent to 2017 or 2022 should Canada fail to eliminate the systemic racial discrimination identified in this case and prevent the emergence of similar practices. Finally, the Revised Agreement cannot bar claims of discrimination in other federal programs or services.

[220] The Tribunal does not anticipate that its interpretation of the release differs from that of the parties. Further, the Tribunal clarifies that it has only considered the release from the perspective of the *CHRA*, not a civil or class action claim. The Tribunal intends its comments on the release to confirm what already appears obvious from the language of the release itself. This does not reflect hesitation on the Tribunal's part in finding that the Revised Agreement fully satisfies the Tribunal's compensation orders but the Tribunal's experience that it is often valuable to make wording abundantly clear. These comments should not cause the parties any hesitation in seeking the Federal Court's approval of the Revised Agreement.

[221] Second, the Tribunal finds that the Revised Agreement does not resolve the issue of long-term remedies, reform, eliminating the systemic discrimination found and preventing similar practices from recurring. Accordingly, this ruling does not address those issues.

F. Conclusion

[222] As explained above, the Tribunal finds that all categories of victims/survivors who were originally disentitled or had their entitlements reduced or who were not considered under the 2022 FSA have now been included in the Revised Settlement. This inclusion is done in a manner that fully accounts for the Tribunal's compensation orders on quantum, categories of victims/survivors and interest on compensation. The compensation will also be done in a manner that is culturally appropriate and safe for children and all victims/survivors and avoids having children testify. Therefore, the Tribunal finds the Revised Agreement fully satisfies all the Tribunal's compensation orders.

[223] As part of their submissions for this motion the Caring Society has described the Tribunal's approach in this case:

> Throughout this sacred and important case for First Nations children, youth and families, the Canadian Human Rights Tribunal ("Tribunal") has focused on the human rights of First Nations children and youth, placing their right to substantive equality at the forefront of its analysis. The remedies ordered by the Tribunal acknowledge the egregious and harmful nature of the discrimination flowing from Canada's flawed and inequitable provision of child and family services and its discriminatory definition and approach to Jordan's Principle. The Tribunal awarded individual compensation to victims of Canada's wilful and reckless conduct to recognize the harm, trauma and victimization of First Nations children and families stemming from Canada's systemic violations of the *Canadian Human Rights Act* ("CHRA").

The Tribunal finds this is an appropriate characterization of the spirit of the Tribunal's compensation ruling.

[224] Further, the Tribunal emphasizes that its analysis has always placed the right of First Nations children and families to substantive equality at the forefront of all its rulings and orders including those related to Jordan's Principle, reform, cessation of the discriminatory

practice and preventing it from reoccurring; and immediate, mid-term and long-term remedies. This continues to be the Tribunal's focus.

[225] Finally, the Panel looks forward to the next steps to be completed in this journey - namely complete reform; sustainable, long-term remedies for multiple generations to come; and the cessation of the discriminatory practice and the prevention of its reoccurrence.

G. Orders

Pursuant to section 53(2) of the *CHRA*, the Tribunal makes the following orders:

A) The Tribunal finds that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding;

B) The Tribunal finds that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; First Nations caregiving parents/grandparents who experienced multiple First Nations children removed from their homes, families, and communities; and, First Nations children eligible for compensation due to denials, unreasonable delays, and gaps in essential services due to Canada's discriminatory approach to Jordan's Principle;

C) The Tribunal makes an order clarifying its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

D) The Tribunal makes an order varying 2020 CHRT 7, providing that compensation of $40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under

2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent;

E) The Tribunal makes an order clarifying its order in 2019 CHRT 39, to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation ($40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps;

F) The Tribunal makes an order finding that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (including the Caring Society) and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. This order supersedes the Tribunal's order in 2021 CHRT 7;

G) The Tribunal makes an order that, conditional upon the Federal Court's approval of the Revised Agreement, the Tribunal's jurisdiction over its Compensation Orders will end on the day that all appeal periods in relation to the Federal Court's approval of the Revised Agreement expire or, alternatively, on the day that any appeal(s) from the Federal Court's decision on the approval motion for the Revised Agreement are finally dismissed;

H) The Tribunal makes an order that the parties will report to the Tribunal, within 15 days of each of the following: (1) the result of the Federal Court's decision on approval of the Revised Agreement; (2) the expiry of the appeal period relating to the Federal Court's decision on the Revised Agreement or of an appeal having been commenced.

H. Retention of jurisdiction

This ruling does not affect the Panel's retention of jurisdiction on other issues and orders in this case other than as specified in A) and G). Consistent with the approach to remedies taken in this case, the Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief and reform, whether on consent or otherwise, that is found to be satisfactory by this Panel in eliminating the systemic discrimination found and preventing its reoccurrence or, after the adjudication of outstanding issues, if any, leading to final orders or, as the Panel sees fit considering the upcoming evolution of this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 26, 2023

Canadian Human Rights Tribunal

Parties of Record

Motion dealt with in writing without appearance of parties

Written representations by:

David P. Taylor, Sarah Clarke and Kevin Droz, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Dianne Corbiere, D. Geoffrey Cowper K.C. and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Brian Smith, counsel for the Canadian Human Rights Commission

Christopher Rupar, Paul Vickery, Sarah-Dawn Norris and Jonathan Tarleton, counsel for the Respondent

Maggie Wente, Sinéad Dearman Jessie Stirling and Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Christopher Rapson and Natalie Posala, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 13

CITATION: MacDonald et al v. BMO Trust Company et al, 2021 ONSC 3726
COURT FILE NO.: 06-CV-316213 CP
DATE: 20210617

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES RICHARD MACDONALD, LYNN D. ZOPPAS, JOHN A. ZOPPAS and MICHAEL HALASZ

Plaintiffs

- and -

BMO TRUST COMPANY, BMO NESBITT BURNS INC. and BMO INVESTORLINE INC.

Defendants

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Michael Eizenga, Odette Soriano, Linda Rothstein, Jeffrey Larry, Paul Davis and Douglas Montgomery* for the Plaintiffs

Peter Griffin and Jonathan Chen for the Defendants

HEARD: May 12, 2021 via Zoom video and subsequent written submissions

Settlement and Legal Fees Approval

[1] This class action about hidden foreign exchange fees on currency conversions in registered accounts has settled for $100 million. The plaintiffs seek judicial approval of the settlement agreement, class counsel's legal fees based on the 25 per cent contingent fee retainer and the payment of significant honoraria to the representative plaintiffs.

[2] For the reasons that follow, I approve the settlement agreement and the requested honoraria. I also approve a generous legal fees award but not on the basis of a straight-line application of a contingent fee percentage. In a large recovery or "mega" settlement such as we have here, the legal fees approved must take into account not only the risks incurred and results achieved but also the need to maintain the integrity of the legal profession.

Background

[3] The proposed class action against the BMO defendants for failing to disclose its foreign exchange mark-up in RRSP and other registered accounts was filed in 2006. The action was certified as a class proceeding seven years later in 2013.[1]

[4] The parties' motion for summary judgment on the common issues was heard and decided in 2020.[2] On the liability issues, I found that the BMO defendants were liable to the class over the 10-year class period for breach of trust, breach of fiduciary duty and breach of contract, and concluded that the appropriate remedy for the defendants' wrongdoing was an accounting and disgorgement of profits.[3]

[5] On damages, counsel agreed that the total amount of the impugned mark-up (excluding interest) was $102.9 million. Two issues had to be decided: (i) the profits realized on this amount after the deduction of 'reasonable and necessary expenses' and (ii) the appropriate "time value of money" or PJI amount.

[6] The defendants and their experts argued at the summary judgment motion that after the deduction of all reasonable and necessary expenses, the profit on the $102.9 million was about $38 million. Adding a simple PJI rate, the damages award would be about $52 million. The plaintiffs and their experts pushed for a much larger recovery based on an elevated measure of the time value of money. The class sought disgorgement of $420 million (based on the bank's internal rate of return) or $210 million (based on a typical rate of return on a balanced portfolio). If the court concluded that a simple PJI rate

---

[1] *MacDonald v BMO Trust.* 2012 ONSC 759.

[2] *MacDonald et al v. BMO Trust Company et al,* 2020 ONSC 93.

[3] *Ibid.,* at paras. 102-103.

as prescribed by the *Courts of Justice Act* [4] was more appropriate, then the amount requested by class counsel was approximately $148 million.

[7] In the summary judgment decision, I directed that the 'reasonable and necessary expenses' (and hence the determination of the profits) would be decided on a reference and I concluded that the appropriate PJI rate would be the simple interest rate as set out in the legislation. I said this in my reasons for decision:

> The core finding is that the defendants' failure to disclose the amount of the markup fee charged on the foreign exchange conversions and the unauthorized self-payment are a breach of trust and fiduciary duty. The most appropriate remedy is an equitable accounting of the profits that were realized on the $102.9 million in undisclosed markup fees. There is no basis for an elevated interest award.
>
> The said profits, as well as the precise PJI amount, will be determined on the reference that will be conducted as soon as convenient. [5]

[8] Both sides filed notices of appeal. The defendants appealed primarily on the liability findings and the plaintiffs appealed on the time value of money issues and my "simple rate of interest" decision. Counsel on both sides, however, agreed to defer the appeals and first complete the reference as scheduled. Additional expert reports and factums were filed by both sides. The calculations in this additional material proceeded on the basis of my finding that a simple (and not elevated) PJI rate would be used. As class counsel explained in an affidavit filed on this motion for settlement approval:

> In terms of quantum, the defendants' position on the reference had not changed materially from summary judgment. They advanced a profit number of $37.6 million which, together with simple interest of 3.8% as per the *Courts of Justice Act*, resulted in a total of $52.4 million.
>
> The evidence of the class was that the defendants' profits were between $62 million and $97.8 million after accounting for the statute-barred amounts. Adding prejudgment interest under the *Courts of Justice Act*, the total recovery for the class would be between approximately $100 million and $145 million.

---

[4] *Courts of Justice Act,* R.S.O. 1990, c. C.43.

[5] *MacDonald, supra,* note 2, at paras. 102-103.

[9] Just days before I was to hear the reference, counsel advised that they had reached a settlement. After 15 years of litigation (12 years if you deduct the three-year stay[6]) the parties agreed to settle this action for a non-reversionary, all-inclusive sum of $100 million.

The settlement

[10] The settlement agreement provides for a speedy, no-claim process that will distribute the funds to some 135,000 class members. An accounting firm (Deloitte) will calculate each class member's entitlement based on the foreign currency transactions in their registered accounts. The defendants will distribute the funds directly to the class members on a pro-rata basis (subject to a $25 minimum threshold) either by direct deposit if the class member still has an account with the defendants or by cheque mailed to the class member.

[11] Because the distribution costs are $12 to $23 per class member, the parties agreed that payments will be made only if they exceed a $25 threshold. The defendants estimate that this $25 minimum (as well as any cheques that are returned uncashed) will mean that approximately $380,000 will not be distributed to class members and must therefore go cy-pres. The parties have agreed that the first $250,000 in cy-pres will be paid to the Class Action Clinic at the University of Windsor and the second $250,000 to the United Way of Canada which funds financial literacy programs across the country.

[12] The settlement agreement also provides that in addition to the $100 million settlement fund, the defendants will pay the costs of notice, administration, and distribution. All class member payments paid by direct deposit (estimated to be 41 per cent of the payments) will be completed within 90 days of settlement approval and reasonable efforts will be made to ensure that payments paid by cheque will be completed within 150 days of settlement approval.

Settlement approval

[13] As I advised counsel at the hearing, this settlement is easily approved.

---

[6] The parties agreed to stay the action until another proceeding commenced by other counsel, *Skopit v. BMO Nesbitt Burns Inc.,* was decided. As it turned out, the *Skopit* action settled for a much smaller amount but the waiting time added three years to this action.

[14] The $100 million settlement amount is well within the required zone of reasonableness[7] — recall that the amount in dispute (with PJI included) ranged from a low of $52.4 million to a high of $145 million. The $100 million settlement amount is almost exactly in the middle.

[15] Add to this the fact that the action settled just a few days before the scheduled reference to determine the "profits" on the impugned $102.9 million in revenues. As the designated referee, I had already reviewed the expert reports and counsels' written submissions about 'reasonable and necessary expenses' and the appropriate 'profits' award and had a good understanding of what might be awarded. I can therefore advise the parties with a reasonable degree of confidence that the $100 million settlement amount (which arguably consists of about $64 million in principal and $36 million in simple PJI) is indeed fair and reasonable and in the best interests of the class.

[16] The settlement is approved. Kudos again to both sides for achieving a reasonable resolution to such a long and hard-fought litigation.

Legal fees approval

[17] This is the issue that consumed most of the time at the hearing and that prompted several follow-up written submissions.

[18] The retainer agreement provides that class counsel (Paliare Roland Rosenberg Rothstein LLP) will be paid a contingency fee of 25 per cent of recovery (plus disbursements and taxes) and 10 per cent of any amount in excess of $500 million. The action settled for $100 million. Class counsel docketed $5.5 million in unbilled time and ended up carrying just under $900,000 in disbursements. They ask that the court approve the agreed-to $25 million in legal fees (plus disbursements and taxes).

[19] The applicable law is not in dispute. Under ss. 32 and 33 of the *Class Proceedings Act*,[8] class counsel's fee agreement must be judicially approved. The court will approve

[7] *Dabbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).

[8] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

the fee agreement if it is "fair and reasonable."[9] If the agreement is not approved, then under s. 32(4)(a), the court may determine the appropriate amount.

[20] There is no question that class counsel have earned a premium legal fee well in excess of the $5.5 million in docketed time. This class action was truly self-made. It did not piggy-back on parallel U.S. proceedings; it did not use product recalls, corporate guilty pleas or government studies as a spring-board. Mr. MacDonald, the lead plaintiff, discovered a problem with the defendant's foreign currency conversion methods and retained class counsel. Class counsel embarked on a hard-fought 15-year litigation that involved a difficult summary judgment motion and an unexpected accounting reference and, as already noted, ended with a very fair and reasonable settlement.

[21] The issue is the determination of the appropriate legal fee. As I reminded counsel during the hearing, the straight-line application of the agreed-to contingency fee percentage — the "presumed validity" approach that I adopted in *Cannon*[10] and refined in *Brown*[11] — works well for most class action settlement amounts that average under $40 million but is not appropriate in large, "mega fund" settlements that are in the $100 million range or higher. As I noted in *Brown*:

> In *Cannon*, I embraced the percentage of the fund approach and accorded presumptive validity to the percentage that was agreed to in the contingent fee retainer agreement (up to one third) if certain conditions were satisfied … the risk incurred by class action lawyers, like personal injury lawyers, was best measured by the wins and losses in many cases over many years and not just by the specific case that was before the court. I was comfortable doing this because almost all of the settlements were under $40 million (i.e. they were not mega-fund cases) and there was rarely, if ever, any direct evidence in the record that the straight-forward application of the percentage approach resulted in legal fees that were excessive or otherwise unreasonable.[12]

---

[9] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at para. 27.

[10] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[11] *Brown v. Canada (Attorney General)* 2018 ONSC 3429.

[12] *Ibid.,* at para. 46.

[22] A straight-line application of the contingency fee percentage in mega-settlements can result in undeserved windfalls and transform class action litigation into something approaching a lottery. Here is how I put it in *Brown*:

> It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well. However, it is also important that the court's approval of class counsel's legal fees not result in windfalls …
>
> Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls. Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.[13]

[23] My suggestion in *Brown* that *Cannon* should not be used where the recovery is more than $50 million was not intended as an automatic cut-off or "bright line" — indeed in *Manulife Financial*[14] I approved a 22.5 per cent contingency on a $69 million settlement. And here, as I freely admitted to class counsel during the hearing, I would have approved a 25 per cent contingency fee on say a $64 million settlement (which is arguably the core settlement amount minus PJI).

[24] Here, however, we have a $100 million settlement and a request for $25 million in legal fees.[15]

[25] The concern is the 9-digit size of the settlement and the need to ensure that the approval of legal fees in these so-called mega-settlements remains as principled as possible and not result in undeserved and unseemly windfalls. Because *Cannon* should not be used in mega-settlements, one must revert to the case-by-case approach and determine the fair and reasonable legal fee by considering the applicable law and comparable decisions.

---

[13] *Brown, supra,* note 11, at paras. 50-51.

[14] *Ironworkers Ontario Pension Fund v. Manulife Financial Corp.*, 2017 ONSC 2669.

[15] At the hearing, class counsel reduced their request to $23 million and in their final written submission suggested that the approved legal fees should be "over $20 million."

[26] Although a wide range of factors may be considered,[16] the case law makes clear that the most important factors in determining whether the requested legal fee is fair and reasonable are the risks incurred and the results achieved[17] and also "whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession".[18]

[27] It is the concern about the integrity of the profession that may best explain judicial approval of premium legal fees in mega-settlements. The concern about the integrity of the profession is said to be a concern about the "decency, honour and high-mindedness of the profession, both in substance and in public perception."[19] And the approval of straight-line percentages in mega-settlements resulting in undeserved or unseemly legal fees will obviously not maintain "the integrity of the profession."[20]

[28] It is therefore not surprising that the court's primary focus in mega-settlements is the actual dollar amount of the approved legal fee, not percentages or multipliers.[21] It is one thing to approve a $8 million legal fee (say 20 per cent of a $40 million settlement). It is quite another to approve a $50 million fee (20 per cent of a $250 million settlement).[22] The former is still a large number to be sure, but easier to explain and

---

[16] The list of factors that judges may consider when assessing whether the legal fees request is fair and reasonable are lengthy and include (a) the time spent and work done; (b) the factual and legal complexities; (c) the risk undertaken; (d) the degree of responsibility assumed by class counsel; (e) the monetary value of the matters in issue; (f) the importance of the matter to the class; (g) the degree of skill and competence demonstrated by class counsel; (h) the results achieved; (i) the ability of the class to pay; (j) the expectations of the class as to the amount of the fees; and (k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement. See *Smith v. National Money Mart,* 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[17] *Lavier, supra,* note 9, at para. 27. Also see Winkler J. in *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J) at para. 61: "Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class."

[18] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690, at para. 47 (B.C.C.A.); *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*., 2018 ONSC 6447, at para. 76.

[19] *Richardson (Guardian ad litem of) v. Low*, (1996), 23 B.C.L.R. (3d) 268 at paras. 29-30; discussed in *Endean v. Canadian Red Cross Society,* [2000] B.C.J. No. 1254 at para. 73 et seq.

[20] No judge would ever approve (and to their credit, no class counsel has ever asked for) a 25 per cent contingency fee on say a $1 billion settlement.

[21] *Richardson v. Low* (1996), 23 B.C.L.R. (3d) 268 (S.C.) at para. 35.

[22] Especially when the size of the "mega" recovery is more attributable to the happenstance of a large class size than to any corresponding assumption of risk or increase in effort on the part of class counsel.

justify in terms of risks incurred and results achieved than the latter which is more akin to a lottery win.

[29] It is evident from a survey of the mega-settlement decisions that the judge's approval of class counsel's legal fees, although certainly driven by an analysis of risks and results, is ultimately determined with an eye on the final dollar amount. The approved dollar amount is kept within appropriate bounds by using multipliers and fee/recovery ratios or percentages as cross-checks and guard-rails.

[30] This is particularly apparent in the billion-dollar settlements where legal fees ranging from $25 million to $50 million have been judicially approved. For example:

- *Endean v. Canadian Red Cross Society*[23] - $1.6 billion settlement in the Hepatitis C class action – court approved $52.5 million in legal fees – court noted involvement of multiple law firms in various provinces – and that the legal fees were 4.26 per cent of the recovery.

- *Baxter v. Canada (Attorney General)*[24] - $1.9 billion settlement in the Residential Schools class action – court approved $40 million in legal fees for the "national consortium" of class counsel and noted that the approved legal fees reflected a 2.73 multiplier (that is 2.73 times the docketed time).

- *Manuge v. Canada*[25] - $887 million settlement in the veterans' pension class action – court approved $35.5 million in legal fees and noted that the approved legal fees were 4 per cent of recovery.

- *Brown v. Canada*[26] - $800 million settlement in the "Sixties Scoop" class action – I would have awarded class counsel in the *Brown* side of the litigation (who had literally "bet the firm" and whose efforts were extraordinary in every respect) a maximum legal fee of $25 million –which amounts to about 6 per cent of the recovery.[27]

---

[23] *Endean v. Canadian Red Cross Society,* [2000] B.C.J. No. 1254.

[24] *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J).

[25] *Manuge v. Canada,* 2013 F.C. 341.

[26] *Brown, supra,* note 11.

[27] Assuming that one-half of the $800 million settlement can be attributed to counsel in *Brown,* the resulting fee/recovery percentage would be 25/400 or just over 6 per cent. As it turned out, the final payment to class counsel

- *Quenneville v. Volkswagen*[28] - $2.1 billion settlement in the Volkswagen "defeat device" class action - consortium of 8 law firms sought $65 million in legal fees – agreed to accept $31.2 million plus disbursements and taxes – which I approved.

- *McLean v. Canada (Attorney General)*[29] - $2 billion settlement of the Indian Day Schools class action – court approved $55 million in legal fees – noted docketed time of $10 million – and that "legal fees will be in the 3% range."[30]

[31] For settlements in the billion-dollar-plus range, Canadian courts have approved legal fee amounts of $25 million to $50 million. As here, each of these class actions were hard-fought, multi-year lawsuits that generated a significant level of docketed time and, in the end, resulted in a good settlement. In addition to assessing the risks and results, the court also considered the number of law firms involved, sometimes used a multiplier on the docketed time as a cross-check, and almost always expressed the final dollar amount in terms of a fee/recovery percentage with the objective of staying within an acceptable 4 per cent.

[32] The lesson from legal fee approvals in the billion-dollar settlements — one that also applies to this $100 million settlement — is two-fold: (i) keep an eye on the actual dollar amount; and (ii) explain and justify the approved legal fee in a principled fashion that is consistent with comparable caselaw.

[33] In the billion-dollar settlements, judges have achieved an admirable level of consistency by using the fee/recovery ratio and concluding that a 3 to 5 percentage was acceptable. I do not suggest that the legal fees herein should be limited to 4 percent of recovery or $4 million. The docketed time alone was more than $5 million. And, as already noted, I would have approved $16 million in legal fees on a $64 million recovery by extending my approach in *Cannon*. And probably even $18 million on a $72 million recovery, given the length of the litigation, the docketed time and the commendable resolution. But as the billion-dollar decisions clearly show, nine or ten-digit settlements and legal fee requests of $25 million or more take judges into a very different comfort zone.

---

was higher than the suggested maximum of $25 million because of an unexpected decision from my Federal Court counterpart: see *Brown v. Canada (Attorney General)* 2018 ONSC 5456, at paras. 18-20.

[28] *Quenneville v. Volkswagen,* 2017 ONSC 3594.

[29] *McLean v Canada (Attorney General),* 2019 FC 1077.

[30] *Ibid.,* at para. 54.

[34] What about mega-settlements in the $100 million range? These, of course, are more directly relevant. There are two comparable cases:

- *CIBC v. Deloitte & Touche*[31]– $122 million settlement of an auditor's negligence class action – the second stage of the litigation proceeded on the basis of a contingency fee agreement which provided for "two times docketed time" plus disbursements and taxes – Perell J. approved $22 million in legal fees based on the agreed 2.0 multiplier.

- *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) SNC-Lavalin Group Inc.*[32] – $110 million settlement of a securities class action – Perell J. approved $23.25 million in legal fees for Ontario class counsel, noting docketed time of $9.1 million and the corresponding 2.54 multiplier.

[35] As I read these decisions (admittedly a small sample), a $100 million settlement can result in approved legal fees of $20 million where they reflect 2 or 2½ times the docketed time.

[36] Here however, as already noted, class counsel docketed $5.5 million in time and at the end were carrying just under $900,000 in disbursements. A 2.5 multiplier would allow $13.75 million in fees. A 3.0 multiplier would allow $16.5 million in fees. The 4.0 multiplier, reserved for "the most deserving case"[33] and used by me in *Brown,* would result in $22 million in legal fees. However, this is not *Brown* where a tiny law firm risked its very survival and where I concluded that the use of the highest multiplier as a cross-check was fully justified.[34]

[37] In any event, as I have made clear in other decisions, I am not a fan of multipliers. I agree with the observation of a Federal Court colleague that in the context of mega-settlements, "the use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute

---

[31] *CIBC v. Deloitte & Touche,* 2017 ONSC 5000.

[32] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*., 2018 ONSC 6447.

[33] See the Court of Appeal's direction in *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.) at 425: that if a multiplier is used, the range of the appropriate multiplier is from "slightly greater than one to three or four in the most deserving case."

[34] *Brown, supra,* note 10, at paras. 68-71.

entitlement."[35] In other words, their value is mainly in their use as cross-checks and guard-rails.

[38] Having examined the applicable caselaw, I come to the following conclusion: on a $100 million settlement, such as here, where the risks incurred by class counsel were real but not remarkable (more on this below), with about $5.5 million in docketed time, the upper bounds of a fair and reasonable legal fees award is at most $20 million.

[39] The question is this: given that I would have approved $16 million in legal fees on a $64 million recovery, and possibly even $18 million on a $72 million recovery, should any additional amount should be awarded to class counsel for achieving a $100 million recovery? Is there anything in the "risks incurred" or "results achieved" analysis that is particularly noteworthy and would move the legal fees needle closer to $20 million?

Risks incurred

[40] As discussed in *Brown*,[36] the primary risk incurred by class action is the risk of non-payment — that after many years of effort, several million dollars in docketed time and sizeable disbursements the action will fail, nothing will be recovered and class counsel will not be paid.[37] Most judges understand that it is the actual "impact"[38] of the non-payment that explains why the risk of non-payment is rewarded with a legal fee premium. A British Columbia judge put it best:

> It is well-recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.[39]

[41] The greater the risk of failure and non-payment – that is, the more serious the financial impact on class counsel – the larger the premium. Hence, in *Brown,* where class

---

[35] *Manuge supra,* note 25, at para. 47.

[36] *Brown, supra,* note 10, at paras. 41-44.

[37] Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at 737.

[38] *Parsons v. Canadian Red Cross Society,* [2000] O.J. No. 2374 (S.C.J.) per Winkler J., at para. 29.

[39] *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69, at para. 73.

counsel had "bet the firm", I would have approved $25 million in legal fees on a $400 million recovery. I hasten to add that class action litigation should not be about betting the firm — my point is simply that if "risk incurred" is to be a meaningful analytical tool, judges must go beyond a formulaic recitation of the well-known catalogue of "risks" (such as, for example, the risk of losing the certification motion) and assess the nature and extent of the actual financial impact on the particular class counsel firm.[40]

[42] Here, however, class counsel presented no hard evidence in this regard. Or even evidence that their firm was obliged to turn away paying retainers in order to conduct this litigation. They simply repeated the familiar menu of "risks" without any demonstration of actual financial impact on them or their firm.[41]

[43] Class counsel also resisted what I thought was a self-evident observation — that third-party funding should be a relevant factor in the "risks incurred" analysis. Here, class counsel had arranged for the Class Proceedings Fund to cover the risk of adverse cost awards and agreed to the CPF's usual 10 per cent levy. Given that no class action will ever proceed without a cost indemnity for the representative plaintiff,[42] class counsel will typically assume the adverse costs risk themselves or secure third-party funding. If the latter is arranged, the levy or price charged for this particular type of 'insurance policy' is routinely paid out of the settlement funds and not out of class counsel's legal fees.[43]

[44] In my view, it is time to acknowledge that third-party funding should be considered in the "risks incurred" analysis. Indeed, the amended CPA explicitly requires

---

[40] It was the unworkability of the conventional approach to risk analysis in the context of "every day" settlements that compelled me to replace the "case by case" approach with the broader and more principled approach set out in *Cannon* and refined in *Brown*.

[41] Risk is best understood in terms of individualized impact. For example, an 80 per cent risk of rain (should it materialize) will have little if any impact on an indoor-wedding but enormous impact on an outdoor event. The risk that $1 million of docketed time will not be recovered will obviously have less of an impact in a large law firm than in a two-person law office.

[42] As Strathy J. noted in *Dugal v. Manulife*, 2011 ONSC 1785 at para. 28: "No rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousands of dollars."

[43] Private sector funders typically charge 7 to 8 per cent of recovery; the CPF levy is 10 per cent.

it.[44] However, I concede that it may be unfair to impose this metric retroactively on a class action that probably began under a different expectation 15 years ago.

[45] In any event, I conclude that there is nothing particularly noteworthy in the "risks incurred" by class counsel in this matter that would move the legal fee needle from the $16 or $18 million level to the $20 million level.

Results achieved

[46] Nor is there anything in the "results achieved" assessment that would do the same.

[47] I agree that class counsel achieved a good result. I also agree that even in the stratosphere of nine or ten-digit mega-settlements, large recoveries should be rewarded with appropriately commensurate legal fees.[45] Indeed, we saw this in our review of the billion-dollar settlements where fees in the range of $25 million to $50 million were judicially approved.

[48] My concern in this case is the sizeable PJI component and the extent to which this should figure in the "results achieved" analysis. It is beyond dispute that this litigation was propelled from the outset with a clear understanding that "the time value of money" would be a significant ingredient in the compensation calculation. This was evident from the statement of claim, the submissions on the summary judgment motion and the accounting reference, the terms of settlement and the settlement agreement itself.

[49] If part of the $100 million settlement includes PJI (perhaps as much as $36 million) should not the "results achieved" be adjusted to accommodate this reality? For example, if only $64 million was actually recovered by class counsel's efforts and the rest simply by the passage of time and the application of a legislatively prescribed interest rate, should this not be relevant in the determination of "fair and reasonable" legal fees?

[50] Here, it is reasonably arguable that at least $30 million of the $100 million was PJI and that the $18 million legal fee that would probably have been awarded on a $72

---

[44] Section 32(2.2) of the amended CPA, S.O. 2020, c. 11, Sched. 4 (which applies to proposed class proceedings filed after October 1, 2020) provides that "the court shall consider …. (c) the existence of any funding arrangement that affected the degree of risk assumed by the solicitor in providing representation."

[45] As the B.C. court noted in *Endean, supra,* note 23, at para. 80: "A reasonable fee should bear an appropriate relationship to the amount recovered."

million settlement is already fair and reasonable and needs no further enhancement. However, it can also be noted, from a class member's perspective, that class counsel recovered almost the entirety of the $102.9 million amount in dispute, full stop.

[51] The upshot of the "risks incurred" and "results achieved" analysis is this: the most this court can justify and explain in a principled fashion consistent with comparable caselaw is a legal fees award that falls within a range of $18 million to $20 million. The right number may well be around $19 million.

[52] However, given that this was a truly self-made class action that consumed 15 years of litigation, 10,000 hours in docketed time and resulted in a genuinely commendable settlement, I am prepared to err on the side of caution and in favour of class counsel.

[53] This court approves $20 million for legal fees, plus disbursements and taxes.

Honoraria approval

[54] Class counsel asks for judicial approval of honoraria totalling $70,000 for the representative plaintiffs — $50,000 to Mr. MacDonald, $10,000 to Mr. and Mrs. Zopas together, and $10,000 to Mr. Halasz. Class counsel have filed detailed evidence describing their specific contributions.

[55] As a general rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where they can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because of their role as class representative that a significant honorarium will be justified.[46]

[56] Here, I am persuaded on the evidence that a performance honorarium at a level of $10,000 is justified for Mr. MacDonald and for Mr. and Mrs. Zopas because of their extraordinary level of dedication and commitment over a long and difficult 15-year litigation. The same can be said about Mr. Halasz although he only joined the action as a representative plaintiff in 2017. I note, however, his level of contribution and the fact that he lives in Ottawa and had to take personal time off work from his job at the National Research Council to attend in Toronto for cross-examinations and participate in a mediation. The requested honorarium is justified.

---

[46] *Aps v. Flight Centre Travel Group,* 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10.

[57] Mr. MacDonald deserves more than just a performance honorarium. He is entitled to the additional $40,000 because of the financial harm he sustained as the lead plaintiff in what became a high-profile class action in the banking community. His employment as an investment advisor became strained and he had to leave the industry well before his retirement age. Comparable employment was hard to find. Mr. MacDonald eventually obtained a contract position teaching banking and finance courses at a local community college. However, his income today is much less than when he worked as an investment advisor. And, as Mr. MacDonald noted in his affidavit, the repercussions from this class action continue to be felt: "I … worry that the publicity associated with the action has and may continue to have a negative impact on my future career prospects."

[58] I therefore have no difficulty concluding that Mr. MacDonald suffered significant financial hardship in taking on the role and responsibilities of the lead representative plaintiff. The request for a $50,000 honorarium is more than justified.

[59] Each of the requested honoraria is approved.

Disposition

[60] The settlement is approved. As are class counsel's legal fees in the amount of $20 million, plus disbursements and taxes, and the requested honoraria.

[61] Orders to go accordingly.

[62] My thanks again to all counsel for their assistance. I am particularly grateful to Mr. Eizenga, who represented class counsel on the legal fees issue, for his submissions and insights.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment is effective from the date it is made and is enforceable without any need for entry and filing.

Date: June 17, 2021

TAB 14

T-463-07
2013 FC 341

Dennis Manuge (*Plaintiff*)

v.

Her Majesty the Queen (*Defendant*)

Indexed as: Manuge v. Canada

Federal Court, Barnes J.—Halifax, February 14; Ottawa, a pril 4, 2013.

Practice — Class Proceedings — Class action settlement — Motion by parties under Federal Courts Rules, r. 334.29 seeking approval for their negotiated settlement of class action taken with respect to Service Income Security Insurance Plan Long Term Disability (SISIP LTD) policy — Action at issue allowed to proceed as class action; challenging, in particular, defendant's practice of deducting monthly Pension Act disability benefits from LTD income payable to disabled class members — Court determining that defendant's interpretation of applicable SISIP LTD policy, practice thereof unlawful — Thereafter, parties negotiating financial implications of judgment — Value of financial settlement estimated at more than $887 million — Central component of proposed settlement constituting full recovery by class members or families thereof of all amounts unlawfully deducted or which would have been deducted in future from SISIP LTD income — Whether class action settlement should be approved — Majority of submissions made by class members expressing strong approval of terms of settlement — Settlement viewed very favourably by most beneficiaries — Thus, proposed settlement of action approved — Constituting generous, complete, thoughtful resolution of issues raised in litigation; would provide substantial financial assistance to thousands of disabled Canadian Forces veterans, families thereof — Class action settlement approved.

Practice — Class Proceedings — Legal costs — Motion brought, in particular, by counsel for class seeking approval for claim to legal fees under Federal Courts Rules, r. 334.4 payable from proceeds of proposed settlement in class action

T-463-07
2013 CF 341

Dennis Manuge (*demandeur*)

c.

Sa Majesté la Reine (*défenderesse*)

Répertorié : Manuge c. Canada

Cour fédérale, juge Barnes—Halifax, 14 février; Ottawa, 4 avril 2013.

Pratique — Recours collectifs — Règlement de recours collectif — Requête des parties présentée au titre de la règle 334.29 des Règles des Cours fédérales par laquelle elles sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (AIP) applicable du Régime d'assurance revenu militaire (RARM) — L'autorisation a été donnée de poursuivre l'action en cause comme recours collectif; celui-ci contestait, en particulier, la pratique de la défenderesse de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la Loi sur les pensions des sommes qui leur sont versées à titre d'AIP — La Cour a jugé que la manière dont la défenderesse interprétait la police d'AIP applicable du RARM ainsi que sa pratique étaient illégales — Plus tard, les parties ont entrepris des négociations en vue de régler les questions liées aux incidences financières du jugement — La valeur du règlement pécuniaire a été estimée à plus de 887 millions de dollars — L'élément central du règlement proposé était le recouvrement intégral, par les membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'AIP du RARM — Il s'agissait de savoir si le règlement de recours collectif devait être approuvé — La majorité des observations des membres du recours collectif exprimaient leur forte approbation envers les modalités du règlement — Le règlement était perçu de manière très favorable par presque tous les bénéficiaires du groupe — Le règlement proposé relativement à la présente action a donc été approuvé — Il constituait une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournirait une aide financière substantielle aux milliers d'anciens combattants des Forces canadiennes ayant une invalidité et à leur famille — Règlement de recours collectif approuvé.

Pratique — Recours collectifs — Honoraires — Requête présentée, en particulier, par les avocats du groupe qui sollicitaient l'approbation de la Cour, au titre de la règle 334.4 des Règles des Cours fédérales, pour que leurs honoraires soient

— Claim opposed by defendant's counsel on grounds of excessiveness — What amount of legal fees claimed by counsel for class should be approved? — Rules, r. 334.4 requiring that legal fees payable to class counsel must be fair, reasonable — In determining amount, Court examining several factors including results achieved; extent of risk assumed by class counsel; amount of professional time incurred; quality of representation; complexity of issues raised by litigation; fees approved in comparable cases — In present case, high quality of legal work performed by class counsel leading to favourable liability outcome — Litigation risk assumed by class counsel substantial, exceeding tolerance level of others — Evidence showing that law firms retained on behalf of class working for more than 6 years with over 8 500 hours of unbilled time — Settlement of class would provide meaningful compensation for several thousand deserving Canadian Forces (CF) veterans — Given all factors considered herein, legal fees representing 8 percent of retroactive refunds payable to class beneficiaries approved — Recovery of legal costs herein in keeping with fees approved in comparable cases, representing sufficient incentive to counsel to take on high-risk litigation without unduly impacting on much-needed recoveries of disabled CF veterans.

This was a motion by the parties under rule 334.29 of the *Federal Courts Rules* seeking approval for their negotiated settlement of the class action taken with respect to the Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy. This action was allowed to proceed as a class action and it challenged, in particular, the defendant's practice of deducting monthly *Pension Act* disability benefits from the LTd income payable to disabled class members. It was determined that the defendant's interpretation of the applicable SISIP LTd policy and its practice were unlawful. That determination was not appealed and the parties negotiated to work out the financial implications of the judgment rendered. Counsel for the class also sought approval for their claim to legal fees under rule 334.4 of the Rules payable from the proceeds of the proposed settlement but this claim was opposed by the defendant's counsel on the ground that the proposed amount of legal fees was excessive.

prélevés à même les sommes recouvrées au titre du règlement proposé — Les avocats de la défenderesse se sont opposés à cette demande au motif que le montant était excessif — Il s'agissait de savoir quel montant des honoraires demandés par les avocats du groupe devrait être approuvé — La règle 334.4 exige que les honoraires accordés aux avocats du groupe soient justes et raisonnables — Lorsque la Cour a été appelée à déterminer le montant, elle a dû examiner un certain nombre de facteurs, y compris les résultats obtenus, l'étendue du risque assumé par les avocats du groupe, la quantité d'heures de travail effectivement consacrées au litige, la qualité de la représentation, la complexité des questions soulevées par le litige et les honoraires approuvés dans des affaires comparables — En l'espèce, la grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable — Le risque assumé par les avocats du groupe était important et excédait le degré de tolérance d'autres confrères — La preuve a révélé que les cabinets d'avocats retenus pour le compte du groupe ont travaillé plus de 6 ans au recours collectif et qu'ils ont investi plus de 8 500 heures de travail non facturé — Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d'anciens combattants des Forces canadiennes (FC) — Compte tenu de tous les facteurs exposés en l'espèce, des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe ont été approuvés — Le recouvrement des honoraires décrit en l'espèce était conforme aux honoraires approuvés dans des affaires comparables et représentait un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin.

Il s'agissait d'une requête des parties présentée au titre de la règle 334.29 des *Règles des Cours fédérales* par laquelle les parties sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM). L'autorisation a été donnée de poursuivre cette action comme recours collectif; celui-ci contestait, en particulier, la pratique de la défenderesse de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la *Loi sur les pensions* des sommes qui leur sont versées à titre d'a IP. Il a été décidé que la manière dont la défenderesse interprétait l'a IP applicable du Ra RM et sa pratique étaient illégales. a ucun appel n'a été interjeté à l'égard de cette décision, et les parties ont entrepris des négociations en vue de régler les questions liées aux incidences financières du jugement rendu. Les avocats du groupe ont aussi demandé l'approbation de la Cour, au titre de la règle 334.4 des Règles, pour que leurs honoraires soient prélevés à même les sommes recouvrées au titre du règlement proposé, mais les avocats de

The value of the financial settlement in question was estimated at more than $887 million which included the net present value of monies payable in the future to disabled class members. Similar offsets of *Pension Act* benefits from a number of other federal financial support programs were removed. The central component of the proposed settlement was the full recovery by approximately 7 500 class members or their families of all amounts unlawfully deducted or which would otherwise have been deducted in the future from their SISIP LTd income. a lso negotiated were reasonable rates for pre- and post-judgment interest, the establishment of a $10 million bursary fund that could be accessed by class members and their families and a streamlined process for administering the payment of refunds and for resolving future claim disagreements.

The principal issue was whether the class action settlement should be approved. The appropriate amount of legal fees claimed by counsel for the class also had to be determined.

Held, the class action settlement should be approved and the legal fees claimed by counsel for the class granted in accordance with the reasons for order.

The vast majority of submissions made by class members expressed strong approval of the terms of settlement including the claim to legal costs. The overwhelming tone of the submissions to the Court was complimentary to the plaintiff and to his legal team and strongly supportive of the settlement. Based on this support, it could satisfactorily be said that the settlement was viewed very favourably by almost all class beneficiaries.

The criticism that the settlement ought to have imposed upon the government an indemnity obligation for legal costs failed to recognize that, in the Federal Court, legal costs are not, except in exceptional circumstances, payable by either party to a class proceeding regardless of the outcome pursuant to rule 334.39 of the Rules. In the absence of any provision in the Rules for the separate payment of costs, it was not unreasonable for the parties to negotiate a settlement that provided for legal costs to be borne out of the settlement proceeds.

la défenderesse se sont opposés à cette demande au motif que le montant proposé à titre d'honoraires était excessif.

La valeur du règlement pécuniaire en question a été estimée à plus de 887 millions de dollars, un chiffre qui comprend la valeur actualisée nette des montants qui seront versés aux membres du groupe qui ont une invalidité. d e plus, la défenderesse a mis fin à la déduction des prestations versées au titre de la *Loi sur les pensions* des sommes versées au titre d'un certain nombre d'autres programmes fédéraux de soutien financier. L'élément central du règlement proposé était le recouvrement intégral, par les 7 500 membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'a IP du Ra RM. Par ailleurs, les parties ont négocié des taux raisonnables en ce qui a trait aux intérêts avant et après jugement, à la création d'un fonds de perfectionnement de 10 millions de dollars auquel les membres du groupe et leur famille pourront avoir accès et à un processus simplifié quant à la gestion du paiement des remboursements et quant au règlement des différends possibles à l'égard des réclamations.

Il s'agissait principalement de savoir si le règlement de recours collectif devait être approuvé. Le montant approprié des honoraires des avocats du groupe devait également être déterminé.

Jugement : Le règlement de recours collectif doit être approuvé et les honoraires des avocats du groupe doivent être accordés en conformité avec les motifs de l'ordonnance.

La grande majorité des observations des membres du recours collectif exprimaient leur forte approbation envers les modalités du règlement, y compris quant à la réclamation relative aux honoraires. Les observations formulées à la Cour consistaient, en très grande majorité, en des compliments envers le demandeur et son équipe d'avocats ainsi qu'en un fort appui envers le règlement. Compte tenu de cet appui, on peut raisonnablement dire que le règlement était perçu de manière très favorable par presque tous les bénéficiaires du groupe.

La critique selon laquelle le règlement aurait dû imposer au gouvernement une obligation d'indemniser eu égard aux dépens ne tient pas compte du fait que, sauf dans des circonstances exceptionnelles, la Cour fédérale n'adjuge les dépens à ni l'une ni l'autre des parties dans le contexte d'un recours collectif, et ce, peu importe l'issue du recours, conformément à la règle 334.39 des Règles. Vu que les Règles ne contiennent pas de dispositions prévoyant que les dépens peuvent être payés séparément, il n'était pas déraisonnable de la part des parties de négocier un règlement portant que les dépens pouvaient être intégrés au produit du règlement.

n otwithstanding some expressed concerns by a few class members, the proposed settlement of this action was approved. It was a generous, complete and thoughtful resolution of the issues that were raised in the litigation and would provide substantial financial assistance to thousands of disabled Canadian Forces (CF) veterans and their families. The terms of settlement were also the product of extensive negotiations between the parties and it would not serve the interests of the vast majority of class members to send the parties back into further discussions to address the concerns of a handful of those who opposed the arrangement. In short, it represented a fair and reasonable compromise that was in the best interests of the class as a whole.

a s for the claim by class counsel to legal costs, it was left to the Court under rule 334.4 to determine the appropriate amount thereof. Rule 334.4 requires that legal fees payable to class counsel must be fair and reasonable. In determining what is fair and reasonable, the Court had to look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, and the fees approved in comparable cases.

The high quality of the legal work performed by class counsel led to the favourable liability outcome. The litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others, a factor that favoured premium costs recovery. The evidence showed that the law firms retained on behalf of the class worked for more than 6 years and amassed more than 8 500 hours of unbilled time. The settlement of the class would provide meaningful compensation for several thousand deserving CF veterans, a factor that favoured the award of a costs premium to class counsel. The public interest in this case was more properly situated around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation.

While a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be relevant and sometimes a compelling consideration in the final assessment of legal fees, such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold. The contingency fee agreement that was executed by the plaintiff

Malgré les réserves exprimées par quelques membres du groupe, le règlement proposé relativement à la présente action a été approuvé. Il constituait une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournirait une aide financière substantielle aux milliers d'anciens combattants des Forces canadiennes (FC) ayant une invalidité et à leur famille. Les modalités du règlement étaient aussi le produit de longues négociations entre les parties et il ne servirait pas les intérêts de la grande majorité des membres du groupe de renvoyer les parties à la table de négociations pour qu'elles traitent des réserves exprimées par une poignée de personnes qui s'opposent à l'accord. Bref, le règlement constituait un compromis juste et raisonnable qui était dans les meilleurs intérêts du groupe dans son ensemble.

Quant aux honoraires demandés par les avocats du groupe, il appartenait à la Cour, en application de la règle 334.4, de déterminer le montant approprié de ces honoraires. La règle 334.4 exige que les honoraires accordés aux avocats du groupe soient justes et raisonnables. Lorsque la Cour a été appelée à déterminer ce qui est juste et raisonnable, elle a dû examiner un certain nombre de facteurs, y compris les résultats obtenus, l'étendue du risque assumé par les avocats du groupe, la quantité d'heures de travail effectivement consacrées au litige, le lien de causalité entre les efforts déployés par les avocats et le résultat obtenu, la qualité de la représentation, la complexité des questions soulevées par le litige, la nature et l'importance du litige et les honoraires approuvés dans des affaires comparables.

La grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable. Le risque assumé par les avocats du groupe en lien avec le litige était important et excédait presque assurément le degré de tolérance d'autres confrères, un facteur militant en faveur d'une majoration des frais recouvrés. La preuve a révélé que les cabinets d'avocats retenus pour le compte du groupe ont travaillé plus de 6 ans au recours collectif et qu'ils ont investi plus de 8 500 heures de travail non facturé. Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d'anciens combattants des FC, un facteur qui milite en faveur de l'octroi de dépens majorés aux avocats du groupe. L'intérêt public en l'espèce s'articulait plutôt autour des intérêts du groupe que de l'intérêt général prétendu de la population à garder sous contrôle la compensation offerte aux avocats ayant participé au recours collectif.

Bien qu'une convention d'honoraires conditionnels conclue entre les avocats et un représentant demandeur dans le contexte d'un recours collectif projeté puisse être pertinente et qu'elle puisse parfois être une considération déterminante lors de l'examen définitif concernant les honoraires, une telle convention d'honoraires ne sera pas nécessairement une considération principale parce que celle-ci est plus souvent signée à un stade précoce de l'affaire, où on en sait fort peu

was of no particular significance to the assessment here because the plaintiff and class counsel essentially walked away from the agreement.

g iven all the factors considered in this case, legal fees in an amount equal to 8 percent of the retroactive refunds payable to class beneficiaries were approved. The recovery of legal costs herein was in keeping with the fees approved in comparable cases and represented a sufficient incentive to counsel to take on high-risk litigation without unduly impacting on the much-needed recoveries of disabled CF veterans.

sur son déroulement futur. La convention d'honoraires conditionnels qui a été signée par le demandeur n'était pas réellement importante dans le contexte du présent examen parce que le demandeur et les avocats du groupe ont essentiellement renoncé à cette convention.

Compte tenu de tous les facteurs exposés en l'espèce, des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe ont été approuvés. Le recouvrement des honoraires décrit en l'espèce était conforme aux honoraires approuvés dans des affaires comparables et représentait un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin.

STa TuTeS and ReguLa TIOnS CITed

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (u .K.) [R.S.C., 1985, a ppendix II, no. 44].
Federal Courts Rules, SOR/98-106, rr. 334.29, 334.4.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1.
Pension Act, R.S.C., 1985, c. P-6.

LOIS e T RÈgLeMenTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-u .) [L.R.C. (1985), appendice II, nº 44].
Loi de l'impôt sur le revenu, L.R.C. (1985) (5ᵉ suppl.), ch. 1.
Loi sur les pensions, L.R.C. (1985), ch. P-6.
Règles des Cours fédérales, d ORS/98-106, règles 334.29, 334.4.

CaSeS CITed

aPPLIed:

Helm v. Toronto Hydro-Electric System Ltd., 2012 OnSC 2602 (CanLII), 40 C.P.C. (7th) 310.

COnSIdeRed:

Manuge v. Canada, 2008 FC 624, [2009] 1 F.C.R. 416, revd 2009 FCa 29, [2009] 4 F.C.R. 478, affd 2010 SCC 67, [2010] 3 S.C.R. 672; *Manuge v. Canada*, 2012 FC 499, [2013] 4 F.C.R. 647; *Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47; *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 O.R. (3d) 281 (S.C.J.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294; *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482; *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 O.R. (3d) 481 (S.C.J.).

ReFeRRed TO:

Bodnar v. Cash Store Inc., 2010 BCSC 145, 84 C.P.C. (6th) 49; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. n o. 1598 (g en. d iv.) (QL); *Slater Vecchio LLP v. Cashman*,

JuRISPRudenCe CITÉe

dÉCISIO n a PPLIQuÉe :

Helm v. Toronto Hydro-Electric System Ltd., 2012 OnSC 2602 (CanLII), 40 C.P.C. (7th) 310.

dÉCISIOnS exaMInÉeS :

Manuge c. Canada, 2008 CF 624, [2009] 1 R.C.F. 416, inf. par 2009 Ca F 29, [2009] 4 R.C.F. 478, conf. par 2010 CSC 67, [2010] 3 R.C.S. 672; *Manuge c. Canada*, 2012 CF 499, [2013] 4 R.C.F. 647; *Châteauneuf c. Canada*, 2006 CF 286; *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3ᵉ) 281 (C.S.J.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294; *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482; *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 R.J.O. (3ᵉ) 481 (C.S.J.).

dÉCISIOnS CITÉeS :

Bodnar v. Cash Store Inc., 2010 BCSC 145, 84 C.P.C. (6th) 49; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. nº 1598 (d iv. gén.) (QL); *Slater Vecchio LLP v. Cashman*,

2013 BCSC 134, [2013] 8 W.W.R. 392; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226, [2005] O.T.C. 208 (Ont. S.C.J.).

MOTIOn under rule 334.29 of the *Federal Courts Rules* in which the parties sought approval for their negotiated settlement of a class action involving the Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy and in which counsel for the class sought approval for their claim to legal fees under rule 334.4 of the Rules. Class action settlement approved; legal fees granted in accordance with reasons for order.

aPPeaRanCeS

Peter J. Driscoll, *Daniel Wallace* and *Ward K. Branch* for plaintiff.
Paul B. Vickery, *Lori Rasmussen* and *Travis Henderson* for defendant.

SOLICITORS OF ReCORd

McInnes Cooper, Halifax, and *Branch MacMaster LLP*, Vancouver, for plaintiff.
Deputy Attorney General of Canada for defendant.

The following are the reasons for order and order rendered in English by

[1] Barnes J.: This proceeding was initiated by statement of claim filed on March 15, 2007. In mid-February 2008, a motion to certify the proceeding as a class action was argued before me at Halifax, n ova Scotia and by a decision rendered on May 20, 2008, I certified the proceeding as a class action: see *Manuge v. Canada*, 2008 FC 624, [2009] 1 F.C.R. 416. That decision was appealed by the defendant and on February 3, 2009 the Federal Court of a ppeal set aside my certification order: see *Canada v. Manuge*, 2009 FCa 29, [2009] 4 F.C.R. 478. That decision was further appealed by the plaintiff, d ennis Manuge, to the Supreme Court of Canada and on d ecember 23, 2010 that Court, by unanimous decision, restored my order thereby allowing the action to

2013 BCSC 134, [2013] 8 W.W.R. 392; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226, [2005] O.T.C. 208 (C.S.J. Ont.).

Re Qu ÊTe présentée au titre de la règle 334.29 des *Règles des Cours fédérales* par laquelle les parties sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM) et par laquelle les avocats du groupe demandaient l'approbation de leurs honoraires au titre de la règle 334.4 des Règles. Le règlement de recours collectif a été approuvé et les honoraires ont été accordés conformément aux motifs de l'ordonnance.

OnT COMPaRu

Peter J. Driscoll, *Daniel Wallace* et *Ward K. Branch* pour le demandeur.
Paul B. Vickery, *Lori Rasmussen* et *Travis Henderson* pour la défenderesse.

a VOCa TS InSCRITS au dOSSIeR

McInnes Cooper, Halifax, et *Branch MacMaster LLP*, Vancouver, pour le demandeur.
Le sous-procureur général du Canada pour la défenderesse.

Voici les motifs de l'ordonnance et l'ordonnance rendus en français par

[1] Le juge Barnes : La présente instance avait été amorcée au moyen d'une déclaration déposée le 15 mars 2007. À la mi-février 2008, une requête en autorisation de l'instance comme recours collectif avait été plaidée devant moi à Halifax (n ouvelle-Écosse), et, par décision rendue le 20 mai 2008, j'ai autorisé l'instance comme recours collectif : voir *Manuge c. Canada*, 2008 CF 624, [2009] 1 R.C.F. 416. La défenderesse avait interjeté appel de cette décision, et le 3 février 2009, la Cour d'appel fédérale a annulé l'ordonnance d'autorisation que j'avais délivrée : voir *Canada c. Manuge*, 2009 Ca F 29, [2009] 4 R.C.F. 478. Le demandeur, M. d ennis Manuge, avait subséquemment interjeté appel de cet arrêt à la Cour suprême du Canada, qui, dans une

proceed as a class action: see *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672.

[2] To their credit, the parties then jointly proposed to bring an issue of law before the Court for summary determination. That matter was argued before me at Halifax and by decision rendered on May 1, 2012, I determined that the defendant's interpretation of the applicable Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy and that, in particular, the practice of deducting monthly *Pension Act*, R.S.C., 1985, c. P-6, disability benefits from the LTd income payable to disabled class members was unlawful: see *Manuge v. Canada*, 2012 FC 499, [2013] 4 F.C.R. 647. That determination was not appealed and the parties undertook extensive negotiations with a view to working out the financial implications of my judgment.

[3] These reasons are issued in connection with a motion by the parties under rule 334.29 of the *Federal Courts Rules*, SOR/98-106 (Rules) seeking Court approval for their negotiated settlement of this class action. Counsel for the class also seek Court approval for their claim to legal fees under rule 334.4 payable from the proceeds of the proposed settlement. That claim is opposed by counsel for the defendant on the ground that the proposed amount of legal fees is excessive.

g eneral Principles a pplicable to Class a ction Settlements

[4] Court approval of a class action settlement is appropriate where, in the overall circumstances, it is deemed to be fair and reasonable and in the best interests of the class as a whole: see *Bodnar v. Cash Store Inc.*, 2010 BCSC 145, 84 C.P.C. (6th) 49, at paragraph 17. In *Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47,

décision unanime rendue le 23 décembre 2010, a rétabli mon ordonnance, ce qui permettait que l'action soit poursuivie comme recours collectif : voir *Manuge c. Canada*, 2010 CSC 67, [2010] 3 R.C.S. 672.

[2] Les parties, et cela est tout à leur honneur, ont ensuite conjointement proposé de présenter une question de droit à la Cour, en vue d'obtenir un jugement sommaire. Cette affaire a été débattue devant moi à Halifax, et j'ai statué, par décision rendue le 1er mai 2012, que la manière dont la défenderesse interprétait la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM) et, particulièrement, que la politique de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la *Loi sur les pensions*, L.R.C. (1985), ch. P-6, des sommes qui leurs sont versés à titre d'assurance invalidité prolongée était illégale : voir *Manuge c. Canada*, 2012 CF 499, [2013] 4 R.C.F. 647. a ucun appel n'a été interjeté à l'égard de cette décision, et les parties ont entrepris des négociations approfondies en vue de régler les questions liées aux incidences financières de mon jugement.

[3] Les présents motifs sont délivrés en lien avec une requête des parties présentée au titre de la règle 334.29 des *Règles des Cours fédérales*, d ORS/98-106 (les Règles), par laquelle elles sollicitaient l'approbation de la Cour à l'égard de leur règlement négocié quant au présent recours collectif. Les avocats du groupe ont aussi demandé l'approbation de la Cour, au titre de la règle 334.4 des Règles, pour que leurs honoraires soient prélevés à même les sommes recouvrées au titre du règlement proposé. Les avocats de la défenderesse s'opposent à cette demande, au motif que le montant proposé à titre d'honoraires est excessif.

Les principes généraux applicables aux règlements de recours collectifs

[4] Il y a lieu que la Cour approuve un règlement de recours collectif dans le cas où, au vu des circonstances globales, elle juge que le règlement est juste et raisonnable, et qu'il est dans le meilleur intérêt du groupe dans son ensemble : *Bodnar v. Cash Store Inc.*, 2010 BCSC 145, 84 C.P.C. (6th) 49, au paragraphe 17. d ans

at paragraph 7, Justice d anièle Tremblay-Lamer, described the general approach to the approval of a class settlement in this Court:

> The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. e ven if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.

[5] It is not open to the reviewing court to rewrite the substantive terms of a proposed settlement nor should the interests of individual class members be assessed in isolation from the interests of the entire class: see *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. n o. 1598 (g en. d iv.) (QL), at paragraphs 10–11.

[6] It will always be a particular concern of the Court that an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

The Terms of the Proposed Settlement

[7] The settlement proposed by the parties includes a number of advantageous financial and administrative terms. The value of the financial settlement has been estimated at more than $887 million which includes the net present value of monies payable in the future to disabled class members. The financial effect of the settlement has also been extended voluntarily by the defendant by the removal of similar offsets of *Pension Act* benefits from a number of other federal financial support programs.

la décision *Châteauneuf c. Canada*, 2006 CF 286, au paragraphe 7, la juge d anièle Tremblay-Lamer a décrit la démarche générale de la Cour en matière d'approbation d'un règlement de recours collectif :

> La Cour saisie d'un règlement d'un recours collectif n'y cherche pas la perfection, mais plutôt que le règlement soit raisonnable, un bon compromis entre les deux parties. Le but d'un règlement est d'éviter les risques d'un procès. Même imparfait, le règlement peut être dans les meilleurs intérêts de ceux qui sont affectés, particulièrement si on le compare aux risques et au coût d'un procès. Il faut toujours tenir compte qu'un règlement proposé signifie le désir des parties de régler le dossier hors cour sans aucune admission de part et d'autre ni quant aux faits ni quant au droit.

[5] La cour de révision ne peut réécrire les modalités de fond d'un règlement proposé, et les intérêts des membres du recours collectif ne devraient pas être examinés séparément de ceux de l'ensemble du groupe : voir *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. n° 1598 (d iv. gén.) (QL), aux paragraphes 10 et 11.

[6] Il sera toujours d'une grande importance pour la Cour de ne pas rejeter à la légère un règlement négocié d'égal à égal et de bonne foi. Les parties sont, après tout, les mieux placées pour apprécier les risques et les coûts (autant d'un point de vue financier que d'un point de vue humain) liés au fait de mener à terme un recours collectif complexe. Le rejet d'un règlement comportant de multiples aspects, comme celui négocié en l'espèce, entraîne aussi le risque de déraillement du processus de négociation et de la perte de l'esprit de compromis.

Les modalités du règlement proposé

[7] Le règlement proposé par les parties contient un certain nombre de modalités avantageuses, autant sur le plan financier que sur le plan administratif. La valeur du règlement pécuniaire a été estimée à plus de 887 millions de dollars, un chiffre qui comprend la valeur actualisée nette des montants qui seront versés aux membres du groupe qui ont une invalidité. d e plus, la défenderesse, en mettant fin à la déduction des prestations versées au titre de la *Loi sur les pensions* des sommes versées au titre d'un certain nombre d'autres

programmes fédéraux de soutien financier, a sciemment amplifié l'incidence financière du règlement.

[8] The central component of the proposed settlement is the full recovery by approximately 7 500 class members or their families of all amounts unlawfully deducted or which would otherwise have been deducted in the future from their SISIP LTd income. The agreed retroactive recovery of benefits dates back to June 1, 1976, that being the date the *Pension Act* offset began. This part of the settlement resulted from a concession by the defendant to abandon its limitations defences and to expand the class to include disabled Canadian Forces (CF) members who would otherwise have been left out. The agreement also provides for the recovery of offsets by the spouses and minor children of deceased members in lieu of the cumbersome and complex process of recognizing estate claims.

[8] L'élément central du règlement proposé est le recouvrement intégral, par les 7 500 membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'a IP du Ra RM. Le recouvrement rétroactif des prestations a été consenti jusqu'au 1er juin 1976, soit la date à laquelle avait commencé la compensation effectuée au titre de la *Loi sur les pensions*. Cette partie du règlement découle de la concession, faite par la défenderesse, d'abandonner sa défense relative aux limites à la couverture et d'agrandir le groupe pour qu'y soient inclus les membres des Forces canadiennes (FC) ayant une invalidité, lesquels auraient autrement été laissés pour compte. L'accord prévoit aussi que les conjoints et les enfants mineurs des membres décédés auront droit au recouvrement, au lieu de devoir recourir au processus lourd et complexe de reconnaissance des réclamations successorales.

[9] In addition, the parties have negotiated reasonable rates for pre- and post-judgment interest dating back to 1992 totalling more than $80 million as of February 14, 2013. Interest continues to accrue at $1.3 million per month.

[9] d e plus, les parties ont négocié des taux raisonnables en ce qui a trait aux intérêts avant et après jugement, qui remontent à 1992 et qui s'élevaient à 80 millions de dollars en date du 14 février 2013. Les intérêts continuent de s'accumuler, à raison de 1,3 million de dollars par mois.

[10] It is acknowledged by the parties that the payment of LTd benefits to members of the class will attract income tax. Because SISIP LTd benefits constitute taxable income, the payment of income tax is essentially unavoidable. In order to mitigate the impact of tax on lump sum recoveries, disabled recipients will be permitted to spread their retroactive refunds over the years it would have been payable if that option reduces their tax exposure. Further tax mitigation measures include a cash top up of 3.27 percent on retroactive LTd benefits payable to members and the right to deduct legal fees as an expense incurred in the recovery of taxable income.

[10] Les parties reconnaissent que les prestations d'a IP versées aux membres du groupe seront assujetties à l'impôt sur le revenu. Vu que les prestations d'a IP du Ra RM constituent un revenu imposable, le paiement d'impôt sur le revenu est essentiellement inévitable. Pour atténuer l'incidence de l'impôt sur les sommes forfaitaires recouvrées, les prestataires ayant une invalidité auront la possibilité, si cela leur permet de diminuer leur montant d'impôt à payer, de répartir les sommes reçues à titre de remboursements rétroactifs sur les années au cours desquelles elles auraient été exigibles. d 'autres mesures d'atténuation fiscale comprennent un supplément de traitement en espèces de 3,27 p. 100 sur les prestations rétroactives d'a IP devant être versées aux membres, ainsi que le droit de déduire les honoraires, à titre de dépense engagée en vue du recouvrement d'un revenu imposable.

[11] In recognition of the hardships experienced by some members of the class, the parties have agreed to establish a $10 million bursary fund to be administered over a period of 15 years by the a ssociation of u niversities and Colleges of Canada. This fund can be accessed by class members and their families for part-time or full-time study and is expected to generate bursaries of up to $1 300 for each eligible applicant.

[12] The parties have also negotiated a streamlined process for administrating the payment of refunds and for resolving future claim disagreements. Specifically, a number of members of the class were subjected to *Pension Act* offsets that exceeded the value of their SISIP LTd benefits. These members came to be identified as "zero sum" members. Because the SISIP administrator had not maintained medical and financial information for zero sum members, it was not possible to readily determine their ongoing eligibility for LTd benefits. This barrier to recovery was resolved, in part, by allowing the SISIP administrator to access medical data from other government sources and by establishing proxy indicators for determining a person's ongoing level of disability. a proxy would include the recognition of "total disability" under other disability programs such as the Canada Pension Plan. For members released after n ovember 30, 1989, the defendant has agreed unconditionally to treat all zero sum members as disabled during the initial 24-month own occupation disability period.

[13] For class members who disagree with the defendant's assessment of disability or with the amount payable, a simple and binding appeal process has been established. Class counsel have undertaken to represent those members on any appeal brought before an agreed and experienced arbitrator who will be paid by the defendant.

[11] Pour tenir compte des difficultés vécues par certains des membres du groupe, les parties ont convenu de créer un fonds de perfectionnement de 10 millions de dollars, qui sera géré pendant une période de 15 ans par l'a ssociation des universités et des collèges du Canada. Les membres du groupe et leur famille pourront avoir accès à ce fonds en vue d'études à temps partiel et à temps plein, et on s'attend à ce que des bourses allant jusqu'à 1 300 dollars puissent être accordées à chaque demandeur admissible.

[12] Les parties ont aussi négocié un processus simplifié quant à la gestion du paiement des remboursements et quant au règlement des différends possibles quant aux réclamations. Plus précisément, un certain nombre de membres du groupe ont été visés par des compensations effectuées au titre de la *Loi sur les pensions* qui excédaient la valeur de leurs prestations d'a IP du Ra RM. Ces membres en sont venus à être désignés sous le nom de bénéficiaires à « somme zéro ». Il était difficilement possible d'établir si ceux-ci étaient constamment admissibles aux prestations d'a IP, parce que l'administrateur du Ra RM n'avait pas gardé leurs renseignements financiers et médicaux. Cet obstacle au recouvrement a été levé, en partie, en permettant à l'administrateur du Ra RM d'avoir accès aux données médicales provenant d'autres sources gouvernementales et en établissant des indicateurs approximatifs pour déterminer le degré constant d'invalidité d'une personne. Ce calcul tenait compte d'une reconnaissance « d'invalidité totale » au titre d'autres programmes de gestion de l'invalidité, comme celui du Régime de pensions du Canada. Pour les membres libérés après le 30 novembre 1989, la défenderesse a consenti, sans condition, à considérer comme invalides tous les membres à somme zéro au cours de la période de 24 mois initiale correspondant à leur emploi antérieur.

[13] u n processus d'appel simple et exécutoire a été établi pour les membres du groupe qui sont en désaccord avec l'évaluation de la défenderesse quant à l'invalidité ou avec la somme devant leur être versée. Les avocats du groupe se sont engagés à représenter les membres dans le cadre de tout appel interjeté à cet égard, lesquels seront instruits par une arbitre expérimentée, au sujet de laquelle les parties se sont entendues et dont la rémunération sera assurée par la défenderesse.

[14] The proposed settlement also provides for the appointment of a monitor who will be responsible for assessing the defendant's compliance with its terms. The monitor will report quarterly and will be paid by the defendant.

[15] Finally, save for a remaining issue between the parties concerning the calculation of Consumer Price Index (CPI) benefits payable under the SISIP policy (to be resolved later by the Court), the settlement provides for a release of the defendant from further liability in connection with claims arising, or which could have been raised, in this litigation.

The Views of Class Members

[16] The preliminary notice of settlement invited class members to write to counsel either supporting or opposing the terms of settlement. Two hundred and sixty-nine responses were received by counsel and submitted by affidavit to the Court. a small number of class members wrote directly to the Court. a t the hearing of the motion to approve the proposed settlement, a number of class members appeared and, of those, several addressed the Court. The vast majority of those submissions expressed strong approval of the terms of settlement including the claim to legal costs. Only 15 of the written submissions expressed general disagreement with the settlement and another 18 opposed only the claim to legal fees. a further 30 class members advocated for the defendant to satisfy the claim to legal fees advanced by class counsel.

[17] The overwhelming tone of the submissions to the Court was complimentary to Mr. Manuge and to his legal team and strongly supportive of the settlement. a few examples will be sufficient to illustrate this general view. g eorge Hrynewich wrote the following:

[14] Le règlement proposé prévoit aussi la nomination d'un surveillant, qui aura la responsabilité de vérifier si la défenderesse se conforme aux modalités du règlement. Le surveillant présentera un rapport chaque trimestre et sera rémunéré par la défenderesse.

[15] e n dernier lieu, à l'exception d'un différend qui reste à trancher entre les parties concernant le calcul de l'indice des prix à la consommation (IPC) concernant les prestations payables au titre de la police du Ra RM (et qui sera tranché à une date ultérieure par la Cour), le règlement prévoit la libération de la défenderesse à l'égard de toute responsabilité en lien avec les réclamations qui découlent du présent litige ou qui auraient pu y être soulevées.

L'opinion des membres du groupe

[16] L'avis préliminaire de règlement invitait les membres du groupe à écrire à leurs avocats pour exprimer leur appui ou leur opposition aux modalités du règlement. Les avocats ont reçu 269 réponses, qu'ils ont produites à la Cour par voie d'affidavit. u n petit nombre de membres du groupe ont écrit directement à la Cour. u n certain nombre de membres du groupe étaient présents lors de l'audition de la requête visant l'approbation du règlement proposé, et plusieurs d'entre eux se sont adressés à la Cour. Ils y exprimaient, dans la grande majorité de leurs observations, leur forte approbation envers les modalités du règlement, y compris quant à la réclamation relative aux honoraires. Seules 15 des observations écrites témoignaient d'un désaccord général quant au règlement, et 18 autres relataient uniquement un désaccord quant à la réclamation des frais juridiques. d e plus, 30 membres du groupe ont pris position pour que la défenderesse fasse droit à la réclamation des honoraires formulée par les avocats du groupe.

[17] Les observations formulées à la Cour consistaient, en très grande majorité, en des compliments envers M. Manuge et son équipe d'avocats ainsi qu'en un fort appui envers le règlement. Quelques exemples suffiront pour illustrer cette opinion générale. M. g eorge Hrynewich a rédigé ce qui suit :

a s for the settlement, I will get back what was clawed back by SISIP. The interest amounts are fine as far as I am concerned, because honestly, I probably would have spent the money and not made any interest on it. Lawyer fees—of course everyone would like to see things like this lower, but I was expecting them to be higher, so I feel that they are fair. They did a lot of work for us and put up with a lot. It would be nice to see them give Mr. Manuge a little bit more for his work in starting the suit and carrying on with it. We cannot escape income tax, and I would rather see them hold back too much now and have the Canada Revenue a gency (CRa) give me a refund later, than have to scramble to pay money back to CRa next year. In summary, I have to say that I am satisfied that we accomplished the main goals that I wanted to see accomplished when I joined this lawsuit. I did not join this expecting to get rich and I think the settlement is reasonable and fair.

[TRADUCTION] Le règlement me permettra de récupérer ce que le Ra RM m'a arraché. Le montant à titre d'intérêts est acceptable en ce qui me concerne, parce qu'honnêtement, j'aurais probablement dépensé l'argent et je n'aurais gagné aucun revenu d'intérêt. Les honoraires des avocats? C'est certain que tout le monde aimerait que ces frais-là soient moins élevés, mais je m'attendais à ce qu'ils soient plus élevés, de sorte que j'estime qu'il sont justes. Ils ont travaillé beaucoup pour nous et ils ont dû composer avec plusieurs problèmes. Ce serait bien si M. Manuge pouvait en obtenir un peu plus pour tout le travail qu'il a fait pour lancer l'action en justice et la poursuivre. On ne peut échapper à l'impôt sur le revenu, et je préférerais plutôt que l'a gence du revenu du Canada (l'a RC) retienne trop d'argent et qu'elle me rembourse plus tard, plutôt que d'avoir à trouver les moyens de lui redonner de l'argent l'année prochaine. e n bref, je dois dire que je suis convaincu que nous avons atteint les buts principaux que je voulais qu'on accomplisse lorsque je me suis greffé à cette action en justice. Je ne m'y suis pas joint en m'attendant à devenir riche et je crois que le règlement est raisonnable et juste.

Perhaps most of all I would like to see this end, and end while we are ahead. If someone could promise me that I would definitely get more money, but that it would take several more years and might cause us to lose some of the other things we have gained, I would say no thanks. You would have to be able to guarantee that I would get hundreds of thousands of dollars, if not a million, before I would say that I would even think about it. But this is just my opinion and I will respect the opinion of the majority of the suit members, as well as the judgment and decisions of the court.

Peut-être, et surtout, j'aimerais que ce processus prenne fin, et qu'il prenne fin alors que nous avons un règlement favorable. Si quelqu'un me promettait que j'obtiendrais définitivement plus d'argent, mais que cela pourrait nécessiter plusieurs années supplémentaires et nous faire perdre certains de nos autres gains, je lui dirais non merci. Cette personne devra pouvoir me garantir que j'obtiendrais des centaines de milliers de dollars, voire un million, avant que je lui dise que je songerais même à y penser. Ce n'est que mon avis, et je respecte l'opinion de la majorité des membres du groupe, ainsi que le jugement et les décisions de la Cour.

Marcel Pellerin wrote:

Hello my name is Marcel Pellerin and I vote Ye S to accept this settlement proposal.

I would have liked more tax relief, however I am very pleased that this whole thing is almost over.

The stress anxiety and physical illness that this has caused me over the last 10 years is more than I could continue to bare.

Thank you so very much to our legal team and Mr. Manuge. You have achieved a wonderful thing for the class [i]ncluding me and my teenage daughter.

Marcel Pellerin a écrit ce qui suit :

[TRADUCTION] Bonjour, je m'appelle Marcel Pellerin et je vote POuR l'acceptation de cette proposition de règlement.

J'aurais aimé bénéficier de plus d'allègements fiscaux, mais je suis cependant très content que toute cette histoire soit presque terminée.

Je ne pourrais plus continuer d'endurer le stress, l'anxiété et les problèmes de santé physique que l'affaire m'a causés au cours des dix dernières années.

Merci beaucoup à notre équipe d'avocats et à M. Manuge. Vous avez obtenu un merveilleux résultat pour le groupe, [n]otamment pour moi et pour ma fille adolescente.

d ana Morris wrote:

I would like to thank you and your staff for the work you have done on our behalf with this Class a ction. This was a

d ana Morris a écrit ce qui suit :

[TRADUCTION] J'aimerais vous remercier, vous et votre personnel, pour tout le travail que vous avez fait pour notre

monumental task that clearly was not for the weak. Your diligence and professionalism should set a standard for all to emulate.

I still find it difficult, no, impossible to guess-estimate the amount that would come our way however at this point it is a mute point! Had it not been for the courage of d ennis Manuge and Peter d riscoll, as well as their determination to see it through, we (the class members) would have absolutely nothing to look forward or dream about.

I, as a class member and disabled Veteran, with my family, support the a greement and the proposed legal fee percentage as outlined by McInnes Cooper in the email dated 9 January 2013 sent to all Class Members.

I can't say this enough, "THan K YOu so very much" for giving us hope and "a little piece of ourselves back".

[18] g iven the strong support for the settlement expressed by the vast majority of class members who made submissions and the general notoriety of this case and its outcome within the community of disabled veterans, I am satisfied that the settlement is viewed very favourably by almost all class beneficiaries. Certainly, if there was general dissatisfaction with the settlement, I would have expected that more than a few members of the class would have expressed their concerns to the Court.

[19] It is apparent from the submissions received from class members that some of the opponents to the proposed settlement mistakenly believe that the Court has the authority to unilaterally amend its terms. With the exception of the approval of legal fees under rule 334.4 of the Rules, the Court has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety.

[20] Three recurring issues of concern to some class members had to do with the payment of income tax on retroactive payments of LTd income, the unwillingness of the government to contribute to the legal costs incurred by the class and the absence of an award for

compte dans le présent recours collectif. Il s'agissait d'une tâche monumentale, pour laquelle il fallait manifestement des nerfs solides. La minutie et le professionnalisme dont vous avez fait preuve devraient être la norme à imiter.

Je trouve toujours qu'il est difficile… non, impossible, d'estimer les sommes qui nous seront accordées; cela dit, à ce stade-ci, cela n'a pas d'importance! Si ce n'avait été du courage de dennis Manuge et de Peter driscoll, ainsi que de leur détermination à aller jusqu'au bout, nous (les membres du groupe) n'aurions rien à quoi nous attendre, ni à espérer.

À titre de membre du groupe et d'ancien combattant invalide, j'appuie, tout comme ma famille, l'accord et le pourcentage d'honoraires, tels que décrits par McInnes Cooper dans le courriel daté du 9 janvier 2013 et envoyé à tous les membres du groupe.

Je ne saurais assez dire « MERCI beaucoup », pour nous avoir donné de l'espoir ainsi que « redonné une petite partie de nous-mêmes ».

[18] Compte tenu du fort appui envers le règlement qui a été exprimé par la vaste majorité des membres du groupe ayant présenté des observations ainsi que de la notoriété générale de la présente affaire et de son issue au sein de la communauté des vétérans invalides, je suis convaincu que le règlement est perçu de manière très favorable par presque tous les bénéficiaires du groupe. Si l'insatisfaction à l'égard du règlement était généralisée, je me serais certes attendu à ce que plus que quelques membres du groupe aient fait part de leurs réserves à la Cour.

[19] a u vu des observations des membres du groupe, il appert que certains des opposants au règlement proposé croient, à tort, que la Cour a le pouvoir d'en modifier les modalités de manière unilatérale. À l'exception de l'approbation des honoraires en vertu de la règle 334.4 des Règles, la Cour n'a pas le pouvoir de modifier un règlement conclu entre les parties ou de leur imposer ses propres modalités. Le rôle de la Cour se limite plutôt à approuver ou à rejeter un règlement dans son intégralité.

[20] Le paiement d'impôt sur le revenu tiré des prestations rétroactives d'a IP, la réticence du gouvernement à contribuer au paiement des frais juridiques engagés par le groupe et l'absence d'indemnité à titre de dommages-intérêts généraux ou punitifs étaient trois questions

general or punitive damages. a few individuals had specific concerns including the mother of a deceased veteran who objected to the exclusion of extended family from the class.

[21] The concern expressed by a few members of the class about the failure to incorporate a recovery for general damages is not persuasive. This was a breach of contract claim where such recoveries are infrequently recognized and certainly not in substantial amounts. Counsel also points out with some justification that the agreed $10 million bursary fund represents a form of surrogate recovery for the personal hardships experienced by some members of the class over the years. Protecting claims to general damages would also have required class members to produce individual medical evidence and presumably to testify about the hardships they had experienced. In my view such an approach would have been more time-consuming, expensive and complex than warranted by the benefits that would likely have been generated.

[22] The criticism that the settlement ought to have imposed upon the government an indemnity obligation for legal costs fails to recognize that in this Court legal costs are not, except in exceptional circumstances, payable by either party to a class proceeding regardless of the outcome: see rule 334.39 of the Rules. This provision was adopted to eliminate a practical barrier to the commencement of a class proceeding by a representative plaintiff who might otherwise be exposed to a substantial costs award if the case was ultimately unsuccessful. In the absence of any provision in our Rules for the separate payment of costs, it was not unreasonable for the parties to negotiate a settlement that provided for legal costs to be borne out of the settlement proceeds.

récurrentes au sujet desquelles certains membres du groupe avaient des réserves. Quelques personnes étaient préoccupées par des points précis, dont notamment la mère d'un ancien combattant décédé, qui s'opposait au fait que les membres de la famille élargie soient exclus du groupe.

[21] Les réserves exprimées par quelques membres du groupe à propos du défaut d'inclure une indemnité à titre de dommages-intérêts généraux ne sont pas convaincantes. Il s'agissait d'une réclamation relative à la violation d'un contrat, une situation dans laquelle on accorde rarement de telles indemnités, dont le montant n'est certainement pas substantiel. Les avocats soulignent aussi, non sans justification, que le fonds de perfectionnement de 10 millions de dollars au sujet duquel les parties se sont entendues représente une forme d'indemnité de remplacement pour les difficultés personnelles vécues par certains des membres du groupe au fil des ans. Le maintien des réclamations en dommages-intérêts généraux aurait également exigé de chacun des membres du groupe qu'il produit une preuve médicale et, possiblement, qu'il livre un témoignage au sujet des difficultés qu'il a vécues. Je suis d'avis qu'une telle démarche aurait nécessité plus de temps et de ressources financières, et qu'elle aurait été plus complexe que ne le justifieraient les avantages pécuniaires qui en auraient découlé.

[22] La critique selon laquelle le règlement aurait dû imposer au gouvernement une obligation d'indemniser eu égard aux dépens ne tient pas compte du fait que, sauf dans des circonstances exceptionnelles, la Cour n'adjuge pas les dépens à ni l'une ni l'autre des parties dans le contexte d'un recours collectif, et ce, peu importe l'issue du recours : voir la règle 334.39 des Règles. Cette disposition avait été adoptée dans le but d'éliminer un obstacle pratique à l'introduction d'un recours collectif par un représentant demandeur, car, sinon, ce dernier pourrait être exposé à une importante adjudication des dépens s'il devait ultimement être débouté. Vu que nos règles ne contiennent pas de dispositions prévoyant que les dépens puisse être payés séparément, il n'était pas déraisonnable de la part des parties de négocier un règlement portant que les dépens pouvaient être intégrés au produit du règlement.

[23] a few members of the class complain that income tax will be payable on their retroactive LTd payments. Taxes are, however, the inevitable consequence of the application of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, and the manner in which SISIP LTd premiums were paid over the years. u nder the proposed settlement, class members are entitled to a 3.27 percent gross up for taxes and will be able to elect to receive benefits over time if that creates a more favourable tax outcome. These measures will mitigate the impact of income tax on taxable recoveries. It must also be kept in mind that had class members received their full LTd benefits in accordance with the SISIP policy that income would have been taxable at the time of receipt.

[24] n o class action settlement will ever be perfect. Recovery is always limited to those who meet the definition of a class member under the terms of certification. In cases like this involving thousands of unique individual claims, it is impossible and undesirable to treat every beneficiary equally in either financial or administrative terms. It is inevitable that a settlement like this one will leave a few people behind or benefit some ahead of others. In this case those distinctions are of insufficient weight to reject the proposed settlement.

[25] n otwithstanding the concerns expressed by a few members of the class, I have no hesitation in approving the proposed settlement of this action. It is a generous, complete and thoughtful resolution of the issues that were raised in the litigation and it will provide substantial financial assistance to thousands of disabled CF veterans and their families. The terms of settlement are also the product of extensive negotiations between the parties. It would not serve the interests of the vast majority of class members—many of who are suffering financially—to send the parties back into further discussions to address the concerns of a handful of those who oppose the arrangement. It is also a settlement that is supported by the vast majority of class members who

[23] Quelques membres du groupe se plaignent qu'ils devront payer l'impôt sur le revenu à l'égard de leurs prestations rétroactives d'a IP. Cependant, l'imposabilité est une conséquence inéluctable de l'application de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1, et de la manière avec laquelle les primes d'a IP du Ra RM ont été payées au fil des ans. Selon le règlement proposé, les membres du groupe ont droit à une majoration de 3,27 p. 100 aux fins de l'impôt et ils pourront choisir de recevoir des prestations échelonnées, si cela leur permet d'obtenir un résultat plus avantageux sur le plan fiscal. Ces mesures atténueront l'incidence de l'impôt sur le revenu à l'égard des sommes recouvrées imposables. On doit aussi garder à l'esprit que, si les membres du groupe avaient reçu leurs prestations intégrales d'a IP conformément à la police du Ra RM, celles-ci auraient été assujetties à l'impôt au moment de leur réception.

[24] Il n'y aura jamais de règlement de recours collectif parfait. Le recouvrement est toujours confiné aux personnes qui répondent à la définition de membre du groupe, selon les modalités de l'autorisation. d ans des affaires, comme celle en l'espèce, qui concernent des milliers de réclamations uniques, il est impossible et non souhaitable de traiter chaque prestataire de la même manière, autant d'un point de vue financier que d'un point de vue administratif. Il est inévitable qu'un règlement comme celui en l'espèce laisse pour compte quelques personnes ou profite davantage à certains. d ans le cas présent, ces écarts ne sont pas assez importants pour rejeter le règlement proposé.

[25] Je n'ai aucune hésitation à approuver le règlement proposé relativement à la présente action, et ce, en dépit des réserves exprimées par quelques membres du groupe. Il constitue une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournira une aide financière substantielle aux milliers d'anciens combattants des FC ayant une invalidité et à leur famille. Les modalités du règlement sont aussi le produit des longues négociations entre les parties. Il ne servirait pas les intérêts de la grande majorité des membres du groupe — dont un bon nombre éprouvent des difficultés financières — de renvoyer les parties à la table de négociations pour qu'elles traitent des réserves exprimées par une poignée de personnes

took the opportunity to make their views known to the Court. In short, it represents a fair and reasonable compromise that is in the best interests of the class as a whole and it is, accordingly, approved.

[26] I would be remiss if I failed to recognize legal counsel, Mr. Manuge and the g overnment of Canada for the generosity of spirit and compromise that so obviously motivated their negotiations and which led to the resolution of the long-standing grievance that was at the heart of this case. Without the tenacity of Mr. Manuge, the essential goodwill of the parties and the hard work of all legal counsel involved, this settlement would not have been possible.

[27] The claim by class counsel to legal costs is a different matter. The parties do not agree on that issue and, in any event, it is left to the Court under rule 334.4 to determine the appropriate amount for those costs.

[28] a t the heart of the application of rule 334.4 is the requirement that legal fees payable to class counsel be fair and reasonable: see *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 O.R. (3d) 281 (S.C.J.) (*Parsons*). In determining what is fair and reasonable the Court must look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by the class, the existence of a fee agreement and the fees approved in comparable cases. Some authorities have also recognized a broader public interest in controlling the fees payable to the legal profession: see *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294 (*Endean*), at paragraph 73.

qui s'opposent à l'accord. Ce règlement a aussi reçu l'assentiment de la grande majorité des membres du groupe qui ont saisi l'occasion de faire connaître leur opinion à la Cour. e n résumé, le règlement constitue un compromis juste et raisonnable, qui est dans les meilleurs intérêts du groupe dans son ensemble et qui est, par conséquent, approuvé.

[26] Il serait négligent de ma part de ne pas reconnaître que les avocats, M. Manuge et le gouvernement du Canada ont fait preuve d'un esprit de générosité et de compromis, lequel a manifestement guidé leurs négociations et a conduit au règlement du différend de longue date qui était au cœur de la présente affaire. Le règlement n'aurait pas été possible sans la ténacité de M. Manuge, la bonne volonté fondamentale des parties et le travail ardu de tous les avocats concernés.

[27] C'est toutefois différent en ce qui concerne la réclamation relative aux honoraires présentée par les avocats du groupe. Les parties ne s'entendent pas quant à cette question, et, quoi qu'il en soit, il appartient à la Cour, en application de la règle 334.4 des Règles, de déterminer le montant approprié de ces honoraires.

[28] L'obligation que les honoraires accordés aux avocats du groupe soient justes et raisonnables est au cœur de l'application de l'article 334.4 des Règles : voir *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3e) 281 (C.S.J.) (*Parsons*). Lorsque la Cour est appelée à déterminer ce qui est juste et raisonnable, elle doit examiner un certain nombre de facteurs, y compris les résultats obtenus, l'étendue du risque assumé par les avocats du groupe, la quantité d'heures de travail effectivement consacrées au litige, le lien de causalité entre les efforts déployés par les avocats et le résultat obtenu, la qualité de la représentation, la complexité des questions soulevées par le litige, la nature et l'importance du litige, la probabilité que les réclamations individuelles aient été soumises aux tribunaux de toute façon, les opinions exprimées par le groupe, l'existence d'une convention d'honoraires et les honoraires approuvés dans des affaires comparables. On a aussi reconnu, dans certaines décisions, qu'il existe un intérêt public général à ce qu'un contrôle soit exercé sur

les honoraires payables aux avocats : voir *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294 (*Endean*), au paragraphe 73.

The Quality of Legal Representation and the Results a chieved

[29] The certification and liability determinations that provided the impetus for this settlement resulted from the skillful and tenacious advocacy of class counsel in the context of an adversarial contest involving equally skilled and tenacious opposing counsel. The issues were thoroughly briefed and persuasively argued and there is no question that the high quality of the legal work performed by class counsel led to the favourable liability outcome.

[30] The terms of settlement are equally impressive. e very dollar deducted will be returned to class members or their families with appropriate interest. n otwithstanding the impact of legal fees, the amounts recovered by class members will provide meaningful and, in many cases, badly needed compensation. The defendant's withdrawal of its limitation defences will add many more claimants to the class and will allow for recoveries dating back to 1976. a $10 million bursary program will be put in place as a surrogate for potential claims to general damages. a s discussed above, general damages are notoriously difficult to prove in breach of contract cases. That is particularly true for cases where claimants are medically disabled and the psychological impacts arising from financial deprivation are often hard to isolate from other underlying conditions. The solution adopted by the parties to resolve this issue was novel and creative. The same can be said for the inclusion of surviving spouses and dependant children in lieu of the immense difficulties that would arise from involving the estates of deceased members. Simple and cost effective measures have been put in place to resolve any ongoing disputes about entitlements and it is anticipated that the take-up rate for beneficiaries will approach 100 percent. These are results that would not have been reasonably contemplated by anyone at the outset of this litigation. Indeed, if settlement negotiations had been undertaken

La qualité de la représentation juridique et les résultats obtenus

[29] Les décisions relatives à l'autorisation de recours collectif et à la responsabilité, lesquelles étaient à l'origine du règlement, découlaient d'une représentation habile et tenace de la part des avocats du groupe dans le contexte d'un processus contradictoire qui les opposait à des avocats tout aussi habiles et tenaces. Les questions en litiges ont été abordées en profondeur et ont été plaidées de manière convaincante; il ne fait aucun doute que la grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable à leurs clients quant à la question de la responsabilité.

[30] Les modalités du règlement sont tout aussi impressionnantes. Chaque dollar déduit sera remboursé aux membres du groupe ou à leur famille, avec les intérêts applicables. a bstraction faite de l'incidence des honoraires, les sommes recouvrées par les membres du groupe constitueront une indemnisation valable et qui, pour nombre de ces derniers, était grandement nécessaire. Le fait que la défenderessse ait retiré ses allégations en défense fondées sur les limites à la couverture permettra à d'autres demandeurs de s'ajouter au recours collectif, ainsi que le recouvrement de sommes datant de 1976. u n fonds de perfectionnement de 10 millions de dollars sera établi, à titre d'indemnité de remplacement eu égard à d'éventuelles réclamations en dommages-intérêts généraux. Comme il a été discuté ci-dessus, il est notoire qu'il est difficile de prouver l'existence de dommages de droit dans un cas de violation de contrat. Cela se révèle particulièrement vrai dans des cas où les demandeurs ont une invalidité attestée par un médecin, et les incidences psychologiques découlant du manque d'argent sont souvent difficiles à isoler des autres facteurs sous-jacents. La solution retenue par les parties pour résoudre le présent litige était novatrice et créative. On peut en dire de même de l'inclusion des conjoints survivants et des enfants à charge, plutôt que de faire entrer en jeu la succession des membres du groupe qui sont décédés, avec les énormes difficultés

before my judgment was rendered, a reasonable outcome would have been substantially less favourable to the class than this one. The excellence of the legal representation provided by class counsel and the success that was achieved in the settlement negotiations are factors that favour a significant premium in the assessment of costs.

que ce processus entraînerait. d es mesures simples et efficientes ont été mises en place pour résoudre tout différend qui persisterait concernant les prestations, et on s'attend à ce que les prestataires acceptent celles-ci dans une proportion approchant 100 p. 100. Il s'agit de résultats qui n'auraient pas été raisonnablement envisagés par quiconque au début du présent litige. e n fait, si les négociations quant au règlement avaient été entreprises avant que j'aie rendu mon jugement, l'issue raisonnablement envisageable aurait été substantiellement moins favorable aux membres du groupe que celle en l'espèce. L'excellente représentation juridique offerte par les avocats du groupe et le succès obtenu dans le contexte des négociations quant au règlement sont des facteurs qui militent en faveur d'une majoration importante dans la taxation des dépens.

Litigation Risk

[31] There can be no doubt that legal counsel for the class exposed themselves to a significant level of risk in taking on this case. Once the case was finally certified as a class action, counsel were committed to bringing it to a final conclusion on behalf of all of the members of the class: see *Slater Vecchio LLP v. Cashman*, 2013 BCSC 134, [2013] 8 W.W.R. 392.

[32] In the ordinary course of this type of litigation, counsel could expect to be engaged for many years. In this case tens of thousands of pages of documents were expected to be discoverable and extensive witness examinations and other pre-trial work was contemplated. When class counsel accepted the retainer there was no expectation that the determinative legal issue would be resolved in a summary way and that no appeal would be taken from that decision. g iven the defendant's adversarial approach to the motion to certify, counsel would have assumed that they were exposing themselves to a financial risk measured in the potential loss of professional time and disbursements of probably tens of millions of dollars. This was also not a case where the defendant's liability approached a level of certainty. The claim to Charter relief [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (u .K.)

Le caractère risqué du litige

[31] Il ne fait aucun doute que les avocats du groupe se sont exposés à un important degré de risque lorsqu'ils ont accepté le mandat quant à la présente affaire. u ne fois que l'affaire avait ultimement été autorisée comme recours collectif, les avocats étaient tenus de la porter jusqu'à sa conclusion définitive, pour le compte de tous les membres du groupe : voir *Slater Vecchio LLP v. Cashman*, 2013 BCSC 134, [2013] 8 W.W.R. 392.

[32] d ans le cours normal de ce type de litige, les avocats peuvent s'attendre à ce que leurs services soient retenus pendant de nombreuses années. e n l'espèce, on s'attendait à ce que des dizaines de milliers de pages de preuve documentaire soient communiquées; des interrogatoires exhaustifs de témoins ainsi que d'autres tâches préalables au procès étaient aussi envisagés. Lorsque les avocats du groupe ont accepté le mandat de représentation en justice, on ne s'attendait pas à ce que la question juridique déterminante soit réglée de manière sommaire et à ce que cette décision ne fasse pas l'objet d'un appel. Compte tenu de l'opposition exprimée par la défenderesse à l'égard de la requête en autorisation, les avocats auraient assumé qu'ils s'exposaient à un risque financier pouvant se mesurer en une possible perte d'heures de travail professionnel et en des débours qui atteindront probablement des dizaines de millions de dollars. Il ne s'agissait pas non plus d'une affaire où la responsabilité

[R.S.C., 1985, a ppendix II, n o. 44]] was doubtful at best and the point of contractual interpretation that ultimately drove the settlement was neither a sure thing nor invulnerable to appeal. While there was likely a political dimension to the ultimate settlement, it is doubtful that much, if anything, would have been recovered if my liability ruling had been unfavourable to the class and had then withstood an appeal.

de la défenderesse était presque chose certaine. L'issue de la réclamation quant au redressement fondé sur la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-u .) [L.R.C. (1985), appendice II, nº 44]] était douteuse dans le meilleur des cas, et l'élément d'interprétation contractuelle qui a, en fin de compte, conduit au règlement n'était ni une certitude ni blindé contre un appel. Bien qu'il y eût possiblement une dimension politique au règlement définitif, il est peu probable qu'une telle somme eut été recouvrée, le cas échéant, si ma décision quant à la responsabilité avait été défavorable au groupe et qu'elle avait ensuite été confirmée en appel.

[33] e ven the motion to certify this action exposed counsel to considerable risk. a lthough my decision to certify was reinstated by the Supreme Court of Canada, the likelihood of obtaining leave to that Court was only about one in ten. Furthermore, that decision turned on a contentious issue of jurisdictional law that had long been unresolved in the national jurisprudence. Counsel for Mr. Manuge undertook a three-year process to achieve certification. They also assumed tens of thousands of dollars of out-of-pocket expenses and agreed to indemnify Mr. Manuge for his potential exposure to legal costs before the Supreme Court of Canada.

[33] Même la requête en autorisation de l'action comme recours collectif exposait les avocats à un degré de risque considérable. Bien que ma décision d'autoriser le recours collectif ait été rétablie par la Cour suprême du Canada, la probabilité d'obtenir l'autorisation de pourvoi devant cette cour n'était d'environ qu'une chance sur dix. d e plus, l'arrêt de la Cour suprême du Canada était centré sur une question contestée en matière de droit judiciaire qui subsistait depuis longtemps dans la jurisprudence canadienne. Les avocats de M. Manuge ont entrepris un processus de trois ans pour obtenir l'autorisation du recours collectif. Ils ont aussi pris en charge des dizaines de milliers de dollars de frais remboursables et ils ont accepter d'indemniser M. Manuge pour sa possible condamnation aux dépens devant la Cour suprême du Canada.

[34] The litigation risk that class counsel assumed is also illustrated by the fact that the grievance that was at the centre of the case had been well known for more than 30 years and had attracted no litigation either individually or as a class proceeding until Mr. Manuge's claim was taken up by Mr. Peter d riscoll in 2007.

[34] Le risque assumé par les avocats du groupe en lien avec le litige s'illustre aussi par le fait que le différend qui était au cœur de l'affaire était bien connu depuis plus de 30 ans et que celui-ci n'avait pas été judiciarisé, que ce soit à titre individuel ou à titre de recours collectif, jusqu'à ce que Mᵉ Peter d riscoll accepte, en 2007, le mandat concernant la réclamation de M. Manuge.

[35] Counsel for the defendant points out that the litigation risk decreased significantly once a decision was taken not to appeal my judgment. In the result, it is argued that the value of professional time incurred by class counsel after that point ought to be discounted.

[35] Les avocats de la défenderesse soulignent que la décision de ne pas interjeter appel de mon jugement a fait diminuer de manière considérable le risque lié au litige. Par conséquent, ils ont prétendu que la valeur rattachée aux heures consacrées au travail professionnel par les avocats du groupe après ce moment-là ne devrait pas faire partie du calcul.

[36] Counsel for the class argues that the defendant's initial opposition to the proceeding was the cause of much of the legal work that was incurred. a ccording to this view, the defendant's initial conduct in the defence of the claim diminishes the weight of its current argument that the claim to legal fees is excessive.

[37] a t this stage, I am not particularly concerned about the positions taken by the parties before the settlement was achieved. It is sufficient to observe that the litigation risk assumed by class counsel is primarily measured by the risk they assumed at the outset of the case. This point was made by Justice Warren Winkler in *Parsons*, above, in the following passages [at paragraphs 29, 36–38 and 42]:

> Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.
>
> …
>
> It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

[36] Les avocats du groupe prétendent que la plupart des heures de travail juridique qu'ils ont consacrées à la présente affaire étaient attribuables au fait que la demanderesse s'était initialement opposée au recours collectif. Selon eux, la conduite initiale de la défenderesse dans sa défense contre la réclamation diminue le poids de l'argument qu'elle présente à ce stade-ci, selon lequel les honoraires réclamés sont excessifs.

[37] À cette étape-ci, je ne me préoccupe pas particulièrement des positions que les parties avaient adoptées avant de conclure le règlement. Il suffit de relever que le risque lié au litige que les avocats du groupe ont assumé est surtout apprécié en fonction du risque assumé au tout début de l'affaire. Ce point a été souligné par le juge Warren Winkler dans la décision *Parsons*, précitée, dans les passages suivants [aux paragraphes 29, 36 à 38 et 42] :

> [TRADUCTION] d e plus, un recours collectif introduit des complications supplémentaires. Les recours collectifs complexes se subsument dans les heures productives des avocats. Le risque assumé par les avocats n'est pas simplement en fonction des probabilités de gagner ou de perdre sa cause. Il faut aussi s'arrêter aux ressources investies par l'avocat du groupe et aux incidences que cela aura dans l'éventualité où le recours devait échouer. Le fait d'avoir gain de cause dans l'un des deux recours collectifs pourrait être une marque de réussite raisonnable. Cependant, pour l'avocat qui est débouté lors de son premier recours collectif, l'épuisement total des ressources dont il dispose pourrait faire en sorte qu'il serait incapable de piloter une autre action. Par conséquent, le véritable risque assumé par l'avocat du groupe n'est pas la simple réciproque de « l'évaluation de la probabilité de succès » de l'action, même si ce calcul ne repose sur aucun degré de certitude. À un certain point, un avocat qui défend un groupe dans le contexte d'un recours collectif complexe peut véritablement, pour reprendre les mots employés par M. Strosberg, « parier son cabinet », et ce, sans égard au degré de risque. Il faut en tenir compte lors de l'appréciation du facteur de « risque » eu égard aux honoraires appropriés pour les avocats.
>
> […]
>
> Il appert du dossier que, même si le présent litige a pris la forme d'une négociation en vue d'un règlement à compter du milieu de l'année 1998, les risques assumés par l'avocat du groupe n'en étaient pas moins réels que s'il avait consacré ses heures professionnelles à l'obtention d'une décision dans un processus judiciaire, et ce, à tous les stades du litige.

In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. a ccordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. a s the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed.

…

The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a

d e plus, la législation autorisant les recours collectifs introduit plusieurs caractéristiques qui distinguent ces actions d'un litige ordinaire. u n des aspects qui alourdit le risque inhérent aux recours collectifs est l'exigence que tout règlement conclu soit approuvé par la cour. d e longues négociations nécessitent que les avocats et les parties y consacrent du temps et des ressources. Cependant, la cour n'approuvera pas un règlement de recours collectif qu'elle juge ne pas être dans le meilleur intérêt du groupe, et ce, sans égard à la question de savoir si les avocats du groupe sont d'avis contraire. Par conséquent, les avocats du groupe peuvent se trouver dans la situation d'avoir consacré du temps et des ressources en vue de la négociation d'un règlement, qu'ils croient être dans le meilleur intérêt du groupe, seulement pour réaliser que la cour n'approuvera pas le règlement qui a été conclu. Bien que cette situation constitue un risque en soi, elle entraîne aussi un avantage pour le défendeur, qui peut réussir à prolonger les négociations jusqu'à ce que les ressources des avocats du groupe soient épuisées, avant de présenter une « offre définitive de règlement » qui peut ultimement ne pas être approuvée par la cour. d ans de tels cas, les avocats du groupe peuvent avoir épuisé leurs ressources en tentant d'obtenir un règlement raisonnable et, par conséquent, être incapables de poursuivre le litige. Il s'ensuit que, dans le contexte d'un recours collectif, le risque n'est pas simplement apprécié en fonction des questions de savoir si un procès est prévu et si le groupe aura gain de cause. Il existe plutôt des risques inhérents à l'adoption et au maintien d'une stratégie donnée en vue du règlement de l'affaire.

Compte tenu de ce qui précède, je ne peux souscrire à la prétention selon laquelle le degré de risque dans la présente affaire était moins élevé du fait que les parties ont choisi de négocier. d e plus, contrairement à ce que certains intervenants ont fait observer, il semble que le fait que les avocats du groupe aient consacré du temps et des ressources dans les négociations occasionnait, au fur et à mesure que ces négociations continuaient, une augmentation du risque plutôt qu'une diminution. Les négociations devenaient plus difficiles du fait que les parties se rapprochaient d'un règlement, puisque les questions devenaient plus pointues, ce qui entraînait un accroissement, et non une diminution, du risque d'aboutir dans une impasse. La progression des négociations faisait en sorte qu'elles devenaient de plus en plus périlleuses.

[…]

Les dépenses des avocats du groupe, autant sur le plan du temps consacré que sur le plan financier, risquaient de devenir des pertes si un politicien au pouvoir avait décidé, pour des raisons de commodité ou de principe, de ne pas régler de recours collectifs ou d'instaurer de manière unilatérale un régime de compensation sans égard à la faute, et ainsi court-circuiter l'avocat du groupe et le litige. Il y avait toujours le

reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[38] In my view the litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others. This is a factor favouring a premium costs recovery, in part, to motivate counsel to take on difficult class litigation involving potentially deserving claims that might not otherwise be pursued.

Time and effort expended

[39] The affidavit of lead counsel, Mr. d riscoll, discloses that the two firms retained on behalf of the class worked for more than 6 years (involving 20 legal professionals) and amassed more than 8 500 hours of unbilled time. Considerable further work remains including the direct supervision of the refund process and monitoring and assisting with individual appeals. The efforts undertaken to date to respond to enquiries from hundreds of highly engaged class members have been considerable and will undoubtedly continue. Out-of-pocket expenses are now approaching $200 000 and are estimated to exceed $260 000 before the case is concluded. a ll of the file expenses have been borne by counsel and were, in considerable measure, at risk. Class counsel value their current unbilled time at more than $3.2 million. This seems to me to be a reasonably fair valuation. However, it is important to recognize that much of the billable time expended and all of the file disbursements have been carried by these law firms for several years and that considerable work remains to monitor and manage the individual claims of class members.

danger intrinsèque qu'un règlement pancanadien puisse être impossible à obtenir, en raison de la réticence d'un gouvernement en particulier ou du groupe partie à une action en particulier à approuver une entente.

[38] Je suis d'avis que le risque assumé par les avocats du groupe en lien avec le litige était important et qu'il excédait presque assurément le degré de tolérance d'autres confrères. Il s'agit d'un facteur militant en faveur d'une majoration des frais recouvrés, en partie pour inciter les avocats à accepter des mandats relatifs à des recours collectifs ardus qui concernent des réclamations potentiellement fondées qui pourraient sinon être abandonnées.

Le temps et les efforts consacrés

[39] L'affidavit de Me d riscoll, l'avocat principal, révèle que les deux cabinets d'avocats retenus pour le compte du groupe ont travaillé plus de 6 ans sur le recours collectif (qui a nécessité 20 avocats) et qu'ils ont investi plus de 8 500 heures de travail non facturé. Il leur reste d'autres tâches considérables à accomplir, y compris superviser directement le processus de remboursement ainsi que fournir de l'aide relativement aux appels interjetés à titre individuel par les membres du groupe et suivre l'évolution de ces appels. Ils ont déployé des efforts considérables jusqu'à maintenant afin de répondre aux demandes de renseignements provenant de centaines de membres très actifs du groupe, et continueront sans doute de ce faire. Les frais remboursables s'élèvent maintenant à tout près de 200 000 dollars, et on estime que ceux-ci excéderont 260 000 dollars d'ici la conclusion de l'affaire. Les avocats ont assumé l'ensemble des dépenses liées au dossier, lesquelles représentaient, dans une très large mesure, un risque. Les avocats du groupe évaluent à plus de 3,2 millions de dollars leurs heures de travail non facturé à ce stade-ci. Cette évaluation me semble raisonnablement juste. Cependant, il est important de reconnaître que ces cabinets d'avocats ont assumé, pendant plusieurs années, les coûts liés à une grande partie des heures de travail facturables et l'ensemble des débours liés au dossier et qu'il leur reste un travail considérable à effectuer relativement à la surveillance et à la prise en charge des réclamations des membres du groupe à titre individuel.

The Importance of the Litigation to the Class

[40] This was important litigation dealing with a long-standing, contractual grievance involving thousands of disabled CF veterans. Since 1976, the practice of deducting *Pension Act* disability payments from SISIP LTd benefits had been the source of hardship drawing considerable third-party criticism. until my liability judgment was delivered, the government of Canada forcefully defended its position. The settlement of this class action will provide meaningful compensation for several thousand deserving CF veterans and will likely represent the fourth highest financial payout in Canadian class action history. These are factors that favour the award of a costs premium to class counsel.

L'importance du litige pour les membres du groupe

[40] Il s'agissait d'un important litige concernant un différend contractuel de longue date touchant des milliers d'anciens combattants des FC ayant une invalidité. depuis 1976, la politique de déduire les prestations d'invalidité versées au titre de la *Loi sur les pensions* des prestations d'IP du RM avait entraîné plusieurs difficultés et avait attiré plusieurs critiques de la part de tierces parties. Le gouvernement du Canada a défendu sa position avec vigueur, jusqu'à ce que je rende mon jugement quant à la responsabilité. Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d'anciens combattants des FC, et le paiement au titre de ce règlement constituera vraisemblablement le quatrième en importance de l'histoire des recours collectifs au Canada. Il s'agit de facteurs qui militent en faveur de l'octroi de dépens majorés aux avocats du groupe.

The Public Interest

[41] If there is a public interest that pertains to matters such as this, it is more properly situated around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation. In my view it is relevant in assessing the reasonableness and fairness of class action legal fees to consider the impact of those fees on the individual recoveries of class members. This, I think, is what was of concern in *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482 (*Killough*), where at paragraph 8, the Court referred to the impact of the agreed fee on the fund that would otherwise be available to the class.

L'intérêt public

[41] S'il existe un intérêt public concernant les affaires comme celle dont je suis saisi, celui-ci s'articule plutôt autour des intérêts du groupe que de l'intérêt général prétendu de la population à garder sous contrôle la compensation offerte aux avocats ayant participé au recours collectif. Je suis d'avis qu'il est pertinent de tenir compte de l'incidence des honoraires liés au recours collectif sur les sommes recouvrées par les membres du groupe pour décider si ces honoraires sont raisonnables et justes. Je crois qu'il s'agissait de la préoccupation exprimée par la Cour suprême de la Colombie-Britannique dans la décision *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482 (*Killough*), lorsqu'elle a fait mention, au paragraphe 8, des répercussions des honoraires convenus sur les sommes qui seraient sinon disponibles pour le groupe.

[42] For someone like Mr. Manuge whose claim to retroactive LTd benefits is estimated at less than $10 000, the deduction of legal fees of about $1 500 could not be considered to be unfair or unreasonable. However, for a CF veteran suffering from a major, work-limiting disability, the deduction of more than $37 000 from an award of $250 000 will result in a meaningful

[42] Pour quelqu'un comme M. Manuge, dont la réclamation aux prestations rétroactives d'IP est estimée à moins de 10 000 dollars, la déduction d'un montant de 1 500 dollars au titre des honoraires ne pourrait être considérée comme injuste ou déraisonnable. Cependant, pour un ancien combattant des FC qui a une invalidité majeure limitant sa capacité de travailler, la déduction

financial deprivation. In short, those who are arguably the most in need of their retroactive recoveries are the ones carrying most of the burden of legal costs. This is a factor that supports a reduction in the award of costs to class counsel.

d'un montant de plus de 37 000 dollars d'une indemnisation de 250 000 dollars entrainera une perte importante d'un point de vue financier. e n bref, les personnes qu'on pourrait qualifier de celles ayant le plus besoin de leurs indemnités rétroactives sont celles qui assument la plupart de la responsabilité quant aux honoraires. Il s'agit d'un facteur qui milite en faveur d'une diminution de la somme accordée aux avocats du groupe.

The Contingency Fee a greement, the Claim to a Percentage Recovery and the u se of a Multiplier

La convention d'honoraires conditionnels, la réclamation d'un pourcentage du recouvrement et le recours à un multiplicateur

[43] I accept that a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be relevant and, sometimes, a compelling consideration in the final assessment of legal fees. It strikes me, nonetheless, that such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold. I made essentially the same point in my decision to certify this proceeding in *Manuge v. Canada*, 2008 FC 624 [cited above], at paragraph 34:

[43] Je reconnais qu'une convention d'honoraires conditionnels conclue entre les avocats et un représentant demandeur dans le contexte d'un recours collectif projeté peut être pertinente et qu'elle peut parfois être une considération déterminante lors de l'examen définitif concernant les honoraires. J'ai néanmoins l'impression qu'une telle convention d'honoraires ne sera pas nécessairement une considération principale, parce que celle-ci est plus souvent signée à un stade précoce de l'affaire, où on en sait fort peu sur son déroulement futur. Il s'agit essentiellement du point que j'ai soulevé au paragraphe 34 de la décision *Manuge c. Canada*, 2008 CF 624 [précitée], au paragraphe 34, la décision par laquelle j'ai autorisé la présente instance comme recours collectif :

> One other concern raised by the Crown involves the magnitude of the contingency fee that would be payable under the terms of the retainer agreement entered into between Mr. Manuge and his legal counsel. That agreement provides for a fee of 30% of any favourable financial judgment plus disbursements. The agreement also duly notes that the fee payable "shall be subject to approval by the Court." There is certainly nothing inappropriate about a contingency fee arrangement in a case like this one where the outcome is unpredictable and where the amounts individually in issue appear insufficient to support litigation. The amount of fee payable at the end of a class proceeding is, of course, subject to assessment by the trial court and must bear some reasonable relationship to the effort actually expended and to the degree of risk assumed by counsel. I have no reservations about the ability of the Court to deal with this issue, if necessary, in the exercise of its supervisory jurisdiction.[1]

> u n autre point soulevé par la Couronne concerne l'ampleur des honoraires conditionnels qui seraient payables au titre du mandat de représentation en justice conclu entre M. Manuge et son avocat. Ce mandat prévoit des honoraires représentant 30 p. 100 de tout jugement rendu en faveur de M. Manuge, outre les débours. Le mandat précise aussi que les honoraires payables [TRADUCTION] « devront être approuvés par la Cour ». Il n'y a évidemment rien d'illégitime à ce que soit conclu un accord d'honoraires conditionnels dans un cas comme celui-ci, dont l'issue est imprévisible et où les sommes, considérées isolément, ne semblent pas justifier un recours aux tribunaux. Le montant des honoraires payables à l'issue d'un recours collectif dépendra naturellement de l'appréciation du juge de première instance et devra être proportionnel aux efforts effectivement consentis et au risque pris par l'avocat. Je n'ai aucune réserve sur l'aptitude de la Cour à examiner cet aspect, au besoin, dans l'exercise de sa fonction de surveillance[1].

[1] a lso see *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 O.R. (3d) 281 (S,C,J,), at para. 58.

[1] Voir aussi *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3e) 281 (C.S.J.), au par. 58.

[44] When Mr. Manuge entered into the fee agreement with his legal counsel, no one knew that the issue of certification would ultimately reach the Supreme Court of Canada or that the determinative liability issue would be finally resolved after a short hearing on agreed evidence and without extensive discovery or a trial. Similarly, no one could have accurately predicted the outcome of the negotiations that led to the settlement now before the Court including the willingness of the respondent to abandon what was likely a viable, if partial, limitations defence.

[45] The contingency fee agreement that was executed by Mr. Manuge and which purported to award legal fees of 30 percent of amounts recovered on behalf of members of the class is of no particular significance to this assessment. That is so because Mr. Manuge and class counsel have essentially walked away from the agreement. What they are now seeking is the approval of legal fees representing approximately 7.5 percent of the gross value of the settlement inclusive of past and future benefits. It is also proposed that the fees be payable wholly from the past amounts due to class members which would represent about 15.7 percent of the total value of the retroactive entitlements of class members.

[46] a part from the obvious fact that the fees now claimed represent about one-quarter of the amount provided for in the initial contingency fee agreement, I was not provided with a clear explanation for how the figure of $65 million was reached beyond the observation that the figure was set at less than the amount of accrued interest included within the settlement. The figure claimed for legal fees is thus not much more than a number and a very large number at that.

[47] The use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement. e ach approach has its place. The multiplier

[44] Personne ne savait, lorsque M. Manuge a conclu la convention d'horaires avec ses avocats, que la question de l'autorisation du recours collectif serait ultimement plaidée à la Cour suprême du Canada ni que la question déterminante de la responsabilité serait en fin de compte résolue après une courte audience en fonction d'une preuve produite d'un commun accord et sans qu'elle ne nécessite un long processus d'interrogatoire préalable, ni un procès. d ans la même veine, personne n'aurait pu prédire avec exactitude l'issue des négociations ayant conduit au règlement dont la Cour est saisie, ni que la défenderesse consentirait à abandonner sa défense valable, quoique partielle, relative aux limites à la couverture.

[45] La convention d'honoraires conditionnels qui a été signée par M. Manuge et qui avait pour objet de prévoir des honoraires équivalant à 30 p. 100 des sommes recouvrées pour le compte des membres du groupe n'est pas réellement importante dans le contexte du présent examen. Il en est ainsi, parce que M. Manuge et les avocats du groupe ont essentiellement renoncé à cette convention. Ils demandent maintenant l'approbation d'honoraires représentant approximativement 7,5 p. 100 de la valeur brute du règlement, y compris les prestations antérieures et les prestations futures. Ils proposent aussi que les honoraires soient en totalité payés à même les montants dus aux membres du groupe à l'égard du passé, ce qui représenterait environ 15,7 p. 100 de la valeur totale de leurs prestations rétroactives.

[46] Mis à part le fait évident que les honoraires réclamés à ce stade-ci représentent environ un quart du montant prévu dans la convention d'honoraires conditionnels initiale, on ne m'a présenté aucune explication claire quant à savoir comment en était-on arrivé à la somme de 65 millions de dollars, hormis l'observation selon laquelle cette somme a été fixée à un montant moindre que celui du montant des intérêts courus prévus dans le règlement. La somme réclamée à titre d'honoraires n'est guère plus qu'un simple nombre, qui s'avère d'ailleurs être très élevé.

[47] Il est approprié d'utiliser des pourcentages et des multiplicateurs pour déterminer les honoraires liés à un recours collectif, mais surtout pour vérifier leur caractère raisonnable, et non pas pour établir un montant absolu.

appears to be a tool better suited to cases where the social benefits achieved may be greater than the amounts recovered and where a percentage approach would likely under-compensate counsel. In the so-called common fund cases the use of a percentage appears to be preferred because it tends to reward success and to promote early settlement.

[48] In my view there is a danger in placing undue emphasis on either a multiplier or a percentage recovery in a case like this. My concern is the same as that expressed by Justice Ian Pitfield in *Killough*, above, in the following passages [at paragraphs 45–48]:

> With respect, other factors do not elevate the contribution of counsel in this action to the level of contribution of counsel in relation to the earlier settlement. While time accumulated on the matter and comparative multipliers are relevant and useful, caution must be exercised when using them as benchmarks for the assessment of the reasonableness of any fee. The principal concern is that there is no means of assessing whether the accumulated time was necessary and represented a reasonable and productive use of counsel's time. Class actions must not represent an open-ended invitation to accumulate time without regard to productivity.
>
> The accumulation of substantial time charges in relation to a legal matter does not always justify compensation at base rates or multiples thereof. Conversely, low time endeavours may justify fees that are many multiples of the book value of accumulated time.
>
> Multipliers and percentage of recovery comparisons are completely arbitrary. The efficacy of multipliers is affected by the reasonableness, which cannot be assessed with any confidence, of the base of accumulated time and hourly rates from which the multiplier is derived. The percentage of recovery comparison is reduced and therefore made to appear more favourable by comparing the total fee to a global settlement amount that included the benefit pool, the administration fund, goods and services tax and provincial sales tax where applicable, and the aggregate of legal fees. Legal fees were included notwithstanding the repeated assertion in affidavits and submissions that legal fees were independent of any other settlement consideration.

Chaque méthode a son utilité. Le multiplicateur semble être une méthode qui convient davantage à des cas où les effets sociaux bénéfiques obtenus peuvent être plus importants que les sommes recouvrées et où la méthode du pourcentage entraînerait probablement une compensation insuffisante pour les avocats. Le recours à un pourcentage semble être privilégié dans ce que l'on appelle les affaires de fonds communs, parce que cette méthode tend à récompenser la réussite et à favoriser un règlement rapide.

[48] Selon moi, il est dangereux d'accorder une importance excessive à la méthode du multiplicateur ou à celle fondée sur un pourcentage du règlement dans une affaire comme celle-ci. Je partage la préoccupation exprimée par le juge Ian Pitfield dans les passages suivants de la décision *Killough*, précitée [aux paragraphes 45 à 48] :

> [TRADUCTION] a vec égards, les autres facteurs n'ont pas pour effet d'élever l'apport des avocats dans la présente affaire au même degré que celui des avocats en lien avec le règlement antérieur. Bien que le temps consacré à l'affaire et les multiplicateurs comparatifs soient pertinents et utiles, il convient de faire preuve de prudence lorsque vient le temps d'utiliser ces facteurs comme référence pour déterminer le caractère raisonnable des honoraires. La principale préoccupation réside dans le fait qu'il n'existe pas de moyens pour établir si le temps consacré était nécessaire et s'il représentait une utilisation raisonnable et productive du temps des avocats. Les recours collectifs ne doivent pas constituer une invitation à accumuler des heures de travail sans tenir compte de la productivité.
>
> L'accumulation importante de temps facturé en lien avec une affaire juridique ne justifie pas toujours une compensation établie au moyen de taux de base ou de multiples de ceux-ci. e n revanche, des démarches qui nécessitent peu de temps peuvent justifier des honoraires plusieurs fois plus élevés que la valeur comptable aux heures consacrées.
>
> Les comparaisons entre la méthode du multiplicateur et celle du pourcentage du recouvrement sont complètement arbitraires. L'efficacité des multiplicateurs est affectée par le caractère raisonnable, qui ne peut nullement être apprécié en fonction des heures accumulées et des taux horaires desquels le multiplicateur est dérivé. La comparaison du pourcentage de recouvrement est réduite, et, par conséquent, elle semble être plus favorable en comparant les honoraires globaux à un montant global de règlement qui comprenait l'ensemble des prestations, le fonds de gestion, la taxe sur les produits et services et la taxe de vente provinciale le cas échéant, et l'ensemble des honoraires. Les honoraires ont été inclus, sans égard à l'affirmation, répétée à maintes reprises dans les

affidavits et les observations, selon laquelle les honoraires n'étaient pas liés à aucune autre considération du règlement.

In sum, while counsel must be fairly and reasonably compensated for the risk assumed by and the work done on behalf of any class, the assessment of fairness and reasonableness is ultimately more subjective than it is objective.

e n résumé, bien que les avocats doivent être compensés de manière juste et raisonnable eu égard au risque assumé et au travail effectué pour le compte du groupe qu'ils représentent, la détermination du caractère raisonnable est, en fin de compte, plus subjective qu'objective.

[49] The defendant places considerable emphasis on the relatively low value of professional time expended by class counsel and then argues for the use of typical multiplier of 1.5 to 3.5. This seems to me to be overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended. Here I agree with the views expressed by Justice g eorge Strathy in *Helm v.Toronto Hydro-Electric System Ltd.*, 2012 On SC 2602 (CanLII), 40 C.P.C. (7th) 310, at paragraphs 25–27:

[49] La défenderesse met considérablement l'accent sur la valeur relativement faible des heures de travail professionnel consacrées par les avocats du groupe et elle fait ensuite valoir que le modificateur habituel, situé entre 1,5 et 3,5, devrait être employé. Cela me semble simpliste et en grande partie insensible aux facteurs militant en faveur d'un recouvrement majoré. Il convient de récompenser l'efficacité dont les avocats ont fait preuve dans l'obtention d'un excellent résultat, et non de la décourager au moyen de l'application rigide d'un multiplicateur aux heures de travail consacrées. e n l'espèce, je souscris aux opinions exprimées par le juge geor ge Strathy dans la décision *Helm v. Toronto Hydro-Electric System Ltd*., 2012 On SC 2602 (CanLII), 40 C.P.C. (7th) 310, aux paragraphes 25 à 27 :

The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the plaintiff to enter into serious and ultimately productive settlement discussions?

[TRADUCTION] Les honoraires proposés représentent une majoration importante en comparaison à une situation où ils seraient calculés en fonction de la multiplication du temps consacré par les taux horaires réguliers. e st-ce que cela justifie pour autant de refuser de tels honoraires? Seraient-ils plus appropriés, ou moins appropriés, si le règlement avait été conclu quatre années plus tard, à la veille du procès, alors que plus d'un million de dollars en heures de travail facturable auront été accumulées? Les avocats ne devraient-ils pas être récompensés pour avoir réussi à obtenir une conclusion rapide et louable quant au présent litige? n e devraient-ils pas être félicités pour avoir adopté une stratégie dynamique et innovatrice à l'égard du jugement sommaire, laquelle a fait en sorte que le demandeur a pu entreprendre des négociations de règlement sérieuses et qui se sont en fin de compte avérées productives?

Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.

Les avocats du demandeur sont des professionnels sérieux, responsables, engagés et efficaces en matière de recours collectif. Ils font preuve d'esprit d'initiative. Ils accepteront certaines causes qu'ils perdront, ce qui leur occasionnera des conséquences importantes sur le plan financier. Ils accepteront des mandats relatifs à des affaires, pour lesquels ils ne seront pas payés pendant des années. À mon avis, ils devraient être généreusement compensés lorsqu'ils obtiennent des résultats excellents de manière rapide, comme en l'espèce.

For those reasons, I approve the counsel fee.

a lso see *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226 (Ont. S.C.J.), at paragraph 107.

[50] It can be equally unhelpful to look for guidance from authorities where legal fees have been approved as a percentage of the amounts recovered. a reasonable fee should bear an appropriate relationship to the amount recovered: see *Endean*, above, at paragraph 80. Cases that generate a recovery of a few million dollars may well justify a 25 percent to 30 percent costs award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars. Presumably that is the reason why class counsel are not relying on the initial contingency fee allowance of 30 percent. That is also the reason that the three authorities that represent the strongest comparators to this case in terms of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 O.R. (3d) 481 (S.C.J.); *Endean*, above; and *Killough*, above.[2] These comparable decisions do not support an award of costs in this case of approximately 7.5 percent or, in financial terms, $65 million.

Conclusion

[51] Having regard to all of the considerations outlined above, I will approve legal fees in an amount equal to 8 percent of the retroactive refunds payable to class beneficiaries (including the cancellation of debts owing

2 In *Baxter,* above, a costs award representing 4.87 percent of a projected payout of almost $2 billion was approved. This resulted in legal fees of between $85 and $100 million. In *Endean*, above, legal fees of $52 500 000 were approved representing 4.26 percent of the total amount recovered. In *Killough*, above, legal fees of $37 290 000 were agreed between the parties and were not to be deducted from the settlement proceeds. This figure was approved by the Court—albeit with reservations—and it represented 3.64 percent of the total award.

Pour les présents motifs, j'approuve les honoraires.

Voir aussi la décision *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226 (C.S.J. Ont.), au paragraphe 107.

[50] Il n'est pas non plus d'une grande utilité de s'inspirer des précédents dans lesquels les honoraires approuvés constituaient un pourcentage des montants recouvrés. d es honoraires raisonnables devraient avoir un lien adéquat avec la somme recouvrée : voir *Endean*, précitée, au paragraphe 80. Les affaires étant à l'origine de recouvrements de quelques millions pourraient bien justifier une adjudication des dépens correspondant à 25 à 30 p. 100 du recouvrement global. Il est plus difficile d'appuyer une telle solution lorsque la décision prévoit le recouvrement de centaines de millions de dollars. On peut supposer qu'il s'agit du motif pour lequel les avocats du groupe n'invoquent pas l'indemnité de 30 p. 100 prévue dans la convention d'honoraires conditionnels. Il s'agit aussi du motif pour lequel le pourcentage de dépens accordés dans les trois précédents qui se comparent le mieux à la présente affaire en ce qui concerne les sommes recouvrées était situé au bas de l'échelle : voir *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 R.J.O. (3e) 481 (C.S.J.); *Endean*, précitée, et *Killough*, précitée[2]. Ces décisions comparables n'appuient pas une adjudication des dépens d'approximativement 7,5 p. 100, ou, en termes financiers, 65 millions de dollars, dans la présente affaire.

Conclusion

[51] Compte tenu de tous les facteurs exposés ci-dessus, j'approuverai des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe (y compris

2 d ans la décision *Baxter,* précitée, une adjudication des dépens correspondant à 4,87 p. 100 d'un paiement projeté de presque deux milliards de dollars a été approuvée. Cela a donné lieu à des honoraires se situant entre 85 et 100 millions de dollars. d ans la décision *Endean*, précitée, des honoraires de 52 500 000 dollars ont été approuvés, ce qui représentait 4,26 p. 100 du total de la somme recouvrée. d ans la décision *Killough*, précitée, les parties ont consenti à des honoraires de 37 290 000 dollars, et ceux-ci n'ont pas été déduits des produits du règlement. Ce montant a été approuvé par la Cour — non sans réserve — et il représentait 3,64 p. 100 du montant total accordé.

by class members to Manulife Financial). This figure is approximately 4 percent of the total value of the settlement. In addition I will approve the deduction of an amount equal to 0.079 percent of refunds payable to class beneficiaries (including the cancellation of debts by class members to Manulife Financial) as an indemnity for out-of-pocket expenses. Class counsel are also authorized to deduct required goods and services tax, harmonized sales tax and/or provincial sales tax from refunds payable to class beneficiaries and to remit those amounts to the Canada Revenue a gency or to the appropriate provincial agency.

[52] I am satisfied that the above recovery of legal costs is in keeping with the fees approved in the comparable cases. More importantly it represents a sufficient incentive to counsel to take on high-risk class litigation without, at the same time, unduly impacting on the much-needed recoveries of disabled CF veterans. I am grateful to counsel for their thorough briefing of the relevant jurisprudence and, in particular, to counsel for the Minister who brought the required adversarial balance to the process.

d iscretionary Payments

[53] Class counsel have undertaken to create a fund for veterans in need of legal assistance with the allocation of $1 003 420 from their costs award. In addition they propose to pay to Mr. Manuge an honorarium of $50 000 in recognition of his significant contribution to the prosecution of this action. Several members of the class argued that Mr. Manuge ought to receive more than $50 000. However, to the extent that the Court has any control over the use of costs awarded to counsel, I do not think it appropriate that Mr. Manuge receive more than the amount described in the preliminary notice of settlement sent to class members. That was the basis on which the proposal would have been considered by class members and it is not desirable that a unilateral and *ex post facto* alteration be made at this stage. The proposal

l'annulation des dettes des membres du groupe à la Financière Manuvie). Ce montant représente approximativement 4 p. 100 de la valeur totale du règlement. d e plus, j'approuverai la déduction d'un montant correspondant à 0,079 p. 100 des sommes à rembourser aux prestataires du groupe (y compris l'annulation des dettes des membres du groupe à la Financière Manuvie), à titre d'indemnité pour les frais remboursables. Les avocats du groupe sont aussi autorisés à déduire la taxe sur les produits et services, la taxe de vente harmonisée ou la taxe de vente provinciale des sommes à rembourser aux prestataires du groupe, selon le cas, ainsi qu'à remettre ces montants à l'a gence du revenu du Canada ou à l'organisme provincial approprié.

[52] Je suis convaincu que le recouvrement des honoraires décrit ci-dessus est conforme aux honoraires approuvés dans les affaires comparables. Fait plus important, il représente un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin. J'exprime ma reconnaissance aux avocats, pour leur examen approfondi de la jurisprudence pertinente et, plus particulièrement, les avocats du ministre, qui ont joué leur rôle d'adversaire nécessaire en l'espèce.

Les paiements discrétionnaires

[53] Les avocats du groupe se sont engagés à créer un fonds d'aide juridique à l'intention des anciens combattants, par l'allocation d'un montant de 1 003 420 dollars, lequel est tiré des dépens qui leur ont été accordés. d e plus, ils proposent de payer à M. Manuge des honoraires de 50 000 dollars, en reconnaissance de son apport important relativement à la présente action. Plusieurs membres du groupe ont prétendu que M. Manuge devrait recevoir un montant supérieur à 50 000 dollars. Cependant, dans la mesure où la Cour a une forme de contrôle sur les dépens accordés aux avocats, je ne crois pas qu'il soit approprié que M. Manuge reçoive un montant supérieur à celui décrit dans l'avis préliminaire de règlement qui a été envoyé aux membres du groupe. Il s'agissait des modalités de la proposition qui aurait été

to establish a legal assistance fund for veterans is laudable and, if Court approval is required, it, too, is given.

[54] n o award of costs is made in connection with this motion.

[55] I will leave it to counsel to make the required changes to the proposed settlement order to be submitted to the Court for execution and issuance.

ORde R

THIS COu RT ORde RS that the settlement of this action is approved on the terms proposed by the parties.

THIS COu RT Fu RTHe R ORde RS that the legal costs payable to class counsel are approved on the following terms:

(a) for legal fees, by the deduction of an amount equal to 8 percent of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary;

(b) for disbursements, by the deduction of an amount equal to 0.079 percent of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary; and

(c) by the deduction from refunds payable to class beneficiaries and the remission of all required goods and services tax, harmonized sales tax and/or provincial sales tax.

examinée par les membres du groupe, et il n'est pas souhaitable d'y apporter, après coup, une modification unilatérale à cette étape-ci. La proposition de créer un fonds d'aide juridique à l'intention des anciens combattants est louable, et la Cour approuve aussi cette proposition, si cela s'avère nécessaire.

[54] a ucuns dépens ne sont accordés relativement à la présente requête.

[55] Je laisse aux avocats le soin d'apporter les modifications requises à la proposition d'ordonnance de règlement qui sera soumise à la Cour pour exécution et délivrance.

ORd Onnan Ce

La COu R ORd Onne Que le règlement relatif à la présente action soit approuvé, selon les modalités proposées par les parties.

La COu R ORd Onne en Ou TRe Que les dépens à payer aux avocats du groupe soient approuvés, selon les modalités suivantes :

a) en ce qui concerne les honoraires, par la déduction d'un montant correspondant à 8 p. 100 du remboursement et l'annulation des dettes, le cas échéant, de chaque prestataire admissible du groupe envers la Financière Manuvie;

b) en ce qui concerne les débours, par la déduction d'un montant correspondant à 0,079 p. 100 du remboursement et l'annulation des dettes, le cas échéant, de chaque prestataire admissible du groupe envers la Financière Manuvie;

c) par la déduction des remboursements à verser aux prestataires du groupe et la remise de tout montant payé à titre de taxe sur les produits et services, de taxe de vente harmonisée ou de taxe de vente provinciale, selon le cas.

TAB 15

Federal Court Cour fédérale

Date: 20190819

Docket: T-2169-16

Citation: 2019 FC 1077

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN and
MARIETTE LUCILLE BUCKSHOT

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER – COUNSEL FEES

PHELAN J.

I. Introduction

[1] This is the decision concerning the approval of counsel fees and the payment of honorariums to named plaintiffs in the Indian Day Schools Settlement Agreement [Settlement and/or Agreement]. The matter proceeded separately from the Settlement Approval Hearing but immediately after its conclusion. While this is a separate decision from the Settlement Approval, this decision should be read with the "Settlement Approval Decision".

[2] Under Rule 334.4 of the *Federal Courts Rules,* SOR/98-106, all payments to counsel flowing from a class proceeding must be approved by the Court. The Court must ensure that legal fees payable to Class Counsel are "fair and reasonable" in all of the circumstances (*Manuge v R*, 2013 FC 341 at para 28, 227 ACWS (3d) 637 [*Manuge*]).

[3] By operation of the Settlement, Class Counsel fee approval is severable from the approval of the Settlement and the Court can approve the Settlement separately from approval of Counsel Fees. The pertinent provisions are Sections 2.02 and 2.03 of the Settlement as set out below:

> **2.02 Effective in Entirety**
>
> Subject to 2.03, none of the provisions of this Agreement will become effective unless and until the Federal Court approves this Agreement.
>
> **2.03 Legal Fees are Severable**
>
> In the event that the Federal Court does not approve the legal fees set out in 13.01 and 13.02 but otherwise approves the Agreement,

> the provisions of the Agreement other than 13.01 and 13.02 will come into effect on the Implementation Date. 13.01 and 13.02 will not come into effect unless and until the Federal Court so orders.

[4] The Class Counsel fee arrangements were negotiated and concluded after the Settlement had been concluded. The evidence is that this was an arm's length, good faith negotiation separate from the Settlement.

[5] The fees at issue are $55 million inclusive of disbursements and applicable taxes payable after the Implementation Date plus a further $7 million in legal fees payable to Class Counsel for legal services rendered for a period of four (4) years after the Implementation Date.

[6] All fees are to be paid by the Defendant Canada and not by any of the members of the Survivor or Family Classes.

[7] The legal fees regime under the Settlement is captured in sections 13.01-13.05:

> **13.01 Class Counsel Fees**
>
> Canada agrees to pay Class Counsel in respect of their legal fees and disbursements the amount of fifty-five million dollars ($55,000,000.00) plus applicable taxes within thirty (30) days after the Implementation Date.
>
> **13.02 Post-Implementation Fees**
>
> Within thirty (30) days after the Implementation Date, Canada will pay to Class Counsel the additional sum of seven million dollars ($7,000,000.00) in trust for legal fees, applicable taxes and disbursements to be rendered by Class Counsel to Survivor Class Members for services rendered for a period of four (4) years after the Implementation Date. Fees and disbursements of Class Counsel incurred after the Implementation Date shall be approved by the Court on a quarterly basis. Any amount remaining in trust,

including interest, after all such legal services have been completed and fees and disbursements approved shall be transferred by Class Counsel to the McLean Day Schools Settlement Corporation, to be used for Legacy Projects or as may be ordered by the Court.

13.03 Scope of Ongoing Legal Services

(1) Class Counsel agrees that it will provide legal advice to Survivor Class Members on the implementation of this Settlement Agreement, including with respect to the payment of compensation, for a period of four (4) years after the Implementation Date.

(2) Class Counsel agrees that it will not charge any Survivor Class Member for fees or disbursements in respect of any matter related to the administration of the Federal Court Class Action or to the implementation of this Settlement, including the payment of compensation.

13.04 Pre-Approval of Fees Required

No legal fees or disbursements may be charged to Survivor Class Members or Family Class Members in respect of compensation under this Settlement or any other legal advice relating to this Settlement by legal counsel other than Class Counsel without the prior approval of such fees or disbursements by the Federal Court on a motion under Rule 334.4 of the Federal Courts Rules on notice to the Parties.

13.05 No Other Fees to be Charged

The Parties agree that it is their intention that all payments to Survivor Class Members under this Agreement are to be made without any deductions on account of legal fees or disbursements.

II. Background

[8] The nature of the litigation, the history of it, the risks of litigation and the benefit of the Settlement are set out in the Settlement Approval Decision.

[9] The initial claim against Canada regarding Indian Day Schools had been commenced by Joan Jack [Jack] in the Manitoba Court of Queen's Bench. She and her partner Louay Alghoul [Alghoul] were granted the opportunity to make submissions on this matter of fees.

[10] While there was no formal request by Jack and Alghoul, a fair reading of their submissions is a request that this Court not approve Counsel Fees unless they are compensated in some fashion for this initial work.

[11] Jack's evidence, also discussed in the Settlement Approval Decision, is that she took this matter on under a contingency arrangement in 2009. By 2012, the burden of the litigation caused the bankruptcy of her firm. No other firm was prepared to undertake the case or assist her due to the complexity and risk.

[12] Jack then joined up with Alghoul & Associates to continue the litigation. However, by 2016, the class plaintiffs (principally Garry McLean) were dissatisfied with the lack of progress and ended the retainer. Gowling WLG [Gowling] was then retained and after some initial trouble with the transfer of files and a complaint against Jack to the Law Society, the matter was transferred to Gowling.

[13] When Gowling took over the matter, they obtained a retainer agreement with a 15% contingency fee. That agreement has clearly been superseded by this current arrangement.

[14] Neither Jack nor Alghoul took steps to preserve a solicitor's lien or claim against Gowling. If they have any such rights, they are not a proper matter for this Court to adjudicate. If there had been any fee sharing agreement regarding the class proceeding between Gowling and Jack or Alghoul, the Court would have likely had to approve it under Rule 334.4. However, as no such fee sharing agreement exists, any other claim between Jack and Alghoul and Gowling is a matter under the Manitoba action and a matter within that province (see *Bancroft-Snell v Visa Canada Corp,* 2016 ONCA 896 at paras 67, 111, 133 OR (3d) 241). The assessment of Gowling's position in this litigation takes into account the fact that they took over a case which had some initial work performed and was a case with considerable complexity, burden and risk.

[15] The question before this Court is whether the fees are "fair and reasonable".

[16] Approval of counsel fees has become an increasingly more challenging matter. Class Counsel are caught in the unenviable position of being the "client" in the matter of fees.

[17] To assist the Court and Class Counsel and to ameliorate potential criticism of Class Counsel fees, the Court appointed W.A. Derry Millar, an experienced counsel and former Treasurer of the Law Society of Upper Canada, as *Amicus Curiae* [*Amicus*]. As said before, in doing so, the Court is not in any sense expressing or implying concern about the professional standards or ethical conduct of Gowling or the members of the firm responsible for this file.

[18] The *Amicus* filed a Brief and made submissions in Winnipeg. In carrying out his mandate, the *Amicus* attended at Gowling's offices to review relevant records. In his Brief, the

Amicus confirmed the factors identified by Gowling's counsel as the relevant factors for the Court in assessing the counsel fees. He also confirmed the reliability of the expenses.

[19] In summary, the *Amicus* agreed with Gowling's position on the relevant factors and the conclusions and confirmed that the fees agreed to are consistent with the applicable case law (including the honorarium of $7,500 to be paid to each of the named plaintiffs).

[20] Through the Settlement Approval Hearing process, some Class Members objected to the proposed fees based on the absolute quantum, often tied into their concerns with the "restrictions" on retaining other counsel in the Settlement. There was little, if any, guidance from the objections as to what a "fair and reasonable" fee should be.

III. Analysis

[21] Gowling advanced two propositions supporting fee approval. The first is that the process taken to negotiate the fee is sufficient assurance to justify approval. The second is the more traditional approach of examining a list of relevant factors to establish that the fees are "fair and reasonable".

[22] In respect of the first proposition - the process - counsel relied on *Adrian v Canada (Minister of Health)*, 2007 ABQB 377, 418 AR 215 [*Adrian*], in which the settlement was concluded and then the fees settled. That court concluded that because of the process of negotiating a reasonable settlement before the fees were discussed, it was not necessary to review the established factors. There are other cases of similar conclusions.

[23] With the greatest respect to those decisions, this approach is inconsistent with the "hands on" approach courts must exercise in fee approvals and it tends toward the "rubber stamping" so often rejected by courts (see e.g. *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 at para 12, [2006] OJ No 4968 [*Baxter*]).

[24] The process is not determinative, but it is an important factor. However, it is still the Court's obligation to ensure that what comes out of a proper process is "fair and reasonable". Therefore, I accept that the process is a positive and important factor to be considered with other relevant factors.

[25] The Federal Court has an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court's comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (*Condon* at para 83).

A. *Results Achieved*

[26] This is a large class action settlement. The base amount of $1.47 billion to $1.6 billion includes only Level 1 compensation and the Legacy Fund, not Level 2-5 claims. Total

compensation is reasonably expected to exceed $2 billion. It also affects a substantial number of people - more than 120,000 Day School survivors. The $200 million Legacy Fund itself is also a significant achievement in amount and purpose that will affect families and communities of survivors, as well as the survivors.

[27] The benefits of the Settlement are set out in the Settlement Approval Decision. They are significant and the result of extensive time and effort in the negotiation of the Settlement.

B. *Risk*

[28] This was always a risky case. The extent of that risk is confirmed, in part, by the experience (and bankruptcy) of former counsel. The case lay dormant because of the risk and burden of prosecuting the case. Those risks included:

- Uncertainty as to class size;
- Uncertainty as to certification due to the multitude of individual issues;
- A class period that presented challenges of time, diversity and unavailability of witnesses and records;
- The extensive burden of evidence gathering, discoveries, and expert evidence;
- The range of defences available to the Defendant which could limit the class size and breadth of the proceedings;
- The complexity of legal and factual issues in the areas of constitutional and indigenous law including the lack of precedent in a rapidly developing area of law;
- The challenge of derivative claims of Family Class Members including in respect of some provincial laws; and
- The very real prospect of losing some or all of the action at trial.

[29] In *Manuge*, Justice Barnes emphasized the element of risk. He concluded at paragraph 37 that risk is to be assessed at the time it is assumed by counsel - not with the benefit of hindsight where many may be tempted to say “but this result was inevitable”. If it was, there would have been a number of firms who would have offered to assume carriage of the litigation.

[30] Justice Winkler in *Parsons v Canadian Red Cross Society*, 49 OR (3d) 281, [2000] OJ No 2374 [*Parsons*], discussed the risks inherent in these kinds of cases.

> [29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's [*sic*] first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the “judgmental probability of success” in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, “betting his or her law firm”. This must be considered in assessing the “risk” factor in regard of the appropriate fee for counsel.
>
> …
>
> [36] It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.
>
> [37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class

proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a “final settlement offer” that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

[38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed…

…

[42] … The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[31] The last point in Justice Winkler's decision is particularly relevant. When Class Counsel took on the mandate, they accepted it without any assurance that politically the case would settle and certainly not achieve this result. Cases with public policy elements have their own unique risk of being caught up in the political debates. In the present case, it was not until October 2017 that the responsible minister received a mandate letter giving some comfort that resolution might be possible.

[32] As the dockets examined by the *Amicus* confirm, the Class Counsel team devoted substantial time and effort on the file. In addition to the risk of not being paid, those counsel would have put parts of their practice on hold, turning away work and putting the firm at risk of a significant loss.

[33] It is not a requirement of this factor that the firm "bet the farm" (as described in other cases, such as *Parsons*). That is an unrealistic threshold, but in this case one firm "lost the farm". The financial risk to the firm and to the lawyers is a real risk and a risk that should be rewarded.

C. *Time Expended*

[34] The record confirms that Class Counsel expended significant time and expense. As of the hearing, the firm had recorded fees of approximately $8 million and disbursements of approximately $470,000. As confirmed by the *Amicus*, the hourly rates of the six main lawyers were consistent with the year of call and experience of Toronto and Ottawa counsel.

[35] It is estimated that there is likely $2.0 to $2.5 million more in fees and disbursements through to implementation of the Settlement.

[36] Accepting that time docketed would ultimately be about $10.5 million, the agreed-upon fees represent a five times multiplier. However, the use of a multiplier as the basis for approving the fee is not appropriate. As commented upon in *Condon* and in *Manuge*, the multiplier may reward the inefficient and punish the efficient.

[37] Nevertheless, it serves as a useful check but nothing more - a factor but not a key one.

D. *Complexity*

[38] The Settlement Approval Decision discusses to some extent the complexity of the case. It has procedural, evidentiary and legal complexities that encompass a large number of claimants across the vastness of Canada. The administration of the Settlement will continue to require commitment and expenditures because of those complexities.

E. *Importance to the Plaintiffs*

[39] The affidavits of named plaintiffs like the late Garry McLean, Margaret Swan, Angela Sampson, Mariette Buckshot, Claudette Commanda and Roger Augustine all attest to the importance of the litigation to them and to members of their community.

[40] The thousands of objectors and supporters all confirm, if only by their participation, the importance of this litigation. One cannot ignore its historic importance.

F. *Degree of Responsibility assumed by Counsel*

[41] This case is somewhat unique in large class action settlements (those exceeding $500 million) because one firm had complete carriage of the case. The usual model has been a consortium of law firms on the plaintiffs' side.

[42] In this case, Gowling assumed complete responsibility for the case. It had to draw upon the expertise of multiple lawyers in a large number of areas of law but particularly in Indigenous law, constitutional law, public law, personal injury law, class action law and corporate/charities (not for profit) law.

G. *Quality and Skill of Counsel*

[43] There is no doubt as to Gowling's high standing in the legal community and in the areas of law relevant to this litigation. The firm and the Indigenous Law Group in particular have been involved in numerous landmark cases and transactions. It has a number of lawyers from Indigenous communities across the country.

[44] The Court has had an opportunity to observe many of the Gowling lawyers involved throughout this litigation process and has seen their dedication and expertise.

H. *Ability of Class Members to Pay*

[45] It is obvious that Class Members did not and do not have the ability to pay for the services of Class Counsel. That was clear from the context of the case, and the affidavits of such people as Angela Sampson.

I. *Expectation of the Class*

[46] It is fair to say that the representative plaintiffs expected to pay 15% of the proceeds obtained in the litigation as fees, and a separate amount for disbursements - all as contained in the Retainer Agreement.

[47] The agreed upon $55 million for fees and disbursements represent approximately 3% of the total Settlement.

[48] The agreed fees, as per the Settlement, are a substantial advantage to the Class Members as the Defendant is absorbing that cost. Nothing is deducted from the amounts going to Class Members.

[49] To this substantial advantage is the further $7 million for the provision of legal advice to individual Class Members. Class Members can obtain legal advice without any deduction from their compensation.

[50] The Retainer Agreement falls away with the approval of the Settlement resulting in a substantial benefit to the Class.

J. *Fees in Similar Cases*

[51] There is no question that the negotiated legal fee of $55 million is substantial but it must be considered in context.

[52] That fee, in the context of the minimum Level 1 settlement payment of $1.27 billion plus $200 million for the Legacy Fund, represents 3.74% of the value of the Settlement.

[53] That percentage is further reduced by the amounts which would be paid out for Level 2 to 5 claims with no additional amount for fees. It is estimated that the total payout could approach $2 billion for a fee percentage of approximately 2.75%.

[54] In summary, the legal fees will be in the 3% range.

[55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at $52.5 million on $1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at $37.2 million on $1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at $75 million on $625-875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[56] To this must be added the $7 million for future legal services. If the amount is not consumed, the remaining balance is paid over to the Legacy Fund.

K. *Honorarium*

[57] I agree with the proposal to award each of the named plaintiffs an honorarium of $7,500 to be paid out of the Class Counsel fees. Honorariums are given when the representative plaintiff(s) contribute more than the normal effort of such a position - for example, forfeiting their privacy to a high profile class litigation and participating in extensive community outreach (see *Merlo* at paras 68-74). Honorariums to representative plaintiffs are to be awarded sparingly, as representative plaintiffs are not to benefit from the class proceeding more than other class members (*Eidoo v Infineon Technologies AG,* 2015 ONSC 2675 at paras 13-22, 253 ACWS (3d) 35).

[58] In this case, there are three representative plaintiffs, Claudette Commanda, Roger Augustine, and Mariette Buckshot, and three additional named plaintiffs, Garry McLean (who was a representative plaintiff until he passed away), Angela Sampson, and Margaret Swan. The Plaintiffs seek honorariums for all six named plaintiffs. The case law cited before the Court only discussed awarding honorariums to representative plaintiffs, meaning those plaintiffs confirmed as representative plaintiffs in the certification order. However, this is a unique case where all named plaintiffs made that extra effort in advancing the claim and essentially took on the role of representative plaintiffs in their instructions to counsel and communication with Class Members. They took the risk of initiating the claim, pursued it to the extent of terminating original counsel,

seeking out new counsel, and instructing on the myriad of issues which arose as the case was recast and proceeded through litigation and negotiation.

[59] They put their personal histories out in public to advance the case and they participated in community outreach and countering misinformation about the case - sometimes in the face of personal repercussions.

[60] Further, the honorariums come from the fees Class Counsel have earned. If Class Counsel is content, it serves no useful purpose for the Court to interfere.

IV. Conclusion

[61] For all these reasons, the Court will approve the Class Counsel fee provisions of the Settlement and order Class Counsel to pay $7,500 to each of the six named plaintiffs from the Class Counsel fees when paid out.

"Michael L. Phelan"
Judge

Ottawa, Ontario
August 19, 2019

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2169-16
STYLE OF CAUSE:	GARRY LESLIE MCLEAN, ROGER AUGUSTINE,, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN and MARIETTE LUCILLE BUCKSHOT v HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MAY 15, 2019
REASONS FOR ORDER – COUNSEL FEES:	PHELAN J.
DATED:	AUGUST 19, 2019

APPEARANCES:

David Klein Angela Bespflug	FOR THE PLAINTIFFS
Catharine Moore Sarah-Dawn Norris	FOR THE DEFENDANT
Clint Docken, Q.C.	FOR JOAN JACK AND LOUAY ALGHOUL
W.A. Derry Millar	COURT APPOINTED *AMICUS CURIAE*

SOLICITORS OF RECORD:

Klein Lawyers Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT
WeirFoulds LLP Barristers and Solicitors Toronto, Ontario	COURT APPOINTED *AMICUS CURIAE*

TAB 16

Federal Court Cour fédérale

Date: 20170530

Docket: T-1685-16

Citation: 2017 FC 533

Ottawa, Ontario, May 30, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

JANET MERLO AND LINDA GILLIS DAVIDSON

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This matter was certified as a class action for settlement purposes by Order of this Court on January 13, 2017. This class action relates to gender and sexual orientation based harassment and discrimination of women who worked in the Royal Canadian Mounted Police [RCMP].

[2] This is a Motion by the Representative Plaintiffs seeking approval of the terms of the proposed settlement of this class action. The Defendant [Canada] consents to the terms of the

settlement. The proposed settlement has a number of features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial.

[3] For the reasons that follow, I approve the settlement, I approve the payment of an honorarium of $15,000 to each of the Representative Plaintiffs, Ms. Merlo and Ms. Davidson, and I approve counsel fees.

I. Background

[4] On October 6, 2016, the Representative Plaintiffs and the Defendant reached an agreement to settle the claims for gender and sexual orientation based harassment and discrimination of women who worked in the RCMP since September 16, 1974 [Settlement Agreement]. The settlement is national in scope, therefore the Representative Plaintiffs consolidated the action filed in British Columbia in 2012 by Ms. Merlo [Merlo Action], and an action filed in Ontario in 2015 by Ms. Davidson [Davidson Action].

[5] In their claims the Representative Plaintiffs make allegations of gender-based bullying, discrimination, and harassment, which they both experienced while they were employed with the RCMP. The Plaintiffs claim that this harassment and discrimination has impacted their careers within the RCMP and has caused them to suffer physical and psychological damage, personal expense, and loss of income.

[6] On certification as a class action, the primary class was defined to include all female current and former living Regular Members, Civilian Members and Public Service Employees who worked within the RCMP since September 16, 1974. This date is significant as it is the first date on which women were eligible to join the RCMP. Including historical claims is significant as those claims would have been otherwise time barred due to the expiry of limitation periods.

[7] Secondary class members were defined to include those with a derivative claim in accordance with applicable family law legislation arising from a family relationship with a primary class member.

[8] In support of this Motion for approval the parties rely upon the following Affidavits:

- Affidavit of Whitney Santos sworn May 11, 2017 [Santos Affidavit]
- Affidavit of Mandy Ng affirmed May 11, 2017
- Affidavit of Janet Merlo sworn May 10, 2017
- Affidavit of Linda Gillis Davidson affirmed May 11, 2017

II. Key terms of the Settlement Agreement

[9] The Settlement Agreement contains non-monetary and monetary terms.

[10] The non-monetary terms are significant as they represent relief that would not otherwise be available to the class following a trial as they would be beyond the jurisdiction of the court, i.e. institutional change initiatives within the RCMP, a public apology, and the creating of a

scholarship. The following from the Settlement Agreement provides an overview of the Settlement terms:

> B. The Plaintiffs and the Defendant ("the Parties") recognize and acknowledge that gender and sexual orientation based harassment, gender and sexual orientation based discrimination, and sexual assault, including physical assault in the course of conduct constituting harassment have no place in the RCMP and wish to enter into this Settlement Agreement to:
>
> > (a) restore confidence in the RCMP as an organization that values equity and equality;
> >
> > (b) implement measures to eliminate workplace harassment and discrimination in the RCMP; and
> >
> > (c) resolve the Claims of Primary Class Members who experienced and/or continue to experience gender and/or sexual orientation based harassment and discrimination (as defined below) while working in the RCMP during the Class Period;
>
> C. The Parties agree to: a) implement change initiatives and best practices aimed at eliminating Harassment in the RCMP and increasing equality and b) compensate Class Members who suffered injury as a consequence of that Harassment.

[11] The monetary terms of the settlement are outlined in the Santos Affidavit as follows:

> 11. As described in detail below, the Settlement provides six levels of compensation ranging from $10,000 to $220,000. For women whose claims are assessed at levels 5 and 6, compensation in an aggregate total of up to 10% of the claimant's award will be awarded to their spouses and children.
>
> *Compensation Levels*
>
> 12. The Settlement provides six levels of compensation. Each level sets out a non-exhaustive list of culpable conduct and effect on the victim. The multiple levels recognize that there are many different forms of gender and sexual orientation based harassment and discrimination, and each will have a unique impact on the victim.

> 13. The amount of compensation paid for each level reflects the recoveries class members might recover at trial with some compromise to take into account potential litigation risks (defences, statutory bars, limitation periods, contributing causes, etc.) and the fact that the adjudication process under the Settlement is confidential and non-adversarial. There is also, of course, the benefit of receiving compensation now rather than having to wait for the uncertain outcome of a trial and potential appeals.
>
> 14. The Compensation Levels and criteria are in Schedule B, Appendix 6 of the Settlement Agreement
>
> […]
>
> *The Claims Process*
>
> 15. The Settlement creates a confidential, non-adversarial procedure for assessing claims that is based on document review and claimant interviews. The process is designed to be a safe environment for class members to tell their stories.
>
> […]
>
> *Confidentiality*
>
> 24. The Settlement incorporates numerous safeguards to protect the privacy of claimants and to maintain confidentiality in the claims process. Confidentiality was a significant concern for class members, many of whom had experienced retaliation while working within the RCMP after making complaints that they experienced harassment and/or discrimination. The Settlement incorporates multiple measures to protect the identity of claimants, thereby encouraging class members to feel safe when making claims under the Settlement.

III. Notice of Proposed Settlement

[12] Following the certification of the class action, Class counsel undertook an extensive communication plan to advise potential class members of the proposed settlement and to advise them of the date of the settlement approval hearing. The right of class members to object to the settlement and the right to opt out were also detailed in the communications.

[13] At the hearing, I was advised that communications were sent to over 20,000 class members. As well, a copy of the Settlement Agreement had been made available on Class counsel websites and on the Assessor's website.

IV. Issues

[14] The following are the issues for determination on this Motion:

(a) Approval of the Proposed Class Settlement Agreement

(b) Approval of the Notice Plan and Appointment of Assessor

(c) Relief from Rule 334.21(2)

(d) Honorarium to Ms. Merlo and Ms. Davidson

(e) Class Counsel Fees and Disbursements

V. Analysis

(a) *Approval of the Proposed Class Settlement Agreement*

[15] Rule 334.29 of the *Federal Court Rules*, SOR/98-106 [*Rules*] provides as follows:

Approval	**Approbation**
334.29 (1) A class proceeding may be settled only with the approval of a judge.	**334.29 (1)** Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.
Binding effect	**Effet du règlement**
(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	**(2)** Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

[16] On approving a settlement, the test to be applied "is whether the settlement is fair and reasonable and in the best interests of the class as a whole" (C*ardozo v Becton, Dickinson & Co*, 2005 BCSC 1612, 145 ACWS (3d) 381 citing at para 16 *Dabbs v Sun Life Assurance Co of Canada,* [1998] OJ No 1598, (24 February 1998), Ontario, 96-CT-022862 (Ont Gen Div) at para 9, aff'd (1998), 40 O.R. (3d) 429, 5 CCLI (3d) 18 (Ont Gen Div); *Haney Iron Works Ltd v Manulife Financial* (1998), 169 DLR (4th) 565, 9 CCLI (3d) 253 (BCSC) at para 27; and *Fakhri v Alfalfa's Canada*, 2005 BCSC 1123, 47 BCLR (4th) 379 at para 8).

[17] While the court has the power to approve or reject a settlement, it may not modify or alter a settlement (*Haney Iron Works*, *supra* at para 22; *Dabbs*, *supra* at para 10).

[18] The settlement is judged by a standard of reasonableness, not perfection (*Châteauneuf v Canada*, 2006 FC 286 at para 7, 54 CCPB 47).

[19] The factors to consider when the reasonableness of a settlement is being assessed have been delineated in a number of cases (*Fakhri, supra* at para 8) and are addressed below.

i. *Likelihood of recovery or the likelihood of success*

[20] It is evident from the litigation history of the Merlo and Davidson actions that there are many complex issues with these claims. Success was not guaranteed.

[21] There were various defences available to the Defendant. There was a risk that the Plaintiffs would not be successful at certification or at the common issues trial. Even if the

Plaintiffs were able to get over these hurdles, they faced the prospect of appeals and individualized proceedings which could take an additional ten (10) years to complete. For these reasons, the Parties submit that any litigation discount factored into this settlement is outweighed by the potential litigation risks and inevitable delays of carrying on with the litigation.

[22] Furthermore, as part of the settlement, potential barriers to recovery and defences which would have otherwise been available to Canada have been waived.

ii. *Amount and nature of discovery evidence*

[23] The Parties submit that although this litigation has not reached the discovery phase, Class counsel developed a complete understanding of the underlying facts and circumstances of the claims.

[24] The Santos Affidavit details the steps taken by Klein Lawyers LLP in 2012, in creating a detailed questionnaire that was sent to each potential class member who contacted the firm. In 2014, Klein Lawyers LLP contacted the approximately 150 class members who completed detailed questionnaires. With this information, Klein Lawyers LLP was able to prepare charts illustrating the types of harassment experienced by 147 class members, the impacts of that harassment, and the experiences of class members after reporting such behaviour to the RCMP.

[25] I accept the submissions of Class counsel that even without discovery they had a wealth of information on the nature of the claims they were advancing. They were also well positioned to understand the factual matrix of these claims and the challenges they would face in moving

forward with the litigation. Potential bars to recovery were a real risk. These factors informed the decision making process as counsel considered the proposed settlement and provided their recommendations to the Plaintiffs.

iii. *Settlement terms and conditions*

[26] The Parties submit that the Settlement Agreement is fair, efficient and in the best interests of the class.

[27] The inclusive class definition and a class period that dates back to 1974, provides compensation to class members who would otherwise be barred (because of limitation periods) from successfully pursuing an action. Further, considering the very personal and painful nature of the claims, the settlement process includes a non-adversarial claims process with numerous safeguards to protect the privacy of claimants.

[28] There are 6 levels of compensation, ranging between $10,000.00 – $220,000.00 dependent upon the nature of the conduct and its impact on the victim. Compensation is also available to spouses and children of claimants whose claims are assessed at the two highest levels (level 5 or level 6). The settlement is on a “claims made” versus a “lump sum” basis. This means there is no ceiling or cap on the total compensation that may be paid to members of the class. Therefore there is no risk of depletion of the settlement fund, nor is there any necessity to prorate claims. Simply put, every approved claim will be paid by the Defendant.

[29] At this stage, Class counsel conservatively estimates there will be over one thousand (1,000) claimants with an estimated pay out of approximately 89 million dollars.

[30] In the Settlement Agreement, the amounts allocated for non-pecuniary damages for the psychological injuries caused by workplace harassment is in line with, or exceeds, the amounts awarded in reported cases (*Sulz v Canada (AG)*, 2006 BCSC 99, 263 DLR (4th) 58, aff'd 2006 BCCA 582, 276 DLR (4th) 391; *Rees v Canada (Royal Canadian Mounted Police)*, 2004 NLSCTD 138, 239 Nfld & PEIR 1, rev'd 2005 NLCA 15, 246 Nfld & PEIR 79; *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 SCR 546; *Clark v Canada*, [1994] 3 FCR 323, 76 FTR 241; *Unger v Singh*, 2000 BCCA 94, 133 BCAC 265; *Wong v Luong*, 2004 BCSC 1489, 135 ACWS (3d) 354; *Chancey v Chancey* (1999), 86 ACWS (3d) 885, [1999] BCJ No 551 (SC); *Kinsella v Logan* (1996), 179 NBR (2d) 161, 63 ACWS (3d) 840 (CA). rev'ing (1995), 163 NBR (2d) 1, 55 ACWS (3d) 542 (QB); *Nagy v Canada*, 2005 ABQB 26, 41 Alta LR (4th) 61, aff'd 2006 ABCA 227, 272 DLR (4th) 601; *J.R.I.G. v Tyhurst*, 2001 BCSC 369, 103 ACWS (3d) 635, aff'd 2003 BCCA 224, 226 DLR (4th) 447).

[31] The claims process will be handled the Honourable Mr. Bastarache, C.C., Q.C., who has previously administered class actions settlements involving institutional abuse. He also played a significant role in assisting the parties to reach this settlement. He is highly regarded by the parties and they are satisfied that he will act fairly and compassionately in the role as Assessor.

[32] Ensuring a confidential process for claimants is an overarching feature of the settlement because of the nature of the psychological injuries. The settlement also includes a number of confidentiality safe guards which are particularly important for current serving members of the

RCMP. The RCMP will not see the claims and they will not know the identity of the claimants. The RCMP designated contact will work from a secured room with access to the physical premises and to the records restricted.

[33] The settlement has strong support from class members. This settlement has a number of benefits beyond financial compensation, including an apology, change initiatives for the RCMP and the creation of a scholarship. These could not have been achieved through litigation.

iv. *Recommendations and experience of counsel*

[34] Class counsel, Klein Lawyers LLP and Kim Orr Barristers P.C., are highly experienced in class action litigation. Both firms have practiced in the specialized area of class action litigation for over 20 years.

[35] They have been involved in this litigation since the claims were filed. They recommend the settlement to Ms. Merlo and Ms. Davidson based upon a consideration of the benefits of the terms of the settlement as against the risks of continuing with the litigation. Their professional opinions are that the settlement affords the best opportunity for class members to be fairly compensated.

v. *Future expense and likely duration of litigation*

[36] If this settlement is not approved, the Merlo Action and the Davidson Action will resume. In the Merlo Action, the Defendant objected to certification and the certification hearing took 7

days. In the Davidson Action, part of the claim was struck (2015 ONSC 8008, 262 ACWS (3d) 648). The certification hearing started in 2016 and a decision has not yet been rendered.

[37] Based on the history of those proceedings to date, the Plaintiffs face the prospect of appeals; followed by the probability of further individualized proceedings which themselves may be subject to appeals.

[38] In reality, many years of litigation lie ahead if this settlement is not approved.

vi. *Recommendations of neutral parties*

[39] The parties concede that they would not have reached this settlement without the assistance of the Honourable Mr. Bastarache, C.C., Q.C., who has been a neutral participant in the settlement negotiations since April 2016.

[40] Additionally the parties were assisted by a number of experts who helped frame the terms of settlement, including the internal change initiatives within the RCMP, and also helped develop the compensation protocol.

[41] Psychologist Dr. Daylen helped to develop the recommended assessment protocol for this matter and proposed the contents of the different compensation levels which later became integrated, with some modification, into the Settlement Agreement.

[42] Professor Llewellyn is a Law Professor with an expertise in restorative justice. She provided guidance on the structure of the settlement process to ensure it was relational and restorative. Her recommendations assisted the parties in including restorative justice features in the Settlement Agreement such as change initiatives and the public apology.

[43] Dr. Berdahl is an expert in organizational behavior and workplace harassment. She was retained to prepare a report for the certification application in the Merlo Action. Her report outlines the necessity for confidentiality in the claims process and she made recommendations on steps to advance positive cultural changes within the RCMP.

vii. *Number of objectors and nature of objections*

[44] As of the date of the Motion, approximately 20,000 class members were provided with notice of the certification and notice of the settlement hearing. From that mass communication, only three written objections were received. Two of the objections are from individuals who are not included in the class definition. Therefore these were in effect objections to the class definition rather than objections to the settlement. The one other objection was from an individual who objected to the settlement amount on the basis that her claim would exceed the amounts provided for in the settlement. In which case, opting out of the settlement would have been the option open to this particular claimant.

[45] No objections were voiced at the hearing.

viii. *Presence of good faith and absence of collusion*

[46] Negotiations towards settlement in the Merlo Action started in early 2014 and continued into 2015. In January 2016, negotiations in both the Merlo and Davidson actions were undertaken and culminated in the Settlement Agreement. There were a total of ten in person settlement meetings and numerous conference calls and various forms of other communications.

[47] The Parties explain that this litigation has been ongoing for over five (5) years, and that the successful rounds of negotiations included the assistance of the neutral party the Honourable Mr. Bastarache, C.C., Q.C..

[48] Legal counsel for the Plaintiffs was assisted throughout the process by a number of experts who made important contributions to the framework of the Settlement Agreement.

[49] Based on the above, I am satisfied that all parties acted in good faith and there is no evidence of collusion.

ix. *Communication with class members*

[50] Following the certification of this class action on January 13, 2017, a robust notice distribution scheme to potential class members was undertaken. Class counsel estimates that over 20,000 notices were sent out. Notices were also published in newspapers throughout the country.

[51] Class counsel advise that they have been contacted by over a thousand (1000) women wishing to participate in this Settlement

[52] The representative Plaintiffs have also had a hands-on role in the settlement discussions and communication with potential class members.

x. *Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation*

[53] The Merlo and Davidson actions were pursued as stand-alone claims and although there was some settlement discussion, both actions continued along their litigation path.

[54] As settlement negotiations in both the Merlo and Davidson actions were brought together, there were several reports addressing the issue of gender harassment within the RCMP. These reports provided the Parties with additional information as to the nature of the harassment problem in the RCMP and the steps that would be required to address the problem.

[55] In early 2014, the Defendant expressed an interest in a global settlement. Negotiations continued through 2015 and 2016. The Settlement Agreement was signed by all parties on October 6, 2016.

xi. *Conclusion*

[56] Having outlined and considered all the factors above, this Court finds the proposed Settlement Agreement fair, reasonable and in the best interests of the class as a whole. The Settlement Agreement is approved.

(b) *Approval of the Notice Plan and Appointment of Assessor*

[57] In addition to approval of the Settlement Agreement, the Parties also seek approval that the office of the Assessor (Honourable Mr. Bastarache, C.C., Q.C.) be responsible for disseminating the Notice to class members. The Honorable Mr. Bastarache, C.C., Q.C., conducted individual interviews and assessments to determine compensation in an out of court settlement for victims of sexual abuse by Catholic priests in the Diocese of Bathurst and Archdiocese of Moncton, New Brunswick. Based on his experience in this role, as well as his many years as a Supreme Court Justice, the Representative Plaintiffs believe that the Honourable Mr. Bastarache, C.C., Q.C., will fairly assess the claims and will deal with all claimants in a sensitive and empathetic manner. The Honorable Mr. Bastarache, C.C., Q.C., retained Versailles Communications to prepare a Notice Plan. The Notice will inform class members of how they may submit claims. The proposed manner of distribution for the Notice is the same as the distribution that was approved by this Court for the Notice of Certification and Settlement Approval Hearing.

[58] The Settlement Agreement is posted on the websites of Class counsel (Klein Lawyers LLP and Kim Orr Barristers P.C.), as well as on a settlement website which was created by the office of the Assessor (https://merlodavidson.ca/en/).

[59] The Notice will be distributed by:

- direct mail to potential class members;
- posting on the Assessor's website, Class counsel's websites, and the RCMP's website and intranet;
- publication of the Notice in major Canadian newspapers;
- an advertising campaign on Facebook; and
- posting in all RCMP physical premises.

[60] I approve the Notice Plan and I also approve the appointment of the Honorable Mr. Bastarache, C.C., Q.C., as the assessor to administer the settlement and determine which claimants are eligible for compensation pursuant to the terms of the Settlement Agreement.

(c) *Relief from Rule 334.21(2)*

[61] The Representative Plaintiffs seek relief from the application of Rule 334.21(2) of the *Rules*, *supra*, which states:

334.21 (2) A class member shall be excluded from the class proceeding if the member does not, before the expiry of the time for opting out specified in the certifying order, discontinue a proceeding brought by the member that raises the common questions of law or fact set out in that order.	**334.21 (2)** Le membre est exclu du recours collectif s'il ne se désiste pas, avant l'expiration du délai prévu à cette fin dans l'ordonnance d'autorisation, d'une instance qu'il a introduite et qui soulève les points de droit ou de fait communs énoncés dans cette ordonnance.

[62] They rely upon Rule 55 of the *Rules* which states:

55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.	**55** Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

[63] They argue that this would be an appropriate case to apply the relief provided for in Rule 55.

[64] This Court has held in *Chow v Canada (Minister of Citizenship and Immigration)*, [1998] 161 FTR 156 at para 8, 46 Imm LR (2d) 231, in explaining the requirement of special circumstances, that "implicit, in special circumstances is, on the one hand, justice and, on the other hand, that there be no prejudice." This Court further noted in *Pearson v Canada* (2000), 195 FTR 31 at para 5, 100 ACWS (3d) 44, that "any application of rule 55 must accord with the general principles espoused by the Federal Court Rules".

[65] The general principles are explained at Rule 3 of the *Rules*, namely that:

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[66] The Parties submit that the Representative Plaintiffs should not be excluded from this proceeding, since allowing them to participate in the settlement claims process does not cause prejudice, actual or otherwise, upon the Defendant as they will discontinue the British Columbia and Ontario actions upon approval of the Settlement Agreement by this Court. They argue that the application of Rule 55 accords with the general principles of the *Rules* and specifically encompassed in Rule 3.

[67] The Court accepts these submissions and finds that, in these specific circumstances, Rule 334.21(2) shall not apply to the Representative Plaintiffs.

(d) *Honorarium to Ms. Merlo and Ms. Davidson*

[68] The payment of an honorarium of $15,000 to each the Representative Plaintiffs is requested on the basis that this is an exceptional case and the contributions of the Representative Plaintiffs are worthy of recognition in the form of honorarium payment. If approved, the payment will be payable out of Class counsel fees.

[69] This request is based upon their important contributions to this litigation and their considerable time and efforts as the Representative Plaintiffs. They each commenced their own class actions in BC and Ontario, and actively advanced those claims. This included publicizing their personal account of the gender and sexual orientation harassment which they endured within the RCMP. This has required the public re-living of painful events.

[70] They gave their name and gave their face to high profile class litigation and by necessity, they forfeited their privacy for the benefit of many others who can remain anonymous. Being prepared to spearhead such a cause comes at a personal cost and a deprivation of privacy.

[71] They have both travelled for the litigation and Settlement meetings, they have given media interviews to raise awareness of this class proceeding, and encouraged other class members to come forward with their experiences. They have had personal contact with hundreds of potential class members.

[72] In *Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at para 43, [2012] 5 CTC 24, a list of considerations were identified in assessing whether the representative plaintiff(s) should receive an honorarium, as follows:

> (a) active involvement in the initiation of the litigation and retainer of counsel;
>
> (b) exposure to a real risk of costs;
>
> (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
>
> (d) time spent and activities undertaken in advancing the litigation;
>
> (e) communication and interaction with other class members; and
>
> (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

[73] In *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675, [2015] OJ No 2062, citing at paragraph 13 *The Law of Class Actions in Canada,* by Warren K. Winkler et al, (Toronto: Canada Law Book, 2014), the Ontario Superior Court explains how usually compensation to the representative plaintiff is appropriate uniquely in situations where the plaintiff has provided services which are over and above the usual duties of a representative plaintiff.

[74] I have no difficulty concluding that this case warrants the award of honorarium to both Representative Plaintiffs, Ms. Merlo and Ms. Davidson, in the amount of $15,000.00 each.

(e) *Class Counsel Fees and Disbursements*

[75] Approval of legal fees in the amount of 15% is also sought. Both Representative Plaintiffs signed contingency fee agreements agreeing to pay 33.3%, however, because of the

structure of the settlement, class members will only be paying 15% of recovery toward legal fees.

[76] No objections to the legal fees were raised.

[77] The Federal *Rules* provide:

Approval of payments	**Approbation des paiements**
334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.	**334.4** Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[78] In *Cardozo v Becton, Dickinson & Co,* (*supra* at para 25), the British Columbia Supreme Court outlined various factors to be considered by the court in assessing the reasonableness of fees. These factors are addressed below.

i. *Results achieved*

[79] The terms of the settlement have been outlined above and offer advantages for class members which would not have been available had the matter proceeded through litigation. The class and class period are broadly defined, and the claims-made settlement ensures each approved claim will be paid. As well, the confidential and non-adversarial claims process is a significant feature of the settlement process considering the nature of the claims.

[80] The monetary compensation available under the Settlement Agreement is reasonable and within the range of compensation that might be awarded at trial.

[81] The Settlement Agreement also provides for non-monetary benefits for class members, namely, a public apology and the implementation of measures aimed at reducing and eliminating gender and sexual orientation based harassment in the RCMP.

[82] Class counsel also successfully negotiated settlement terms that the Defendant would not rely upon limitation periods or statutory bars to any of the class claims.

[83] Class counsel will also continue to be involved in settlement administration.

ii. *Risks undertaken*

[84] The litigation risks assumed by Class counsel here was substantial. The fact that no other Canadian law firms filed parallel actions indicated that this matter was seen by other lawyers as being highly complex and unlikely to succeed. Furthermore, Class counsel pursued this litigation to completion on their own rather than with a consortium of counsel from various provinces.

[85] Some of the risks associated with these claims included the fact that there was little accurate information as to the extent of gender and sexual orientation based harassment in the RCMP. Counsel was also aware that securing evidence to advance the claims was likely to require years of contested litigation and discoveries. There was a risk that the class would not be certified given the plethora of individual issues involved.

[86] The Defendant opposed certification of both the Merlo and Davidson actions. Based upon the submissions filed in those actions which were included in the Motion Record, it is clear that Canada was forcefully defending the claims.

[87] These were not claims that had a guarantee of success at the end of the day.

iii. *Time expended*

[88] The Parties submit that Class counsel diligently litigated the actions and engaged in intense settlement negotiations. Class counsel devoted considerable time and resources to the prosecution of the actions. In some cases, they hired personnel specifically to work on these claims. Many of the class members were interviewed and a total of six experts were retained. Class counsel also covered the costs of disbursements. By taking on litigation of this magnitude, counsel states that they were unable to explore or embark on other potentially lucrative class actions.

iv. *Complexity of the matter*

[89] This was multi-faceted complex class litigation with substantive legal complexity involving novel claims with potential legislative barriers. Expertise in in the areas of psychology, psychiatry, and the study of gender dynamics and gender and sexual orientation based harassment and discrimination were necessary. Additionally, class members were seeking more than monetary compensation. They wanted a public apology from the RCMP for the harassment experienced by class members, and they wanted to see initiatives and changes implemented

within the RCMP to reduce and eliminate harassment. While relief of this nature is outside the litigation realm, these were factors which the class members insisted upon and which added a level of complexity for Class counsel.

v. *Degree of responsibility assumed by counsel*

[90] The Merlo Action in British Columbia was commenced in 2012 and the Davidson Action in Ontario was commenced in 2015. No other parallel actions were filed. Class counsel assumed complete responsibility for commencing and prosecuting this litigation.

vi. *Importance of the matter to the client*

[91] As indicated in the Merlo and Davidson Affidavits, this was deeply personal litigation. Their claims were for serious psychological injuries that impacted their lives and the lives of other class members in many diverse and significant ways.

[92] The Plaintiffs also wanted a settlement which would have a lasting impact of the culture of the RCMP by helping reduce the incidents of gender and sexual orientation based discrimination. Their insistence on an apology and change initiatives demonstrates the importance of this this litigation to the Plaintiffs.

vii. *Quality and skill of counsel*

[93] As noted above, there is no question that Class counsel is highly experienced in the specialized field of class actions. Their experience has been noted in other class action decisions

(*Ramdath v George Brown*, 2016 ONSC 3536 at para 2, [2016] OJ No 2803; *McSherry v Zimmer GMBH*, 2012 ONSC 4113 at para 21, 226 ACWS (3d) 351; *Richard v British Columbia*, 2010 BCSC 773 at para 12, 191 ACWS (3d) 734; *Rideout v Health Labrador Corp*, 2007 NLTD 150 at para 71, 270 Nfld & PEIR 90).

viii. *Ability of the class to pay*

[94] Given the nature of the defences raised by the Defendant, class members could likely not have been able to afford to retain legal counsel on a fee for service basis. Of note as well is that Class counsel here did not seek any third party litigation financing in this case. In doing so, Class counsel incurred added financial risk.

ix. *Client and the class' expectation*

[95] By signing the contingency fee agreements, Ms. Merlo and Ms. Davidson expected to pay legal fees of 33.33% of whatever they recovered. However, as Class counsel was able to negotiate a contribution from the Defendant toward Class Counsel Fees, the amount for legal fees that will be paid by each class member will only be 15%.

[96] The Notice of Settlement Approval Hearing informs class members that Class counsel will ask the Court to approve a Class Counsel Fee of 15% payable from the compensation awarded to each class member under the Settlement Agreement.

[97] No class member objected to the legal fees.

x. *Fees in similar cases*

[98] The Parties submit that a contingency fee of 33.33% in a class action has been held to be presumptively valid on the basis of the decisions in *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537, [2016] OJ No 2936; *Cannon v Funds for Canada Foundation,* 2013 ONSC 7686, [2013] OJ No 5825.

xi. *Conclusion*

[99] I am satisfied in all of the circumstances that the fees meet the criteria for approval and I therefore approve the fees. In addition to being reasonable, the fees are less than those provided for by the contingency fee agreements signed by both Ms. Merlo and Ms. Davidson. I would also note that the fact that Class counsel was willing to act on a contingency fee basis for these claims, which faced a number of hurdles, achieves one of the policy objectives of class proceedings which is access to justice for those who might not otherwise be able to afford legal representation.

[100] Furthermore, pursuant to the Settlement Agreement, the Defendant has agreed to pay the reasonable disbursements. Accordingly there will be no deduction from the amounts paid to the class members for disbursements.

ORDER in T-1685-16

THIS COURT ORDERS that:

1) The Settlement of this action as set out in the Settlement Agreement, including the Recitals, and Schedules and Appendices, in Schedule "A" attached to this Order, is fair and reasonable and in the best interests of Class Members, and is approved.

2) The Settlement and this Order are binding on the Parties and on every Class Member, including Persons Under Disability, unless they opted out or are deemed to have opted out on or before the expiry of the Opt Out Period, being March 29, 2017, and are binding whether or not such Class Member claims or receives compensation.

3) The Parties to the Settlement Agreement may make non-substantive amendments to the Settlement Agreement, including its Schedules and Appendices, provided that each Party to the Settlement Agreement agrees in writing to any such amendments.

4) The Notice to Class Members of the approval of the settlement of this action shall be substantially in the form and content attached to this Order as Schedule "B" (the "Notice"). The Notice shall be distributed in accordance with the Notice Plan attached to this Order as Schedule "C".

5) The Notice shall be published within 10 business days of the "Implementation Date", as defined in the Settlement Agreement.

6) The Defendant, Her Majesty the Queen, shall pay the amounts required under the Settlement Agreement, including the cost of Notice and administration of the Settlement.

7) The Honourable Michel Bastarache, C.C., Q.C., is appointed as Assessor to administer the Settlement.

8) The Assessor cannot be compelled to be a witness in any civil or criminal proceeding, administrative proceeding, grievance or arbitration where the information sought relates, directly or indirectly, to information obtained by the Assessor by reason of the Settlement or the settlement claims process.

9) No documents received by the Assessor, directly or indirectly, by reason of the Settlement or the settlement claims process, are producible in any proceedings.

10) The RCMP and Canada shall release to the Assessor information and documents required by him or as otherwise required by the Settlement Agreement, including in the Schedules and Appendices.

11) Rule 334.21(2) does not apply to the Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, and neither is excluded from this proceeding despite not having discontinued the parallel proceedings in British Columbia and Ontario (namely, Supreme Court of British Columbia Action No. S-122255, *Merlo v Canada (AG)* and Ontario Superior Court of Justice Action No. CV-15-52473600CP, *Davidson v Canada (AG)* collectively the "Parallel Actions") prior to the opt out deadline.

12) The contribution to Class Counsel Fees payable by the Defendant, in the amount of $12 million plus applicable sales taxes is approved, and is ordered to be paid by the Defendant to Class Counsel within 30 days following the Court Approval Date. The sum of $6 million plus applicable sales taxes will be paid, by wire transfer, to each of Klein Lawyers LLP and Kim Orr Barristers P.C.

13) A payment by each Class Member of a Class Counsel Fee of 15%, plus applicable sales taxes, of the individual compensation paid to the Class Member under the Settlement, is approved. The 15% Class Counsel Fee is not payable on amounts paid to Class Members

for reimbursement of out of pocket or travel expenses pursuant to Article 11.04 of the Settlement Agreement. The 15% Class Counsel Fee payable by each Class Member will be calculated by the Assessor who will hold back the Class Counsel Fee and applicable sales tax from the compensation otherwise payable to the Class Member. The Assessor will remit 50% of the Class Counsel Fees plus applicable sales tax to Klein Lawyers LLP and 50% plus applicable sales tax to Kim Orr Barristers P.C. by wire transfer on the first business day of each month for all payments made to Class Members in the prior month.

14) Upon the Court Approval Date, the Defendant, Her Majesty the Queen, and any and all other applicable provincial and territorial Ministers and governments who are liable for the actions of RCMP members acting as provincial constables under provincial legislation and/or other provincial-federal policing agreements, and their respective officers, agents, servants and employees ("Releasees"), are forever and absolutely released separately and severally by the Class Members from any and all actions, including claims made under the *Canadian Charter of Rights and Freedoms*, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, grievances and complaints, and demands of every nature or kind available, asserted or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has, or may hereafter have, directly or indirectly, arising from or in any way relating to, or by way of any subrogated or assigned right, or otherwise in relation to gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period (the "Released Claims"), and this release includes any such claim made or that could have been made in any proceeding

including the Parallel Actions whether asserted directly by the Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member.

15) The obligations assumed by the Defendant, Her Majesty the Queen, under the Settlement Agreement are in full and final satisfaction of any and all claims by Class Members against the Releasees, including claims made under the *Canadian Charter of Rights and Freedoms*, relating to or arising from gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period.

16) Class Members are barred from making any claim or taking or continuing any proceedings arising out of, or relating to, the Released Claims against any Releasee or other person, corporation or entity that might claim damages and/or contribution and indemnity and/or other relief against the defendant, Her Majesty the Queen, including relief of a monetary, declaratory, or injunctive nature, under the provisions of the *Negligence Act*, RSO, 1990, c N-1, or its counterparts in other jurisdictions, the *Police Act*, RSBC 1996, c 367 or its counterpart in other jurisdictions, the *Canadian Charter of Rights and Freedoms*, the common law, Quebec civil law, or any statutory liability.

17) The Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, are each awarded an honorarium of $15,000, which will be paid out of Class Counsel Fees.

18) This Court shall retain continuing jurisdiction over the Settlement and its implementation, interpretation and enforcement.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1685-16
STYLE OF CAUSE:	JANET MERLO AND LINDA GILLIS DAVIDSON v HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 24, 2017
ORDER AND REASONS:	MCDONALD J.
DATED:	MAY 30, 2017

APPEARANCES:

David A. Klein Angela Bespflug Won J. Kim Megan B. McPhee Aris Gyamfi	FOR THE PLAINTIFFS
Mitchell R. Taylor Charmaine De Los Reyes Sarah Hagen	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Kim Orr Barristers P.C. Barristers and Solicitors Toronto, Ontario Klein Lawyer LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT

TAB 17

Federal Court Cour fédérale

Date: 20220818

Docket: T-402-19
T-141-20
T-1120-21

Citation: 2022 FC 1212

Ottawa, Ontario, August 18, 2022

PRESENT: Madam Justice McDonald

CLASS PROCEEDINGS

Docket: T-402-19

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH,

KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1120-21

BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

INTERIM ORDER AND REASONS

[1] On this Motion, filed August 15, 2022, the Plaintiffs seek an interim Order against non-parties as follows:

(i) an interim and interlocutory Order that no legal professionals, other than class counsel appointed by this Court, the Plaintiff Assembly of First Nations [AFN], or the Court-appointed administrator, Deloitte LLP, publish a communication to class members relating to these class proceedings without the Court's prior approval obtained on motion made on notice to the parties in these class proceedings; and

(ii) an interim and interlocutory Order that the websites of the Consumer Law Group [CLG] and any other such websites containing communications to class members relating to these class proceedings be removed upon service of the Court's Order herein, pending the disposition by the Court of the Plaintiffs' Motion for relief in the week of November 21, 2022, unless such communications are approved by the Court on motion made on notice to the parties in these class proceedings.

[2] In support of their Motion, the Plaintiffs filed the following Affidavits:

a. Affidavit of Janice Ciavaglia affirmed on August 15, 2022;

b. Affidavits of Wenxin Yu affirmed on August 15, 2022;

c. Affidavit of Kenneth Dennis Brady Dixon sworn on August 11, 2022; and

d. Affidavit of Kim Blanchette sworn on August 15, 2022.

[3] CLG was served with the Motion and filed an Affidavit of Andrea Grass sworn on August 16, 2022. CLG also filed a letter dated August 16, 2022, agreeing to the interim Order.

I. Background

[4] By way of brief background, the underlying class proceedings relate to harms caused by the discriminatory provision of child and family services and essential services to First Nations' children. The class members are children and young adults who have experienced homelessness, substance misuse, disabilities, and encounters with the criminal justice system. The First Nations class members are described by AFN as "some of the most vulnerable individuals in Canadian society".

[5] The parties reached a Final Settlement Agreement (FSA) on June 30, 2022, which, if approved by the Court, will provide $20 billion in compensation to the class members. The Court approval hearing for the FSA is scheduled for September 19, 2022.

[6] In advance of the FSA approval hearing, the Court approved the Notice Plan developed by class counsel to provide class members with detailed information relating to the FSA. This Notice is expected to be published by August 19, 2022.

[7] In the meantime, and prior to the FSA receiving Court approval, CLG, who are not class counsel and who have had no involvement in these proceedings, put information on two websites about the "settlement" and invited class members to "Join this Class Action". Their websites offer contingency fee retainers and request that class members provide personal information - including information about "damages or symptoms experienced".

[8] The Plaintiffs assert the CLG website communications contain misleading information about the class action, the potential settlement agreement, and the prospective claims process. On the CLG websites, there is no reference to or identification of class counsel. Further, the Plaintiffs allege the solicitation of retainer agreements and the request for information about damages or symptoms from class members is exploitative, re-traumatizing, and contrary to the various safeguards built into the FSA and the Notice Plan.

[9] At the hearing of this Motion, legal counsel for CLG confirmed the information relating to these class proceedings has been removed from their websites. A hearing to determine the extent to which non-class counsel may communicate and engage with class members regarding the claims process is set for November 21, 2022. In advance of that hearing, CLG advised the Court that it does not object to the interim Order sought by the Plaintiffs.

II. Issue

[10] The only issue is whether the Court should exercise its discretion and grant the interim Order.

III. Analysis

[11] The relief sought by the Plaintiffs falls within the Court's plenary jurisdiction to manage its own proceedings (*Dugré v Canada (Attorney General),* 2021 FCA 8 at para 20).

[12] Furthermore, as noted in *Federal Courts Rules,* SOR/98-106, Rule 385(1)(a):

Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may	Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :
(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding;	a) donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

[13] The Affidavit of Janice Ciavaglia, the Chief Executive Officer of the AFN, speaks to how First Nations individuals have been exploited and re-traumatized in other class action settlements, such as the Indian Residential Schools Settlement Agreement (IRSSA). She states as follows at paragraphs 15 and 17 of her Affidavit:

> 15. The AFN and its class counsel have gone to great lengths to ensure that the claims process for this proposed settlement will minimize the risk of re-traumatization to complainants, be as accessible as possible and will not require lawyers to successfully submit a claim. There is no individualized assessment that requires a narrative-form explanation of the claimant's circumstances or the harm suffered in order to establish an entitlement to compensation. Any additional compensation amounts are based upon objective factors. The settlement is designed in accordance with the lessons learned from the IRSSA compensation process, which were documented in a report from the National Centre for Truth and Reconciliation…
>
> …
>
> 17. Thus, the Parties to the proposed settlement agreement negotiated a crucial component through the appointment of "navigators" which are to be funded by Canada. Navigators will offer community-based, culturally competent support in order to

> assist claims members fill out the required documentation and submit a complete claim. This service will not cost anything to the Claimants and no portion of their compensation award will be affected. The involvement of lawyers foreign to the settlement and First Nations communities, acting as "form fillers" is unacceptable to the AFN and raises a serious risk of re-traumatization and revictimization. It may also dissuade some class members from engaging with the claims process at all, as a result of First Nations individuals' past experiences and the legacy of the IRSSA implementation process.

[14] The issues that arose in other First Nations class action settlements are discussed in more detail in *Fontaine Estate v Canada*, [2014] MJ No 159 and *Fontaine v Canada (Attorney General),* 2016 ONSC 5359.

[15] With respect to accuracy and reliability of the information on the CLG website, the Affidavit of Kenneth Dennis Brady Dixon is telling. Mr. Dixon is First Nations and states he was aware of the class proceedings and had contacted class counsel to discuss the case. However, when he saw the CLG advertisement, he believed this was how the compensation was being provided and that he needed to sign the CLG retainer in order to claim compensation. When his brother told him the retainer stated CLG would charge 25% of the compensation, he contacted class counsel again, only then learning that CLG was not associated with the class action.

[16] The Notice Plan provides as follows:

> …The plan is designed to notify the class members of certification and the settlement approval hearing in a trauma-informed and culturally sensitive manner, and to provide them with the opportunity to see, read, or hear the notice of certification and settlement approval hearing, understand their rights, and respond if they so choose…

> The notice plan seeks a proportionate, multi-faceted, culturally appropriate, relevant and trauma-informed approach to notice dissemination… [Footnotes omitted.]

[17] In keeping with the objectives of the Notice Plan, it is vital that the details of the proposed FSA are sensitively and accurately communicated to the members of the class. This will allow class members to make informed decisions about their rights and the claims process. Importantly, class members will be advised that they will not need to retain legal counsel in order to advance a claim.

[18] Therefore, until the Notice Plan has been communicated to class members, allowing non-class legal counsel to provide information on the proposed FSA in a manner that is outside the Court's purview poses a serious risk to the class proceedings.

[19] Based upon the foregoing and considering the applicable legal test from *RJR-MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311 (as cited in *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at para 25 [*Equustek*]), I am satisfied that:

a. there is a serious issue to be tried considering the history of predatory activity on First Nations class action settlements;
b. the class members will suffer irreparable harm if the Notice Plan is not communicated in a culturally sensitive and trauma-informed manner; and
c. the balance of convenience favours granting the relief.

[20] Accordingly, in my view, it is just and equitable in the circumstances to exercise the Court's jurisdiction and grant the injunctive relief sought against non-parties (*Equustek* at para 28).

IV. Conclusion

[21] The Plaintiffs' Motion is granted.

INTERIM ORDER IN T-402-19, T-141-20, AND T-1120-21

THIS COURT ORDERS that:

1. no legal professionals, other than class counsel appointed by this Court, the Plaintiff, Assembly of First Nations, or the Court-appointed administrator, Deloitte LLP, shall publish a communication to class members relating to these class proceedings without the Court's prior approval obtained on motion made on notice to the parties in these class proceedings; and

2. the websites of the Consumer Law Group and any other such websites containing communications to class members relating to these class proceedings shall be removed upon service of this Order, pending the disposition by the Court of the Plaintiffs' Motion for relief in the week of November 21, 2022, unless such communications are approved by the Court on motion made on notice to the parties in these class proceedings.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-402-19
STYLE OF CAUSE:	XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-141-20
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-1120-21
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 17, 2022
ORDER AND REASONS:	MCDONALD J.
DATED:	AUGUST 18, 2022

APPEARANCES:

David Sterns Mohsen Seddigh Robert Kugler	FOR THE PLAINTIFFS Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

D. Geoffrey Cowper, Q.C. Dianne G. Corbiere Peter N. Mantas	FOR THE PLAINTIFFS Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson
Jeff Orenstein	FOR THE RESPONDENT
Jonathan Tarlton	FOR THE DEFENDANT

SOLICITORS OF RECORD:

SOTOS LLP Toronto, ON KUGLER KANDESTIN Montréal, QC MILLER TITERLE + CO. Vancouver, BC	FOR THE PLAINTIFFS Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout
NAHWEGAHBOW, CORBIERE Rama, ON FASKEN MARTINEAU DUMOULIN Ottawa, ON	FOR THE PLAINTIFFS Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson
CONSUMER LAW GROUP Ottawa, ON	FOR THE RESPONDENT
Attorney General of Canada Ottawa, ON	FOR THE DEFENDANT

TAB 18

Parsons et al. v. Canadian Red Cross Society et al.

Kreppner et al. v. Canadian Red Cross Society et al.

[Indexed as: Parsons v. Canadian Red Cross Society]

49 O.R. (3d) 281
[2000] O.J. No. 2374
Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice
Winkler J.
June 22, 2000

Civil procedure -- Class proceedings -- Counsel fee -- Premium fee -- Lump sum counsel fee -- Whether fee fair and reasonable -- Criteria for determining whether court should approve counsel fee in class proceedings -- Class counsel applying for court approval of counsel fees after settlement of two class proceedings on behalf of individuals infected with Hepatitis C from Canadian blood supply -- Lump sum counsel fees of $15 million and $5 million respectively approved -- Class Proceedings Act, 1992, S.O. 1992, c. 6., ss. 32, 33.

Two class proceedings, the "transfused action" and the "hemophiliac action", under the Class Proceedings Act, 1992 ("CPA") were brought on behalf on all individuals in Canada, except for those in Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period January 1, 1986 to July 1, 1990. There were concurrent class proceedings in Quebec and British Columbia. All the actions were settled by a pan-Canadian settlement agreement that was approved by the courts in Ontario, Quebec and British Columbia and that involved the federal government, which was a defendant, and the provinces and territories, which intervened for the purposes of joining the settlement. The

settlement provided for benefits to class members in a global amount of around $1.5 billion and for total class counsel fees of $52.5 million. Over 60 lawyers and legal staff were involved in bringing the proceedings to a conclusion. The class counsel groups in the transfused action applied for approval of a $15 million fee, and the class counsel groups in the hemophiliac action applied for approval of a $5 million fee respectively.

Held, the motion for approval should be granted.

The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA, under which the court may, amongst other things, approve a fee agreement or determine the fees. The CPA permits agreements for the payment of fees and disbursements only in the event of success in a class proceeding. Premium fees in a variety of forms, including a multiplier of a base fee or a lump sum fee, may be awarded to achieve the CPA objective of providing enhanced access to justice. The fairness and reasonableness of any fee awarded is to be determined by the degree of success achieved in light of the risk undertaken by the counsel in conducting the litigation.

In the instant litigation, class counsel produced the best possible result short of a trial. The features of the settlement that provided for individual claim administration and that provided for payments more advantageous to class members than the payment approach commonly applied to personal injury tort litigation enhanced the result and demonstrated the thoroughness of class counsel in fashioning a satisfactory settlement.

As for the risk factor, in the context of the CPA, the fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters, and the instant case fell within this category. Although there were political overtones to the litigation because of the involvement of the governments, the risks attendant to litigation generally were present. More to the point, the evidence established that the settlement was driven by the threat of litigation and not by political considerations. The settlement negotiations were litigious as evidenced by the

length of time and effort taken to reach a binding agreement. The negotiations were logistically difficult, intense, time-consuming, adversarial, and hard fought. The logistical complexity was overwhelming. The insistence of the government that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 governments, each with differing political agendas and policies, and the class counsel groups in the various actions had their own internal disputes and were by no means speaking in a unified voice at all times. At various times "deal breaking" issues surfaced and the success of the negotiations hung in the balance. And there was no merit in the argument that the risks diminished with time as the negotiations progressed. The expert report filed to support the argument of diminished risks was fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of a proceeding. Class proceedings by their nature introduce several features that bear on counsel's risk and that distinguish class proceedings from ordinary litigation. There is the risk that the court will not approve the settlement. There is the risk that the defendant may extend the negotiations and exhaust the resources of class counsel before a settlement can be approved. In the instant case, the evidence was that the risk was increasing as the negotiations continued up until the final judgment was entered. The risk in the instant case was at the high end of the scale of risk.

The fees sought in the two actions were fair and reasonable, and the defendants and intervenors did not put forward any principled or evidentiary basis for reducing the fees. While the fees being sought were substantial, the quantum, in and of itself, does not provide a basis for attacking the fee. The test is whether the fees are fair and reasonable in the circumstances. The policy of the CPA was not to limit the amount of fees but to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued.

The fairness and reasonableness of the fee can be assessed by a variety of corroborating tests. These involve, variously, testing the fee as a percentage against recovery, as a multiple

of base fees, as against the retainer agreements and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. On the basis of these tests, the fees, although large, were reasonable. Additionally, the fees compared favourably with the fees awarded in other major class proceedings in Canada and the fees would not impair the sufficiency of the trust fund established to provide benefits for class members. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum contemplated in the retainer agreements were fair and reasonable and accordingly should be approved.

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186, 21 C.P.C. (4th) 272 (Gen. Div.); Doyer v. Dow Corning Corp., Que. S.C., Tingley J.S.C., September 1, 1999 (unreported); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114 (C.A.); Harrington v. Dow Corning Corp., [1999] B.C.J. No. 320 (S.C.); Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.); Pelletier v. Baxter Health Care Corp., [1999] Q.J. No. 3038 (S.C.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Authorities referred to

Ontario, Report on Class Actions (Ontario Law Reform

Commission, 1982), pp. 135-38
Ontario, Report of the Attorney General's Advisory Committee on Class Action Reform (February, 1990), p. 20

MOTION for the approval of counsel fees in class proceedings under the Class Proceedings, 1992, S.O. 1992, c. 6.

Harvey T. Strosberg, Q.C., Heather Rumble Peterson and Patricia A. Speight, for plaintiffs, Diana Louise Parsons et al.
Terrence J. O'Sullivan and Vanessa Jolles, for plaintiffs, James Kreppner et al.
Richard F. Horak and M. Michle Smith, for defendant, The Queen in Right of Ontario.
Michel R. Lapierre, for defendant, Attorney General of Canada.
Beth Symes, for Thalassemia Foundation of Canada, friend of the court.
William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.
Janice E. Blackburn, for Canadian Hemophilia Society, friend of the court.

[1] WINKLER J.: -- This is a motion for approval of the counsel fees in two companion class proceedings, Parsons et al. v. The Canadian Red Cross Society et al. (the "transfused action") and Kreppner et al. v. The Canadian Red Cross Society et al. (the "hemophiliac action") commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). These actions were brought on behalf of all individuals in Canada, except for those in the provinces of Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period of January 1, 1986 to July 1, 1990. There are concurrent class proceedings before the courts of Quebec and British Columbia for individuals in those provinces. The parties in all of the class proceedings across Canada have entered into a pan-Canadian settlement of the litigation. In reasons released on September 22, 1999, I approved the

settlement as it applied to the national classes in the transfused action and the hemophiliac action. The settlement has also been approved by the courts in Quebec and British Columbia as it relates to the actions in those provinces.

[2] The settlement agreement was presented to the courts for approval by all of the parties to the litigation. It contemplated payment of total class counsel fees for all of the actions in the amount of $52.5 million. That figure was used in the actuarial calculations in order to permit the courts to assess the settlement and the sufficiency of the trust fund established for the payment of claims to the class members in the litigation. The Ontario class counsel groups in the transfused action and in the hemophiliac action now bring this motion for the approval of their fees specifically.

Background

[3] The defendants in the Ontario class actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario and the Attorney General of Canada. In addition, all other provinces and territories of Canada, with the exception of British Columbia and Quebec, intervened for the purposes of joining the settlement. Only the governments participated in the settlement, the proceedings against the CRCS having been stayed as a result of an order of Mr. Justice Blair in respect of ongoing proceedings concerning the CRCS under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").

[4] The transfused action and the hemophiliac action were commenced as a result of the contamination of the Canadian blood supply with the Hepatitis C virus ("HCV") during the 1980s. The classes in the actions, however, are described more narrowly as those persons infected by HCV from the blood supply between January 1, 1986 and July 1, 1990.

[5] The classes are confined to the 1986-90 time period because of the basis of the claims asserted in the actions. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The

federal, provincial and territorial governments ("FPT governments") provided funding to the CRCS and staffed an overseer committee known as the Canadian Blood Committee ("CBC") which was composed of their representatives. The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after "surrogate" testing for HCV became available and had been put into widespread use in the United States. It was alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidents of HCV infection from contaminated blood and blood products would have been reduced by as much as 75 per cent during the class period. Consequently, the plaintiffs brought actions on behalf of the classes described above in which claims were asserted in negligence, breach of fiduciary duty and strict liability as against all of the defendants.

[6] As a result of the pan-Canadian settlement agreement, these claims have been settled, although without any admission of liability on the part of any of the defendants. Pursuant to the terms of the settlement agreement, the class counsel in each of the actions now seek court approval of their fees. This motion is in respect of the fees in the class actions commenced in Ontario on behalf of the national classes. Similar motions have been brought in the actions in British Columbia and Quebec.

[7] The motion was heard over a three-day period during which submissions were made by or on behalf of the class counsel in both actions, by counsel for the federal and Ontario governments and by counsel for certain intervenors and friends of the court. In addition, the parties filed affidavit evidence, transcripts of the cross-examinations on the affidavits and, in the case of the federal and Ontario governments, a document which was purported to be an expert's report in respect of fees. The author of this report was cross-examined and a transcript of the cross-examinations was included in the record.

[8] It was apparent at the conclusion of this extensive

hearing that there is agreement among all of the participants with respect to certain facts. These are as follows:

1. The settlement agreement contemplates that total lawyers fees in the Ontario, Quebec and British Columbia actions may amount to $52.5 million. There will be no impact on the sufficiency of the fund to provide the benefits to the claimants set out in the agreement so long as the counsel fees do not exceed this amount.

2. All participants are of the view that class counsel conducted the litigation in a skilful and effective manner and achieved an excellent result for the class members through the negotiated settlement.

3. There is no issue with the total number of hours docketed by class counsel during the proceedings, nor is there any issue with respect to the number of law firms or lawyers engaged in negotiating this settlement on the part of the plaintiffs.

4. The factual account of the conduct of the negotiations as set out in the affidavits of the class counsel group are accepted as being accurate.

5. All participants acknowledge that the class counsel are entitled to a fair and reasonable fee.

[9] Where the defendants and the intervenors part company with class counsel is in respect of the characterization of what, in principle and quantum, constitutes a "fair and reasonable fee".

Law

[10] The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA. These sections provide in pertinent part:

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in

writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

. . . . .

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of the fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or

all class members; and

(b) a settlement that benefits one or more class members.

[11] The leading Ontario case on the quantification of appropriate fees in class proceedings is Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325 (C.A.). Goudge J.A., writing for the court, addressed the purpose of awarding premium fees in respect of successful class proceedings. He stated at pp. 422-23:

> [A] fundamental objective [of the CPA] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

(Emphasis added)

[12] Although the issue before the Court of Appeal in Gagne involved a premium fee in the form of a multiplier of a base fee, it has been held that this is not the only acceptable form of premium fee arrangement in class proceedings conducted under the CPA: see Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470 (Gen. Div.); Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186 (Gen. Div.).

[13] Notwithstanding the different forms that a premium fee arrangement may take, the principle enunciated by Goudge J.A. regarding the purpose of awarding premium fees in a class proceeding has a general application. If the CPA is to achieve the legislative objective of providing enhanced access to

justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved: see Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.). This approach was approved by Goudge J.A. in Gagne where he stated at p. 423:

> In my view, [it is correct to focus] on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor conducted the proceedings.

Analysis

[14] In my view, there are a variety of methods that may be utilized under the CPA to determine an acceptable premium on fees. It is appropriate to utilize this flexibility in fixing the fees in class proceedings where necessary. Here, class counsel seek to have their fees fixed on a lump sum basis pursuant to the retainer agreements with the representative plaintiffs and the provision in the settlement agreement. While this is acceptable in form, in my view, the court must still adhere to the principles discussed in Gagne in assessing the fairness and reasonableness of the counsel fee, whether that fee is calculated on a lump sum basis or otherwise.

A. Result achieved in the litigation

[15] I will deal first with the success or result achieved in the instant litigation. I note in passing that one of the most striking aspects of the fee hearing was the number of issues upon which all participants expressed agreement. As stated above, it was common ground that an excellent result was obtained for the class members through the negotiated settlement of the litigation.

[16] Nonetheless, the court, in fulfilling its role in the approval of fees, must form its own view of the success achieved. The characterization of the result by the parties and other participants is but one factor to be considered. The court's analysis must be objective. In this regard, I concluded in approving the settlement that class counsel have produced the best possible result short of trial: see Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at para. 91. Moreover, the settlement provides for payments according to the degree of harm suffered by the class members, as well as for progressive increases in those payments to class members should their condition worsen. This avoidance of the "once and for all" lump sum payment approach commonly applied in personal injury tort litigation entails an overriding advantage for class members and consequently must augur favourably for class counsel in any considered analysis of the result.

[17] From the perspective of the class members, however, the total compensation or nature of payment cannot be the only criterion on which to judge the result obtained through settlement. Significant weight must also be given to the relative ease or difficulty of access to the benefits achieved through the settlement by a class member: see also Gagne at p. 425. In this case, a procedure for claims administration has been wrought into the settlement that will see most class members able to obtain compensation without the need for further legal assistance or proceedings. This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but

more so, it demonstrates the thoroughness of class counsel in fashi oning a satisfactory settlement.

B. Risk undertaken by class counsel

[18] I turn now to the risk factor. In the context of the CPA, the premium on fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters. Conversely, this does not mean that there should be a reward for bringing forward speculative cases of dubious merit. In my view, the instant matter falls squarely into the first category. Nonetheless, it was strongly contended by the defendants and intervenors that the extra-legal considerations at play in these actions mitigated the risk. The underlying premise for this submission was that this was not litigation in the ordinary sense because the government defendants were inclined to settle for policy and political reasons that had little or nothing to do with the merits of the litigation or the vigorous manner in which it was being pursued. Accordingly, the defendants and intervenors took the position that the risks attendant to litigation generally were not present here. I disagree.

[19] It was common ground among the parties that there were political overtones to the litigation. Nonetheless, to accept the proposition that any extra-legal influence reduced the risk of the litigation would be to engage in a purely speculative, after the fact interpretation of the events that transpired during the course of this litigation. But, more to the point, this proposition is contradicted by the evidence. It is clear that this settlement was driven by the threat of litigation and not by political considerations. This is demonstrated by the chronology of the events, set out in the chart below, leading up to the announcement by the federal, provincial and territorial governments ("FPT governments") on March 27, 1998 that a fund of $1.1 billion would be set aside to satisfy the claims of those persons infected by HCV from the blood supply:

	DATE	EVENT
1.	June 21, 1996	Quebec transfused class action is filed.

2.	September 9 to 11, 1996	The FPT governments announced their decision declining compensation to blood victims.
3.	December 19, 1996	The British Columbia transfused class action is commenced.
4.	October 24, 1996	The FPT Health Ministers announce that they have decided against compensation.
5.	May 22, 1997	The British Columbia transfused class action is certified.
6.	July 7, 1997	There is an agreement on lead counsel for the Ontario HCV class action.
7.	September 16, 1997	Notice of the Ontario transfused class action is given to Ontario and the other provincial governments.
8.	November 26, 1997	The final report of the Krever Inquiry is released.
9.	February 10, 1998	The statement of claim in the Ontario transfused class action is issued on behalf of a national class.
10.	February 23, 1998	The Quebec transfused class action is certified.
11.	March 27, 1998	On behalf of the FPT Ministers of Health the Honourable Allan Rock announces a financial assistance package to persons infected with HCV between 1986 to 1990 of up to $1.1 billion.

[20] It can be seen from this sequence of events that the FPT governments did not make any overtures toward compensating defendants until class proceedings had been certified in British Columbia and Quebec and there was a potential for

certification of a national class encompassing all those persons in the rest of Canada in the Ontario proceedings. It must also be noted that even though the announcement of March 27, 1998 could hardly be considered a formal binding offer of settlement, it was only intended to apply to those persons included in the class proceedings. The litigious nature of the settlement negotiations is further evidenced by the length of time and effort taken to reach a binding agreement. Even then, there were still numerous conditions attached because of the desire of the FPT governments to have one pan-Canadian settlement for all of the actions. Furthermore, there has never been any admission of liability by the defendants. Indeed the final settlement agreement contains a specific disclaimer of liability.

[21] The evidence of Douglas Elliot, a member of the class counsel group, is instructive. Mr. Elliot is a highly experienced lawyer in blood litigation in Canada. As a result of his involvement with the issues surrounding the Hepatitis C litigation and his participation at the Krever Commission inquiry, he attempted to assemble a counsel group to prosecute a class proceeding on behalf of those infected with HCV from the blood supply.

[22] In his affidavit, Mr. Elliot chronicles three years of unsuccessful attempts to find counsel in Ontario willing to lead and participate in a class proceeding related to the HCV problems stemming from the contamination of the Canadian blood supply. He deposed that it was difficult to find any law firm, large or small, willing to take on the litigation, especially in the role of lead counsel. It is his evidence that none of the counsel he approached regarded the potential political considerations as altering the fundamentally litigious nature of these proceedings. Their rejections were based strictly on the legal problems which the case presented. He states in para. 41 of his affidavit:

> 41. I believe that there were few lawyers who were knowledgeable about the operation of the blood system in Canada to begin with, and many regarded tainted-blood cases on behalf of plaintiffs as unattractive owing to their

> complexity and their prohibitive costs. The trial in Pittman, which was by this time completed, had lasted almost one year. To put the matter simply and directly, the lawyers to whom I spoke well understood that, in relation to this class action and the complex issues of liability, there were simply much easier ways to earn a living. And so they declined to become involved.

His evidence in this respect was not challenged by the defendants or intervenors. In the result, I must conclude that any suggestion that the political implications of the issues made the litigation less risky, apart from being inaccurate, was not apparent to most of the lawyers in Ontario at the outset of the litigation.

[23] In consideration of the chronology of the events in this litigation and the uncontested evidence of Mr. Elliot, I am unable to accept the contention that political considerations operated to either transform this litigation or diminish the risk associated with it in any material way.

[24] This leads in turn to another argument that was advanced by the government defendants. They contended that, even if the proceedings were considered to be litigation in the ordinary sense, the inherent risks diminished with time as the negotiations progressed. In consequence, they submit that any premium on the fee should reflect this diminishing risk. In support of this proposition, these defendants filed the report of Michael Ross, a vice-president of the accounting film KPMG. Mr. Ross, in accordance with his instructions, attempted in his report to apply mathematical parameters, including a factor for changing risk, to the determination of an appropriate counsel fee in a class proceeding. However, this report was less than helpful, in part because of the flaws in the underlying premise that the risk factor in litigation can be ascertained with mathematical precision, and in part because of his fundamental misconception of the nature of a class proceeding and the CPA.

[25] That said, I realize that Mr. Ross was given an impossible task. His assignment was, in reality, to attempt to define a subject with more precision than the subject would

bear. As Goudge J.A. stated in Gagne, the fixing of an appropriate fee in a class proceeding is "an art, not a science". As such, the court must be wary of attempts to measure appropriate fees by the application of pseudo-scientific or mathematical methods. Such an approach is inherently unreliable when a subject with as many variables as this litigation is considered.

[26] Mr. Ross based his evidence on the premise that the premium on a fee should be reflective of the "judgmental probability of success" in the litigation. In his opinion, the amount of the premium over the ordinary fees should be a reciprocal of the risk of the litigation. As a theoretical example, this would ensure that counsel taking on litigation with an estimated 50 per cent probability of success would not suffer any economic prejudice if the fee earned in the successful actions was multiplied by a factor of two. For every two actions, one unsuccessful, one successful, that counsel undertake, the fees would balance out and there would be no loss.

[27] This mathematical approach is fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of the proceeding. The vagaries of litigation simply do not permit it.

[28] Mr. Ross also propounded the theory that the risk of the litigation changed as it progressed and that, therefore, the premium should reflect the changing risk. While there may be some truth to the assertion that the risk of litigation changes over the course of the proceeding, it must be considered that changes can occur which both diminish and exacerbate risk at different points in the litigation. There is no more prospect of assigning a precise mathematical value to the risk on a segmented, progressive basis than there is at the outset of the litigation.

[29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some

consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

[30] Equally troubling is the fact that Mr. Ross did not consider the unique features of the CPA in formulating his theory regarding the "judgmental probability of success". This was apparent from the transcript of his cross-examination. For example, it was clear that Mr. Ross did not appreciate the risk induced into class action litigation by the additional element of the requirement to attain certification. In the result, the probability of success or failure on the certification motion was not a factor that Mr. Ross considered. This is a significant omission if his fee theory is to be applied to class proceedings. More importantly, it is illustrative of the inherent unreliability of this evidence and, further, is indicative that Mr. Ross is offering an opinion to the court that is clearly outside his area of expertise.

[31] In the result, I conclude that the report of Mr. Ross is of no value in determining either the risk assumed by class counsel or the reasonableness of the fee in these actions.

[32] The government defendants chose to rely heavily on this report and did not offer any other evidence on the assessment of the risk involved in the litigation. They did not file affidavits from any member of the counsel group that were involved in the negotiations on behalf of the governments, nor did they provide any evidence from any person at a senior

administrative level in the governmental departments responsible for the litigation. Instead, the government defendants conceded that the accounts of the negotiations proffered by the affiants deposed on behalf of the class counsel group were accurate. Interestingly in this regard, the government defendants chose to file as part of their evidence the affidavits of class counsel in the British Columbia and Quebec actions.

[33] A picture emerges from the affidavits proferred by class counsel and the government defendants of negotiations that were logistically difficult, intense and time-consuming, adversarial and hard fought. There were obvious points at which potential "deal-breaking" issues surfaced and the success of the negotiations hung in the balance. The various affiants cite examples.

[34] Bonnie Tough, the lead counsel for the hemophiliac action, states in her affidavit:

> 107. There was throughout the negotiations and even following the Framework Agreement in December of 1998 the risk that one or more governments would not approve the settlement. It was never clear to me the extent to which the various provinces and territories were represented at the negotiating table. It was clear that to the extent they were represented by one or more lawyers, those lawyers were without authority to conclude a deal.
>
> 108. Even within the governments, it was not clear who was instructing the lawyers, i.e. Attorneys' General, Department of Justice, Ministries of Health, Cabinet, Treasury Boards, etc. I was concerned that the successful conclusion of any deal depended upon the attitudes and conduct of a phantom group with whom I was not directly speaking. I did not know the extent to which political differences might influence the acceptance or rejection of any settlement. Changes in governments throughout the time only exacerbated this concern.

[35] Heather Peterson, a member of the class counsel group in

the transfused action, states in her affidavit:

> 78. During [the] last stages of negotiations additional issues arose, some of which also threatened to undermine the negotiations. Two of the most serious examples come to mind:
>
> (a) The Framework Agreement provides . . . that the [Settlement] Fund would generate interest as if the amount had been notionally invested at the interest rate paid "from time to time on Long Term Government of Canada Bonds from April 1, 1998 for the duration of the Plan." However during negotiations, the federal government took the position that only the T-bill rate should be paid. Class Action Counsel took the position that maintenance of this position by the FPT governments would be a "deal breaker".
>
> (b) On or about May 9 and 10, 1999, at a negotiation meeting in Vancouver, the FPT Governments raised the prospect of including in the settlement persons who had contracted HCV from immune globulins. The Framework Agreement and all of the ensuing negotiations until that date had not included any reference at all to this group.
>
> . . . [the Ontario government] took the position that [it] wished to be finished with all HCV blood litigation and thus wanted persons who contracted HCV from immune globulins in the Class Period included in the settlement. Strosberg's response was that there was simply no basis to include these persons in the plaintiffs' class. The end of these discussions came on May 13, 1999 at the Toronto offices of McCarthy Tetrault . . . [when] Strosberg told counsel to the FPT Governments that their insistence upon including recipients of immune globulins in the class was a "deal breaker," that it was their choice, but under no circumstances would he accept this group in the class. Strosberg intended to break off negotiations if the FPT Governments did not yield on the issue. Strosberg and I left that session uncertain as to whether negotiations had broken down. Thankfully, the FPT Governments eventually relented.

[36] It is apparent from the record that even though this

litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

[37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhauste d before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

[38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a

settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed. In that respect, one need look no further than to the actual settlement approval process which required a review of the settlement by this court. In order to obtain the approval of this court, modifications were required to the settlement agreement. Although the court took the view that these modifications were "non-material" as that term was set out in the agreement, the federal government took a different view, as related in the affidavit of Ms. Peterson. She deposed as follows:

> 92. After Mr. Justice Winkler's [sic] delivered his reasons on December 22, 1999 counsel for the federal government and counsel for Ontario asserted orally that the modifications he had suggested and the reasons were indeed "material differences".
>
> 93. After delivery of Mr. Justice Winkler's reasons, counsel for the federal government urged class action counsel to join with him in attempting to persuade Mr. Justice Winkler that his suggested modification relating to the surplus should be abandoned. He told us that if we did not agree he would recommend to the federal government to take issue at Mr. Justice Winkler's suggested modification. He said that, in his opinion, the modification was a "material difference" and that, therefore, there was not court approval of the settlement agreement. He urged class action counsel to make those fundamental choices before the telephone conference he was having with the FPT Deputy Ministers of Health to be held on October 14, 1999. Strosberg believed strongly that the FPT governments would ultimately accept the three modifications proposed by Mr. Justice Winkler. Class action counsel deferred to Strosberg's political judgement and did not agree with counsel for the federal government, and ultimately the FPT govern ments consented to the three modifications. Even after the delivery of Mr. Justice Winkler's reasons, then, fundamental tactical decisions were required and considerable uncertainty remained over whether or not there was actually a settlement.

(Emphasis added)

Clearly the risk continued up until the final judgment was entered.

[39] There was an additional submission by one of the intervenors that despite the fact that there may have been risk associated with the negotiations, there was a general cooperative tenor to the negotiations that lessened the risk. I cannot accede to this submission for several reasons. First, it is contrary to the evidence. J.J. Camp, lead counsel for the class in the British Columbia action, whose affidavit was filed on this motion by the federal government, deposed:

> 95. On July 9, 1998 I had an extensive telephone conference with [government counsel] during which they proposed a new counter offer. The tenor of the discussion at times became quite acrimonious with both sides alleging how disappointed they were with the position of the other . . .

This is echoed in the affidavit of Bonnie Tough, lead counsel for the class in the hemophiliac action. She states:

> 79. Finally, in November of 1998, there was a meeting in Ottawa with Transfused Class Counsel, Hemophilia Class Counsel and counsel for the governments. The meeting was acrimonious and ended with all parties walking from the table in frustration.

[40] But, in any event, risk is not synonymous with acrimony in a negotiation process. Even if the tenor of the negotiations changed somewhat for the better after certain points of contention were resolved, there is nothing in the record which would indicate that these negotiations were anything less than hard fought to the end. As such, they were capable of being derailed at any point, regardless of the level of acrimony between the participants. Indeed, the federal government chose to characterize the negotiations in exactly this manner in its submissions to the court on the settlement approval motion. As stated in the factum filed on that motion by counsel for the

federal government:

> 106. It is common ground between the parties that the agreement was reached only after an excess of a year of hard fought negotiations between the Parties.
>
> . . . . .
>
> 108. The March 1998 announcement expressly contemplated that:
>
> "details of assistance will be determined through a negotiation process submitted to the courts for approval. This should ensure fairness. Victims and their legal representatives will be part of this process."
>
> Apart from this direction, however, Ministers [sic] merely outlined certain "principles" and "suggestions" for what the final negotiated arrangement would look like . . .
>
> . . . . .
>
> 111. Further negotiations and an extensive drafting exercise took place subsequent to the Agreement in Principle which resulted in the Agreement before the court today. There can be no dispute but that the Agreement is the product of intense negotiations between counsel for the plaintiffs and FPT governments.

(Emphasis added)

> [41] Further evidence of the tone of the negotiations, or at least the position taken by the parties, can be found in the affidavit of Ms. Peterson. She stated:
>
> 79. During the negotiations, counsel for the federal government occasionally observed that the option always remained for the FPT governments, or one or some of them, to legislate a program in place of a court-approved negotiation settlement within the framework of the class actions. This option was always a real and substantial risk for class action counsel and our counsel group.

. . . . .

81. Settlement was always dependant upon formal cabinet approval by all 14 FPT governments. During the negotiations, tensions were palpable among the FPT governments. Counsel for the various FPT governments at times asserted differing, disconsolate positions; so also did class action counsel. Through it all, it became clear to me that, from the FPT government side of the negotiating table, political considerations were as important as legal issues. The concerns about political ramifications was a constant risk, because there were numerous provincial elections and changes in provincial governments (including the creation of a new territory) in the course of the negotiations from April 1998 to October 1999.

[42] While I do not equate acrimony with risk, complexity, on the other hand, breeds risk in any proceeding. In this case, the logistical complexity was overwhelming. The insistence of governments that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 FPT governments, each with differing political agendas and policies. Although obtaining approval from this group alone was daunting enough, the class counsel groups in the various actions on the other side of the bargaining table were by no means speaking in a unified voice at all times. In the transfused and hemophiliac actions in Ontario, the combined class counsel groups were comprised of over 60 lawyers and supporting legal personnel. In addition, the negotiations were played out against the backdrop of changes in the provincial and territorial governments, changes in the Ministers of Health for all of the governments, and political activism directed at attaining a universal settlement for all persons infected with HCV by blood in Canada, regardless of the date of infection. The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-

Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[43] The evidence is compelling. This litigation, notwithstanding the fact that it was conducted as a protracted negotiation, was redolent with risk. Moreover, in so far as it is appropriate to assess the risk assumed by class counsel on a sliding scale or range depending on the nature of the action in comparison to other actions, I am satisfied that the risk enuring to class counsel in these actions should be considered to be at the high end of any such scale.

C. Fair and reasonable fee

[44] A fair and reasonable fee must be reflective of the risk undertaken by class counsel and the result attained for the class in the action. My analysis of those factors is set out in the foregoing. The next step is to determine, through their application, whether the fees being sought by the class counsel groups, $15 million in the transfused action and $5 million in the hemophiliac action, constitute fair and reasonable fees in the circumstances.

[45] In considering this, I cannot accede to the submissions of the various intervenors with respect to the fees. Taking their submissions as a group, the intervenors submitted that fees ranging between approximately $6 million and $11 million should be awarded in the transfused action. In the hemophiliac action, the range of the intervenors' submissions was from approximately $2 million and $3 million. Although the intervenors did not seriously question the allocation of lawyers and legal staff, they did attack the hourly rates of certain counsel. This attack lacked any evidentiary basis, however, and thus must be rejected. The second, and main, submission of the intervenors was that there was a diminution of risk either because of the political considerations or the fact that these proceedings were conducted as a negotiation rather than as a completely adversarial trial process. Since I have rejected these underlying propositions as being unsupported by the evidence, it follows that the submission

founded on them must be rejected as well.

[46] I have considerable difficulty with the submission of the government defendants on different grounds. While I have rejected the intervenors' submissions as founded on erroneous assumptions, there was, to their credit, an implicit acknowledgement, and application, within those submissions of the dual factors of result and risk to be considered in determining a fair and reasonable fee. In contrast, the government defendants submitted figures in respect of the fees that represented less than the monetary value of the docketed time of the class counsel groups. This submission was made despite the acknowledgement by the government defendants of the "high degree of competence of the class counsel" and the recognition of the satisfactory result attained for the classes. Further they took no issue with the hours expended by the class counsel groups, the number of counsel within those groups, or the class counsel evidence with respect to the difficulty of the negotiations. The fee proposed by the governments wa s arrived at by combining an arbitrary reduction of the hourly rates of the class counsel group and an addition of a premium of approximately 10 per cent of the reduced amount. If accepted, the net effect of the governments' submission would be to deprive class counsel of any premium, multiplier or reward of any nature reflecting risk or result.

[47] The position taken by the government defendants is untenable. Considered in the context of these proceedings, the fees they propose are not reflective of either the result obtained or the risk undertaken even if just one of those factors were to be considered in isolation. More so however, the fees proposed by the government defendants are at variance with the apparent underlying policy of the CPA and the interpretation of that policy by the Court of Appeal in Gagne.

[48] It was suggested by Mr. O'Sullivan, who appeared on behalf of the class counsel group in the hemophiliac action, that it was obvious that the government defendants' position was driven by political expediency rather than by a sincere effort to assist the court in determining an appropriate fee. In support of this analysis, he provided several press

clippings, including some culled from newspaper editions published during the three days of this hearing, that were critical of the fees being sought by the class counsel group. He suggested that the government position, when compared to the positions taken by class counsel and the intervenors, was so far outside the range of reasonableness that it could only be inferred that political, rather than legal considerations must be at play.

[49] Notwithstanding these submissions, it is not within the purview of the court's role on this motion to impute ulterior motives to any party and I make no finding in respect of the submissions of Mr. O'Sullivan. As I stated in my reasons regarding the settlement approval, "extra-legal concerns, even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review . . .".

[50] Nonetheless, the concern expressed over extra-legal considerations may well be symptomatic of a general lack of understanding of the legal framework in which these proceedings evolved. The court was invited to address this issue in these reasons by Mr. Dermody, counsel for the intervenors. He expressed a concern that there was a general misunderstanding regarding the nature of these proceedings that had the potential to create animosity between the class members, their counsel and the FPT governments which might, in turn, erode the salutary benefits of the settlement and reflect negatively on the fair compensation of counsel. This point is well taken.

[51] In addressing the issue, the starting point must be an understanding that the proceedings were litigious in nature and that the settlement offered by the FPT governments was driven by the prospect of an unfavourable determination, however probable or improbable, if the litigation proceeded to a conclusion. There is no evidence to support any assertion to the contrary. In the result, there was nothing untoward in the way that the government defendants or the class counsel groups conducted themselves in resolving the litigation. Hard bargaining is a fact of life in any high stakes negotiation. Outright capitulation from either side of the table is not a

realistic expectation. There were arguable defences and a legitimate question as to the ultimate liability of the governments. While recognizing that the victims had suffered a tragedy, the governments, as litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created b y these two concerns obviously complicated matters for the FPT governments and for the class counsel groups. Despite these complexities, the parties persevered through arduous negotiations and reached an agreement to settle the outstanding litigation within a legal framework.

[52] In recognition of the legal framework within which the settlement was negotiated, the agreement crafted speaks directly to the question of class counsel fees in that it stipulates a limit on those fees. All counsel agreed that the fees sought would not exceed $52.5 million in total. The details of the background negotiations that led to this provision are contained in the affidavits of the British Columbia and Quebec class counsel. The government elicited an agreement from the class counsel groups that they would not seek fees on the basis of a percentage of the total settlement and further, that the counsel group would agree to a cap on the total mount of fees. In addition to the other concessions extracted by the governments, counsel were required to surrender any fee agreements that they may have executed with individual class members. Mr. Camp deposes to this at para. 148:

> 148. Under my fee agreement, [the class counsel group] were entitled to charge up to one-third of the settlement amount attributed to the British Columbia class action. Quebec class counsel also had a percentage contingency fee agreement with their representative plaintiff. Class Counsel in both the Framework Agreement and the Settlement Agreement have waived their rights to seek recovery of class counsel fees based on a percentage of the settlement amount. Without doubt, in my opinion, the compromise by class counsel of their right to claim class counsel fees on the basis of percentage of any settlement or judgment, which in my case amounted to up to one-third, was a significant concession which assisted the

parties in coming to an agreement.

Mr. Lavigne similarly stated in his affidavit:

> 145. It should be noted that 166 of the 450 victims who are on the M.M.M.F. lists have agreed, by giving a written mandate, a copy of which is attached hereto, to pay a sum amounting to 20% of any amount that was obtained by a judicial process or negotiation process or by government compensation;
>
> 146. The client's expectations in this respect have been clearly established since 1995 and have always comprised a clear, plain and precise working basis for all of the people who came into contact with our firm;
>
> 147. This percentage agreement, which is entirely proper and legal in Quebec, has been set aside as regards a claim of 20% in the total amount of the settlement;
>
> 148. In the final quibbling during the negotiations that led to the Agreement of June 15, 1999, the applicant solicitors agreed to this additional concession, which was demanded by the governments, and particularly by the federal government, so that the Agreement could be concluded;
>
> 149. However, consideration for this was provided: that an agreement would be negotiated and concluded after the Agreement was signed to avoid any question of conflict of interest. Those negotiations have never taken place, and so it is impossible for us to take a position jointly with the respondents regarding the amount of the fees;

[53] A final agreement regarding fees was never negotiated. Nevertheless, in consideration of the negotiated surrender of the individual contingency fee agreements, the undertaking by class counsel not to seek a fee on a percentage basis and the express cap of $52.5 million on total fees, there is no other reasonable conclusion than that there was a tacit understanding between class counsel and the governments that this amount represented a fair and reasonable fee for counsel in the

circumstances.

[54] To put this in its proper context, it must be remembered that over 400 of the then identified class members in British Columbia and Quebec had negotiated individual contingency fee arrangements whereby they would have paid between 20 per cent and 33 per cent of any compensation received. This arrangement would produce a counsel fee of over $220 million, at a minimum, if extrapolated against the total settlement and the estimated class size as a whole. In comparison, the cap on fees negotiated by the governments is very favourable indeed.

[55] However, while this tacit agreement between the parties regarding fees is instructive, it is not in itself determinative. In order to arrive at the appropriate premium fee, "all the relevant factors must be weighed".

[56] The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in Gagne, is whether the fees are fair and reasonable in the circumstances. The legislature has not seen fit to limit the amount of fees awarded in a class proceeding incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in Gagne, is to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. To this effect, the authors of the Ontario Law Reform Commission's Report on Class Actions (1982) stated at pp. 135-38:

> Critics of class actions often compare the total amount of administrative costs and lawyer's fees with the amount of each class member's claim, and then suggest that these costs and fees have the effect of depriving class members of any significant recovery. However, a comparison of total costs and fees with an individual class member's claim gives a rather myopic view of the issue. A better sense of whether the costs and fees of a class action are reasonable can be achieved by determining the percentage of the class recovery

consumed by such costs and fees.

> Empirical data also has been collected concerning the percentage of class recoveries consumed by lawyers' fees alone. [In the United States] the data collected . . . indicates that, in slightly more than fifty percent of the cases for which such information was available, lawyers' fees represented twenty-five percent or less of the recovery, while in only 10.7 percent of the cases did such costs exceed fifty percent of the recovery.
>
> These percentages of class action awards consumed by lawyers' fees and administrative costs do not appear particularly unreasonable, given the complexity of class suits. Moreover, the figures revealed by the empirical studies do not appear to be out of line with the proportion of individual recoveries consumed by lawyers fees and disbursements in individual litigation in Ontario, if the Law Society of Upper Canada was correct in suggesting that Ontario clients tend to receive a "net recovery" reduced by fifteen to twenty-five percent.
>
> In evaluating the fairness of lawyers' fees documented by the empirical studies, it is important to remember that, at least in the case of individually non-recoverable claims, any attempt to assert the claim through an individual suit would, by definition, consume 100 percent of the claim. Measured by this standard, the proportion of an individual class member's recovery consumed by class lawyers' fees in the United States does not appear inherently unreasonable. Moreover, in some cases, the costs of individual litigation may consume a substantial proportion of even those claims that are individually recoverable and, in such situations, the class action will also result in cost savings, even if the share consumed by lawyers fees remains substantial.

[57] The OLRC Report has been widely acknowledged to be the most sophisticated and extensive analysis of class actions undertaken in the world: see the Report of the Attorney General's Advisory Committee on Class Action Reform (Ontario, February 1990) at p. 20. The pragmatic approach it displays

towards counsel fees in class actions was based on careful study and analysis. It is significant that the authors of the report did not consider counsel fees representing 25 per cent of the total recovery "inherently unreasonable".

[58] However, the appropriateness of a premium fee, whether as a lump sum, as a percentage of the recovery or as a multiplier of a base fee must be assessed against the facts of each case. The adoption of any standard multiplier or percentage fee would undoubtedly result in fee awards that have little relation to the risk undertaken or the result achieved. This was recognized by Goudge J.A. in Gagne. To use these proceedings as an example, notwithstanding the OLRC Report and the typical awards in class proceedings, a fee based on 20 per cent or more of the recovery would be clearly excessive and represent a windfall for the counsel groups.

Disposition

[59] Class counsel in the transfused action and the hemophiliac action seek court approval of "lump sum fees" in the amounts of $15 million and $5 million respectively, and ask that the fees be fixed in those amounts, pursuant to written retainer agreements with the representative plaintiffs. This lump sum method of payment is expressly contemplated by s. 32(1)(c) of the CPA and by the settlement agreement, which provides at para. 13.03:

> The fees, disbursements, costs GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the settlement amount.

(Emphasis added)

[60] Moreover, it has been held that the contingency fee provisions of the CPA are not limited to a base fee and multiplier arrangement, but instead permit of fee arrangements of various types, including lump sums and as percentages of

recovery. In Nantais v. Telectronics Proprietary (Canada) Ltd., supra, Brockenshire J., in approving a lump sum fee, stated at p. 528:

> . . . the special provisions relating to "multipliers" for hourly rates [do not prevent], in any way, other arrangements as specifically authorized under s. 32(1)(c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers.

[61] In Crown Bay Hotel v. Zurich Indemnity Co. of Canada, supra, this court stated at p. 88:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in Nantais, is in place, such a fee arrangement encourages rather than discourages settlement. . . . Fee arrangements which reward efficiency and results should not be discouraged.

[62] However, regardless of the manner in which a premium fee is awarded in a class proceeding, whether by lump sum or otherwise, to adopt the words of Goudge J.A. in Gagne, the premium must be one that "results in fair and reasonable compensation to the solicitors" having regard for the risk undertaken and the result achieved.

[63] In Gagne, Goudge J.A. set out a series of useful corroborating tests for analyzing the fairness and reasonableness of the fee. These involve, variously, testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreement and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. As he stated at p. 425:

> In the end, [these considerations must result] in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might will be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

[64] The first of the corroborating factors is a test of the fee as a percentage of the class recovery. I note that the settlement agreement expressly prohibits class counsel from asking that their fees be fixed as a percentage of the settlement amount. Nevertheless, it remains a valid basis for comparison purposes. The fees sought in the transfused action represent 2.36 per cent of the portion of the settlement apportionable to the Ontario national class victims. The work in the hemophiliac action was for the benefit of all hemophiliacs. The fees sought in the hemophiliac action equate to 3.33 per cent of the total amount of the settlement apportionable to the hemophiliac class members. On this basis, the fees, although large, are more than reasonable.

[65] Second, the fee should be tested as a multiple of the base fees docketed by class counsel. On this basis, the fees sought are consistent with the suggested range set out in Gagne for "the most deserving case". I note that the calculation is made more complex by the fact that class counsel continued to do work necessary to ensure the implementation of the settlement after the date of the expiry of the period for appeal of the approval. The settlement agreement contemplates that additional fees will be paid to counsel for certain administrative work, over and above the class counsel fee, at

an hourly rate. However, as stated above, an important consideration in measuring the result achieved is whether or not the job is complete. Accordingly, it is my view that the work that has been performed to date was properly required of class counsel to ensure that the settlement was implemented. Counsel have valued the additional work at approximately $675,000 for counsel in the transfused action and $148,000 for counsel in the hemophiliac action from the end of the appeal period on January 22, 2000 to May 14, 2000. They have made a written submission to the court that their work as class counsel was completed on May 14, 2000. I cannot accede to this submission. While the administration is functional and claims are now being received, processed and paid, some details must still be completed. Thus, there will be no further compensation to counsel for any additional time spent in attending to these matters. The premium fee being sought in these actions is being sought on the basis of a "job well done". The court will not approve an additional fee for this work, or any additional work remaining to be done in order to complete the implementation of the settlement and its administration.

[66] Without considering the value of the "additional work", the lump sum fees constitute a multiplier of 3.57 in the transfused action and 4.29 in the hemophiliac action. When the fees for this additional work are included however, the multipliers are 3.07 and 3.80 respectively. For the hemophiliac action, the base fee and multiplier approach yields a figure at the high end of the range set out in Gagne, but the result obtained for the Hemophiliac class members justifies such an award. The qualifying threshold negotiated by class counsel eliminates a potentially insurmountable burden of proof that those class members would otherwise have faced.

[67] Third, the fees may also be measured by the expectation of the representative plaintiff as evidenced by the retainer agreement. Here, unlike the usual case, the specific amount of the fees were agreed to by reasonably informed representative plaintiffs. Moreover, the retainer agreements executed by the representative plaintiffs are a marked improvement over the individual fee agreements signed by the class members in Quebec and British Columbia.

[68] The fee must also provide a sufficient economic incentive to attract counsel to cases of a similar nature in the future. The words of Goudge J.A. bear repeating. As he stated in Gagne at pp. 422-23:

> The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

(Emphasis added)

In the present circumstances, given the difficulty in securing counsel for the classes, let alone the experienced counsel that were ultimately retained, the incentive of a reasonable premium was necessary to ensure that these victims had counsel of the highest calibre without the benefit of whom this settlement could not have been achieved. The lump sum fees set out in the retainer agreements meet this test.

[69] Additionally, the fees compare favourably with the fees awarded in other major class proceedings in Canada as shown by the following chart:

Action	Total Class Recovery	Class Counsel Fees	Percentage of Recovery	Further Legal Fees Anticipated to be Incurred by Class Members
Harrington v. Dow Corning Corp. [1999] B.C.J. No. 320 (S.C.)	$40,000,000	$6,000,000	15%	Yes

(Quicklaw)				
Doyer v. Dow Corning Corp. (Sept. 1, 1999), 500-06-000013-384 Sup. Ct. of Que. Tingley J.S.C.	$52,000,000	$10,4000,000	20%	Yes
Nantais v. Teletroncis Proprietary (Canada) Ltd. (1996) 28 O.R. (3d) 523 (Gen. Div.)	$23,140,000	$6,000,000	26%	Yes
Pelletier v. Baxter Health Care Corp.,* [1999] Q.J. No. 3038 (S.C.) (Quicklaw)	$21,525,000	$3,648,000	16.9%	Yes
*combined with Jones v. Baxter Health Care Corp. in Ontario				

[70] Finally, the fees, as set out in the retainer agreements, if approved, will not impair the sufficiency of the trust fund established to provide the benefits to the class members. The actuarial report prepared by Eckler and Partners

specifically addresses this issue.

[71] These class proceedings have been described throughout as the largest personal injury case in Canadian legal history. The global settlement amounts to over $1.5 billion dollars when all benefits are included. The settlement is pan-Canadian in scope. The defendants include all of the federal, provincial and territorial governments in Canada. The prime defendant, CRCS, is under court protection pursuant to the CCAA. The benefits are to be paid out of a trust fund established for the class members rather than out of the general revenue accounts of the governments. The nature of the benefits provided through the settlement is imaginative and incorporates some of the innovative measures regarding compensation in personal injury lawsuits that courts have been advocating for over 20 years.

[72] The logistics of the litigation must also be considered. It took almost three years to find lawyers willing to undertake the case because of the size and complexity. The investment required of class counsel, and the inherent risk of non-recovery, were daunting. Over 60 lawyers and legal staff were involved in bringing this litigation to a successful conclusion. Neither the governments nor the intervenors challenged the number of people or the hours required of those people to finalize the settlement.

[73] The evidence of class counsel regarding the negotiations was accepted. Indeed, the government defendants echoed the evidence of class counsel in their own submissions on the earlier motion for settlement approval. It common ground that class counsel did an excellent job. There was unanimity as to the quality of the settlement. Further, in so far as there were arbitrary points of contention raised on this motion, the evidence of class counsel on those points stands unchallenged and uncontradicted. Simply put, neither the intervenors nor the government defendants have put forward any principled or evidentiary basis for reducing the proposed counsel fees. Accordingly, I cannot accept their submissions that the fees specified in the retainer agreements should be reduced.

[74] To look back with the clarity of hindsight and re-

evaluate the relevant factors in light of subsequent events when fixing fees is unfair. A court must, as best as it is able, consider the elements of the litigation as they would have appeared to the parties at the material times. To do otherwise would be inconsistent with the underlying policy of the CPA. Here, the fees sought as agreed to by the representative plaintiffs are large but so were the lawsuits and the settlement. The settlement agreement evidences that the size of the fee was anticipated by the governments who now object. As Goudge J.A. stated, the opportunity for class counsel to receive a premium for taking on difficult litigation and doing it well must not be "a false hope". It is an essential ingredient of the CPA that counsel be provided with a significant incentive to take on meritorious class proceedings. This means that premium fee awards must reflect the reality of the risk and the success of the efforts of class counsel in a meaningful way. Without this, injured parties will be denied the services of the most experienced counsel.

[75] This litigation was of the most difficult kind on a number of fronts. It epitomized risk as that term is used in the context of fee awards under the CPA. It is questionable whether any single member of the class would have had the financial resources to prosecute a lawsuit to a successful conclusion in consideration of the scope, the factual complexity of such a case, the myriad of legal issues that would have arisen and the countless years that such litigation would consume. In contrast, this settlement provides class members with access to immediate benefits without any further legal impediments to their claims. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum fees contemplated in the retainer agreements are "fair and reasonable".

[76] Accordingly, the retainer agreements in the transfused and the hemophiliac actions are approved. The lump sum fees set out therein are also approved and fixed. Counsel may attend before me to address the matter of disbursements. The final order will address the outstanding work to be done by class counsel.

[77] In light of the magnitude of these actions, and the issues involved, the court permitted and, indeed, encouraged submissions from persons with a stake, in one form or another, in the litigation. The fees submitted by counsel for these stakeholders, identified variously as intervenors and friends of the court, are also approved.

Order accordingly.

TAB 19

T-2212-16

2018 FC 641

Jessica Riddle, Wendy Lee White and **Catriona Charlie** (*Plaintiffs*)

v.

Her Majesty the Queen (*Defendant*)

INDEXED AS: RIDDLE V. CANADA

Federal Court, Shore J.—Ottawa, May 10, 11 and June 21, 2018.

Crown — Torts — Motion for order inter alia certifying action as class proceeding for settlement purposes, approving Settlement Agreement reached in November 2017 between parties (Settlement Agreement) — Loss of culture, language, identity led to loss of personal, collective essence for vulnerable children who were "scooped" from 1951 to 1991 — Foundation proposed in Settlement Agreement to ensure claim of cultural identity bringing about living entity for all Indigenous peoples in Canada, including Métis — Twenty-three class proceedings across Canada existing at different stages in respect of Sixties Scoop —Federal Court, provincial court jurisdictions seized of subject matter — Actions seeking damages for harm caused by alleged breaches of fiduciary, common law duty on part of Federal Crown — Federal Government initiating mediation regarding Sixties Scoop litigation across country — Class counsel, representative plaintiffs recommending that Settlement, Foundation be approved as fair, reasonable, in best interests of class members — Whether Settlement Agreement should be approved in accordance with Federal Courts Rules, r. 334.29 — Legal test to be applied for approval of Settlement is whether settlement fair, reasonable, in best interests of class as whole — Settlement Agreement providing non-monetary benefits that would allow survivors to heal, obtain education, reconcile, commemorate — Foundation would be implemented ensuring that all survivors of Sixties Scoop would benefit from it, including Métis, non-status Indians — Regarding fiduciary duty, common-law duties of care of Canada, Supreme Court of Canada previously holding that more difficult to prove breach of fiduciary duty against government than against private actor — As to legal fees sought, those fees fair, reasonable — Regarding compensation range, proposed sums were meaningful amounts of money as per the evidence — As to capped Settlement Fund, compensation was symbolic payment, not one that could, with any sum, recompense suffering for loss of persona, family, nation, thus identity — While Settlement Agreement only applying to status Indians according to Indian Act and to Inuit, Settlement Agreement fair — Action certified as class proceeding, Settlement approved with modifications as ordered — Motion granted, action against defendant dismissed.

Practice — Class Proceedings — In motion for order certifying action as class proceeding for settlement purposes, for order approving settlement agreement reached in November 2017 between parties, Court having to determine whether Settlement Agreement should be approved in accordance with Federal Courts Rules, r. 334.29; whether legal fees sought fair, reasonable, in accordance with Federal Courts Rules, r. 334.4 — Terms of Settlement Agreement, compensation fund, simple paper-based claims process, non-monetary benefits all compelling factors proving that legal fees fair, reasonable in case at bar — Regarding individual compensation range of $25 000 to $50 000, considering that claimants would not be required to prove harm or loss to receive compensation, proposed sums meaningful amounts of money as per evidence — As to capped Settlement Fund, compensation here symbolic payment, not one that could, with any sum, recompense suffering for the loss of cultural identity — While Settlement Agreement only applying to status Indians according to Indian Act, to Inuit, Settlement Agreement fair — Action certified as class

proceeding, Settlement approved with modifications as ordered.

This was a motion for an order *inter alia* certifying the action as a class proceeding for settlement purposes and approving the Settlement Agreement reached on November 30, 2017 between the parties (Settlement Agreement or Settlement). Subsequent to the conclusion of settlement discussions and the proposed Foundation, Prime Minister Justin Trudeau, while at the United Nations headquarters in September 2017 apologized for Canada's most shameful abuse perpetrated towards the Indigenous population. Loss of culture, language and identity led to a loss of personal and collective essence for vulnerable children who were "scooped" from 1951 to 1991. A Foundation was proposed in the Settlement Agreement reached by the class representatives and the Federal Government. The Foundation, by which reconciliation was proposed, was to ensure the claim of cultural identity brings about a living entity for all Indigenous peoples in Canada, including the Métis, by which to claim a return in particular to Indigenous languages, cultures and spiritual traditions.

At the time, twenty-three class proceedings across Canada were at different stages in respect of the Sixties Scoop. The Federal Court and provincial court jurisdictions were seized of the subject matter. These actions sought damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown. On February 1, 2017, the Federal Government announced its intention to initiate mediation in regard to the Sixties Scoop litigation across the country. During the mediation, a wide, all-encompassing range of comprehensive topics were discussed and negotiated.

Class counsel and the representative plaintiffs recommended that the Settlement and the Foundation be approved as fair, reasonable and in the best interests of the class members.

The main issue was whether the Settlement should be approved in accordance with rule 334.29 of the *Federal Courts Rules*.

Held, the motion should be granted and the action against the defendant dismissed.

The legal test to be applied for the approval of the Settlement was whether the settlement was fair and reasonable and in the best interests of the class as a whole. In order to approve the Settlement, the Court was guided by several factors in the evaluation of the proposed Settlement, including the likelihood of success or recovery with continued litigation; the amount and nature of discovery evidence or investigation; and the settlement terms and conditions. The evidence showed undeniably that bringing closure was critical for the survivors of the Sixties Scoop. It was acknowledged that without a settlement agreement, there lied the uncertainty of further litigation and appeals. The Settlement Agreement at issue provides non-monetary benefits that will allow survivors to heal, to obtain education, to reconcile and to commemorate. In order to do so, a Foundation would be implemented and will ensure that all survivors of the Sixties Scoop will benefit from it, including Métis and non-status Indians. With regard to the fiduciary duty and common-law duties of care of Canada, the Supreme Court of Canada has held that it is more difficult to prove breach of fiduciary duty against a government than it is against a private actor (*Alberta v. Elder Advocates of Alberta Society*). Finally, the parties addressed the risks that are involved with future delays. Given the survivors' advanced ages, it became highly substantial to carefully consider this factor under the circumstances.

The Court also had to determine whether the legal fees sought were fair and reasonable in accordance with rule 334.4 of the *Federal Courts Rules*. The Court considered the fact that the fees were discussed during a judicial mediation and that "[t]here is a *prima facie* presumption of fairness when a proposed settlement is negotiated at arms-length". The fees sought represented approximately 8 percent (equivalent to $75 million) of the total value of the global Settlement Agreement, whereas evidence showed that the applicable retainer agreements mentioned

percentage rates of 20 to 33 percent of the total payment. The Court also considered the fact that the litigation was fraught with risk and that the claims in this class action referred to a loss of cultural identity. It accepted that this class proceeding had given rise to specific risks regarding the timing and the uncertainty of potential individual hearings as well as uncertain results at trial. Class counsel and the Federal Government's commitment in the inauguration of the Settlement, and its incessant efforts in negotiating it, was one of the reasons why the result achieved was successful. Class counsel and the Federal Government were able to avoid delays and expensive costs associated with individual hearings by which to compensate class members. Moreover, proof was provided to demonstrate that the results achieved were in fact exemplary. These factors included a significant compensation fund with a simple one-page claims process, as well as non-monetary benefits to the class, including reconciliation, healing and commemorative activities and services in the amount of $50 million by which to begin such work. The parties protected the privacy of the claimants throughout the settlement process. The terms of the Settlement Agreement, the compensation fund, the simple paper-based claims process, as well as the non-monetary benefits were all compelling factors proving that the legal fees were fair and reasonable in the case at bar.

Regarding the individual compensation range of $25 000 to $50 000, it was determined that given that the claimants would not be required to prove harm or loss in order to receive compensation, the proposed sums were meaningful amounts of money as per the evidence. As to the capped Settlement fund at $750 million, it was recognized that no amount of money whatsoever could compensate for a loss of cultural identity. This was a symbolic payment and, not one that could, with any sum, recompense suffering for the loss of persona, family, nation and thus identity.

While the Settlement Agreement only applied to status Indians according to the *Indian Act* and the Inuit, the Court agreed that the Settlement Agreement was fair. Other elements such as the claimants' ability to retrieve personal records, maintaining a historical archive of stories and experiences, and consultation were discussed.

For these reasons, the Court certified the action as a class proceeding and approved the Settlement with the modifications as ordered. The action against Canada was also dismissed.

STATUTES AND REGULATIONS CITED

Canada Not-for-profit Corporations Act, S.C. 2009, c. 23.

Federal Courts Act, R.S.C., 1985, c. F-7.

Federal Courts Rules, SOR/98-106, rr. 334.16, 334.21(2), 334.29, 334.4, 369, 391.

Indian Act, R.S.C., 1985, c. I-5.

Limitations Act, R.S.A. 2000, c. L-12, s. 3(1)(b).

Negligence Act, R.S.O. 1990, c. N.1.

TREATIES AND OTHER INSTRUMENTS CITED

Memorandum of Agreement Respecting Welfare Programs for Indians, effective December 1, 1965, between the Province of Ontario and INAC, 1965.

Sixties Scoop Settlement Agreement, November 2017.

CASES CITED

APPLIED:

Brown v. Canada (Attorney General), 2017 ONSC 251 (CanLII), 136 O.R. (3d) 497; *Merlo v. Canada*, 2017 FC 533, [2017] F.C.J. No. 773 (QL).

CONSIDERED:

Brown v. Canada (Attorney General), 2013 ONSC 5637 (CanLII), 5 C.C.L.T. (4th) 243; *Brown v. Canada (Attorney General)*, 2010 ONSC 3095 (CanLII), 102 O.R. (3d) 493; *Brown v. Canada (Attorney General)*, 2011 ONSC 7712 (CanLII), 114 O.R. (3d) 352; *Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47, [2006] F.C.J. No. 363 (QL); *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (QL) (Gen. Div.); *Manuge v. Canada*, 2013 FC 341, [2014] 4 F.C.R. 67; *Semple et al. v. The Attorney General of Canada et al.*, 2006 MBQB 285 (CanLII), 40 C.P.C. (6th) 314; *McKillop and Bechard v. HMQ*, 2014 ONSC 1282 (CanLII); *Quatell v. Attorney General of Canada*, 2006 BCSC 1840; *Rideout v. Health Labrador Corp.*, 2007 NLTD 150 (CanLII), 279 Nfld. & P.E.I.R. 90; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (QL) (Sup. Ct.); *Clegg v. HMQ Ontario*, 2016 ONSC 2662 (CanLII); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 2002 CanLII 49647, [2002] O.J. No. 1855 (QL) (Sup. Ct.); *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179, 2016 CanLII 76817; *Fontaine v. Canada*, 2006 NUCJ 24 (CanLII); *Abdulrahim v. Air France*, 2011 ONSC 512 (CanLII), 16 C.P.C. (7th) 289; *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 (CanLII), 38 C.P.C. (7th) 86, [2011] O.J. No. 2487 (QL) (Sup. Ct.); *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 O.R. (3d) 481 (Sup. Ct.).

REFERRED TO:

Thompson et al. v. Manitoba et al., 2016 MBQB (CanLII), 92 C.P.C. (7th) 83, affd 2017 MBCA 71 (CanLII), 5 C.P.C. (8th) 134; *Serhan v. Johnson & Johnson*, 2011 ONSC 128 (CanLII), 79 C.C.L.T. (3d) 272; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37; *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283 (CanLII); *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983; *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271 (CanLII), 45 C.C.E.L. (4th) 217.

AUTHORS CITED

Manitoba. Review Committee on Indian and Metis Adoptions and Placements. *No quiet place: final report to the Honourable Muriel Smith, Minister of Community Services*, Winnipeg: Manitoba Community Services, 1985.

McLachlin, Beverley, P.C. “Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance” (Annual Pluralism Lecture 2015, delivered at the Aga Khan Museum, Toronto, Ont., May 28, 2015).

Trudeau, Justin “Address to the 72th Session of the United Nations General Assembly” delivered at the United Nations headquarters, New York, 21 September, 2017.

MOTION for an order *inter alia* certifying the action, which involved the loss of cultural identity, as a class proceeding for settlement purposes and approving the Settlement Agreement reached on November 30, 2017 between the parties. Motion granted, action against defendant dismissed.

APPEARANCES

E. F. Anthony Merchant, Q.C. and *Evatt Merchant, Q.C.* for plaintiff Jessica Riddle.

Celeste Poltak, Garth F. Myers and *Kirk M. Baert* for plaintiff Wendy Lee White.

David A. Klein and *Angela Bespflug* for plaintiff Catriona Charlie.

Catharine Moore and *Travis Henderson* for defendant.

SOLICITORS OF RECORD

Merchant Law Group LLP, Saskatoon, for plaintiff Jessica Riddle.

Koskie Minsky LLP, Saskatoon, for plaintiff Wendy Lee White.

Klein Lawyers LLP, Vancouver, for plaintiff Catriona Charlie.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order and order rendered in English by

SHORE J.:

I. Overview

[1] This litigation is “historically unique” and was “inherently fraught with risk”. This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v. Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Edward Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation (compensation) when what is at stake is a people’s children’s cultural identity. [T]his is the largest award ever to answer the grievance of a people’s children’s loss of cultural identity.

(Affidavit of M. Brown, at paragraphs 43–44, Exhibit “113” to the Settlement approval affidavit of D. Rosenfeld, at paragraph 252, motion record (Settlement approval), Tab 6(113), page 2107.)

The precedents in *Brown v. Canada* of Justice Belobaba are historically exemplary in their understanding of cultural identity as essential to the human personality. (The certificate decision is *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 (CanLII), 5 C.C.L.T. (4th) 243. The summary judgment decision establishing Canada’s legal liability in tort is *Brown v. Canada (Attorney General)*, 2017 ONSC 251 (CanLII), 136 O.R. (3d) 497.)

II. Introduction

[2] Subsequent to the conclusion of Settlement discussions and the proposed Foundation, in principle respectively, Prime Minister Justin Trudeau addressed the 72th Session of the United Nations General Assembly at the United Nations headquarters on September 21, 2017. In a historic first, the Prime Minister apologized for Canada's most shameful abuse perpetrated. The Prime Minister specified the devastating legacy of the treatment of the Indigenous population.

[3] On October 6, 2017, Crown-Indigenous Relations and Northern Affairs Minister, Carolyn Bennett, made the announcement as to the Agreement-in-Principle reached on the Settlement and proposed Foundation.

[4] The travesty of Indigenous children "scooped" from their homes, communities and families was already identified and specified in Patrick Johnson's 1983, Canadian Council on Social Development Report and also, in Justice Edwin Kimelman's 1985 report, *No Quiet Place* [*final report to the Honourable Muriel Smith, Minister of Community Services*, Winnipeg: Manitoba Community Services, 1985].

[5] The loss of cultural identity of children taken from their traditional homes led to a loss of belonging. Loss of culture, language and identity led to a loss of personal and collective essence for vulnerable children who were "scooped" from 1951 to 1991. The loss of belonging took away the reason and purpose for life of individuals who lost the direction for a life journey before it could even begin. It also led to a sense of not being able to identify, thus, a loss of persona. The attempt to commit "cultural genocide" of entire Indigenous nations, as stated by former Chief Justice Beverley McLachlin, is that which she defined as "the worst stain in Canada's human rights record".

[6] "The most glaring blemish on the Canadian historic record related to our treatment of the First Nations that lived here at the time of colonization". These words were spoken by the former Chief Justice of Canada at the fourth annual Pluralism Lecture of the Global Centre for Pluralism in 2006 ["Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance", May 28, 2015, at page 7] (all of which took place under the auspices of the Aga Khan, spiritual leader of Ismaili Muslims, who founded the Centre together with the Federal Government). The Chief Justice continued by categorically stating that Canada had developed an "ethos of exclusion and cultural annihilation".

[7] Let us not forget that which was said by the First Prime Minister of Canada, John A. Macdonald, that it was important to solve the "Indian" problem by having "to take the Indian out of the child".

[8] The aim was to remove aboriginal, religious and social traditions; forbid children to speak their native languages, not allow them to dress traditionally and subject them, thus, to a loss of a sense of belonging.

[9] Most significant when one loses one's roots, one loses the potential for wings, to soar and fulfill dreams, hopes and aspirations.

[10] A Foundation is proposed in the Settlement Agreement [*Sixties Scoop Settlement Agreement*] reached by the class representatives and the Federal Government. On the Development Board of the Foundation, the undersigned judge is simply there to implement the terms of the Agreement for the Foundation to be transferred entirely into Indigenous hands. As the Chief Justice of the Supreme Court of Canada, Beverly McLachlin [as she then was], specified a judge is not only to render a judgment but to ensure that it is implemented. A judge is seized to ensure that a judgment is put into effect. The Foundation is to ensure the claim of cultural identity brings about a living entity for all Indigenous peoples in Canada, including the Métis, by which to claim a return to Indigenous languages, cultures, spiritual traditions, in addition to changing the paradigm in Canada in respect of all Indigenous peoples. To ensure that the suffering of the past will not be forgotten; that, every story, that can be told, will be told, to be remembered. That, all be done, for tears recalled of individuals not to be lost to the annals of history, but to be recorded to be remembered. This, for such an aberration never to take place again in that which we call, civilized Canada! Every history text book from primary, secondary, college and university must include this sordid chapter of Canadian history. It is important to recall that justice cannot exist without truth; and, truth cannot exist without compassion.

[11] Reconciliation is proposed by the creation and establishment of the proposed Foundation. Thereby, to build bridges between the generations in Indigenous families and communities; thereby, to ensure that divided generations understand what had happened. The bridges, to be constructed, between the generations in Indigenous families and communities, will then produce a climate by which to understand hidden pain and suffering that caused hurt in subsequent generations. Also, a dialogue is proposed to take place between the children of victims and the children of perpetrators to ensure truth and reconciliation are brought about for a healing of our nation. (This will include the work of health professionals.)

[12] The general population, when aware of abuse, lost its humanity. A loss of conscience was thus perpetrated in the general population aware of the perpetration. Individuals of the Indigenous nations lost their cultural identity which must be made available for a homecoming for those who lost their internal and external homes.

III. Factual Background

[13] A summary of class actions in respect of the Sixties Scoop appears below:

A. *The Class Actions*

[14] Twenty-three class proceedings across Canada are at different stages in respect of the Sixties Scoop. The Federal Court and provincial court jurisdictions are seized of the subject matter. As stated clearly and categorically by Justice Belobaba, these actions “seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown” (*Brown v. Canada (Attorney General)*, 2013 ONSC 5637 [cited above], at paragraph

10). The proceedings, summarized below, reflect the basis of both jurisdictions, federal and provincial, thereon:

(1) The Ontario Proceedings

[15] A proposed class action was initiated on February 9, 2009, in *Brown v. Canada (Attorney General)*. Damages were sought against the Federal Crown and the plaintiffs' motion for certification was conditionally approved by Justice Belobaba of the Ontario Superior Court of Justice, on May 26, 2010 [2010 ONSC 3095 (CanLII), 102 O.R. (3d) 493]. Leave to appeal the certification was granted and the Ontario Divisional Court allowed the appeal in December 2011 [2011 ONSC 7712 (CanLII), 114 O.R. (3d) 352].On July 15 and 16, 2013, the parties appeared before Justice Belobaba for the purpose of rehearing the motion to certify the action as a class proceeding and the Court certified that action. On February 14, 2017, the Ontario Superior Court granted a summary judgment to the plaintiff and the class. As part of the 1965 Agreement [*Memorandum of Agreement Respecting Welfare Programs for Indians*, effective December 1, 1965, between the Province of Ontario and INAC], Canada had a common law duty of care to act reasonably in order to prevent "Indian" children in Ontario from losing their aboriginal identity.

(2) The Manitoba Proceedings

[16] A proposed class action was initiated on April 20, 2009, in *Thompson et al. v. Manitoba et al.*, 2016 MBQB 169 (CanLII), 92 C.P.C. (7th) 83, by the Merchant Law Group. A second proposed class action was initiated on March 13, 2015, also by the Merchant Law Group. A proposed class action was initiated on April 20, 2016, in *Meeches et al. v. Canada* with Koskie Minsky LLP and Troniak Law. According to the Court, "[t]he selection of the Meeches action and the consortium to act as lead counsel will, in my opinion, best serve the interests of the putative class and the policy objectives of the *CPA*" (affidavit of D. Rosenfeld, at paragraphs 44–45, motion record, Tab 6, pages 190–191). On July 21, 2017, the Manitoba Court of Appeal dismissed the appeal of the carriage order [2017 MBCA 71 (CanLII), 5 C.P.C. (8th) 134]. On October 10, 2017, a National Settlement Agreement-in-Principle had been reached under the auspices of the Federal Court of Canada and the representative class parties; thus, the certification motion return dates were no longer required.

(3) The Saskatchewan Proceedings

[17] A proposed class action was then initiated on August 22, 2011, in *Thompson v. Canada* by the Merchant Law Group. Another proposed class action was initiated on December 17, 2014, in *Blue Waters v. Saskatchewan et al.* in Regina also by the Merchant Law Group. A proposed class action on October 7, 2016, in *Ash v. Attorney General of Canada* by Koskie Minsky LLP and Sunchild Law, was also initiated. In respect of a May 18, 2017 *Blue Waters* Action, notice of motion was filed to quash the *Ash* Action appeal. On September 14, 2017, Koskie Minsky LLP informed Justice Keene that the motion for carriage should be adjourned on a *sine die* basis because an Agreement-in-Principle had by then been reached with Canada on August 30, 2017.

(4) The Alberta Proceedings

[18] On August 18, 2011, an action was initiated in the Court of Queen's Bench of Alberta in *Van Name v. Alberta et al.* by the Merchant Law Group. On October 6, 2016, the Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper initiated in *Glenn v. Canada*. On September 5, 2017, due to the National Agreement-in-Principle, Koskie Minsky LLP specified to the Court that the decision under reserve was no longer needed.

(5) The British Columbia Proceedings

[19] On May 30, 2011, a proposed class action was initiated in *Russell v. Her Majesty the Queen* by the Klein Law Firm. Furthermore, on December 16, 2016, another class action proceeding, *Tanchak v. HMQ*, was initiated by the Merchant Law Group; and on March 24, 2017, a proposed class proceeding, *Jones v. HMQ*, was also brought forward by the Stephen Bronstein Professional Corporation; and, on May 19, 2017, the Klein Law Firm initiated an application in the British Columbia Supreme Court to have the *Tanchak* and *Jones* Actions stayed.

B. *The Mediation*

[20] On February 1, 2017, the Federal Government announced its intention to initiate mediation in regard to the Sixties Scoop litigation across the country (affidavit of D. Rosenfeld, at paragraphs 124–126, 128, motion record, Tab 6, page 203). The Federal Court Dispute Resolution mediation took place by order of Justice Michael Manson of the Federal Court, as dated on May 3, 2017; and then, further, by consent of all plaintiff parties, and the defendant party, the Canadian Federal Government, Justice Michel M.J. Shore, by order of Justice Manson dated May 3, 2018, presided over the motion for settlement approval in the *White* Action, the *Riddle* Action and the *Charlie* Action pursuant to rule 391 of the *Federal Courts Rules*, SOR/98-106, wherein all parties to the action consented to such with Court approval. During the mediation, a wide, all-encompassing range of comprehensive topics were discussed and negotiated:

a) confidentiality of the process;

b) carriage issues;

c) class definition;

d) class size;

e) existing programs available to status Indians;

f) the comprehensive Foundation and healing, truth-reconciliation issues;

g) the mandate of the Foundation;

h) eligibility;

i) compensation;

j) the claims process;

k) the claims of the deceased;

l) the verification process and the extent of same;

m) administration;

n) notice; and

o) settlement implementation issues.

(Affidavit of D. Rosenfeld, at paragraph 139, motion record, Tab 6, pages 205–206.)

[21] By an order dated January 4, 2018, Justice Michel M.J. Shore consolidated the *White*, *Riddle* and *Charlie* Actions.

C. *The Settlement Agreement*

[22] Class Counsel and the Representative plaintiffs have recommended that the Settlement and the Foundation be approved by this Court as fair, reasonable and in the best interests of the Class Members. The entire Settlement is found in Appendix A and the Foundation in Appendix B at the end of the reasons for judgment. The essential terms of the Settlement are as follows:

(1) The Foundation

[23] The purpose of the Foundation is to enable change and reconciliation as well as access to healing/wellness, commemoration and education activities for communities and individuals so as to ensure that the events giving rise to the Sixties Scoop are not repeated anywhere in Canada. The Foundation will provide funding for activities and services such as:

- (Reconciliation) assisting Sixties Scoop survivors to reunite with their families and communities;
- (Healing and Wellness) providing them opportunities to gather to participate in sharing and healing activities;
- (Commemoration) organizing conferences and expositions in order to raise awareness about the Sixties Scoop;
- (Education) and establishing scholarships to enable research, publication, learning and teaching in relation to the history of the Sixties Scoop.

(2) Eligible Class Members

[24] To be eligible to make a claim for compensation through the Settlement, one must:

- be a registered Indian (as defined in the *Indian Act*, R.S.C., 1985, c. I-5) or Inuit person or person eligible to be registered as an Indian or Inuit who was removed from their home in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents; and

- who was adopted or made a permanent ward and was alive on February 20, 2009.

(3) The Compensation Scheme

[25] At the outset, Canada shall transfer 500 million dollars for payment of claims to the Administrator. Depending on the number of Eligible Class Members, the Administrator will make Individual Payments to each approved claimant in the amount of either a Base Payment or an Adjusted Payment; however, Canada will not be required to pay more than 750 million dollars). Depending on the number of Approved Claimants, each Eligible Class Member who submits a claim shall receive a compensation of maximum $50 000.

(4) The Claims Process

[26] The Claims Process is intended to be simple, paper-based, cost effective, user-friendly and to minimize the burden on the applicant by a one page form. Each Eligible Class Member will receive an Individual Payment by simply submitting an Individual Payment Application to the Administrator.

(5) Releases

[27] The class members agree to release Canada from any and all claims that have been pleaded or could have been pleaded with respect to their placement in foster care, Crown wardship or permanent wardship, and/or adoption.

(6) Opt-outs

[28] Should 2 000 class members opt out, Canada, in its sole discretion, may decide not to proceed with the Settlement Agreement and shall have no further obligations in this regard.

(7) Legal Fees

[29] Canada had agreed to compensate the counsel representative parties to this Agreement in respect of their legal fees and disbursements to significantly lower fees than originally put forward by counsel, through a payment equal to 15 percent of the designated amount plus applicable taxes. Class counsel further agrees to perform any additional work required on behalf of class members at no additional charge. The

payment of Class counsel is from a separate Fund, created by the Federal Government, not from the class members.

(8) Settlement Approval

[30] The Parties agree that the Settlement per approval in *Brown v. Canada (Attorney General)* in the Ontario Superior Court of Justice and in the action constituted in the Federal Court be consistent with the terms of the Settlement Agreement.

IV. Analysis

A. *Law on Settlement Approval and Analysis*

[31] In this present application, the Court must determine whether the Settlement should be approved in accordance with rule 334.29 of the *Federal Courts Rules*. The legal test to be applied for the approval of the Settlement "is whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v. Canada*, 2017 FC 533, [2017] F.C.J. No. 773 (QL) (*Merlo*), at paragraph 16). In order to approve the Settlement, this Court acknowledges that it is guided by the following factors in the evaluation of the proposed Settlement (*Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47, [2006] F.C.J. No. 363 (QL) (*Châteauneuf*), at paragraph 5):

(a) the likelihood of success or recovery with continued litigation;

(b) the amount and nature of discovery evidence or investigation;

(c) settlement terms and conditions;

(d) recommendations and experience of counsel involved;

(e) future expense and likely duration of contested litigation;

(f) the number and nature of any objections;

(g) the presence of good faith and the absence of collusion;

(h) the dynamics of, and positions taken during, the negotiations;

(i) the risks of not unconditionally approving the settlement.

[32] The parties argue that the Settlement is fair, reasonable and in the best interests of those affected by it. The parties submit that "[t]he Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties" (*Châteauneuf*, above, at paragraph 7). "[A] less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation" (*Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (QL) (Gen. Div.), at paragraph 30). The parties remind the approving Court that it is not its role to

differ from the terms of the Agreement “or to impose its own terms upon them” (*Manuge v. Canada*, 2013 FC 341, [2014] 4 F.C.R. 67 (*Manuge*), at paragraph 19). The Court must also refrain from considering the interests of certain class members over the comprehensive interests of the whole class (*Manuge*, above, at paragraph 5).

[33] It is recognized that the Settlement is presumed to be fair as it is recommended by reputable counsel with expertise (*Serhan v. Johnson & Johnson*, 2011 ONSC 128 (CanLII), 79 C.C.L.T. (3d) 272, at paragraph 55). In cases such as this, “a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80 000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed” (*Semple et al. v. The Attorney General of Canada et al.*, 2006 MBQB 285 (CanLII), 40 C.P.C. (6th) 314, at paragraph 3). According to the evidence, it is undeniable that “bringing closure is critical” for the survivors of the Sixties Scoop (affidavit of Maggie Blue Waters, at paragraphs 67, 92, motion record, Tab 4, pages 101, 109). Other risks may also be involved in cases such as this, where this type of settlement agreement would not be at the heart of this process:

> (a) a national certification order may not be granted;
>
> (b) a fiduciary duty may be found not to be owed, as in Ontario;
>
> (c) liability might not be established;
>
> (d) statutory limitation periods could bar many or all of the class’ claims;
>
> (e) an aggregate award of damages could be denied by the court forcing class members through lengthy and protracted individual assessment;
>
> (f) proven damages could be similar to or far less than the settlement amounts;
>
> (g) ordering reconciliation, commemorative or healing initiatives, of the nature the Foundation is tasked with, would have been outside the jurisdiction or purview of any court to order.

(Memorandum of fact and law of the plaintiffs (Settlement Approval), at paragraph 110.)

[34] Consequently, the Court acknowledges that without a settlement agreement, there lies the uncertainty of “further litigation and appeals” (affidavit of J. Wilson (filed under separate cover)). “There is no assurance that at the end of this process [class members] will receive any more than they will get under these Settlement Agreements” (*McKillop and Bechard v. HMQ*, 2014 ONSC 1282 (CanLII) (*McKillop*), at paragraph 28).

[35] The parties also submit that the features of the Settlement are reasonable and “multi-dimensional” as they reflect the historical and sensitive nature of these proceedings, as well as the unique circumstances of class members:

> (a) there are both monetary and non-monetary benefits to the class;
>
> (b) the claims process is simple and paper-based which avoids class members having to

re-live their experiences in the same way a trial or examination would require;

(c) the claims process does not require proof of “harm” or “loss”;

(d) certain historical and unprecedented initiatives, to be overseen and implemented by the Foundation, will form part of the settlement, initiatives for the benefit of generations of indigenous persons across Canada;

(e) assurances to be sought from provincial governments that there shall be no social assistance governmental claw-backs on settlement funds received; and

(f) no class member will be required to pay counsel to assist with the claims process, meaning any compensation determination shall not be subject to a legal fee deduction.

(Memorandum of fact and law of the plaintiffs (Settlement Approval), at paragraph 116.)

[36] As mentioned above, the Settlement presents a paper-based claims process. The most important feature of the Settlement allows class members to complete their forms confidentially without fear of having to testify or appear in a court in lengthy procedures. The evidence reveals that class members are often disinclined to share their tragic experiences publicly to avoid any embarrassment and humiliation (affidavit of D. Rosenfeld, at paragraphs 170–172, motion record, Tab 6, page 212).

[37] Another particular aspect of the Settlement concerns the eligibility of class members for compensation. The Settlement Agreement established an Exceptions Committee to ensure payment in compensation to Eligible Class Members, particularly, for long-term placement with non-Indigenous families resulting in cultural loss identity (affidavit of D. Rosenfeld, at paragraphs 185–186, motion record, Tab 6, pages 214–215). Evidence on this motion further explains why the provision in the Settlement solves an important issue in respect of the harm experienced by class members:

[T]he settlement is sensitive to the nuance of child welfare law that some indigenous children, who were neither adopted nor made crown or permanent wards, still experience long-term placement in non-indigenous homes, thereby suffering the same harm. There is an ‘exceptional circumstances’ provision within the settlement that answers these persons’ needs.

(Affidavit of Kenneth Richard, at paragraph 5, exhibit “114” to the affidavit of D. Rosenfeld, at paragraph 258, motion record, Tab 6(114), page 2117.)

[38] The parties submit that although “no court has yet recognized the loss of language and culture as a recoverable tort” (*Quatell v. Attorney General of Canada*, 2006 BCSC 1840 (*Quatell*), at paragraph 9), compensation should also involve damages for loss of language and culture due to identity loss. It is noteworthy that class members may not, however, obtain a similar benefit through contested litigation. On the basis of a limitations period, the Settlement also intends to avoid injustice by including class members, who were alive as of February 20, 2009; and, their estates can submit claims for compensation in the event that individuals have since passed away. In fact, the parties submit that there is a possibility that the “ultimate limitation” period in each province would legally forbid claims from being heard. For instance, the ultimate

statutory limitation period in Alberta is 10 years pursuant to its *Limitations Act*, R.S.A. 2000, c. L-12, paragraph 3(1)(b). The parties, therefore, reiterate the unprecedented element of this negotiated class definition that claims include events, experiences which occurred between 1951 and 1991. Lastly, the parties submit that class members will receive compensation for their pain and suffering in respect of the culture identity loss; and, it is important to mention that the payment will be considered as non-taxable income.

[39] As previously stated, the Settlement Agreement provides non-monetary benefits that will allow survivors to heal, to obtain education, to reconcile and to commemorate. In order to do so, a Foundation will be implemented in accordance with the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23 (Final Settlement Agreement, Preamble, section 3.01(2)). The Foundation shall ensure that all survivors of the Sixties Scoop will benefit from it, including Métis and non-status Indians. The purpose of the Foundation is to continue to assist survivors, as well as all Indigenous communities and individuals, on their journey of change, healing and reconciliation (Final Settlement Agreement, Preamble, section 3.01(3) [*Sixties Scoop Settlement Agreement*, November 2017]). “If the matter proceeds to trial, the non-monetary issues would be outside the jurisdiction of the Court” to grant (*Rideout v. Health Labrador Corp.*, 2007 NLTD 150 (CanLII), 279 Nfld. & P.E.I.R. 90, at paragraph 70). The Foundation provides “an invaluable opportunity for Canada-at-large, and especially indigenous people, … by ensuring that those harms are not ever repeated” (affidavit of Dr. R. Sinclair, at paragraphs 7–9, Exhibit “115” to the affidavit of D. Rosenfeld, motion record, Tab 6(115), page 2177).

[40] With regard to the fiduciary duty and common-law duties of care of Canada, the Supreme Court of Canada has held that it is more difficult to prove breach of fiduciary duty against a government than it is against a private actor (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paragraph 62). In fact, in a trial context, the plaintiffs would have had to demonstrate that either (i) the fiduciary duty arose as a result of Canada’s assumption of discretionary control over a specific Aboriginal interest, or (ii) that there had been an undertaking by Canada to act in the best interests of the class members (*Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paragraphs 80 and 85). Bearing this in mind, in *Brown v. Canada (Attorney General)*, 2017 ONSC 251 [cited above] [at paragraph 1], at paragraph 68, Justice Belobaba concluded in the same vein on the notion of fiduciary duty:

> In my view, a fiduciary duty under the first category cannot be established in this case. The aboriginal interest in question is not an interest in land and the action herein is not being advanced as a communal claim but as a class action seeking individualized redress.

[41] Finally, the parties address the risks that are involved with future delays. Given the survivors’ advanced ages, it becomes highly substantial to carefully consider this factor under the circumstances (*McKillop*, above, at paragraph 28). “[I]t is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued” (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (QL)

(Sup. Ct.), at paragraphs 37–38). The parties submit that their recommendations ought to be approved, because “the closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable and in the best interests of the class” (*Clegg v. HMQ Ontario*, 2016 ONSC 2662 (CanLII), at paragraphs 34–35).

B. *Legal Framework on the Fees and Analysis*

[42] In order for this Court to determine whether the legal fees sought are fair and reasonable, in accordance with rule 334.4 of the *Federal Courts Rules* (*Manuge*, above, at paragraph 28), the following factors are to be taken into account by the Court (*Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37, at paragraph 80):

(a) the legal and factual complexities of the action;

(b) the risks undertaken, including that the action might not be certified;

(c) the degree of responsibility assumed by Class Counsel;

(d) the monetary value of the matters at issue;

(e) skill and competence demonstrated by Class Counsel;

(f) the results achieved;

(g) ability of the class to pay and the class expectations of fees;

(h) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.

[43] The Court has considered the fact that the fees were discussed during a judicial mediation and that “[t]here is a *prima facie* presumption of fairness when a proposed settlement is negotiated at arms-length” (*CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 2002 CanLII 49647, [2002] O.J. No. 1855 (QL) (Sup. Ct.), at paragraph 18).

[44] Firstly, the parties submit the total legal fee amount represents less than 10 percent of the overall global payment of the defendant (affidavit of J. Wilson, at paragraph 79, page 15 (filed under separate cover)). The fees sought represent approximately 8 percent (equivalent to $75 million) of the total value of the global Settlement Agreement, whereas evidence shows that the applicable Retainer Agreements mention percentage rates of 20 percent to 33 percent of the total payment (affidavit of D. Rosenfeld, at paragraph 107, motion record (Fee Approval), Tab 6, page 114). The “use of a percentage [for Class Counsel Fees] appears to be preferred because it tends to reward success and to promote early settlement” (*Manuge*, above, at paragraph 47). This Court did consider previously approved percentages by different Courts in other cases, namely in *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC

1283 (CanLII), with an approval of 20.68 percent and in *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983, with 33.33 percent.

[45] Secondly, the Court acknowledges the parties' insistence on the importance of providing free legal assistance to any claimant in need of assistance throughout the claims process. The parties have agreed to respect the provision (section 11.02) contained in the Settlement Agreement in this regard. Without the prior approval of the Federal Court, this provision is intended to ensure "that individual class members will get to keep the full amount of the compensation awarded to them under the settlement" (affidavit of C. Charlie, at paragraph 12, motion record (Fee Approval), Tab 2, page 11). By providing claimants with an assistance of counsel at no charge, Counsel will need to be at their disposal for the next 12 to 18 months until the enactment of the Settlement in order to assist class members with claim forms and to communicate with them in case they have questions (Fee Approval Affidavit of D. Rosenfeld, at paragraph 59, motion record (Fee Approval), Tab 6, pages 103–104).

[46] Thirdly, this litigation is "historically unique" and was "inherently fraught with risk". This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v. Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation when what is at stake is a people's children's cultural identity. [T]his is the largest award ever to answer the grievance of a people's children's loss of cultural identity.

(Affidavit of M. Brown, at paragraphs 43–44, Exhibit "113" to the Settlement Approval affidavit of D. Rosenfeld, at paragraph 252, motion record (Settlement Approval), Tab 6(113), page 2107.)

[47] The Court accepts that these cases, never presented in front of a Court before, undoubtedly pose a significant litigation risk to be assumed by Class counsel (*Manuge v. Canada*, 2014 FC 341 [cited above], at paragraph 34).

[48] The Court also accepts the "risk of continued and perpetual delay in obtaining relief". Class members can benefit from the proposed settlement on which Class Counsel had worked. "Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated" (*McKillop*, above, at paragraph 28). This class action implicates a historical event that began in 1951 and "inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice" (*Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179, at paragraph 53). The Court accepts that this class proceeding has given rise to specific risks with regard to the timing and the uncertainty of potential individual hearings, as well as uncertain results at trial. Class counsel and the Federal Government's commitment in the inauguration of this Settlement, as well as its incessant efforts in negotiating the Settlement, is one of the reasons why the result achieved was successful. Class Counsel and the Federal

Government were able to avoid delays and expensive costs associated with individual hearings by which to compensate class members.

[49] Class Counsel provided proof to this Court in order to demonstrate that the results achieved are in fact exemplary. These factors include a significant compensation fund with a simple one-page claims process, as well as non-monetary benefits to the class, including reconciliation, healing and commemorative activities and services in the amount of $50 million by which to begin such work. The parties protected the privacy of the claimants throughout the settlement process (*Merlo*, above, at paragraph 27). The terms of the Settlement Agreement, the compensation fund, the simple paper-based claims process, as well as the non-monetary benefits are all compelling factors which prove that the legal fees are fair and reasonable in the case at bar:

> [N]o legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community.

(*Fontaine v. Canada*, 2006 NUCJ 24 (CanLII) (*Fontaine*), at paragraph 61.)

[50] Lastly, the legal fees are intended to "encourage counsel to take on difficult and risky class action litigation" (*Abdulrahim v. Air France*, 2011 ONSC 512 (CanLII), 16 C.P.C. (7th) 289, at paragraph 9). It was also concluded in *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 (CanLII), 38 C.P.C. (7th) 86, [2011] O.J. No. 2487 (QL) (Sup. Ct.), at paragraph 53 that "class actions simply will not be undertaken by first rate lawyers … unless they are assured of receiving fair — and … 'generous' — compensation in appropriate cases".

C. *Opposition to the Settlement*

(1) The right to opt-out

[51] Class members, as individuals, may opt out assuming that they are not in agreement with the proposed Settlement. "If they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts" (*Fontaine*, above, at paragraph 59). Bearing in mind that settlements are compromises that intend to resolve contested claims, it is not uncommon that the parties involved will not be satisfied with every element inherent in the settlement (*Quatell*, above, at paragraphs 5–7). Class members may therefore become objectors if they oppose to the Settlement. The parties reminded this Court that it must determine whether the Settlement is fair, reasonable, and in the best interests of the class as a whole. It is therefore important that this Court carefully analyzes the benefits that the proposed Settlement will bring to the class as a whole.

(2) Individual compensation range of $25 000 to $50 000

[52] Some object to the individual damages ranging between $25 000 and $50 000. The parties submit that the quantum of compensation is fair and reasonable. As per the evidence on this motion, even with the approval of the Settlement by Justice Belobaba

in the *Brown* action in Ontario, “Justice Belobaba was indicating amounts in the $10,000 to $25,000 range … and that the average paid on the common experience payment regarding Indian Residential Schools was $22,000” (affidavit of M. Blue Waters, at paragraph 112, Motion Record (Settlement Approval), Tab 4, page 112). Considering that the claimants would not be required to prove harm or loss in order to receive compensation, the proposed sums are “meaningful amounts of money”, as per the evidence.

(3) Capped Settlement Fund at $750 Million

[53] Certain objectors disagree with the capped Settlement Fund. The parties submit that it is appropriate to cap the Settlement fund at such a high amount of $750 million as it will allow every eligible class member to receive no less than $25 000. In fact, caps on settlement funds offer benefits (i.e. interests accruing from the capped settlement fund) to class members in such a way that they receive a sum of money in excess of $25 000, and up to $50 000. The parties also submit that it is reasonable to cap the Settlement fund in this case as the feature has allowed them to establish a simple, non-complex, claims process which would otherwise not have been available in uncapped settlements. It is recognized by this Court that no amount of money whatsoever can compensate for a loss of cultural identity. This is a symbolic payment and, not one that could, with any sum, recompense suffering for the loss of persona, family, nation and thus identity.

(4) Exclusion of Métis and Non-Status Individuals

[54] Certain individuals have raised the objection that the Métis and non-status Indians are not included in the Settlement. The Settlement Agreement only applies to status Indians, according to the *Indian Act*, and the Inuit. The parties submit that the Settlement Agreement is fair for the following reasons with which the Court agrees due to that reflected below:

i. The Settlement contains a Foundation that has been implemented in Canada to serve for the benefit of every survivor of the Sixties Scoop, including Métis and non-status Indians. As per the evidence states, the purpose of the Foundation is to allow healing and reconciliation for all survivors of the Sixties Scoop;

ii. Some federal-provincial child welfare agreements do not apply to Métis and non-status Indians since the provinces do not provide child welfare services to Indians without reserve status. In *Brown v. Canada (Attorney General)*, Justice Belobaba also concluded that Ontario agreed to fund the development of the provincial welfare services only to “Indians with reserve status” (*Brown v. Canada (Attorney General)*, 2013 ONSC 5637 [cited above], at paragraphs 63–71);

iii. Currently, there is no way of determining whether Métis and non-status Indians would be allowed to receive compensation;

iv. The Settlement Agreement does not affect the claims of Métis and non-status Indians against Canada. The evidence clearly states that “[n]othing in this Settlement

bars a claim by Métis against the federal government, or a claim against the provincial authorities by those physically or sexually abused when adopted in state wardship" (affidavit of M. Brown, at paragraph 42, Exhibit "113" to the affidavit of D. Rosenfeld, at paragraph 257, motion record, Tab 6(113), pages 2106–2107).

(5) Release of Claims for Physical and Sexual Abuse While in Care

[55] Some objectors have criticized Canada for the release of the physical and sexual abuse claims. The Court agrees that "the compensation offered by Canada in exchange for the release of all claims is fair and reasonable" (responding memorandum of fact and law of the plaintiffs, at paragraph 35). It is explained that Canada is not to be held liable for the physical and sexual assault experienced by the Sixties Scoop survivors as it would not be in accordance with the federal-provincial agreements. The arrangements that were set forth between the federal Crown and the provinces require only that the provinces inaugurate welfare programs available to all Indians (*Brown v. Canada (Attorney General)*, 2010 ONSC 3095 [cited above], at paragraph 31). Canada, on the other hand, is responsible to provide the provinces with the necessary funding and is not to be held accountable for breach of common law duty of care.

[56] The first Sixties Scoop class action in Ontario, *Brown v. Canada*, also did not implicate allegations of physical and sexual abuse while class members were in care. Evidence shows that "[Class Counsel] chose not to expand it to include a law suit for damages for abuse. … Our claim in Ontario was limited to a loss of cultural identity and did not include the element of abuse as part of the assertion of federal liability" (affidavit of M. Brown, at paragraphs 31 and 42, Exhibit "113" to the affidavit of D. Rosenfeld, motion record (Settlement Approval), Tab 6(113), pages 2103 and 2107). Consequently, class members can still present such claims against the provinces, not Canada, in order to receive compensation for the physical and sexual abuse suffered.

(6) Claimants' Choice of Counsel through Claims Process

[57] Certain individuals have raised the objection that they are entitled to choose their own lawyers for these class proceedings, and that these lawyers should be paid from the compensation granted to claimants. According to section 11.03 of the Settlement Agreement, "[n]o fee may be charged to Class Members in relation to claims under this Agreement by counsel not listed on Schedule 'K' without prior approval of the Federal Court". As a result, pursuant to rule 369 of the *Federal Court Rules*, leave from the Court is required if legal fees are to be paid from claimants' individual compensation. The parties submit that the purpose of section 11.03 is to protect the claimants from lawyers' misconduct and to prevent the overcharging of legal fees which had arisen from the Indian Residential Schools Settlement claims process. The evidence on this motion clearly indicates that "[t]he structure of the proposed settlement is such that an amount for legal fees will be paid up front by Canada, with no counsel being permitted to charge further legal fees against individual payments, without prior authorization from the court" (affidavit of M. Reiher, at paragraph 33, motion record (Settlement Approval), Tab 5, page 156).

[58] According to the evidence on this motion, “the court will be called on to approve fees that are proposed to be charged so that amounts are reasonable and claimants are not surprised by dramatically reduced pay outs” (affidavit of M. Reiher, at paragraph 35, motion record (Settlement Approval), Tab 5, page 156). Class counsel from all across Canada made a commitment to assist, free of charge, every class member in the understanding of the Settlement Agreement, as well as in the completion of the claim forms. Class members will also have access to free legal services provided by 12 Indigenous Liaison Officers in each province and territory (Plan of Administration, Exhibit “A” to the Affidavit of L. Seto, Supplemental Motion Record (Settlement Approval), Tab 6(A), page 53).

(7) Legal Fees to Class Counsel

[59] Some object to the quantum of legal fees. The Court agrees that the fees sought are fair and reasonable, mainly because class counsel will remain available to the claimants following the approval of the Settlement and because the requested fees are less than 10 percent of the overall global payment. All of which the Court accepted, recognizing that no legal fees whatsoever would be permitted against individual payments without prior authorization of this Court.

(8) Class Definition and Cut-Off Date for the Deceased

[60] Some individuals object to the cut-off date of February 20, 2009, because they claim that persons (or their estates) who were deceased prior to this date should also be considered as eligible claimants. It is accepted by the Court that one of the reasons why the parties chose the cut-off date to be February 20, 2009 is due to the *Brown* action which was commenced on that same date in Ontario. Moreover, in *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 O.R. (3d) 481 (Sup. Ct.), at paragraphs 82–84, Justice Winkler addressed a similar objection such as the one at bar:

> …. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP…. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[61] Therefore, the definition of “Eligible Class Member”, as found in the Settlement, allows estates to make claims, whereas, without the inclusion of such date, they would not have been eligible to receive any funds.

(9) Claimants’ Ability to Retrieve Personal Records

[62] Certain objectors are concerned about the difficulty and the complexity in retrieving personal records in order to make their claim for compensation. These records are held with Canada, the provinces and the provincial Children’s Aid Society. The parties did acknowledge this hardship and took the necessary actions in order to

accommodate the class members. “[W]ith the Settlement’s provision [the] burden to obtain records is not upon the Class member, rather, it is upon the governments” (affidavit of K. Richard, at paragraph 7, Exhibit “A” to the affidavit of J. Riddle, motion record (Settlement Approval), Tab 7(A), page 2198). Said otherwise, the evidence clearly states that survivors of the Sixties Scoop will not be encumbered by the task of requesting their official records in order to establish the fact of permanent wardship or adoption (affidavit of Dr. Raven Sinclair, at paragraph 12(e), Exhibit “115” to the affidavit of D. Rosenfeld, at paragraph 254, motion record (Settlement Approval), Tab 6(115), page 2178). Further steps, it is agreed by the Court, have also been taken in such a way that the process for verification of class members will be streamlined. By shifting the burden of proof onto the governments, it is recognized that “if [class members] have no record, [it] creates a process that assures me no indigenous person who lost their spirit and being will be denied recognition because of no record” (affidavit of M. Brown, at paragraph 40(i), Exhibit “113” to the affidavit of D. Rosenfeld, at paragraph 257, motion record (Settlement Approval), Tab 6(113), pages 2106–2107).

(10) Maintaining a Historical Archive of Stories and Experiences

[63] Certain individuals are concerned with the loss of personal stories and experiences present in the historical record. One of the main and key, primary objectives of the Foundation is to encourage survivors of the Sixties Scoop to share their stories for the purposes of commemoration and healing. Past jurisprudence demonstrates that none of the Foundation’s initiatives would have been available to class members through contested litigation (*Rideout v. Health Labrador Corp.*, 2007 NLTD 150 [cited above], at paragraph 70). The importance and value of the Foundation were also described by a class member, stating that “the work of the Foundation, the Agreement which is only the beginning of reconciliation, is part of taking us home — to be ourselves — to reclaim our languages, to reclaim our culture — the wrongs (sic) to continue to grow our essence” (affidavit of M. Blue Waters, at paragraph 96, motion record (Settlement Approval), Tab 4, page 110).

(11) Mediator as Settlement Approval Judge

[64] Certain individuals were dissatisfied that the undersigned, Justice Michel M.J. Shore, was not only the mediator for the proposed Settlement, but was also the presiding judge at the Settlement approval hearing. With respect to rule 391 of the *Federal Court Rules*, all parties (Class Counsel and the respondents) to the action had given their consent prior to the hearing for Settlement approval. An order, confirming the parties’ consent, had been signed and approved by Justice Manson. The evidence also demonstrates that Justice Shore, through an order of the Court, on May 3, 2017, was designated to conduct the Dispute Resolution Conference by Justice Manson prior to sitting on the approval of the Settlement by order of May 3, 2018, exactly one year later.

(12) Consultation

[65] Certain objectors stated their discontent for not being formally consulted about the Settlement Agreement. According to jurisprudence in class actions, such legal duty

is non-existent for such proceedings (*Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271 (CanLII), 45 C.C.E.L. (4th) 217, at paragraph 78); however, class members were given the opportunity to be heard by the Court, as solely to objections to the Settlement. Moreover, survivors of the Sixties Scoop will continue to be consulted for the inauguration of the Foundation as some of them are also members of the Development Board. The Foundation intends to “provid[e] survivors of the Sixties Scoop and their families with ‘Telling Our Stories’ platforms that promote their own healing and that serve as a gift to future generations”. This is to ensure that each and every story that can be told, will be told; and, kept in the annals of Canadian history. By the recounting of the stories, suffering will, at least, have meaning, by a duty to keep the stories alive for those whose stories can be told, as voices of witnesses to history that will thereby remain alive, through narratives to be kept; and, suffering never to be forgotten.

[66] For all the reasons specified above, this Court certifies this action as a class proceeding, approves the Settlement with modification as per the order of the undersigned of May 11, 2018, in respect of dissemination of information of the Settlement to every part of Canada where Indigenous individuals reside, or can be found, in addition to meticulous oversight in respect of funds to be distributed, to ensure that each and every eligible person as per the Settlement receives the payment allotted for such. The Court also dismisses the action against Canada on a without costs basis.

ORDER in T-2212-16 rendered on May 11, 2018

WHEREAS by order of Justice Michael D. Manson of this Court, dated May 3, 2018 and by consent of the parties before the Court, the mediator, Justice Michel M.J. Shore, shall preside over the motion for settlement approval in this action in accordance with rule 391 of the *Federal Courts Rules*;

AND WHEREAS the plaintiffs and the defendant have entered into the Settlement Agreement in respect of the plaintiffs' claims against the defendant;

AND WHEREAS this Court approved the form of notice and plan for distribution of the notice of this motion by order dated January 11, 2018 (the Notice Order);

UPON HEARING the motion made by the plaintiffs, on consent, for an order: (a) certifying this action as a class proceeding for settlement purposes; (b) approving the settlement agreement dated November 30, 2017 between the parties (the Settlement Agreement or Settlement); and (c) approving the notice of this settlement, the opt out and claims period and other ancillary orders to facilitate the Settlement;

AND UPON READING the joint motion records of the parties and the *facta* of the parties;

AND UPON BEING ADVISED of the defendant's consent to the form of this order;

AND WITHOUT ADMISSION OF LIABILITY on the part of the defendant;

AND UPON HEARING the oral submissions of counsel for the plaintiffs, counsel for the defendant, all interested parties, including objections, written and oral.

IT IS ADJUDGED THAT:

(1) For the purposes of this order, the following definitions shall apply:

(i) "Approval Date" means the date that this Court approved the Settlement Agreement;

(ii) "Approval Orders" means this order and the order approving the Settlement Agreement in *Brown v. Canada* (Court File No. CV09-00372025-00CP);

(iii) "Brown Class Members" means members of the class proceeding in the Ontario Superior Court of Justice, *Brown v. Canada* (Court File No. CV-09-00372025- 00CP) who did not opt out of that proceeding;

(iv) "Canada" means the defendant, the Government of Canada, as represented in this proceeding by Her Majesty the Queen;

(v) "Class Actions" mean:

(a) *Wendy Lee White v. The Attorney General of Canada* (Court File No. T-294-17);

(b) *Jessica Riddle v. Her Majesty the Queen* (Court File No. T-2212-16);

(c) *Catriona Charlie v. Her Majesty the Queen* (Court File No. T-421-17);

(d) *Meeches et al. v. The Attorney General of Canada* (Court File No. CI 16-01-01540);

(e) *Maggie Blue Waters v. Her Majesty the Queen in Right of Canada et al.* (Court File No. QBG 2635/14);

(f) *David Chartrand, Lynn Thompson, and Laurie-Anne O'Cheek v. Her Majesty the Queen et al.* (Court File No. CI 15-01-94427);

(g) *Pelletier v. Attorney General of Canada* (Court File No. QGB 631/17);

(h) *Simon Ash v. Attorney General of Canada* (Court File No. QBC 2487/16);

(i) *Ashlyne Hunt v. Her Majesty the Queen in Right of Alberta* (Court File No. 1101-11452);

(j) *Sarah Glenn v. Attorney General of Canada* (Court File No. 1601-13286);

(k) *Skogamhallait also known as Sharon Russell v. The Attorney General of Canada* (Court File No. VLC-S-S113566);

(l) *Linda Lou Flewin v. Attorney General of Canada et al.* (Court File No. Hfx 458720);

(m) *Sarah Tanchak v. Attorney General of Canada et al.* (Court File No. 186178 Victoria);

(n) *Mary-Ann Ward v. The Attorney General of Canada et al.* (Court File No. 500-08-000829-164 Montreal); and

(o) *Catherine Morriseau v. Her Majesty the Queen in Right of Ontario and Attorney General of Canada* (Court File No. CV-16-565598-00CP).

(vi) “Class” or “Class Members” means all Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v. The Attorney General of Canada* (Court File Number CV-09-00372025CP);

(vii) “Implementation Date” means the latest of:

(a) thirty days following the expiry of the Opt Out Period;

(b) the date following the last day on which a Class Member may appeal or seek leave to appeal either of the Approval Orders;

(c) the date of a final determination of any appeal brought in relation to the Approval Orders.

(viii) “Opt Out Period” or “Opt Out Deadline” means the period commencing on the Approval Date and ending 90 days after the Approval Date, during which a Class Member may opt out of this class proceeding, without leave of this Court;

(ix) “Releasees” means individually and collectively, Canada, and each of the past, present and future Ministers of the federal government, its Departments and Agencies, employees, agents, officers, officials, subrogees, representatives, volunteers, administrators and assigns;

(x) “Settlement Agreement” means the Settlement Agreement dated November 30, 2017, attached as Schedule A to this order; and

(xi) “Settlement Fund” means the settlement fund established pursuant to section 4.01 of the Settlement Agreement.

(2) All applicable parties have adhered to and acted in accordance with the notice order and the procedures provided in the notice order have constituted good and sufficient notice of the hearing of this motion.

CERTIFICATION

(3) This action is hereby certified as a class proceeding for the purposes of settlement pursuant to subsection 334.16(1) of the *Federal Courts Rules*.

(4) The Class is defined as:

> All Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or

adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v. The Attorney General of Canada* (Court File Number CV-09-00372025CP).

(5) The representative plaintiffs hereby appointed are Wendy White, Jessica Riddle, and Catriona Charlie who constitute adequate representative plaintiffs of the Class.

(6) Klein Lawyers LLP, Koskie Minsky LLP and Merchant Law Group LLP are appointed as Class Counsel.

(7) The claims asserted on behalf of the Class against the defendant are: (a) negligence; and (b) breach of fiduciary duty.

(8) For the purposes of settlement, this proceeding is certified on the basis of the following common issue:

Did the defendant have a fiduciary or common law duty of care to take reasonable steps to protect the Indigenous identity of the Class Members?

(9) The certification of this action is conditional on the approval of the Settlement Agreement in Ontario in accordance with section 12.01 of the Settlement Agreement. Should the Settlement Agreement be set aside, all materials filed, submissions made or positions taken by any party are without prejudice to any future positions taken by any party on a certification motion.

SETTLEMENT APPROVAL

(10) The Settlement Agreement is fair, reasonable and in the best interests of the plaintiffs and the Class Members.

(11) The Settlement Agreement, which is expressly incorporated by reference into this order, shall be and hereby is approved and shall be implemented in accordance with this order and further orders of this Court.

(12) The claims of the Class Members and the Class as a whole, shall be discontinued against the defendant and are released against the Releasees in accordance with section 10.01 of the Settlement Agreement, in particular as follows:

(i) Each Class Member and his/her Estate Executor and heirs (hereinafter “Releasors”) has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Releasor ever had, now has, or may hereafter have, directly or

indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the Sixties Scoop and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor or by any other person, group or legal entity on behalf of or as representative for the Releasor.

(ii) This Agreement does not preclude claims against any third party that are restricted to whatever such third party may be directly liable for, and that do not include whatever such third party can be jointly liable for together with Canada, such that the third party has no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada.

(iii) For greater certainty, the Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1, or its counterpart in other jurisdictions, the common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to the Sixties Scoop, including any claim against provinces or territories or other entities for abuse while in care; then, the Releasors will expressly limit their claims to exclude any portion of Canada's responsibility.

(iv) Canada's obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in this Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

(13) This Settlement Agreement does not compromise any claims that Class Members have against any Province, Territory or any other entity, other than as expressly stated herein.

(14) This Agreement does not affect the rights of:

(i) Class Members who opt out of any class action that is certified pursuant to this Settlement Agreement; or

(ii) Individuals who are not Class Members.

(15) This order, including the releases referred to in paragraph 12 above, and the Settlement Agreement are binding upon all Class Members, including those persons who are under a disability.

(16) The claims of the Class Members are dismissed against the defendant, without costs and with prejudice and such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

(17) This Court, without in any way affecting the finality of this order, reserves exclusive and continuing jurisdiction over this action, the plaintiffs, all of the Class Members, and the defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this order.

(18) Save as set out above, leave is granted to discontinue this action against the defendant without costs and with prejudice, and that such discontinuance shall be an absolute bar to any subsequent actions against the defendant in respect of the subject matter hereof.

(19) Collectiva Class Action Services Inc. shall be and hereby is appointed as Claims Administrator pursuant to the Settlement Agreement. A complete, significant, and detailed review must take place in regard to the Administrator for all eventual work pertaining to the Administrator's responsibilities, to ensure accurate and effective, wide dissemination of meaningful and pertinent information to the attention of all those who have gone through the "Sixties Scoop" and heirs to those who have been subjected to the "Sixties Scoop" as specified in the Settlement; and, in addition, to supervise and monitor all future work that must be carried out by the Administrator as it pertains to individual payments to Class Members, heirs and others as respectfully specified in the Settlement who will be part of the Exceptions category. The fees, disbursements and applicable taxes of the Claims Administrator shall be paid by the defendant in accordance with section 6.06 of the Settlement Agreement.

(20) No person may bring any action or take any proceeding against the Administrator, the Foundation Table, the Exceptions Committee or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, for any matter in any way relating to the Settlement Agreement, the administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

(21) In the event that the number of persons who appear to be eligible for compensation under the Settlement Agreement who opt out of this class proceeding and the Ontario Action exceeds 2 000, the Settlement Agreement will be void and this judgment will be set aside in its entirety, subject only to the right of Canada, at its sole discretion, to waive compliance with section 5.09 of the Settlement Agreement.

(22) Subsection 334.21(2) [of the *Federal Courts Rules*] does not apply to the plaintiffs in the Class Actions, and those plaintiffs are not excluded from this

proceeding despite not having discontinued their parallel Class Actions prior to the Opt Out Deadline.

(23) The fees payable to Class Counsel are hereby set at $37 500 000 ($37.5 million) in respect of legal fees plus applicable taxes, inclusive of disbursements, payable as follows:

(i) $12 500 000 to Klein Lawyers LLP;

(ii) $12 500 000 to Koskie Minsky LLP; and

(iii) $12 500 000 to Merchant Law Group LLP.

(24) The amounts set out in paragraph 23 shall be paid by the defendant to Class Counsel on the Implementation Date in accordance with the Settlement Agreement. The amounts set out in paragraph 23 shall be in addition to the funding in section 4.01 of the Settlement Agreement.

(25) No counsel or law firm listed in Schedule “K” to the Settlement Agreement or who accepts a payment for legal fees from Canada will charge any Class Member any fees or disbursements in respect of an Individual Payment. Each counsel listed in Schedule “K” to the Settlement Agreement undertakes to make no further charge for legal work for any Class Member with respect to claims under this Agreement.

(26) Notice in the manner attached hereto as Schedule “B” shall be given of this judgment, the approval of the Settlement Agreement, the opt out period and the claims period by the commencement of the Notice Plan attached here to Schedule “C”, at the expense of Canada.

(27) This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Settlement Agreement and this order.

(28) Class Counsel shall report back to the Court on the administration of the Settlement Agreement at reasonable intervals not less than semi-annually, as requested by the Court and upon the completion of the administration of the Settlement Agreement.

(29) The representative plaintiffs Wendy White, Jessica Riddle, and Catriona Charlie shall each receive the sum of $10 000 as an honorarium to be paid by the defendant out of the settlement fund.

(30) The proposed representative plaintiffs in the Provincial Class Actions shall each receive the sum of $10 000 as an honorarium to be paid by the defendant out of the settlement fund.

(31) This order will be rendered null and void in the event that the Settlement Agreement is not approved in substantially the same terms by way of order of the Ontario Superior Court of Justice.

(32) The statutory provisions of the *Federal Courts Act*, R.S.C., 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106 shall apply in their entirety to the supervision, operation, and implementation of the Settlement Agreement and this order.

TAB 20

Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, et al. v. National Money Mart Company et al.

[Indexed as: Smith Estate v. National Money Mart Co.]

106 O.R. (3d) 37

2011 ONCA 233

Court of Appeal for Ontario,
Moldaver, R.P. Armstrong and Juriansz JJ.A.
March 28, 2011

Civil procedure -- Class proceedings -- Compensation for representative plaintiff -- Motion judge erring in ordering representative plaintiff's compensation to be paid out of class counsel fees rather than out of settlement fund.

Civil procedure -- Class proceedings -- Fees -- Counsel fee -- Fee agreement in class proceeding not approved by court and not satisfying requirements of s. 33(4) of Class Proceedings Act -- Determination of counsel fees governed by s. 32(4) of Class Proceedings Act -- Motion judge not erring in failing to apply base fee/multiplier approach in [page38]s. 33(7) -- Settlement of class proceeding consisting of payment of $27.5 million to class, forgiveness of indebtedness, provision of transaction credits to reduce cost of using defendants' services in future, and payment of $3 million to Class Proceedings Fund -- Motion judge entitled to reject class counsel's submission that settlement had value of $120 million and to find that class counsel's claim for fees in amount of $27.5 million was not reasonable -- Class counsel's appeal from all-inclusive award of $14.5 million dismissed -- Class

Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32(4), 33(4), (7).

Civil procedure -- Class proceedings -- Fees -- Disbursements -- Motion judge not erring in failing to give effect to contingency fee agreements entered into by class counsel and non-counsel and in treating those fees as disbursements -- Class Proceedings Act not contemplating contingency fee arrangements with persons other than class counsel and not giving court jurisdiction to allow premium on service providers' fees -- Motion judge not erring in treating fees of other lawyers retained by class counsel to assist them as disbursements where there was no evidence that representative plaintiff made or participated in decision to retain those lawyers.

The plaintiffs brought a class proceeding alleging that they were charged a criminal rate of interest by the defendants for payday loans. The class action was strenuously resisted. Following a mid-trial mediation, the parties agreed to a settlement on the following terms: the defendants would pay $27.5 million to the settlement class; the defendants would forgive the class members' indebtedness to them in the amount of $56,388,071; the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future; the defendants would pay $3 million to the Class Proceedings Fund; and the defendants would pay the costs of administering the settlement, in the amount of $2 million. Class counsel sought approval of a counsel fee of $27.5 million. The motion judge fixed class counsel fees in the amount of $14.5 million, inclusive of GST and disbursements, and allowed the representative plaintiff compensation of $3,000, to be paid out of class counsel fees. Class counsel appealed.

Held, the appeal should be allowed in part.

An uncontested motion for approval of class counsel fees places judges in a difficult position. It would be advisable for motion judges to consider the appointment of amicus curiae to assist them in approving class counsel fees.

The motion judge did not err by failing to apply the base fee/multiplier approach provided for in s. 33(7) of the Class Proceedings Act ("CPA"). In the circumstances of this case, the determination of counsel fees was governed by s. 32(4) of the CPA, not s. 33(7). The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. In this case, the agreement regarding class counsel fees did not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, the agreement stipulated how counsel fees were to be calculated and also stipulated that it would become enforceable only if it were approved by the court under s. 32(2). If it were not approved, then, under s. 32(4) of the CPA, the court could determine the amount owing to counsel. The motion judge in this case did not approve the fee agreement. [page39]

In determining the reasonableness of the claimed counsel fee, the motion judge was entitled to reject class counsel's submission that the settlement had a value of $120 million. The appellants had not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The motion judge did not err in failing to give effect to contingency fee agreements entered into by class counsel and consultants and by treating the consultants' fees as disbursements of class counsel. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

The motion judge did not err in treating the fees of other lawyers retained by class counsel on a contingency basis to assist them as disbursements. There was no evidence that the representative plaintiff made or participated in any decision to retain those lawyers as class counsel. While counsel may

require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel. Moreover, if there was a change in the composition of class counsel, the court was not immediately and directly notified of the changes. Finally, the record did not indicate that those lawyers were intended to have a solicitor-client relationship with the representative plaintiff.

The motion judge erred in ordering that the representative plaintiff's compensation be paid out of class counsel fees rather than out of the settlement fund.

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891, 160 D.L.R. (4th) 186, 62 O.T.C. 71, 21 C.P.C. (4th) 272, 79 A.C.W.S. (3d) 459 (Gen. Div.); Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826, 2009 ONCA 377, 72 C.P.C. (6th) 1, 249 O.A.C. 58; Gagne v. Silcorp. Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182, 167 D.L.R. (4th) 325, 113 O.A.C. 299, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114, 83 A.C.W.S. (3d) 125 (C.A.); Nantais v. Teletronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189, 62 A.C.W.S. (3d) 443 (Gen. Div.), consd

Other cases referred to

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968, 40 C.P.C. (6th) 129, 153 A.C.W.S. (3d) 1044 (S.C.J.); Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62, 154 A.C.W.S. (3d) 542 (S.C.J.); Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (S.C.J.); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 2001 BCSC 198, 85 B.C.L.R. (3d) 233, 102 A.C.W.S. (3d) 655; Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 2001 BCSC 1060, 91 B.C.L.R. (3d) 309, 106 A.C.W.S. (3d) 787; Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 2009 ONCA 690, 78 C.P.C. (6th) 208, 311 D.L.R. (4th) 323, 257 O.A.C. 39 (C.A.); Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349, 106 A.C.W.S. (3d)

193 (S.C.J.); McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.); Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976); Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208, 138 A.C.W.S. (3d) 20 (S.C.J.); Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991); Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 10 O.T.C. 375, 3 C.P.C. (4th) 369, 65 A.C.W.S. (3d) 207 (Gen. Div.); Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004) [page40]

Statutes referred to

An Act Respecting Champerty, R.S.O. 1897, c. 327

Class Action Fairness Act of 2005, 28 U.S.C. (2005), 1712(d)

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, (1), (2), (3), (4), (a) 33, (1), (2), (3), (4), (5), (6), (7), (a), (b), (c), (8), (9)

Criminal Code, R.S.C. 1985, c. C-46 [as am.]

Payday Loans Act, 2008, S.O. 2008, c. 9 [as am.]

Solicitors Act, R.S.O. 1990, c. S.15 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.02

Authorities referred to

Law Society of Upper Canada, Rules of Professional Conduct, rule 2.08(8)(a)

Watson, Gary, "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008)

Winkler, Warren K., and Sharon D. Matthews, "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008)

APPEAL by class counsel from the order of Perell J., [2010] O.J. No. 873, 94 C.P.C. (6th) 126 (S.C.J.) fixing counsel fees in class proceedings.

Terrence J. O'Sullivan and James Renihan, for appellants.

Chris Hubbard, for Money Mart (not participating in appeal).

Mahmud Jamal and Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal).

The judgment of the court was delivered by

[1] JURIANSZ J.: -- This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

[2] By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements, including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

[3] The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. [page41]The date December 15, 2009 is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the Criminal Code's [R.S.C. 1985, c. C-46] provisions prohibiting criminal rates of interest.

[4] Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel -- who had provided their services on a contingency basis -- treated as a component of the class counsel base fee rather than as disbursements, to have the fees of consultants -- who had also

provided their services on a contingency basis -- increased by the multiplier the court awarded to class counsel and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

[5] For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

[6] I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of amicus curiae or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

Background

[7] In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e., a finance charge, a cash chequing fee and an item fee, should be characterized as interest under the Criminal Code's provisions prohibiting criminal rates of interest.

[8] The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal and three leave applications to the Supreme Court of Canada. The issues litigated included whether the order for service of the claim, ex juris, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants and whether the plaintiffs were entitled to partial summary judgment.

[9] The trial began on April 27, 2009 and proceeded for 17 days. It was established that during the class period, class

[page42]members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

[10] Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

(i) the defendants would pay $27.5 million to the settlement class;

(ii) the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;

(iii) the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;

(iv) the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10 per cent of the transaction credits as they are used, and 10 per cent of the unused transaction credits after the expiration date; and

(v) the defendants would pay the costs of administering the settlement, in the amount of $2 million.

[11] At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

Issues

[12] The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services

to the class and that it is important that class counsel be able to retain, on a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a [page43]representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

[13] I summarize the appellants' arguments as follows:

(i) the motion judge erred by failing to apply the base fee/ multiplier approach provided for in s. 33(7);

(ii) the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;

(iii) the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

(iv) the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

(v) the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

[14] There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

The non-adversarial forum

[15] Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees

in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

[16] The motion judge was troubled by what he described at one point as the "ex parte" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that [page44]it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

[17] Winkler J. in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, 8 C.P.C. (5th) 349 (S.C.J.) also compared unopposed motions in class action to ex parte proceedings. After referring to authorities that highlighted that [at para. 20] "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in ex parte proceedings. He stated:

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the

record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

[18] In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in ex parte motions. An order obtained ex parte is very often brought back before the court by an interested party not present at the ex parte hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 311 D.L.R. (4th) 323 (C.A.).

[19] On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

[20] Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to appoint [page45]an amicus. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint amicus to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a guardian ad litem for the settlement fund.

[21] An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The

lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

[22] I discuss each of these strategies briefly.

Amicus

[23] The court has jurisdiction to appoint an amicus to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of amicus in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing amicus to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008), argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

[24] Another significant paper is "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", authored by Winkler C.J.O. and Sharon D. Matthews (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008) and available online at http://www.ontariocourts.on.ca/ coa/en/ps/speeches/caught.htm. The authors note the effect of the absence of an adversary in these situations and suggest the use of amicus: [page46]

Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either

> settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. . . . It may be appropriate to appoint amicus curiae to assist courts in understanding the merits of the settlement generally and as it relates to fees in particular.

[25] The only Canadian case that actually discusses the appointment of an amicus in the context of approving a class settlement or class counsel fees seems to be Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 85 B.C.L.R. (3d) 233 (S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an amicus in motions to approve class counsel fees [at para. 14]:

> In my opinion, there is merit in [the] submission that amicus curiae should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that amicus would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

[26] He found the appointment of an amicus was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing (see Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 91 B.C.L.R. (3d) 309 (S.C.), at para. 40), K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and

disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

Monitors

[27] Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (S.C.J.) [page47]and Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62 (S.C.J.), court-appointed monitors are included in the list of those appearing before the court, but no mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

[28] Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

Guardian ad litem

[29] American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint amicus: see, e.g., Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991). However, the predominant American approach appears

to be the appointment of a guardian ad litem for the settlement fund.

[30] The landmark case seems to be the 1976 decision Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a guardian ad litem for the members of the class, saying [at p. 535 F.R.D.], "The appointment of a guardian ad litem is appropriate where there is litigation between a Guardian and Ward -- herein, the attorneys for the class and the class". Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed [at p. 535 F.R.D.]:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role.

[31] The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), [page48]which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see 1712(d).

Independent counsel

[32] Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent

advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in Killough.

[33] It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of amicus or a guardian is neither necessary nor desirable in every case.

Application to this case

[34] A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an amicus or monitor. Non-monetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the non-monetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file [page49]and dealing with it. Class counsel had not placed before the court any

independent evidence of the value of the various components of the settlement.

[35] No doubt, the motion judge faced a difficult task.

[36] In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in McCarthy [at para. 21] are worth repeating: "The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself." A court must also guard against appearing confrontational by embarking on a cross-examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

[37] The motion judge, after underscoring that [at para. 33] "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA [Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA")] could allow a premium for service providers engaged by class counsel on a contingency basis. He declined [at para. 87] to deal with that question on "what is essentially an ex parte motion where the voices against any change are not being heard". He added [at para. 87] that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion".

[38] The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed amicus and invited intervention from interested groups, such as the Law Society, in regard to the interpretation of its Rules of Professional Conduct.

[39] Before leaving this topic, I add the observation that the

adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be included in the appeal book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set [page50]of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113, [See Note 1 below] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

[40] This court, no less than the motion court, had the discretion to appoint an amicus or guardian to articulate opposition to the appeal. In hindsight, the appointment of amicus or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

[41] With that preface, I turn to the issues raised by the appellants.

Quantum of fees

[42] The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

[43] First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the

analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

[44] Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

Sections 32 and 33 of the CPA

[45] In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base [page51]fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

[46] The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee, the court may consider a number of factors, including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors -- the degree of risk undertaken and the degree of success achieved -- in determining the multiplier to be applied to the base fee.

[47] The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

[48] In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion

judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

[49] I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

[50] As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. [page52]
>
> Interpretation: success in a proceeding
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
>
> (b) a settlement that benefits one or more class members.
>
> Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest

calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding. [page53]

[51] It is readily apparent that the motion judge did not proceed in the manner contemplated by s. 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

[52] While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

Fees and disbursements

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or

not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

[53] Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements must be in writing and must state the terms under [page54]which fees and disbursements are to be paid, must provide an estimate of the expected fee and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are prima facie unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e., one that is approved by the court, are a first charge on any settlement moneys or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to

direct the manner in which class counsel fees are to be determined or calculated.

[54] The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

[55] In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result -- the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

[56] The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in Crown Bay Hotel Ltd. Partnership v. Zrich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891 (Gen. Div.), observed [at para. 11] that "[t]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In Crown Bay Hotel, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

[57] In an earlier case, Nantais v. Telectronics Proprietory (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386 (Gen. Div.), Brockenshire J. commented [at para. 11] that the arrangement of ss. 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4)

[page55]through (9)". That is because s. 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the Solicitors Act, R.S.O. 1990, c. S.15 and An Act Respecting Champerty, R.S.O. 1897, c. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful".

[58] In Crown Bay Hotel, Winkler J. quoted and approved of Brockenshire J.'s comments in Nantais.

[59] Cullity J. in Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 56 C.P.C. (6th) 357 (S.C.J.), at para. 16 said:

> Section 32 is concerned with fee agreements -- contingent or otherwise -- in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

[60] I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I observe that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor [at para. 15] "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

[61] Illustrative of a fee agreement to which s. 33(7)

applies is the fee agreement that was before this court in Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182 (C.A.). Gagne is the main authority on which the appellants relied in this appeal. In Gagne, Goudge J.A. provided the following description of the fee agreement [at para. 8]:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to [page56]that base fee. Finally, the agreement described two examples of how this might work[.]

(Emphasis added)

[62] In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7) (c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
>
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;

plus

(iv) applicable taxes.

[63] This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if para. 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one-third of the recovery.

[64] Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: . . . (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

[65] The distinction is not merely technical. Class members may understand the phrase "[t]he Act . . . may permit a solicitor to be paid . . . a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely [page57]within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

[66] The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client,

and all members of the Class who do not opt out of the Action." Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

[67] It is interesting to note the difference between para. 8, which deals with costs paid by the defendants, and para. 9, which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike para. 8, does not state that counsel fees are subject to the approval of the court.

[68] I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier, but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved, then, under s. 32(4), the court could determine the amount owing to counsel.

[69] In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

[70] There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under para. 9 would be a first charge on the settlement fund by virtue of s. 32(3) of

the [page58]CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3) makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

[71] Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

[72] I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". Gagne, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as a multiplier, as Cumming J. suggested in Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.). It is, however, a matter of discretion.

[73] I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

[74] Before leaving this issue, I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

[75] The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a [page59]contingency fee of at least one-third of the amount recovered in the class action". The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel". Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

[76] Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

[77] Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been advanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount -- namely, $27.5 million.

[78] I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

Reasonableness of class counsel fees

[79] I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

[80] At para. 25 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the [page60]class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[81] There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

[82] The motion judge found that the class proceeding dealt

with matters of high factual and legal complexity, had a substantial monetary value, was important to the class and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that risk should be rewarded. He also attached weight [at para. 127] to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

[83] The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated [at para. 118] that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described [at para. 17] the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent". He added [at para. 93] that an objecting class member "was right in expressing disappointment about the settlement".

[84] The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

[85] The motion judge also observed [at para. 97] that the transaction credits could be viewed "as a business promotion [page61]scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but

"obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of $5 in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

[86] The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

[87] The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded [at para. 97] that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding".

[88] The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

[89] The motion judge did recognize [at para. 104] that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

[90] These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. [page62]The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

[91] Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

[92] Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted [at para. 127], does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee". In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed [at para. 96] that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

[93] The motion judge found [at para. 130] that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case". He concluded [at para. 130] that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

[94] The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

[95] For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the Criminal Code prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's Payday Loans Act, 2008, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation [page63]legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

[96] The motion judge could have explained more clearly why he commented [at para. 99] that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement, but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said [at para. 100]:

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which

was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

[97] I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional $2. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

[98] In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

[99] The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said [at para. 122]:

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already [page64]explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

[100] I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of

such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5 million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

[101] None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

[102] The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The fees of PWC and Mr. Anand

[103] Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multiplier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before

distribution of any fees to the team members.

In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

[104] The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. [page65]The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

[105] By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

[106] Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and disbursements, granting service providers a contingency premium should result in a redistribution of the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service

providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

[107] As I mentioned earlier, the motion judge considered [at para. 87] it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an ex parte motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class [page66]counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out [at para. 85] that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society of Upper Canada's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not "directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the non-lawyers might well be champertous. The motion judge pointed out that An Act Respecting Champerty was still in effect.

[108] I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

[109] While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

[110] Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

[111] Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation to the solicitor for the risk undertaken. Under s. 33(7)(c), the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to [page67]others for risk incurred in undertaking work on the action on a contingency basis.

[112] Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing to the solicitor in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result -- fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

[113] The grammatical and ordinary sense of ss. 32 and 33,

read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

[114] As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say, I agree with the motion judge that what the appellants seek [at para. 87] "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

[115] I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers. [page68]

The fees of FMC and Prof. Krishna

[116] Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and $10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were

retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

[117] Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

[118] The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy and David Stratas of Heenan, Blaikie.

[119] The appellants rely on this court's decision in Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826 (C.A.) to submit that no court approval was required to enlarge the class counsel group to include FMC and Prof. Krishna. Fantl merits closer examination. In Fantl, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said [at para. 47] that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel". Yet, he immediately added, "However, I am of the view that the

case management judge charged with responsibility for [page69]the supervision of the proceeding should be immediately and directly notified of such a change."

[120] Fantl is of little assistance to the appellants in this case.

[121] First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In Fantl, what was in issue was the client's choice of new counsel. Winkler C.J.O. said, at para. 44 of Fantl, that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report". I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

[122] Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as Fantl indicates is required.

[123] Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

[124] The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]". It adds that other lawyers from other firms "assisted class counsel as required".

[125] The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

[126] In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others", the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international [page70]taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs". The affidavit does not mention FMC.

[127] The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta . . . . [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member . . . with the responsibility of defending the action for the objector[.]

[128] The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an

individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

[129] The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to

> . . . use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

[130] I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in Fantl that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

[131] The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna [page71]and FMC are not included as part of class counsel for the purposes of this appeal.

[132] The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof.

Krishna as disbursements rather than as part of class counsel's base fee.

Compensation for the representative plaintiff

[133] The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

[134] In advancing this argument, class counsel relied upon the decision of Sharpe J. in Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 3 C.P.C. (4th) 369 (Gen. Div.). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in Garland v. Enbridge Gas Distribution Inc., supra, and McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.), and Cumming J. in Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

[135] I take the view that as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

[136] In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly. [page72]

Conclusion

[137] I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

Appeal allowed in part.

Notes

Note 1: There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

TAB 21

Federal Court  Cour fédérale

Date: 20211222

Manitoba Court of Queen's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

Citation: 2021 FC 1442

Ottawa, Ontario, December 22, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

Docket: CI-19-01-24661

TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

(Class Proceeding commenced under *The Class Proceedings Act*, CCSM c C 130)

AND BETWEEN:

Docket: T-1673-19

CURVE LAKE FIRST NATION AND CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

(Class Proceeding commenced under Part 5.1 of the *Federal Courts Rules*, SOR/98-106)

ORDER AND REASONS

I. Introduction

[1] On December 7, 2021, this Court, jointly with the Manitoba Court of Queen's Bench [Courts], heard submissions from the parties for approval of the First Nations Drinking Water Settlement Agreement [Settlement Agreement or Settlement]. The Courts have concurrently issued their respective Orders and Reasons approving of the Settlement Agreement [Settlement Approval Decision]. This Order concerning Class Counsel's legal fees should be read together with the Settlement Approval Decision.

[2] On December 8, 2021, after the Settlement Approval Hearing, Class Counsel and the Defendant moved for the approval of Class Counsel's legal fees. The Settlement Agreement defines Class Counsel as McCarthy Tétrault LLP [McCarthy Tétrault] and Olthuis Kleer Townsend LLP [OKT].

[3] Under Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 and subsection 38(2) of *The Class Proceedings Act*, CCSM, c C130, all payments to counsel flowing from a class proceeding must be approved by the Court. The Court must ensure that legal fees payable to Class Counsel are "fair and reasonable" in all of the circumstances (*Manuge v Canada*, 2013 FC 341 at para 28 [*Manuge*]; *McLean v Canada*, 2019 FC 1077 at para 2 [*McLean*]).

[4] As explained in the Settlement Approval Decision, the two Courts exercised their respective jurisdiction to jointly hear the motion for the approval of the Settlement Agreement and Class Counsel's legal fees. As required, each Court separately and independently addressed

the governing test as it relates to the issue before the Courts of whether Class Counsel's legal fees are fair and reasonable.

[5] As also noted in the Settlement Approval Decision, the reasons for Settlement Agreement Approval and Class Counsel legal fee approval have been released separately but concurrently by each Court. After a full analysis, the two Courts are in complete agreement with the results and the reasons therefore. Accordingly, the Orders and Reasons released by each Court replicate to a large extent the reasons of the other. This represents what the Courts which to underscore as complete concurrence.

[6] Article 2, section 2.03 of the Settlement Agreement explicitly states that Class Counsel's legal fees are severable from the approval of the Settlement Agreement:

> **2.03 Legal Fees Severable**
>
> Class Counsel's fees for prosecuting the Actions have been negotiated separately from this Agreement and remain subject to approval by the Courts. The Courts' refusal to approve Class Counsel's fees will have no effect on the implementation of this Agreement. In the event that the Courts refuse to approve the fees of Class Counsel set out in Section 18.01, (a) the remainder of the provisions of this Agreement shall remain in full force and effect and in no way shall be affected, impaired or invalidated, and (b) Section 18.01 shall be modified to reflect such Class Counsel fees as are approved by the Courts, while otherwise effecting the original intent of the Parties as closely as possible.

[7] At the outset, we wish to emphasize that a very important feature of the Settlement Agreement is that the Class is not responsible for paying legal fees for any work leading to the Settlement Agreement or for advice provided to the Class regarding the Settlement Agreement and its acceptance by the Class (Article 18, section 18.01). In addition, the Settlement Agreement

provides that the Class will not be responsible for paying Class Counsel's legal fees for ongoing future legal services (Article 18, section 18.02). These provisions read as follows:

> **18.01 Class Counsel Fees**
>
> Subject to approval by the Courts, and within sixty (60) days of the Implementation Date, Canada shall pay Class Counsel the amount of fifty-three million dollars ($53,000,000), plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance.
>
> **18.02 Ongoing Fees**
>
> (1) Subject to approval by the Courts, within sixty (60) days after the Implementation Date, Canada shall pay to Class Counsel the additional sum of five million dollars ($5 million), plus applicable taxes, in trust ("Funds Held in Trust for Ongoing Fees") for fees and disbursements for services to be rendered by Class Counsel and the Joint Committee in accordance with this Agreement, including the implementation and administration of this Agreement, for a period of four (4) years after the Settlement Approval Hearing ("Ongoing Fees").
>
> (2) Class Counsel shall maintain appropriate records and seek Court approval for payment of the Ongoing Fees from the Funds Held in Trust for Ongoing Fees.
>
> (3) Class Counsel shall report the balance of the Funds Held in Trust for Ongoing Fees to the Courts and Canada on a semi-annual basis.
>
> (4) Class Counsel shall apply to the Courts for orders directing the payment of any Funds Held in Trust for Ongoing Fees that remain in trust four (4) years after the Settlement Approval Hearing.

[8] The motion record demonstrates that the parties negotiated and agreed on Class Counsel's legal fees after the parties concluded the Settlement Agreement. The evidence on the record and the submissions at the hearing also confirm that these negotiations were arm's length and in good faith.

II. Background

[9] The Settlement Approval Decision provides an overview of the litigation, the risks of the litigation, the negotiations leading to the Settlement Agreement, the engagement with the Class, and the benefits of the Settlement Agreement. It is not necessary to repeat the scope of the proceedings and the terms of the Settlement Agreement. We will only do so where it is necessary to determine whether Class Counsel's legal fees are fair and reasonable and in the best interests of the Class.

[10] At the Settlement Approval Hearing, no one objected to the approval of the Settlement Agreement. Similarly, no one objected to the approval of Class Counsel's legal fees.

[11] The evidence on this motion came in the form of an affidavit from Mr. Rosenberg of McCarthy Tétrault. Mr. Rosenberg outlined the legal fees of Class Counsel as well as Erickson LLP and First Peoples Law, who assisted Class Counsel. Mr. Rosenberg's evidence consisted of billable hour rates and the numbers of hours expended at the various stages of the proceedings up to November 22, 2021.

III. Issue

[12] The sole issue is whether Class Counsel's legal fees of 53 million dollars plus 5 million dollars for future work are fair and reasonable and in the best interests of the Class.

IV. Analysis

[13] Class Counsel submitted that the Courts, in deciding whether the fees sought are fair and reasonable, should consider a number of factors, such as:

(a) the extent of the risk assumed by class counsel;

(b) the complexity of issues raised by the litigation;

(c) the character and importance of the litigation;

(d) the degree of responsibility assumed by class counsel;

(e) the likelihood that individual claims would have otherwise been litigated;

(f) the views expressed by class members;

(g) the results achieved by class counsel;

(h) the causal link between the legal effort and the result achieved;

(i) the quality of the legal representation;

(j) the monetary value of the matters at issue;

(k) the amount of professional time incurred by class counsel;

(l) the existence of a fee agreement;

(m) the fees approved in comparable cases;

(n) the ability of the class to pay and the class expectations of fees; and

(o) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.

[14] In *McLean*, Justice Phelan set out a non-exhaustive list of factors in determining what is fair and reasonable:

> [25] The Federal Court has an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court's comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (*Condon* at para 83).
>
> [Emphasis added.]

[15] The categories submitted by Class Counsel differ in appearance than those set forth by Justice Phelan in *McLean*, however, they relate to essentially the same factors. Below, we assess the various factors as set out by Justice Phelan.

A. *Results Achieved*

[16] The Settlement Agreement is a significant and historic class action settlement. The Settlement Approval Decision, at paragraphs 35-59, set out the results contained within the Settlement Agreement. To summarize, some of the key features include:

(1) Retrospective Relief

- A 1.438 billion dollar Trust Fund to compensate the Class (Article 4, section 4.01(2));
- A 50 million dollar Specified Injuries Compensation Fund for injuries suffered by the Class (Article 5, section 5.01(2));
- A 400 million dollar First Nations Economic and Cultural Restoration Fund (Article 6, section 6.01(2));

(2) Prospective Relief

- Canada will spend at least 6 billion dollars between June 20, 2021 and March 31, 2030 to meet its commitment to ensure that First Nations receive safe drinking water (Article 9, section 9.02(2)) [the Commitment].

[17] Under the Commitment, Canada must make reasonable efforts to ensure that Class Members living on reserves have regular access to drinking water in their homes. That water must meet the stricter of the federal or provincial requirements or standard governing residential water quality (Article 9, section 9.01(1)). The Settlement Agreement contemplates a specific alternative dispute resolution process [ADR Process] to resolve disputes related to the Commitment. Class Counsel submitted that the ADR Process is informed by Indigenous legal traditions. The ADR process promotes the use of Indigenous languages, it will occur on the First Nations' respective reserves, and it will utilize certain protocols such as gift giving, Elder participation, and traditional teachings.

[18] The Representative Plaintiffs put forth extensive evidence including various expert reports confirming that there are significant problems with the delivery of safe water to First Nation reserves and that the Class is suffering as a result. All of the Representative Plaintiffs submitted affidavits indicating their relief that the Settlement Agreement will finally address water quality issues on reserves.

B. *Risk*

[19] The Actions filed in the Federal Court and in the Manitoba Court of Queens Bench were novel. There was no jurisprudence on the merits of a class action proceeding that advanced

claims by both First Nations and their members simultaneously. Furthermore, there was no jurisprudence on the scope and extent of Canada's responsibility for the provision of water on reserves nor was there any jurisprudence on the type of prospective relief sought in the Actions. Class Counsel pointed to the reversal of a class action award where collective interests had been reduced but the individual claims were upheld (*Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paras 10, 105-106, 108-113).

[20] Class Counsel also submitted that *Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988 [*Tk'emlúps*] confirms that pursuing claims for a Band or First Nation class presents a risk. In *Tk'emlúps* the Federal Court approved a settlement agreement pertaining to the harms suffered by Day Scholars at Indian Residential Schools. That settlement provided compensation to individual Survivor Class Members and Descendant Class Members. However, the Band Class claims were not settled and that part of the class proceeding is ongoing. Class Counsel submits that this illustrates the risk associated with collective claims of a Band or First Nation.

[21] Counsel also pointed to the following risks:

- the uncertainty of the Class size at the commencement of the Actions;
- the uncertainty of certifying claims due to the number of individual and diverse issues faced by the Class;
- the difficulty in accessing witnesses and records given the semi-historical nature of events;
- the difficulty in obtaining a wide array of expert reports;

- the complex nature of the case involving constitutional law, Aboriginal law, and Indigenous law;
- the defences available to Canada;
- the prospect of not succeeding on the merits due to the complexities; and
- the uncertainty about Court approval of any class action settlement.

[22] In addition, Class Counsel identifies the uncertainty faced due to the political context. At the time of settlement, and during much of the litigation and negotiation, Canada had a minority government with the attendant prospect of a federal election at any time.

[23] With the above in mind, it is fair to state that the success of the class action was far from certain.

C. *Time Expended*

[24] Mr. Rosenberg's affidavit explains the pertinent information about the legal team and their billable rates. He itemizes the time spent by various team members at the various stages of both litigation and negotiation. Without divulging solicitor-client privilege, Class Counsel has provided the Courts with sufficient background on the times and legal fees spent at each stage.

[25] As of November 22, 2021, Class Counsel, Erickson LLP, and First Peoples Law had docketed their billable hours at a combined value of 6,454,951.50 dollars before tax. As of November 22, 2021, the value of disbursements carried by Class Counsel was 208,159.63 dollars

plus tax. Class Counsel also provided separate summaries of the hours expended by each of the law firms involved.

D. *Complexity*

[26] The Settlement Approval Decision provided a more in-depth assessment of the nature and complexity of the claims. It set out an overview of the claims, the procedural history, and the legal and evidentiary complexities involved in seeking individual and collective relief. It also confirms the novelty of the Settlement.

[27] The Settlement Agreement itself illustrates the complexity of settling retrospective claims and prospective commitments. For example, the Settlement includes various forms of compensation and requirements for how Canada must carry out prospective relief. In particular, the Agreement recognizes the need for legislative changes to ensure that Parliament creates proper water quality standards. It also legally obligates Canada to undertake certain commitments that may have been outside the scope of an award after the conclusion of litigation.

E. *Importance to the Plaintiffs*

[28] The affidavits of the Representative Plaintiffs Chief Emily Whetung, Chief Wayne Moonias, former Chief Christopher Moonias, and Chief Doreen Spence clearly set out how important this class action was to them, their families, their communities, and future generations. The Representative Plaintiffs all echo similar viewpoints. For example, Chief Wayne Moonias stated the following at paragraph 11 of his affidavit:

> We encouraged Class Counsel to push every legal boundary they could in order to achieve justice for us in recognition of our longstanding water advisory. All of our priorities that I have discussed above ended up being part of the Agreement in Principle (and ultimately the Final Settlement Agreement). There would be:
>
> a) a legally enforceable Commitment for Canada to take all reasonable efforts to ensure access to clean, safe drinking water on reserve;
>
> b) a Commitment Dispute Resolution Mechanism that would be informed by our Indigenous legal traditions and would take place on our reserve;
>
> c) compensation for both individuals and First Nations as collectives;
>
> d) compensation for youth that had left the community to attend school;
>
> e) recognition that remoteness of a community compounds harms and a multiplier to compensate that;
>
> f) recognition that the claims process cannot retraumatize individuals;
>
> g) recognition that mental trauma from being denied water should be compensated as a specified injury.

[29] As well, while noting that financial compensation can never truly make them whole, the additional affidavits of community members confirm the very real impact that the Settlement Agreement will have on them and their families. The areas covered in the Settlement Agreement, as highlighted by Chief Wayne Moonias, address the effect on Individual Class Members.

[30] At the hearing of this motion, Chief Emily Whetung spoke openly and passionately about the effect that the Settlement Agreement will have on her community and on her children. She explained that now, her children will not be forced to leave their community.

[31] Mr. Laforme, one member of Class Counsel, also explained the effect that contaminated water has had on the spiritual practices of many First Nations who hold water in high regard. He described this historic settlement as an example of true reconciliation.

F. *Degree of Responsibility Assumed by Counsel*

[32] Due to the complexity of this case, Class Counsel assembled a large legal team. Class Counsel has demonstrated their respective expertise and skill. McCarthy Tétrault specializes in class actions and Mr. Rosenberg is one of the leaders of McCarthy Tétrault's class action team. OKT demonstrated that they are specialists in Aboriginal and Indigenous legal issues. Their coming together ensured that Class Counsel advanced all aspects of the Class' interests.

[33] McCarthy Tétrault and OKT were also aided by Erickson LLP and First Peoples Law. These firms provided additional outreach to Indigenous communities and insight into their needs. While McCarthy Tétrault and OKT developed the strategy and approach, they clearly appreciated that others could assist them. In the end, this approach resulted in a very positive outcome for the Class.

G. *Quality and Skill of Counsel*

[34] Throughout the proceeding, Class Counsel advanced parallel tracks of litigation and negotiations. The quality and skill of Class Counsel was key to reaching the Settlement Agreement and the approval stage. Class Counsel has demonstrated how they engaged with the Defendant to ensure that the litigation was advanced in a timely manner while also ensuring that

any negotiations proceeded quickly. Class Counsel also demonstrated how they engaged regularly with the Representative Plaintiffs and Class Members who had questions about the state of the litigation and negotiations.

[35] Both McCarthy Tétrault and OKT highlighted the extensive involvement of Indigenous lawyers on their respective teams. There were no less than five identified Indigenous lawyers who comprised part of the legal team. The evidence of their billable hours confirmed that they were heavily involved. As mentioned in the Settlement Approval Decision, in addition to their professional expertise, Indigenous lawyers provide valuable lived experience that uniquely positions them to understand the needs and objectives of Class Members. While not stated as such, we view this effort by Class Counsel as another aspect of reconciliation. They provided young Indigenous members of their respective teams with an incredible opportunity to participate in an historic claim and settlement. The experience gained by these Indigenous members of the team will be invaluable to their futures and their prospective clients. Class Counsel also provided evidence of the extensive contribution of Indigenous experts, which helped shape the quality and skill of Class Counsel.

H. *Ability of Class Members to Pay*

[36] As already mentioned, Class Members are not paying Class Counsel's legal fees. Class Counsel's fees are severable and being paid by Canada.

[37] Copies of the retainer agreements between Class Counsel and Representative Plaintiffs indicate that, without Canada's agreement to pay for Class Counsel's legal fees, Class Members

would have paid significantly more than what the Settlement Agreement provides for. Based on the contingency fee calculations in the retainer agreements, Class Counsel would have been entitled to recover 293 million dollars on the retrospective compensation or at least 1.1 billion dollars on the global settlement. As it turns out, Class Counsel's fees of 53 million dollars only constitutes 4.8 percent of the fees that they would be contractually entitled to seek from the Class Members.

[38] As former Chief Christopher Moonias stated in paragraph 13 of his affidavit:

> …This class action would not have been possible without law firms that were willing to shoulder the cost of litigating issues of such fundamental importance to our communities and similar communities across the country. Class Counsel are being paid far less that the amounts being contemplated in our retainer agreement. Although I agreed that Class Counsel could be paid out of any recovery for the class, I am pleased that Canada has committed to paying our lawyers' fees instead. This will ensure that lawyers' fees do not erode the money available for class members.

[39] If Canada had not agreed to pay for Class Counsel's legal fees, a significant portion of the compensation covered by the Class would have gone toward paying their lawyers. Canada's commitment to pay Class Counsel's legal fees is a significant and positive factor going toward approval of Class Counsel's legal fees.

I. *Expectation of the Class*

[40] The Representative Plaintiffs' affidavits all state how pleased they are with the performance of Class Counsel and that the Settlement realizes their litigation goals. For example, Chief Doreen Spence states the following in her affidavit at paragraphs 43 and 44:

> I am happy with the work that has been completed by Class Counsel, who have worked very hard to advance this case as quickly as possible. Our case was certified in less than eight months, and we reached the historic Proposed Settlement Agreement less than two years after commencing the action. I always thought that getting to this point would take several years. This result was only possible because Class Counsel engaged a large team and pushed our case forward. I have been very impressed by Class Counsel's strategy and advocacy, which have been essential to achieving the ground-breaking compensation and commitments contained in the Proposed Settlement Agreement.
>
> We recognize Class Counsel for taking on this case, and achieving extraordinary results. I endorse Class Counsel's requested fees and disbursements, as set out in the Proposed Settlement Agreement. I am content that Class Counsel's fees are being paid separately from the money for class members, therefore maximizing compensation for individuals and First Nations.

J. *Fees in Similar Class Actions*

[41] The Court acknowledges that Class Counsel's fees as set out in the Settlement Agreement, totalling 53 million dollars, are significant. Coupled with that, is the amount of 5 million dollars for additional future legal fees for post-implementation legal work. That said, these fees must be considered in the proper context.

[42] In *McLean*, Justice Phelan noted that the legal fees in that case, totalling 55 million dollars plus an additional 7 million dollars for future work, were within the 3% range. He stated:

> [55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at $52.5 million on $1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at $37.2 million on $1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at $75 million on $625-

> 875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[43] We agree with Class Counsel that *McLean* is a good comparator. While multipliers are not determinative, they can assist in assessing the reasonableness of counsel fees. The legal fees in this case translate to a multiplier of less than 5.5% of the total claim settlement. More importantly, the legal fees are severable from the Settlement and Canada is paying those fees, not the Class.

[44] We acknowledge that in comparison to the present matter, the legal work in *McLean* and *Tk'emlúps* took place over a longer period of time. We are satisfied, however, that Class Counsel's legal fees are reasonable in the circumstances. Class Counsel assembled a large team with different areas of expertise and simultaneously pursued parallel tracks of litigation and negotiation. They were guided by expert opinions and various analyses of insufficient access to safe drinking water for First Nations on reserves. All of this added to their fees and contributed to the Settlement being reached in a shorter period of time.

V. Conclusion

[45] For the above reasons, we conclude that Class Counsel's legal fees are fair and reasonable. The legal fee provisions of the Settlement Agreement are approved.

ORDER in T-1673-19

THIS COURT ORDERS:

1. Class Counsel's fees are fair and reasonable;
2. The Defendant shall pay McCarthy Tétrault LLP fifty-three million dollars ($53,000,000) plus applicable taxes of six million eight hundred and ninety thousand dollars ($6,890,000) (together, the "Class Counsel Fees"), for legal fees and disbursements for the prosecution of the within Actions and services rendered in accordance with section 18.01 of the parties' Settlement Agreement in the within Actions dated September 15, 2021 (the "Settlement Agreement");
3. The Defendant shall pay Class Counsel the Class Counsel Fees within sixty (60) days of the Implementation Date. The Implementation Date shall be:
    a. the day following the last day to appeal or seek leave to appeal the Courts' orders approving the Settlement Agreement; and
    b. the day on which the last of any appeals from the orders approving the Settlement Agreement is finally determined,

    whichever is later;
4. The Defendant shall pay McCarthy Tétrault LLP five million dollars ($5,000,000), plus applicable taxes of six hundred and fifty thousand dollars ($650,000) (the "Ongoing Fees"), to McCarthy Tétrault LLP within sixty (60) days of the Implementation Date, to be held in trust and disbursed in accordance with further orders of the Courts to pay fees and disbursements in accordance with section 18.02 of the Settlement Agreement;

5. The Class Counsel Fees and the Ongoing Fees shall be paid separately from any amounts payable to Class Members, as defined in the Settlement Agreement, and in accordance with the Settlement Agreement;

6. There shall be no costs of the within motion for fee approval.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	CI-19-01-24661
STYLE OF CAUSE:	TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF, AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1673-19
STYLE OF CAUSE:	CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 7-9, 2021
ORDER AND REASONS:	FAVEL J.
DATED:	DECEMBER 22, 2021

APPEARANCES:

Michael Rosenberg Eric Block John Brown Stephanie Willsey Alana Robert Harry Laforme Bryce Edwards Kevin Hille Jaclyn McNamara	FOR THE PLAINTIFFS (TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION AND CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS

	ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION)
Chief Emily Whetung	FOR THE PLAINTIFF (CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE)
Catharine Moore Scott Farlinger Samar Musallam Courtney Davidson Sheila Read	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario Olthuis Kleer Townshend LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS (TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION AND CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION)
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT

TAB 22

Date: 20210629
Docket: CI 19-01-24661
(Winnipeg Centre)
Indexed as: Tataskweyak Cree Nation et al. v. Canada (A.G.)
Cited as: 2021 MBQB 153

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	APPEARANCES:
	)	
TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION,	)	H. MICHAEL ROSENBERG
	)	JOHN P. BROWN
	)	ERIC S. BLOCK
	)	STEPHANIE WILLSEY
	)	HARRY S. LAFORME
plaintiffs,	)	KEVIN HILLE
	)	for the plaintiffs
- and -	)	
	)	
ATTORNEY GENERAL OF CANADA,	)	CATHARINE MOORE
	)	SCOTT D. FARLINGER
defendant,	)	for the defendant
	)	
- and -	)	
	)	
MICHAEL DARYL ISNARDY,	)	ANGELA BESPFLUG
	)	MALCOLM N. RUBY
intervener.	)	ADAM BAZAK
	)	MICHAEL A. EIZENGA
	)	RANJAN K. AGARWAL
	)	SACHA R. PAUL
	)	for the intervener
	)	
	)	WRITTEN REASONS PROVIDED:
	)	JUNE 29, 2021

JOYAL, C.J.Q.B.

INTRODUCTION

[1] This is a proceeding under *The Class Proceedings Act*, C.C.S.M. c. C130. The plaintiffs, Chief Spence and Tataskweyak Cree Nation ("TCN") have moved for certification of this action as a class proceeding. Their proposed class proceeding will address class members' entitlement to clean drinking water on Indigenous reserves. The plaintiffs seek both injunctive relief to remedy infrastructure deficits as well as damages to compensate them for the hardships they have suffered.

[2] Canada consents to the certification of the plaintiffs' class proceeding. Despite Canada's consent, the interveners on this motion[1] are objecting to that certification and in so doing, are potentially preventing the parties from turning their attention to the merits of the plaintiffs' claim and the parties' capacity to satisfy the court-ordered timetable governing what should be this case's rapid progress. Pursuant to that court-ordered timetable (formulated and endorsed in the context of case management oversight), the parties have an opportunity to bring this matter to summary judgment (as it relates to the scope of Canada's duties to class members) within a year. In addressing any potential delay and the need to avoid it, counsel for the plaintiffs is correct to assert that it is impossible to overstate the importance of this proceeding to

[1] Although there is legally only one intervener in respect of the legal questions addressed in these reasons, the plural "interveners" is used (when not otherwise specified) when referring generally to both Michael Daryl Isnardy who requests an appointment as representative plaintiff and his counsel (leading the intervention) who seek appointment as class counsel.

class members, especially those who continue to struggle with something as basic as clean drinking water.

[3] In the face of the plaintiffs' and Canada's request for a consent order, which would certify this matter as a class proceeding, the interveners are objecting, alleging as they are on this motion that the plaintiffs have a conflict of interest. They have also raised a last minute and unexpected motion seeking an order appointing Mr. Michael Daryl Isnardy as the representative plaintiff for a subclass of persons in this action.

[4] After providing the interveners a full hearing with respect to their objection on the basis of their contention respecting a conflict, I rejected the interveners' arguments by which they sought to adjourn and stay the plaintiffs' certification claim. At that same hearing and in relation to the unexpected motion seeking the appointment of Mr. Isnardy as the representative plaintiff, I dismissed the motion as ill-timed, made without appropriate standing and/or jurisdiction. Following those determinations, I certified the plaintiffs' action as a class proceeding in accordance with the parties' consent order. At the conclusion of the hearing, I indicated that I would supplement my disposition of the matter (and what would have been the available transcript of my disposition) with brief written reasons to follow at a future date. These are those reasons.

WHO ARE THE INTERVENERS AND WHAT DO THEY SEEK?

[5] The intervention is led by two law firms, Murphy Battista LLP and Gowling WLG (Canada), who are in turn represented by two additional law firms, Bennett Jones LLP and Thompson Dorfman Sweatman LLP. The interveners represent an individual, Michael Daryl Isnardy, who resides in the City of Williams Lake, British Columbia. The interveners have commenced their own class action on behalf of Mr. Isnardy before the Federal Court. Canada has advised that it will not consent to the certification of Mr. Isnardy's Federal Court action as a class proceeding because it is unworkable.

[6] The interveners allege that the plaintiffs have a conflict of interest that prevents them from representing both First Nations and their members. It is the interveners' position that band members must be free to bring claims against their own First Nations for the failure to bring clean drinking water on reserves. Given the position of the interveners, they now propose that only TCN be proposed to represent a class that is limited to impacted First Nations that elect to opt in. With what the plaintiffs describe as a last minute or "surprise" motion, the interveners also propose that Mr. Isnardy be appointed as a representative plaintiff in the present case thereby displacing Chief Spence, to represent a subclass of First Nation members. The plaintiffs however, say the term subclass as used in the present context is a misnomer because the subclass contains the entirety of the class, save for TCN. The plaintiffs are correct when they suggest that the unexpected motion now brought by the interveners, seeks what would effectively be carriage of the class proceeding and that TCN would be relegated to a subclass. It would seem that the interveners' litigation plan suggests

that they do not actually intend to represent a subclass; they propose to prosecute a parallel action.

[7] With the interveners' motion, Mr. Isnardy is seeking to have his Federal Court action certified as a class proceeding while simultaneously seeking to be appointed as a representative plaintiff in the overlapping class proceeding before this Court. As part of the context for the interveners' motion, I note that the motion was brought with seemingly little warning and it comes following this Court's denial of the interveners' request for an adjournment of what had already been the scheduled certification hearing.

[8] I also note that Canada does not have instructions to consent to the certification of a class proceeding led by Mr. Isnardy. It is telling as well that it is Canada's position that Mr. Isnardy's proposed litigation plan does not appear workable.

[9] In the circumstances of this intervention and unexpected motion, were this Court to accede to Mr. Isnardy's request on this motion, it is likely that the class members would be denied a class proceeding flowing from what is the purposeful and rigorous court-ordered timetable respecting a matter that is of obvious and urgent importance. That result would be untenable for the many thousands of class members who need the determinations that underlie the relief they seek.

[10] For the reasons that follow, I have determined that Mr. Isnardy is not a member of the proposed class, that he cannot commence an action in this Court and that he does not have the standing to bring the motion that he has brought. Moreover and more fundamentally, the conflict alleged by the interveners does not exist.

ISSUES

[11] Based on the submissions of the parties and the governing law, the issues to be decided can be reduced to the following questions:

1. Do the interveners have standing to bring what the plaintiffs characterize as the "surprise motion"?
2. Does there exist a conflict of interest?
3. Is there any basis to order separate representation for a subclass?
4. Should this action be certified as a class proceeding in accordance with the parties' consent order?

FACTUAL BACKGROUND AND CONTEXT

[12] For the limited purposes of addressing and deciding the above issues, including the question of certification, I rely upon and largely adopt the facts that have been set out by the plaintiffs in their certification factum. Moreover, on the basis of, amongst other things, the various affidavit evidence, I have determined more specifically and find as fact, the following, all of which also importantly, informs my analysis with respect to the issues identified above:

i. That there is in the present case, no conflict of interest between First Nations and their members and indeed, First Nations and their members have significant common interests that should be addressed together;

ii. That the interveners themselves sought to represent a class of First Nations and their members;

iii. That Mr. Isnardy maintains parallel litigation before the Federal Court, which is both narrower and broader than the proposed class action in the present case;

iv. That the basis upon which the interveners sought and were granted standing was limited and it was only for the purposes of making submissions on a narrow legal issue; and

v. That the timing of the interveners' motion poses a real threat to the plaintiffs' efforts to secure access to justice for class members.

[13] As it relates to the question of a conflict of interest as between First Nations and their members, Chief Spence explains in her June 18, 2020 affidavit, her rationale for advancing a class proceeding on behalf of First Nations and their members (June 18, 2020 affidavit at paragraphs 24 and 25):

> This litigation is vitally important to those whose rights I am seeking to vindicate. I consulted widely with members of the proposed class, both before and after filing suit. These conversations have reinforced my belief that we can only achieve meaningful results by advancing a claim on behalf of individuals and communities. To do otherwise would needlessly fragment the claim. This would diminish our chances of success by narrowing the grounds on which we might establish a right toclean drinking water.
>
> In an action like this one, First Nations and their members have significant common interests that should be addressed together. Everyone wants to establish a right to clean drinking water on reserves, and everyone wants compensation for having been deprived of that right.

[14] According to Chief Spence, this proposed class proceeding does not give rise to any conflict between First Nations and their members. She notes as follows (June 18, 2020 affidavit at paragraph 31):

> I was elected to represent the interests of the members of my First Nation, and I am myself a member. I believe that I am well positioned to speak for both the

> community and the individuals who are members of the community. I do not see any conflict of interest between my role as Chief and my representation of the proposed class. This is not a zero sum game. Both First Nations and their members want water security. They also want compensation. I intend to seek full compensation for the damages suffered by communities and individuals; that is how I will instruct counsel. There is no need to pit individual claims against community claims when they can be advanced together in harmony. The class, taken together, must be made whole.

[15] Prior to entering into the Retainer Agreement, independent legal advice was provided to Chief Spence from counsel specializing in Aboriginal Law.

[16] It should be noted that the interveners themselves sought to represent a class of First Nations and their members. It was in early March 2020 and continuing for the next two months that the interveners repeatedly expressed an interest in forming a consortium with class counsel and consolidating the *Isnardy* action and the *Curve Lake First Nations* action to advance a national class action of First Nations and their members. At no time during those two months did the interveners suggest that there was any conflict that would prevent class counsel from acting for a class composed of First Nations and their individual members. Indeed, the interveners expressed a desire to represent this same proposed class and they seemed to share the view that it was important to address the First Nations' ongoing water problems in addition to seeking compensation for their individual members.

[17] It should also not be overlooked that Mr. Isnardy maintains parallel litigation before the Federal Court. The plaintiffs note that Mr. Isnardy is an individual who resides in an assisted-living facility in Williams Lake, British Columbia. The plaintiffs contend that he waited until the last moment before bringing this "surprise motion". That motion gives rise to various concerns on the part of the plaintiffs, but in addition

to those concerns, they (the plaintiffs) argue that based on class counsel's cross-examination of Mr. Isnardy on the carriage motion in the Federal Court, they do have serious concerns about his (Mr. Isnardy) suitability to serve as a representative plaintiff.

[18] As part of the context for the present motion, I note that Mr. Isnardy's proposed Federal Court class action is both narrower and broader than the proposed action in the present case. In that connection, Mr. Isnardy does not seek to advance any claims on behalf of First Nations, nor does he seek injunctive relief to remedy the water insecurity in reserve communities. Conversely, the present case is limited to First Nations and their members who experienced drinking water advisories lasting more than one year from 1995 onward. It appears that Mr. Isnardy would include every Indigenous person, for all time, who has ever been inconvenienced by a drinking water advisory (of any duration) on a reserve.

[19] When considering the background and context to this motion and the arguments raised by the interveners, it need be remembered that they (the interveners) sought and were granted very limited standing to make submissions on a narrow legal issue. As further background and context to the granting of that limited standing, it should be noted that on June 11, 2020, this Court held a case management teleconference to address the scheduling of the certification motion. Prior to that case conference, the interveners and class counsel made written submissions. At the case conference, they also made oral submissions. After the case conference, they also made further written submissions. It was the interveners' position that the certification hearing should be adjourned until after the Federal Court had decided the carriage motion. It would seem

that the interveners by this time were prepared to see this Court certify a class proceeding for First Nations, but they were nonetheless insistent that Mr. Isnardy's Federal Court class proceeding be certified to represent the individual class members.

[20] In the context of this Court's direction that the certification hearing proceed, the interveners sought and were granted standing to make submissions on the narrow legal issue of a conflict of interest between the plaintiffs and the members of the proposed class. The plaintiffs are correct when they maintain that the interveners did not seek standing to participate in the certification hearing more broadly nor did they seek leave to bring a motion to stay this action or to contest any part of the carriage of the proceedings in this Court.

[21] The interveners themselves acknowledge in their July 6, 2020 cross-motion the limited standing they were granted respecting the submissions they would be permitted to make on a narrow legal issue (the alleged conflict of interest). They also acknowledged the Court's direction (which direction was confirmed by the Court in a June 19, 2020 email) respecting what could be decided on the July 14, 2020 hearing date:

> Joyal CJ confirmed that Mr. Stanley [counsel for Mr. Isnardy] and his client were granted leave to make submissions on the narrow legal issue of the purported conflict of interest between the members of the proposed class. Presumably, those submissions will be made. Joyal CJ agrees with Mr. Rosenberg [Class Counsel] that however carriage is decided in the Federal Court, Mr. Stanley and his client will still have to show why the action in the Court of Queen's Bench should not be certified as a class proceeding. At this stage, the hearing date is set. Leave for Mr. Isnardy to make submissions has been granted on the issue identified. Accordingly, it should be understood that the motion for certification is before the Court on July 14, 2020 and may very well be decided.
>
> [emphasis in original]

[22] Following the case management conference on June 11, 2020, there was no contact made with class counsel (from the interveners) respecting their participation in this action, except for confirmation of the hearing date. As a result, the plaintiffs delivered their motion record and factum in support of the parties' consent certification order. It was not until July 6, 2020 that the interveners advised class counsel of the unexpected motion which suddenly stipulated that the interveners were seeking "an order appointing Isnardy as the representative plaintiff for a subclass of … persons" in this action.

[23] Canada has confirmed its position that there is no conflict of interest between the plaintiffs and class members in respect of the proposed common issues. Canada has also advised that it has no instructions to consent to the certification of the class proceeding that Mr. Isnardy now proposes. Indeed, counsel for Canada notes that Mr. Isnardy is in fact, seeking certification of an entirely different proceeding, which will proceed on an entirely different track and timetable. Such an analysis accords with the plaintiffs' position that while the interveners insist that they are not barring the plaintiffs' efforts to secure access to justice for class members, that is in fact precisely the effect of this motion and more specifically the order they now seek.

ANALYSIS

(i) DO THE INTERVENERS HAVE STANDING TO BRING WHAT THE PLAINTIFFS CHARACTERIZE AS THE "SURPRISE MOTION"?

[24] In addressing this question, it must be underscored that the intervener and his counsel were granted leave to intervene on a single issue: whether there is a conflict

of interest between the plaintiffs and class members that would prevent the Court from certifying a class proceeding. Given the limited nature of the leave that was granted respecting that intervention and given the discussions and submissions surrounding the case management meeting with this Court, it is not unfair for the plaintiffs to characterize the interveners' motion (seeking an order appointing Mr. Isnardy as the representative plaintiff for a subclass) as a "surprise motion".

[25] It is not inaccurate to assert, as the plaintiffs do, that the interveners had expressed little interest in this action prior to June 9, 2020. Currently, Mr. Isnardy has no action in this Court. He has pleaded no facts that would allow Canada to answer his claim or permit this Court to decide his entitlement to relief. As the plaintiffs have persuasively argued, Mr. Isnardy cannot now step into the shoes of Chief Spence. Her pleadings present the facts of her case, not his.

[26] No less important as to whether I hear Mr. Isnardy on the issue of whether he ought to be appointed the representative plaintiff for a subclass, is the issue of jurisdiction (see *Meeking v. Cash Store Inc. et al.,* 2013 MBCA 81 at paragraph 118). Based on the interveners' statement of claim (at paragraphs 3 to 7), Mr. Isnardy is a resident of British Columbia and he claims to have incurred damages in British Columbia. He has no apparent connection to Manitoba. I am in agreement with the submissions of the plaintiffs that the Manitoba courts can assume jurisdiction over the claims of class members resident in other provinces when they are represented by a Manitoba plaintiff with whom they share common issues (see *Meeking* at paragraph 97). With respect to Mr. Isnardy however, as the interveners have insisted,

Mr. Isnardy is not a member of the proposed class, which is defined to exclude him (at paragraph 42 of the interveners' factum they state, "the proposed class definition in the Manitoba class action expressly excludes Isnardy"). The Manitoba Court of Appeal has directed that "[t]he plaintiffs who bring the certification action must have standing to sue as if it were an individual action" (see *Soldier v. Canada (A.G.)*, 2009 MBCA 12 at paragraph 30). In other words, even if this Court were prepared to entertain this unexpected motion, it does not have jurisdiction to appoint Mr. Isnardy as a representative plaintiff. Neither does it have an action in which to do so.

[27] I note that Mr. Isnardy moves under s. 15(1) of *The Class Proceedings Act*, which permits "one or more class members to participate in the proceeding". As Mr. Isnardy is not a member of the proposed class, I am not persuaded that this provision provides Mr. Isnardy assistance. Mr. Isnardy's only standing flows from the Court's Practice Direction regarding *Class Action Judicial Protocol* dated September 4, 2019. In the present case, the interveners only sought limited standing under the protocol and indeed, that is all they were granted. The plaintiffs are correct to insist that the interveners never sought to vary that order and there is no basis to do so. Accordingly, the interveners' limited standing does not permit a motion to displace Chief Spence as the representative plaintiff.

[28] In addition to the above, it behooves me to note the potentially and unjustifiably disruptive nature and impact of the interveners' motion as it relates to the certification motion. The plaintiffs describe the interveners' action as "a late arriving carriage contest that they [the interveners] do not have standing to marshal and to which the

plaintiffs have not had an opportunity to respond". In addressing the potential "disruption", I acknowledge that Chief Spence and TCN have spent months engaging with Canada to negotiate a consent certification order, which, by the interveners' own apparent admission, is advantageous to the class. It is not lost on me that Chief Spence and TCN have, as the plaintiffs suggest, spent months assembling their case on the merits so that they can adhere and attorn (in the context of a designated case management) to a timetable that will enable them to argue for judgment on the first-stage common issue within a relatively brief period of time. For various reasons, courts have consistently rejected what can be objectively seen as disruptive efforts on the part of an intervener, even when such intervention is made on behalf of actual class members who wish to participate in the certification motion. See for example *Fairview Donut Inc. v. TDL Group Corp.*, 2008 CanLII 60983 (Ont. S.C.J.) at paragraph 11; *Romeo v. Ford Motor Co.*, 2017 ONSC 6674 at paragraphs 18 and 19; and *Kidd v. Canada Life*, 2011 ONSC 6324.

[29] For the reasons noted, Mr. Isnardy is not a member of the proposed class, he cannot commence an action in this Court and he does not have standing to bring what the plaintiffs have characterized as the "surprise motion".

(ii) DOES THERE EXIST A CONFLICT OF INTEREST?

[30] The interveners' arguments respecting the alleged conflict of interest were set out in the interveners' June 10, 2020 correspondence to the Court and in their submissions made in respect of the hearing in this Court for which the interveners were granted limited standing on this very issue.

[31] Amongst other arguments, the interveners suggest the following:

a) That the plaintiffs have presented the common issues in such a way that makes clear that they are "not shared by all the class members and unique to the First Nations' individual's subclass (proposed by Isnardy)" (see paragraph 32 of the interveners' factum);

b) That some of the proposed common issues apply only to individual class members and not to their First Nations;

c) That the First Nations and their members have divergent interests because First Nations cannot assert *Charter* claims and as a result, cannot seek relief under s. 24(1) of the *Charter* (see paragraph 54 of the interveners' factum);

d) That First Nations and their members have divergent interests because only individuals "can suffer the results" of certain breaches such as "a lack of adequate access to potable water in terms of both quality and quantity" (see paragraph 56 of the interveners' factum);

e) That First Nations and their members have divergent interests because some heads of damages are only available to individuals, such as "loss of income and loss of advantage" and "loss of opportunity to live on First Nation lands" (see paragraph 60 of the interveners' factum);

f) That First Nations and their members have divergent interests because only individuals can assert a claim of nuisance (see paragraph 58 of the interveners' factum);

g) That individual class members may have claims against their own First Nations that reflect their claims against Canada (see paragraphs 72 to 75 of the interveners' factum); and

h) That even in the absence of claims against a multitude of First Nations, a conflict would nevertheless arise in apportioning fault between First Nations and Canada (see paragraph 76 of the interveners' factum).

[32] I have examined carefully the above arguments and indeed all of the submissions made by the interveners in respect of their position on the issue of conflict of interest. I am not persuaded by those submissions such so as to find the alleged conflict.

[33] Before setting out my brief reasons disposing of the conflict of interest argument, it is well to note as context, three points.

[34] First, it cannot be ignored that the interveners make their arguments with respect to the purported conflict of interest only after it had apparently become clear that they could not form a consortium with class counsel. I note with interest that prior to that, the interveners had sought to join class counsel in representing the same class of individuals and First Nations before the Federal Court.

[35] Second, I also recognize that in Mr. Isnardy's own action before the Federal Court the claim is only against Canada and does not allege that any other person has liability for the damages suffered by his proposed class. As was underscored by the plaintiffs, Mr. Isnardy alleges (as do the plaintiffs) that Canada remains liable to the class members, despite any effort to offload responsibility for water to First Nations.

[36] Third, I wish to state my agreement with the plaintiffs when they appropriately assert that if any party has legitimate reason to raise a conflict of interest, it is Canada — which might seek to apportion liability. Nonetheless, Canada has not in this case, raised the issue of conflict. To the contrary, Canada has consented to the certification of the plaintiffs' class proceeding on the basis that pursuant to s. 4(e)(iii) of *The Class Proceedings Act*, the plaintiffs do not have a conflict of interest with members of the class in respect of the common issues.

[37] With the above context having been set out, I move now to explain my rejection of the interveners' argument in respect of the alleged conflict.

[38] I observe at the outset that First Nations frequently bring actions in the name of the chief on behalf of the First Nation and all of its members as a means of asserting collective rights (see for example, ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44. Indeed, at least five First Nations are proceeding with representative actions against Canada in the Federal Court respecting their entitlement to clean drinking water on their reserves. All of these actions are brought by the chief on behalf of the First Nation and all of the members of the First Nation. They all assert claims similar to those advanced in the present case on behalf of both individuals and the collective.

[39] I accept as does Canada, that pursuant to s. 4(e)(iii) of *The Class Proceedings Act*, the conflict inquiry is limited to the proposed common issues. As was noted in *Berg et al. v. Canadian Hockey League et al.*, 2019 ONSC 2106 (at paragraph 78):

> Thus, a conflict arises when one subgroup of the class will have an adverse result from the resolution of the common issue, not from some speculative consequence that is irrelevant to the resolution of the common issue. As put by the motion judge, at para. 233:
>
> > If the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest.

[40] As the plaintiffs have argued persuasively in the present case, the proposed common issues are entirely directed at Canada's several liability and they raise no apparent prospect of a conflict of interest among class members. As the plaintiffs explain, the first-stage common issue asks what duties Canada owes to First Nations and their members. The second-stage common issue asks whether Canada breached those duties, and if so, what remedy should ordered. It should go without saying that

First Nations and their members have an obvious interest in seeing each of these issues determined in favour of the Class.

[41] On some of the common issues referred to by the interveners, it would seem clear that if it is established that Canada owed a duty to a First Nation, the question remains whether Canada breached that duty. The plaintiffs are well to emphasize that the common issues would apply equally to individuals if it was established that Canada owed duties to individuals. The plaintiffs submit that the common issues use the language of "members" rather than referencing the subgroup as a whole. As was explained by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paragraphs 133 - 35, class actions aggregate the claims of class members, but the class itself does not assert a common claim. In fact, class actions exist to resolve the claims of class members, not of classes. Nonetheless, this does not pre-empt members of a class from sharing common issues.

[42] I accept that the possibility that common issues may be answered differently for different class members does not necessarily make them any less common (see ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1 at paragraph 46).

[43] First Nations and their members do not necessarily have divergent interests because First Nations cannot assert *Charter* claims (as contended by the interveners) or seek relief under s. 24(1) of the *Charter*. The plaintiffs are well to question that stark proposition particularly in relation to claims pursuant to s. 2(a) of the *Charter.* In fact, First Nations are legal entities that have the capacity to bring suit in their own name to advance collective interests (see *Kelly v. Canada (Attorney General)*, 2013

ONSC 1220 and *Bighetty et al. v. Government of Manitoba et al.*, 2011 MBQB 44 at paragraph 34). The Supreme Court of Canada has already acknowledged that some sections of the *Charter* have individual and collective aspects (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12).

[44] In considering the plaintiffs' response to the interveners' argument, I am persuaded by the proposition that all class members suffer the consequences of Canada's breaches of its duties. This contests the interveners' assertion that First Nations and their members have divergent interests because only individuals can suffer the results of certain breaches. As the plaintiffs have submitted, expansion of housing and economic opportunities are "stunted" by the expense of securing clean drinking water all of which further contributes to the departure of community members. Further, as Chief Spence explained at paragraph 31 of her affidavit, "Elders have noticed that the community's youth are disenfranchised from their culture and are increasingly turning to alcohol and drugs. The loss of traditional knowledge sharing about TCN's water ceremonies will have intergenerational impacts."

[45] Neither is it persuasive to argue as the interveners have, that First Nations and their members have divergent interests because it is alleged that some heads of damages are only available to individuals. It seems clear that damages that are suffered most immediately by individuals can also have a devastating impact on a community. Where such damage to a community arises from a breach of duty to that community, those damages are potentially recoverable by that community (see

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344).

[46] As it relates to the interveners' argument on the issue of nuisance, I am in agreement with the plaintiffs when they say that it suffices that First Nations as a collective can assert a claim in respect of a nuisance on lands that are owned collectively, while individuals can assert a claim in respect of a nuisance on lands that had been allotted or leased to them. In *Bighetty* (at paragraphs 27 and 34), it was expressly determined that First Nations can assert claims for nuisance in respect of lands that had not been allotted to their members.

[47] When the interveners allege that individual class members may have claims against their own First Nations that reflect their claims against Canada, they (the interveners) present no evidence of any such liability on the part of First Nations. Such a contention remains speculative and conjectural.

[48] I reject as well the interveners' suggestion that even in the absence of claims against the multitude of First Nations, the conflict would nevertheless arise in apportioning fault between First Nations and Canada. Instead, I am persuaded by the plaintiffs who are correct to stipulate that if ever apportioning were in issue (however unlikely), both First Nations and their members would seek to maximize their recovery from Canada as Chief Spence herself confirms at paragraph 26 of her affidavit.

[49] In examining the entirety of the interveners' submissions, I am of the view that even where there exists different entitlements to relief, such different entitlements do not require subclasses. I accept the submission of the plaintiffs that on a proper view

of the claim, the most that might be said in the present case is that class members may differ in their entitlement to relief. Nonetheless, this does not require subclasses let alone does it raise a conflict of interest such that it would require separate counsel for a subclass (see *Anderson et al. v. Wilson et al.*, 1998 CanLII 18878 (Ont. Div. Ct.) at paragraph 54, varied on appeal, but affirmed on this point). See also *1176560 Ontario Ltd. v. Grant Atlantic & Pacific Co. of Canada Ltd.*, 2004 CanLII 16620 (Ont. Div. Ct.) at paragraphs 20 to 23, leave to appeal refused, [2004] O.J. No. 2009 (C.A.) and *Grant v. Canada (Attorney General)*, 2009 CanLII 68179 (Ont. S.C.J.) at paragraphs 95 and 96.

[50] It should be apparent from the above reasons, and given the manner in which the parties have crafted the common issues, that there is no potential conflict of interest that might prevent the representative plaintiffs from representing a class composed of First Nations and their members. Put simply, the intervener's position respecting a conflict of interest is without merit.

(iii) Is there any Basis to Order Separate Representation for a Subclass?

[51] As I explain below, the plaintiffs have satisfied me that irrespective of my earlier determinations, there is in any event, no basis to order separate representation for a subclass. As the plaintiffs have persuasively submitted, the requirement for separate legal representation would require a real and immediate conflict that is apparent from the pleadings. None is apparent. Moreover, the governing legal authorities suggest a clear preference for preserving the class. Additionally, I note that class counsel have

made appropriate plans to address any conflict of interest that might arise. No less important is the fact that I have determined that the parallel proceedings proposed by the interveners are not in the interests of class members.

[52] An exclusion of a subclass requires at the certification stage an obvious and direct conflict between the interests of class members that is plain on the face of the pleadings (see *Pro-Sys Consultants Ltd.*). It is very difficult if not impossible to determine the requirement for subclasses with separate legal representation at the certification stage (see *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (CanLII) at paragraph 120). A more fair, sensible and expeditious approach would commend a supervisory role for the Court pursuant to *The Class Proceedings Act*. If and where subclasses need be determined, that can and will occur as the need arises (see *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. S.C.J.) at paragraph 71). Yet even then, as the plaintiffs are right to identify, courts are reluctant to separate a subclass to be then separately represented on all common issues.

[53] The plaintiffs are correct when they argue that given the apparent judicial restraint on this issue as found in the jurisprudence, the intervener and his counsel are asking the Court to do something that no Canadian court has done before.

[54] The preponderance of legal authority seems to favour maintaining the integrity of the class at least until an insurmountable conflict arises on the common issues. See for example *Anderson v. Wilson*, 1998 CanLII 18878, 1998 CarswellOnt 698 (Ont. Div. Ct.) at paragraphs 57 – 58, varied on appeal but affirmed on this point, [1999] O.J. No. 2494 (C.A.) at paragraph 40, leave to appeal refused, *Anderson v. Wilson*,

[1999] S.C.C.A 476. The general view appears to be that if and when a real problem arises, it should not be difficult to create separate representation. Prior to that need arising, "economy favours single representation" (see *Anderson v. Wilson*, 1999 CanLII 3753, 1999 CarswellOnt 2073 (Ont. C.A.) at paragraph 39, leave to appeal refused, *Anderson v. Wilson*, [1999] S.C.C.A. 476).

[55] As earlier noted, class counsel have made appropriate plans to address any conflict of interest that might arise. Were such a need for separate representation required, the plaintiffs advise that the parties' litigation plan provides that McCarthy Tétrault LLP will represent a subclass of individuals, while Olthuis Kleer Townshend LLP, will represent the subclass of First Nations. I agree with the plaintiffs that this approach is preferable to relegating individual class members to Mr. Isnardy's potentially unworkable Federal Court proceedings or subjecting them to what the plaintiffs say could be duplicative and costly litigation proposed by the intervener and his counsel. I accept class counsel's submission that their approach will more likely than not facilitate access to justice and judicial economy and is more likely to avoid additional expense and delay.

[56] Finally, it is my view that parallel proceedings as proposed by the intervener are not in the interests of class members. As the plaintiffs have convincingly and importantly set out, the interveners are not actually proposing to represent a subclass in the action before the Court. Instead, they are seeking to conduct an entirely separate class proceeding on behalf of the entire class, save for TCN. Such an approach and the corresponding proposed litigation plan, is as argued, incompatible

with both the parties' court-ordered timeline for this action and the litigation plan to which the parties have consented. It is an approach and timeline that appears at first blush somewhat unrealistic and it holds out the prospect of considerable delay for the plaintiff class.

[57] In the circumstances of the present case, there is no basis to order separate representation for a subclass.

(iv) Should this Action be Certified as a Class Proceeding in Accordance with the Parties' Consent Order?

[58] Based on the above analysis and based upon the consent of Canada, there is nothing before this Court that ought to pre-empt the requested certification of this action as a class proceeding in accordance with the parties' consent. Moreover, in the particular circumstances of this case, such a certification is consistent and in accord with the legal principles and pre-conditions governing certification in a class proceeding.

[59] The matter should now proceed pursuant to the court-ordered timelines with a view to bringing this urgent and important matter to summary judgment within the appropriately expedited time period.

CONCLUSION

[60] As should be apparent from the foregoing analysis, I have answered the first three questions in issue in the negative. I have answered the fourth question in the affirmative.

[61] In doing so, I am both applying the governing law and acknowledging the importance and urgency of this claim. The class members have experienced drinking

water advisories on their reserves. This class proceeding seeks both retrospective compensation and injunctive relief to ensure that class members have adequate access to clean drinking water. Mr. Isnardy's late and unexpected intervention has threatened to disrupt the consent certification of a class proceeding that quite obviously, promises at least the possibility of resolving fundamentally important claims for a disadvantaged group.

[62] I am persuaded that neither Mr. Isnardy, nor his claim, have any connection to Manitoba and that he has no standing to seek appointment as a representative plaintiff in a Manitoba class proceeding. In addition, his ill-timed and unexpected motion, wherein he seeks appointment as a representative plaintiff, has the real potential to cause delay, disruption and prejudice to the plaintiff class in the present case.

[63] Separate and apart from the problematic procedural aspects of Mr. Isnardy's motion and the potential to cause prejudicial delay, I am not convinced that there is a basis to appoint him as a representative plaintiff or to appoint his counsel, Murphy Battista LLP and Gowling WLG (Canada), as class counsel. As earlier noted, given the manner in which the parties crafted the common issues, there is no potential conflict of interest that might prevent the representative plaintiffs from representing a class composed of First Nations and their members. Neither is there a need for subclasses, additional class representatives or separate counsel for the class.

[64] Accordingly, based on my earlier oral disposition of this matter, I am certifying this action as a class proceeding. The representative claimants shall be Tataskweyak

Cree Nation and Chief Doreen Spence, and class counsel shall be McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP.

[65] I am advised that counsel have settled the matter of costs amongst themselves.

_____ C.J.Q.B.

TAB 23

Federal Court Cour fédérale

Date: 20230316

Docket: T-1542-12

Citation: 2023 FC 357

Ottawa, Ontario, March 16, 2023

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE SECWÉPEMC INDIAN BAND and the TK'EMLUPS TE SECWÉPEMC INDIAN BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] On this Motion, the parties seek approval of the Fee Agreement signed on February 3 and 8, 2023, where the Defendant Canada has agreed to pay the all-inclusive sum of $20,000,000.00. This sum includes all past and future legal work, disbursements, costs incurred by Tk'emlúps te Secwépemc, shíshálh Nation (formerly known as Sechelt Indian Band), and the Grand Council of the Crees (Eeyou Istchee) [Funding Nations], the advance costs of

$500,000.00, and honoraria payments of $15,000.00 each of the two individual Representative Plaintiffs.

[2] By separate Order and Reasons reported at *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327 on March 9, 2023, the Court approved the settlement agreement for the settlement of the Band Class claims [Settlement Agreement].

[3] This Motion for approval of the Fee Agreement was heard in Vancouver on February 28, 2023, immediately following the Motion for approval of the Settlement Agreement.

[4] For the reasons that follow, the Fee Agreement is approved in the form submitted.

I. Background

[5] The factual background to this class proceeding and the details of the Settlement Agreement for the Band Class are more fully outlined in the Order and Reasons approving the Settlement Agreement at 2023 FC 327.

[6] This class proceeding was commenced by Tk'emlúps te Secwépemc and shíshálh Nation in August 2012. In July 2016, the Grand Council of the Crees (Eeyou Istchee) joined this litigation as a funding Nation. Class Counsel agreed to share the risk of this litigation with the Funding Nations by working at substantially reduced hourly rates, that were subject to a funding cap.

[7] On January 18, 2023, the parties executed the Settlement Agreement.

[8] On January 21, 2023, this Court ordered, on consent, that the Defendant pay advanced costs to the Representative Plaintiffs in the amount of $500,000.00 [Advanced Costs] for the purposes of setting up a not-for-profit entity to receive the settlement fund (*Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 104).

[9] In support of this Motion for Court approval of the Fee Agreement, the following Affidavits were filed:

- Affidavit of Peter Grant, co-counsel for the Plaintiffs, sworn on February 20, 2023;
- Affidavit of Dr. Matthew Coon Come, former Grand Chief of the Grand Council of the Crees (Eeyou Istchee), affirmed on February 23, 2023;
- Affidavit of Shane Gottfriedson, individual Representative Plaintiff and former elected Chief of Tk'emlúps te Secwépemc, affirmed on February 21, 2023;
- Affidavit of Jasmine Paul, Vice President Negotiation, Governance, and Policy at Castlemain, retained by shíshálh Nation to review its expenses relating to the Band Class claim, sworn on February 22, 2023;
- Affidavit of Matthew Swallow, Treasurer of the Grand Council of the Crees (Eeyou Istchee), sworn on February 22, 2023; and
- Affidavit of Travis Anderson, a Certified Aboriginal Financial Manager and Executive Director of Finance with Tk'emlúps te Secwépemc, sworn on February 22, 2023.

II. Key Terms of Fee Agreement

[10] The key terms of the Fee Agreement are as follows:

- Section 3 provides that Canada will pay the all-inclusive sum of $20,000,000.00 to Class Counsel in trust for legal fees, disbursements, and applicable taxes incurred in the initiation and prosecution of the class action, negotiating and implementing the Settlement Agreement, and honoraria to the individual Representative Plaintiffs;
    - Disbursements include the costs incurred by the Funding Nations, as well as costs incurred by Class Counsel in the prosecution of this Action; and
- Section 4 provides honoraria payments of $15,000.00 to both of the individual Representative Plaintiffs, former Chief Shane Gottfriedson and former Chief Garry Feschuk, for the Band Class.

[11] The Fee Agreement takes into account any amounts previously paid by Canada during this class proceeding, including the Advanced Costs.

III. Issues

[12] The issues for determination on this Motion are as follows:

A. Approval of the Fee Agreement; and

B. Approval of honoraria payments to the individual Representative Plaintiffs.

IV. Analysis

A. *Approval of the Fee Agreement*

General Principles

[13] Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 requires that the Court approve all legal counsel fees in a class proceeding.

[14] The test applied by the Court on a motion to approve counsel fees is whether the legal fees are "fair and reasonable" in the circumstances (*McLean v Canada*, 2019 FC 1077 at para 2 [*McLean*]).

[15] The "fair and reasonable" considerations were outlined at paragraph 25 of *McLean* as follows:

> The Federal Court has an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court's comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (*Condon* at para 83).

[16] Class Counsel in this class proceeding were not acting on a contingency fee basis. Rather, Class Counsel worked on a fixed and discounted hourly rate basis, up to a maximum of $1,800,000.00. Any hours worked over this cap were borne by Class Counsel themselves.

[17] The absence of a contingency fee agreement is a distinguishing feature in considering and weighing the "fair and reasonable" considerations noted above. However, in my view, it is still necessary to consider these factors as against the fees sought to be approved.

(a) Results Achieved

[18] The Representative Plaintiffs' objectives for resolution of the class proceeding were:

(a) a generational solution to the Class Members' loss of languages and culture, in response to generations of harms caused by Residential Schools;

(b) a solution that provides Indigenous peoples autonomy over the programs and initiatives they develop to revitalize Indigenous languages and cultures; and

(c) a resolution guided by the Four Pillars.

[19] The Settlement Agreement of the Band Class met and exceeded these objectives. The Settlement Agreement creates a $2.8 billion dollar fund, which provides for Indigenous-led initiatives to support language, culture, and heritage revitalization initiatives for the Band Class members. The fund will be managed by a not-for-profit entity made up of Indigenous directors.

[20] The Band Class members will identify and develop their own language and culture revitalization programs and initiatives, with a focus on the needs of their individual communities. Those programs will be funded as detailed in the Settlement Agreement. The settlement will provide for 20 years of sustainable funding thus providing a generational focus for the revitalization of Indigenous language and culture.

[21] In this case, the Fee Agreement was negotiated independently from the Settlement Agreement. Isolating these agreements ensured that even if the Fee Agreement was not approved, the Settlement Agreement (if approved) could still be implemented. The two Agreements are also independently funded by Canada.

(b) Risk Undertaken

[22] This was risky litigation and success was far from certain. The claims advanced were novel and untested legal claims seeking damages for loss of language and culture. Canada vigorously defended this class proceeding and raised a number of defenses, including limitation defenses, the Indian Residential Schools Settlement Agreement [IRSSA] releases, and denying any duty of care on the part of Canada. This class action was litigated to the eve of trial and the parties had undergone extensive preparations.

[23] The risk of non-recovery for the Band Class and Class Counsel legal fees was high. Class Counsel nonetheless pushed forward with this proceeding and assumed the risk of only being paid the reduced rate portion of their legal fees, up to the funding cap, if the matter was not successfully concluded. Class Counsel describe this as a risk-sharing arrangement. The contribution cap from the Funding Nations had already been reached prior to trial, meaning Class Counsel were prepared to litigate the ten-week Common Issues Trial without payment.

[24] Further, two of the senior Class Counsel, Peter Grant and Diane Soroka, are sole practitioners, with no colleagues to share the litigation risk.

[25] The Affidavit of Peter Grant summarizes the litigation risk in this class proceeding as follows:

> 25. The Band Class claim is based on the conduct of Canada throughout the 77-year Class Period from 1920 to 1997 regarding 139 Indian Residential Schools located in ten provinces and territories that were operated in partnership with several different religious entities. The Band Class claim seeks damages for the collective impacts of those Residential Schools on 325 Bands located across Canada.

> 26. Throughout this litigation, Canada routinely used this scope and complexity to attack the very premise of the Band Class claim, continually arguing that this complexity meant that the common questions of law or fact simply could not be answered in common. In fact, Canada suggested in the Trial Brief of the Defendant that, as a result of this complexity, the action should be decertified.
>
> 27. The Band Class litigation involved significant risk and uncertainty primarily because of the shear novelty of the claim. The following issues, amongst others, had never been addressed by a court in Canada:
>
> (a) Is loss of language and culture a compensable harm?
>
> (b) Is there a generic right to Indigenous language and culture under s. 35 of the Constitution?
>
> (c) Can First Nations and other Indigenous groups claim for loss of language and culture of the collective as a whole?
>
> (d) Who is the proper rights holder for collective rights of language and culture?
>
> (e) Can a court quantify damages for a claim of collective loss of language and culture? If so, how are they measured?
>
> (f) What are the damages for collective loss of language and culture?
>
> 28. A loss on any one of the above questions could have been fatal to the entire case.

[26] The fact that no other claims were initiated in Canada on behalf of Indian Bands for collective harms of Residential Schools, or for the loss of language and culture as a result of Residential Schools, highlights the uncertainty that surrounded these claims and the risks undertaken by Class Counsel in committing years of time and resources to pursue the action.

(c) Time Expended

[27] This litigation has been ongoing for over a decade. The legal issues were complex and success was uncertain.

[28] The Settlement Agreement was reached immediately before the September 2022 Common Issues Trial was scheduled to begin. Tremendous legal work had been undertaken to prepare this matter for trial. Class Counsel have provided a detailed Affidavit outlining the work performed and has attached copies of time dockets providing a breakdown of the description of the work performed, by who, and the amount of time expended.

[29] Between March 2021 and January 2023, Class Counsel recorded over 8,500 hours. Their legal work will continue as they will provide legal services in the implementation of the Settlement Agreement and in establishing the not-for-profit entity that will administer the settlement fund. This work is over and above any legal work compensated for in the Day Scholars Fee Agreement, following the settlement of the Survivor Class and Descendant Class claims in this class action (*Tk'emlúps te Secwepemc First Nation v Canada*, 2021 FC 1020).

[30] In considering the risks and obligations undertaken by Class Counsel and the success achieved for the Band Class, I have no hesitation in finding that Class Counsel have very much earned the right to a legal fee premium in excess of any docketed time.

(d) Complexity of the Issues

[31] The complexity of this class action cannot be overstated as referenced in more detail in the Order approving the Settlement Agreement. The claims advanced were novel and untested. The evidence was historic and voluminous.

[32] As set out in the Grant Affidavit:

> 34. In fact, after certification, only 98 out of 640 Nations elected to opt into this proceeding. During the intense negotiations in 2016-2017, the return to litigation and the lead up to the trial, no other action of a similar nature was commenced. No Band that did not opt in to this proceeding has yet started its own action against Canada for collective harms caused by Residential Schools.
>
> 35. These facts strongly suggest that, within the legal community of both class action counsel and Aboriginal law counsel, there was no appetite for taking on the enormous risks involved in advancing the novel claims in this Action.

(e) Importance of the Litigation to the Plaintiffs

[33] The damages caused to First Nations language, culture, and heritage through the operation of Residential Schools in Canada are described in the Truth and Reconciliation report as cultural genocide. These losses have not been acknowledged in previous Residential Schools litigations, but the impacts on the Band Class members are still felt in these communities today.

[34] The Affidavits of the individual Representative Plaintiffs, Chief Shane Gottfriedson and Chief Garry Feschuk, submitted for the Motion to approve the Settlement Agreement, attest to the significance and importance of this litigation to their communities.

[35] Class Counsel Peter Grant noted, in his Affidavit:

> 31. Based on my experience with First Nations and my observations of class action lawyers involved in Residential School claims, boarding home claims, and claims relating to the apprehensions of Indigenous children, it is remarkable that, in the thirty years since litigation regarding Residential Schools began in earnest, there has been no other lawsuit filed either by class action counsel nor by other legal counsel claiming damages for collective harms caused to Indigenous collectives as a whole as a result of Canada's IRS policies.
>
> 32. Similarly, other than the James Bay Cree in this proceeding, no other First Nation or Indigenous collective in Canada was willing to join the Representative Plaintiffs and take on the case for collective harms arising from Canada's IRS policies.

[36] Importantly, the Settlement Agreement demonstrates that Canada has changed its understanding and treatment of Indigenous language and culture as collective rights.

(f) Degree of Responsibility Assumed by Class Counsel and Quality and Skill of Counsel

[37] Class Counsel are a team of highly experienced lawyers, combining their expertise in Aboriginal law and class-action litigation. The three lead counsel were involved in the IRSSA settlement and were specifically sought out to act on this matter because of their particular expertise.

[38] Class Counsel were clearly committed to the class action and prosecuted the claims diligently, in spite of significant procedural and legal hurdles, and were prepared to push forward with the litigation even at the risk of no recovery of their legal fees.

[39] Ultimately, after many years, Class Counsel were able to achieve a settlement that met and exceeded the objectives of the Band Class members. Counsel will continue to be involved in providing legal services in the implementation of the Settlement Agreement and the establishment of the not-for-profit entity to administer the settlement fund.

(g) Ability of the Class to Pay and the Expectation of the Class

[40] The Affidavits of Chief Shane Gottfriedson, one of the individual Representative Plaintiffs, and Dr. Matthew Coon Come, former Grand Chief of the Grand Council of Crees (Eeyou Istchee), support the approval of the Fee Agreement and confirm the Fee Agreement is in keeping with their understanding of how fees were to be paid on a successful resolution of the class action. They also confirm that, in their opinion, the fees are fair and reasonable.

[41] There were no objections to the Fee Agreement voiced at the Motion.

[42] As noted, Class Counsel were acting on a fee-for-services retainer and not a contingency fee agreement. Class Counsel Peter Grant's Affidavit and the Affidavits of Dr. Matthew Coon Come and Chief Shane Gottfriedson provide details on the Funding Nations' retainer agreements and funding agreements.

[43] These funding and retainer arrangements were set out in the Grant Affidavit as follows:

> 136. The financial arrangement between the Three Nations and Class Counsel was modified after the settlement of the Day Scholars Settlement Agreement at the request of the Three Nations. The Three Nations agreed to fund disbursements and legal fees at fixed and reduced rates to a maximum of $1,800,000 through to the completion of the first phase of the common issues trial. Any unfunded amounts over and above the cap would be borne by Class Counsel.

…

> 152. As described above, we agreed with the [Three Nations] that their contribution to legal fees and disbursements associated with phase one of the common issues trial would be capped at $1.8 million. As a result of the manner in which the DOJ conducted the litigation, the unanticipated costs of re-opening the opt-in period, and the size, scope and importance of the Band Class claim, our actual docketed fees and disbursements are $4,838,837, far in excess of the $1,800,000 in funding provided by the Three Nations. This left an unfunded amount of over $3 million for docketed fees and disbursements that were not paid by the Three Nations, and that were borne by Class Counsel. If the case had gone to trial, the unfunded amount would have been at least this amount or more for a full trial with all the costs of bringing in witnesses and experts to Vancouver, all of which costs would have been borne by Class Counsel.
>
> 153. This lawsuit was litigated to the literal eve of trial. Given that we had exhausted the contribution paid by the [Three Nations] before the trial was set to commence, Class Counsel had to be, and were, prepared to fully litigate a ten-week common issues trial without any payment.

[44] In his Affidavit, Chief Shane Gottfriedson stated:

> Tk'emlúps te Secwépemc and shíshálh Nation negotiated a retainer with Class Counsel that apportioned the risk of this litigation between Class Counsel, on the one hand, who agreed to take on the significant burden of a risky highly-complex, multiyear lawsuit at heavily-discounted hourly rates, and Tk'emlúps te Secwépemc and shíshálh Nation, on the other hand, who agreed to provide some ongoing funding in order to make the lawsuit sustainable, given the financial pressures on our communities.

[45] The Representative Plaintiffs negotiated heavily reduced, fixed rate fees with Class Counsel, subject to a cap. After the cap was reached, Class Counsel took on the burden of any unpaid legal fees. Additionally, the costs of litigation were borne by the three Funding Nations equally, to facilitate litigation of this claim and distribute the financial burden. None of the Indian Bands who chose not to opt-in to this class action have commenced an individual action for collective compensation.

(h) Fees in Similar Cases

[46] The total value of the settlement is $2.8 billion. Accordingly, legal fees of $20 million represent less than 1% of the settlement.

[47] By comparison, in *McLean,* the Indian Day Schools settlement was approximately $2 billion and the approved legal fees were $55 million, plus $7 million for legal fees for services rendered for a period of four years afterward.

[48] In *Riddle v Canada*, 2018 FC 641, a ‘Sixties Scoop’ class action, the settlement was $750 million and a $75 million legal fee agreement was approved.

[49] In this case, the legal fees sought to be approved are modest by comparison to fees in similar cases.

[50] Overall, I am satisfied the Fee Agreement is fair and reasonable.

B. *Approval of Honoraria Payments to the Individual Representative Plaintiffs*

[51] This Court has noted that compensation to representative plaintiffs is appropriate in situations where there are services which are over and above the usual duties of a representative plaintiff (*Merlo v Canada,* 2017 FC 533 at para 73 [*Merlo*]).

[52] The list of factors relevant for consideration on whether the individual Representative Plaintiffs should receive honoraria includes: significant personal hardship; active involvement in

the initiation of the litigation and retainer of counsel; time spent and activities undertaken in the litigation; communications and interactions with other class members; and participation at various stages of the litigation (*Merlo* at para 72; *Toth v Canada*, 2019 FC 125 at para 96).

[53] The litigation required exceptional efforts on the part of the individual Representative Plaintiffs, who spent 11 years shouldering the burden of this difficult and psychologically taxing litigation. Former Chief Shane Gottfriedson and former Chief Garry Feschuk continued their active involvement in this litigation for years after their terms as elected Chiefs of their respective Nations ended.

[54] Chief Shane Gottfriedson and Chief Garry Feschuk both provided personal Affidavits for trial, detailing their personal experiences and their families' experiences at Residential Schools. They endured cross-examinations and were prepared to testify openly at trial. In doing so, they exposed themselves to re-traumatization at great personal effort, but done for the collective benefit of the Class members.

[55] The Grant Affidavit describes these cross-examinations as follows:

> Both Representative Plaintiffs endured many hours of questioning about the following matters, among other things:
>
> (a) their relatives' and community members' experiences at Residential Schools;
>
> (b) the traumas experienced by their families and community members, including from physical, sexual, and emotional abuse;
>
> (c) the effects of the Canada's assimilationist policies on their languages, cultures, and religions (before and throughout the Class Period); and

(d) the decline of their nations' languages and cultural practices during the Class Period.

[56] The individual Representative Plaintiffs spent significant time travelling to meetings, gathering and reviewing documents, attending examinations and hearings, and reviewing materials to stay up-to-date and informed on the status of the litigation. The individual Representative Plaintiffs have met regularly with Class Counsel to receive updates and provide instructions.

[57] They have also participated in media interviews in relation to this class-action proceeding. At the Settlement Approval Hearing, the Court also heard from Band Class members who praised the vision, commitment, and conviction demonstrated by Chief Gottfriedson and Chief Feschuk in seeing these claims to the end.

[58] In the circumstances, I have no difficulty in finding that this is an appropriate case to recognize the extraordinary efforts of the individual Representative Plaintiffs and I approve the honoraria payments of $15,000.00 to each of Chief Gottfriedson and Chief Feschuk.

V. Conclusion

[59] For the above reasons, the Fee Agreement, including the honoraria payments to the individual Representative Plaintiffs, is approved.

ORDER IN T-1542-12

THIS COURT ORDERS that:

1. The Fee Agreement attached as Schedule "A", is fair, reasonable and is hereby approved pursuant to Rule 334.4 of the Federal Courts Rules, SOR/98-106, and shall be implemented in accordance with its terms;

2. Within thirty (30) days of the Implementation Date, the Defendant shall pay the total and all-inclusive amount of $19,500,000.00 [the Fee Amount, being $20 million less the Advance Costs already paid by the Defendant] to Class Counsel in trust for the legal fees, disbursements, and taxes applicable thereon incurred in the prosecution of the Band Class claim, and for the honoraria payments to the individual Representative Plaintiffs;

3. Honoraria payments of $15,000.00 to the two individual Representative Plaintiffs for the Band Class, former Chief Shane Gottfriedson and former Chief Garry Feschuk, are approved and shall be paid by Class Counsel from the Fee Amount; and

4. There will be no costs on this Motion.

"Ann Marie McDonald"
Judge

Schedule "A" 0008

Court File No. T-1542-12

FEDERAL COURT

CLASS PROCEEDING

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE SECWEPEMC INDIAN BAND and the TK'EMLUPS TE SECWEPEMC INDIAN BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND

PLAINTIFFS

and

HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

DEFENDANT

BAND CLASS SETTLEMENT FEE AGREEMENT

1. Fee Agreement

1.01 The Band Class Settlement Fee Agreement ("Fee Agreement") is the standalone legal agreement regarding legal fees, honoraria, and disbursements as defined in the proposed Band Class Settlement Agreement in the certified class proceeding bearing Court File No. T-1542-12, *Gottfriedson et al. v. His Majesty the King in Right of Canada* ("Settlement Agreement").

1.02 The Fee Agreement was negotiated separately from the Settlement Agreement. All legal fees, disbursements, taxes, and expenses, in addition to the proposed Representative Plaintiff honoraria, are the subject of the Fee Agreement, which is subject to review and approval by the Court.

1.03 Court approval of the Fee Agreement is separate and distinct from Court approval of the Settlement Agreement. In the event that the Court does not approve the Fee

Agreement, in whole or in part, it will have no effect on the approval or implementation of the Settlement Agreement.

1.04 In the event that the Court does not approve the Settlement Agreement, the Fee Agreement becomes null and void.

2. Definitions

2.01 Defined terms in the Settlement Agreement have the same meaning as those terms in the Fee Agreement.

2.02 In this Fee Agreement, the following additional definitions apply:

"Advanced Costs" means $500,000.00 to be paid by Canada for costs associated with establishing and running the Trust/Not-For-Profit Entity prior to the Implementation Date;

"Honorarium" means the award, subject to court approval, to each of the Representative Plaintiffs for the Band Class in the Action for their contributions of time and effort to the litigation.

3. Legal Fees, Disbursements, Taxes, and Expenses

3.01 Canada agrees to pay the total and all-inclusive amount of **$20,000,000.00** in respect of legal fees, disbursements, and taxes related to initiating and prosecuting the Action, negotiating and implementing the Settlement Agreement, and honoraria to the representative Plaintiffs.

3.02 For greater clarity, disbursements include:

3.02.1 costs incurred by class counsel on behalf of the class in the prosecution of the Action;

3.02.2 costs incurred by Tk'emlúps te Secwépemc, shíshálh Nation and the Grand Council of the Crees (Eeyou Istchee) in the prosecution of the Action;

3.02.3 Advanced Costs include:

3.02.3.1 securing legal counsel to provide legal services and advice;

3.02.3.2 recruiting, hiring and paying interim staff, including an interim executive director and executive assistant;

3.02.3.3 securing and leasing office space;

3.02.3.4 opening an account at an accredited Canadian financial institution to receive the funds for the Trust; and

3.02.3.5 securing the services of financial advisors to provide investment advice.

3.03 Payment of the Advanced Costs shall be made in accordance with the Federal Court Order dated January 21, 2023. Payment of the Advanced Costs will be made to Waddell Phillips PC, in trust.

3.04 Payment of the amount set out in section 3.01, with the exception of the Advanced Costs, will be made to Waddell Phillips PC, in trust, within thirty (30) days after the Implementation Date.

4. Representative Plaintiff Honoraria

4.01 The Court will be asked to approve an Honorarium in the amount of $15,000.00 each to be paid to former Chiefs Garry Feschuk and Shane Gottfriedson in recognition of their time and extraordinary efforts devoted to the litigation. The Honorarium payments will be funded from the amount set out in s. 3.01.

4.02 If approved, payment of the Honorarium amounts will be made to the Representative Plaintiffs by Waddell Phillips PC within seven (7) days of payment of the amount set out in s. 3.01.

4.03 In the event that the Court does not approve any or all of the Honorarium payments, in whole or in part, it will have no effect on the approval or implementation of the Settlement Agreement or the remainder of this agreement.

5. No Other Fees or Disbursements to Be Charged

5.01 The Parties agree that it is their intention that payment of the Fund to the Trust will be made without any deductions on account of legal fees or disbursements other than the ongoing operating costs of the Trust/Not-for-Profit-Entity after the Implementation Date including professional fees.

6. Counterpart

6.01 This Fee Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same agreement.

IN WITNESS WHEREOF the Parties have executed this Fee Agreement as of this 21st day of February, 2023.

For the Plaintiffs

Waddell Phillips Professional Corporation,
per John K. Phillips, K.C.
Class Counsel

For the Plaintiffs

Peter R. Grant Law Corporation,
per Peter R. Grant
Class Counsel

4.03 In the event that the Court does not approve any or all of the Honorarium payments, in whole or in part, it will have no effect on the approval or implementation of the Settlement Agreement or the remainder of this agreement.

5. No Other Fees or Disbursements to Be Charged

5.01 The Parties agree that it is their intention that payment of the Fund to the Trust will be made without any deductions on account of legal fees or disbursements other than the ongoing operating costs of the Trust/Not-for-Profit-Entity after the Implementation Date including professional fees.

6. Counterpart

6.01 This Fee Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same agreement.

IN WITNESS WHEREOF the Parties have executed this Fee Agreement as of this 3rd day of February, 2023.

For the Plaintiffs

Waddell Phillips Professional Corporation,
per John K. Phillips, K.C.
Class Counsel

For the Plaintiffs

Peter R. Grant Law Corporation,
per Peter R. Grant
Class Counsel

0013

5

For the Plaintiffs

Diane Soroka Avocate Inc.,
per Diane H. Soroka
Class Counsel

Bess, Darlene

Digitally signed by Bess, Darlene
Date: 2023.02.08 15:22:39 -05'00'

For the Defendants

Darlene Bess
Chief Finances, Results and Delivery Officer Crown-Indigenous Relations and Northern Affairs Canada

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-12
STYLE OF CAUSE:	CHIEF SHANE GOTTFRIEDSON ET AL v HIS MAJESTY THE KING IN RIGHT OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 28, 2023
ORDER AND REASONS:	MCDONALD J.
DATED:	MARCH 16, 2023

APPEARANCES:

Peter R. Grant Diane Soroka John Kingman Phillips, KC W. Cory Wanless Jonathan Schachter Flora Yu	FOR THE PLAINTIFFS
Travis Henderson Ainslie Harvey	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Peter Grant Law Barrister & Solicitor Vancouver, BC	FOR THE PLAINTIFFS
Diane Soroka Advocate, Barrister & Solicitor Inc. Westmount, QC	

Waddell Phillips Professional Corporation Toronto, ON	
Attorney General of Canada Department of Justice Vancouver, BC	For The Defendant

TAB 24

Federal Court  Cour fédérale

Date: 20211119

Docket: T-1663-17

Citation: 2021 FC 1260

Ottawa, Ontario, November 19, 2021

PRESENT: Mr. Justice Gascon

BETWEEN:

ARTHUR LIN

Plaintiff

and

AIRBNB, INC., AIRBNB CANADA INC.,
AIRBNB IRELAND UNLIMITED COMPANY,
AIRBNB PAYMENTS UK LIMITED

Defendants

ORDER AND REASONS

I. Overview

[1] This is a motion brought under Rules 334.29 and 334.4 of the *Federal Courts Rules*, SOR/98-106 [Rules], for judicial approval of: i) a class action settlement [Settlement Agreement], including the appointment of an administrator of the claims to be filed [Claims Administrator]; ii) the legal fees sought by class counsel Evolink Law Group and Champlain

Avocats [Class Counsel Fees]; and iii) the payment of an honorarium to the representative Plaintiff, Mr. Arthur Lin [Honorarium].

[2] The Settlement Agreement, a copy of which is attached as Schedule "A" to this Order, was concluded on August 27, 2021 between Mr. Lin and the defendants Airbnb, Inc., Airbnb Canada Inc., Airbnb Ireland Unlimited Company and Airbnb Payments UK Limited [collectively, Airbnb], in the context of a class action proceeding [Class Action] filed by Mr. Lin in relation to the display of prices on Airbnb's websites and/or mobile applications [Airbnb Platform]. The Airbnb Platform is a digital marketplace connecting individuals seeking accommodations [Guests] with other individuals offering accommodations [Hosts], and allowing them to transact.

[3] For the reasons that follow, I will approve the Settlement Agreement and the appointment of the Claims Administrator on the terms provided by the parties, but I will only approve in part the proposed Class Counsel Fees and Honorarium.

II. Background

A. *Procedural context*

[4] This Class Action was commenced on October 31, 2017. In his statement of claim, Mr. Lin alleged that Airbnb breached section 54 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*], a rarely used criminal offence known as "double ticketing," by charging Guests, for the booking of an accommodation offered by Hosts on the Airbnb Platform, a final

price that was higher than the price displayed at the first stage of browsing on the Airbnb Platform. More specifically, Mr. Lin contested the fact that Airbnb added “service fees” to the final price charged for its accommodation booking services, although these fees were not included in the initial price per night displayed on the Airbnb Platform. The heart of Mr. Lin’s claim was that the inclusion of an additional service fee at a later stage of the sale process resulted in a higher price than the first price expressed to Guests, in contravention of section 54 of the *Competition Act*.

[5] For the purpose of the Settlement Agreement, the class members are defined as all individuals residing in Canada, other than Quebec, who, from October 31, 2015 to June 25, 2019: i) reserved an accommodation for non-business travel anywhere in the world using Airbnb; ii) whose reserved accommodation matched the parameters of a previous search made by the individual on the search results page of Airbnb; and iii) paid, for the reserved accommodation, a price (excluding applicable sales and/or accommodation taxes) that is higher than the price displayed by Airbnb on the said search results page for this accommodation [Class]. Mr. Lin claimed that the Class members having experienced this situation were entitled to the benefit of the lower price, and sought damages equal to the difference between the first price and the final price displayed on the Airbnb Platform.

[6] Following a contested hearing, I certified the proceeding as a class action in a judgment issued on December 5, 2019 (*Lin v Airbnb, Inc*, 2019 FC 1563 [Certification Judgment]).

[7] As of June 27, 2019, prior to the issuance of the Certification Judgment, Airbnb adjusted the Airbnb Platform so that Airbnb now displays an all-inclusive price for all accommodation bookings, excluding applicable taxes, at every step of the search and booking process.

[8] On December 16, 2019, Airbnb filed a Notice of Appeal of the Certification Judgment at the Federal Court of Appeal [FCA]. The appeal was heard on March 4, 2021 by way of Zoom. After the hearing, the FCA reserved its judgment, and the decision on the appeal was under deliberation when the Settlement Agreement was reached by the parties. The FCA is holding the appeal in abeyance pending the completion of the settlement process.

[9] A few weeks before Mr. Lin launched his class action proceeding before this Court in late October 2017, Mr. Preisler-Banoon had filed a similar class action before the Superior Court of Quebec in the matter *Preisler-Banoon c Airbnb Ireland*, 500-06-000884-177 [Quebec Action]. On September 13, 2019, prior to the hearing of the "authorization" (as the certification process is known in Quebec) of the Quebec Action, Airbnb and the Quebec plaintiff executed a settlement agreement. On February 3, 2020, the Superior Court of Quebec rendered a judgment approving the settlement of the Quebec Action (*Preisler-Banoon c Airbnb Ireland*, 2020 QCCS 270 [Quebec Settlement]). The Quebec Settlement has a gross value of $3,000,000 and provides to the Quebec class members (as they are defined in the Quebec Settlement) a credit of up to $45 on their next booking with Airbnb after confirming their eligibility.

B. *Overview of Settlement Agreement*

[10] The parties have entered into the Settlement Agreement on August 27, 2021, subject to this Court's approval. Mr. Lin's legal counsel, Evolink Law Group and Champlain Avocats [Class Counsel], have concluded that the Settlement Agreement is fair, reasonable, and in the best interests of Mr. Lin and the Class.

[11] The material terms of the proposed Settlement Agreement include:

- the settlement is valued at $6,000,000 [Settlement Amount], which includes any claims administration expenses [Administration Expenses], Class Counsel Fees, any Honorarium, and the applicable sales taxes;

- Airbnb will receive a full and final release in respect of the subject matter of this Class Action, namely, the display of prices on the Airbnb Platform [Release];

- the notification to eligible Class members and the claims procedure will be fully electronic, and managed by the Claims Administrator, Deloitte LLP [Deloitte];

- after the Court approves the Settlement Agreement, and before the claims deadline, eligible Class members can make a claim for a pro-rata share of up to $45 from the settlement funds that will remain after deduction of the Administration Expenses, Class Counsel Fees, Honorarium and applicable sales taxes from the Settlement Amount [Net Settlement Funds];

- distribution of the Net Settlement Funds to the eligible Class members that make a claim will be by way of a non-cash-convertible credit on the Airbnb Platform [Credit], to be redeemed on the next accommodation booking within 24 months of issuance; and

- the individuals covered by the Quebec Settlement are excluded from the Settlement Agreement, and claims relating to those individuals will be dismissed from this Class Action.

[12] Once the Settlement Agreement is approved, a hyperlink will be sent to Class members to make a claim. The Credit to be issued by Airbnb will be a one-time-use only, non-transferable, non-refundable, non-cash-convertible credit of up to $45 in value to each eligible Class member who submits a claim. The Credit's ultimate value will depend on the total number of approved claims and on the amount the Court approves for Administration Expenses, Class Counsel Fees, Honorarium and applicable sales taxes – which will all be deducted from the Settlement Amount. The Credit cannot be combined with any other offer discount, or coupon, and must be redeemed within 24 months after issuance, on the next Airbnb accommodation booking in any location worldwide. The Credit will be in the same amount for each Class member. In order to be able to redeem a Credit, the eligible Class members must accept the most recent version of Airbnb's Terms of Service and not be prohibited from using the Airbnb Platform (in accordance with the Terms of Service).

[13] In exchange, Class members will acknowledge that the Credit is in full and complete settlement of their claims and agree to give up any and all claims they may have against Airbnb relating in any way to the display of prices on the Airbnb Platform, including in respect of conduct alleged (or which could have been alleged) in the Class Action.

[14] With respect to Class Counsel Fees, Section 11.3 of the Settlement Agreement provides that Class Counsel will seek approval of the Court for the payment, by Airbnb, of Class Counsel Fees in the amount of $2,000,000, plus applicable taxes. The Settlement Agreement further states

that Class Counsel will not seek additional payments for disbursements. In October 2017, prior to the filing of the Class Action, Class Counsel had entered into a fee agreement with Mr. Lin [Retainer Agreement], which provides for a contingency fee not exceeding 33% of the total amounts recovered by the Class. I pause to observe that, surprisingly, the Class Counsel Fees mentioned in the Settlement Agreement are slightly above what is provided for in the Retainer Agreement concluded with Mr. Lin: they amount to one third of the Settlement Amount (i.e., 33.33%) as opposed to a maximum of 33% set out in the Retainer Agreement, representing a difference of $20,000.

[15] As far as the Honorarium is concerned, the Settlement Agreement provides that Class Counsel may ask the Court for the approval of an Honorarium of $5,000 to Mr. Lin.

[16] Airbnb does not oppose the terms of the Settlement Agreement relating to Class Counsel Fees and to the request made for an Honorarium to Mr. Lin, and has agreed to pay the Class Counsel Fees, Mr. Lin's Honorarium and applicable taxes that are approved by the Court. As indicated above, all of these amounts will be deducted from the Settlement Amount.

C. *Notices to Class members*

[17] On September 16, 2021, the Court issued an order for the distribution of short-form and long-form notices of settlement approval [together, Notices] to the affected Class members, in accordance with Rule 334.34 [Notice Order]. The Notice Order also fixed the settlement approval hearing before this Court on November 1, 2021.

[18] The Notices have been broadly distributed to all persons residing in Canada who were Airbnb customers between October 31, 2015 and June 25, 2019. Through these Notices, Class Counsel advised the Airbnb customers of the settlement of the Class Action and of the settlement approval hearing, and summarized certain elements of the Settlement Agreement. This summary notably referred to the maximum value of $45 for the Credit and explained the redemption process to be followed, as well as the procedure to opt out or object to the proposed settlement. The Notices further informed the potential Class members that the Notices were just a summary, indicated that the Settlement Agreement itself and other court documents were available through a link to the Class Counsel's website (i.e., https://evolinklaw.com/airbnb-service-fees-national-class-action), and mentioned that the Settlement Agreement shall prevail in case of any discrepancy between the Notices and the Settlement Agreement.

[19] The Notices were sent to the Airbnb customers at the end of September 2021. The Claims Administrator has provided its report on the results of the e-mail distribution of the Notices. They are as follows: i) 2,539,475 e-mails were sent; ii) 494,002 e-mails bounced or were undeliverable; iii) 765,736 e-mails were opened, with 412,934 unique opens to the e-mails. In total, 14 individuals contacted Class Counsel indicating a desire to opt out of the Class Action, and 4 individuals submitted a written objection to the proposed Settlement Agreement.

III. Analysis

[20] This motion is seeking the Court's approval for the Settlement Agreement, Class Counsel Fees and Mr. Lin's Honorarium. Each of these three requests will be dealt with in turn.

A. ***Settlement Agreement***

(1) The law relating to approval of class action settlements

[21] Rule 334.29 provides that a class proceeding settlement must be approved by the Court. The legal test to be applied is whether the proposed settlement is "fair, reasonable and in the best interests of the class as a whole" (*Bernlohr v Former Employees of Aveos Fleet Performance Inc*, 2021 FC 113 [*Bernlohr*] at para 12; *Wenham v Canada (Attorney General)*, 2020 FC 588 [*Wenham 1*] at para 48; *McLean v Canada*, 2019 FC 1075 [*McLean 1*] at paras 64-65).

[22] The factors to be considered in the analysis have been reiterated by the Court on several occasions (*Bernlohr* at para 13; *Wenham 1* at para 50; *McLean 1* at paras 64-66; *Condon v Canada*, 2018 FC 522 [*Condon*] at para 19). They are similar to the factors retained by the courts across Canada. These factors are non-exhaustive, and their weight will vary according to the circumstances and to the factual matrix of each proceeding. I summarize them as follows, in what I view as their order of relative importance:

1) The terms and conditions of the settlement;
2) The likelihood of recovery or success;
3) The expressions of support, and the number and nature of objections;
4) The degree and nature of communications between class counsel and class members;
5) The amount and nature of pre-trial activities including investigation, assessment of evidence and discovery;
6) The future expense and likely duration of litigation;

7) The presence of arm's length bargaining between the parties and the absence of collusion during negotiations;
8) The recommendation and experience of class counsel; and
9) Any other relevant factor or circumstance.

[23] A proposed settlement must be considered as a whole and in context. Settlements require trade-offs on both sides and are rarely perfect, but they must nevertheless fall within a "zone or range of reasonableness" (*Bernlohr* at para 14; *McLean 1* at para 76; *Condon* at para 18). Reasonableness allows for a spectrum of possible resolutions and is an objective standard that can vary depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation to class members. However, not every disposition of a proposed settlement agreement must be reasonable, and it is not open to the Court to rewrite the substantive terms of a proposed agreement (*Wenham 1* at para 51). The function of the Court in reviewing a proposed class action settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the agreement (*Condon* at para 44). In the end, the proposed settlement is a "take it or leave it" proposition.

[24] I make one other observation, which relates to the interaction between the approval of proposed class action settlements and the approval of class counsel fees. In mandating that both the class action settlements and the payment of class counsel fees be subject to the Court's approval (i.e., Rules 334.29 and 334.4), the Rules place an onerous responsibility on the Court to ensure that the class members' interests are not being sacrificed to the interests of class counsel, who have typically taken on a substantial risk and who have a great deal to gain not only in removing that risk but in recovering a significant reward from their contingency fee arrangement

(*Shah v LG Chem, Ltd*, 2021 ONSC 396 [*LG Chem*] at para 40).[1] The incentives and the interests of class counsel may not always align with the best interests of the class members. It thus falls on the Court to scrutinize both the proposed settlement agreement and the proposed class counsel fees, as they will typically be interrelated. This is the case here since the Net Settlement Funds available to Class members are equal to the Settlement Amount after deduction of the Class Counsel Fees and other expenses.

(2) Application to this case

(a) *Terms and conditions of the settlement*

[25] Under the terms and conditions of the settlement, the question to be determined is whether the proposed Settlement Agreement, when considered in its overall context, provides significant advantages to the Class members, compared to what would have been an expected result of litigation on the merits.

[26] The key terms of the Settlement Agreement, as seen by the parties, include: a Settlement Amount valued at $6,000,000; distribution of the Settlement Amount by way of a non-cash-convertible Credit issued on the Airbnb Platform; a maximum Credit of $45 per Class member, redeemable within 24 months on the next accommodation booking; and the dismissal of the claims for the Quebec-based members due to potential overlaps with the Quebec Settlement. In his submissions, Mr. Lin also refers to the fact that Airbnb has modified its behaviour and

[1] The certification criteria applicable in this Court are akin to those applied by the courts in Ontario and British Columbia (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23; *Canada v John Doe*, 2016 FCA 191 at para 22; Certification Judgment at para 23). It is therefore not uncommon to see this Court and the FCA refer to case law arising from these provinces in matters relating to class actions, as such case law is instructive in this Court.

changed its pricing display, though this is not, as such, a term and condition of the Settlement Agreement.

[27] In his written and oral submissions to the Court, Mr. Lin focused on five particular aspects of the Settlement Agreement, namely, the non-cash nature of the Credit, the Release granted to Airbnb, the exclusion of Quebec members, the identity of the Claims Administrator, and the scope of eligible Class members. I will briefly look at each element.

(i) Non-cash nature of the Credit

[28] In the current case, the monetary benefit of the Settlement Agreement for the Class members will take the form of a non-cash distribution to the eligible Class members, namely, the Credit. I acknowledge that courts in Canada and in the United States have often expressed concerns about class action settlements – generally referred to as "coupon settlements" – in which class counsel are awarded large fees while leaving class members with coupons or other non-cash awards of little or no value. However, I agree with Mr. Lin that, while the Credit available to Class members in this case is a non-cash settlement, it does not bear the problematic attributes generally associated with "coupon settlements."

[29] First, the Credit granted to Class members will have a wide range of applications. The Class members will be able to use it towards accommodation bookings anywhere in the world, including local staycations or short road-trips, for both the service fees (paid to Airbnb) and the listing fees (paid to the Hosts) that are part of a booking on the Airbnb Platform. Second, the ultimate value of the Settlement Amount (i.e., $6,000,000) is known at the outset, and will not be

dependent on the number of individual Class members who actually redeem the Credit. Third, the claims procedure will be simplified, as eligible Class members will not be required to submit proof of their claims and will be entitled to share in the settlement upon acknowledging that they meet the requirements for a claim. Fourth, the redemption period is long enough, extending to a maximum of 24 months. Fifth, based on inquiries received from potential Class members after the Notices were distributed, Airbnb appears to have a number of repeat customers for its Airbnb Platform. There is therefore a good likelihood that Class members will do business with Airbnb again, and will effectively use the Credit.

[30] In sum, after scrutiny, I am satisfied that the Credit does not fit among those "coupon settlements" that the Court should be reluctant to approve. Rather, the Credit will be distributed in a way that is more akin to a gift card or a bill credit. In addition, based on the evidence before me, it is expected that the take-up rate will be significant among the Class members. Finally, in the circumstances, the distribution of the Net Settlement Funds in the form of Credits through the Claims Administrator is more practical and economical, compared to what a cash distribution would have entailed.

(ii) Release to Airbnb

[31] Turning to the Release clause, the Court has to review the scope of releases granted in class action settlement agreements to ensure that defendants do not unfairly obtain a broad release (or even a release for future claims), beyond the claims that are or could have been raised in the action. Here, I agree with Mr. Lin that there are no concerns relating to the scope of the Release granted to Airbnb in the Settlement Agreement. The Release is qualified by the words

"relating in any way to the display of prices on the Airbnb Platform, including conduct alleged (or which could have been alleged) in the Proceeding," which was the subject matter of Mr. Lin's Class Action. The Release is thus circumscribed to those price-related practices at the source of the Class Action. While the Release extends to all forms of price "display," including arguably false or misleading pricing representations, I am satisfied that it is not overbroad in the context of what was alleged by Mr. Lin in his Class Action.

(iii) Dismissal of the claims for Quebec members

[32] As stated above, the Quebec Settlement provides for the settlement of similar claims made by the class members in the Quebec Action, based on Airbnb's display of prices on the Airbnb Platform. I agree with Mr. Lin that it is fair and reasonable to exclude those claims from the Settlement Agreement as amounts received by the Quebec members under the Quebec Settlement would overlap with the Settlement Agreement and would create a potential of double indemnity for the class members residing in Quebec.

(iv) Use of Deloitte as Claims Administrator

[33] The estimated Administration Expenses primarily consist of the fees for the Claims Administrator, Deloitte, and amount to an all-inclusive total of $320,500. I agree with Mr. Lin that this amount is justified in the circumstances and I am satisfied that Deloitte is well qualified to act as Claims Administrator.

(v) Eligible Class members

[34] The Settlement Agreement provides for an additional requirement to be eligible to claim a Credit, which results in a slight reduction of the number of eligible Class members entitled to receive compensation. Eligible Class members will be limited to those individuals that used the Airbnb Platform for the first time between October 31, 2015 and June 25, 2019. Therefore, Class members that already had an account and had used the Airbnb Platform prior to October 31, 2015 will not be eligible for a Credit. Airbnb estimates that the difference between Class members who will be eligible for a Credit and the total of Class members who used the Airbnb Platform during the relevant period represents approximately 194,000 individuals.

[35] I am satisfied that this reduced distribution of the Settlement Amount to a more limited number of Class members is a reasonable compromise in light of Airbnb's position that those Guests who had experienced the impugned pricing practice more than once are on a different legal footing.

(vi) Other elements

[36] In assessing the terms and conditions of a proposed class action settlement and determining whether they are fair, reasonable and in the best interests of the class members, the Court should also consider the expected take-up rate by the class members, particularly where there is a fixed settlement fund as is the case here (*Condon* at para 48), or where the quantum of the compensation to be received by each claimant depends on the number of eligible claimants who submit a claim. The Court may therefore take into account evidence on the expected

participation in the settlement by class members when it assesses the sufficiency of available settlement funds or the effective monetary compensation of class members (*Bodnar v The Cash Store Inc*, 2010 BCSC 145 at para 21).

[37] In this case, based on the evidence provided by Mr. Lin (through the affidavit sworn by Class Counsel Simon Lin [Counsel Affidavit]), it is reasonable to estimate that approximately 30% of the Class members will apply for a Credit and participate in the claims process. The evidence reveals that, in the Quebec Settlement, the take-up rate ended up being effectively about 30%, translating into a credit of approximately $9.50 per individual Quebec class member. According to the Counsel Affidavit (at paragraphs 108-110), Class Counsel expects that, in the current case, the take-up rate will be “reasonably high” and “similar” to the Quebec Settlement, although it could be affected by some other factors, in particular the pandemic. Based on the evidence before me, I therefore agree that 30% is a reasonable rough estimation of the proportion of eligible Class members who are expected to file a claim to the Net Settlement Funds.

(vii) Conclusion

[38] In summary, when considered in their overall context, I am satisfied that the terms and conditions of the Settlement Agreement provide significant advantages to the Class members which might not have been achieved with the continued litigation, and are a positive factor supporting the approval of the Settlement Agreement.

(b) *Likelihood of recovery or success*

[39] The next factor to consider is the likelihood of recovery or success. This factor refers to the likelihood of success of Mr. Lin's Class Action if it were to proceed on the merits. This factor of likelihood of recovery or success must be assessed at the time when the parties choose between proceeding with the litigation or settling the matter. Under this factor, the Court must determine whether the proposed Settlement Agreement is an attractive viable alternative to continued litigation.

[40] Here, I am satisfied that the Settlement Agreement is a reasonable and attractive viable alternative to litigation for Mr. Lin and the Class, because litigating the Class Action could have led to unforeseen conclusions. The ultimate success of Mr. Lin in his Class Action was uncertain for three main reasons, namely, the pending appeal before the FCA, the risk involved at the merits trial, and the difficulties linked to enforcing a judgment from this Court in foreign jurisdictions.

[41] First, the pending appeal before the FCA focused on three important issues, for which the outcome is fairly difficult to predict: i) whether a section 36 claim based on section 54 of the *Competition Act* requires pleading and proving "reliance"; ii) whether it was sufficient for Mr. Lin to plead the simple difference between the two prices posted by Airbnb as damages under section 36 of the *Competition Act*; and iii) whether the Class description met the appropriate standard for certification. Since many of these issues are novel, the risk of an adverse decision from the FCA is a real possibility for the Class members.

[42] Second, the success of Mr. Lin at a merits trial faces several hurdles. In my reasons delivered in the Certification Judgment, I commented on the challenges in litigating this Class Action to a successful conclusion on the merits. I notably indicated that the application of the "double ticketing" provision to this case was not free from doubt (Certification Judgment at para 7), and that Airbnb had raised numerous valid points regarding the legal interpretation of sections 36 and 54 of the *Competition Act* and their application to this case (Certification Judgment at para 34). I further recognized that, in light of the paucity of "double ticketing" cases, Mr. Lin certainly appeared to be stretching the potential interpretation and application of section 54 of the *Competition Act*, and that he was extending it into unchartered territory (Certification Judgment at para 56). I noted that, in its submissions, Airbnb had raised valid and relevant points regarding the nature and identity of the product or products effectively supplied by Airbnb through the Airbnb Platform, and that it was certainly open to Airbnb to submit and argue that section 54 of the *Competition Act* could not apply to its situation because what is effectively supplied through the Airbnb Platform are two different products by two different persons at two different prices (Certification Judgment at para 53). In other words, there were solid factual and legal arguments advanced by Airbnb on the presence of two products, on whether what is supplied by Airbnb could be characterized as a bundle of different articles and services, and on whether the product at issue is the bundle or its components, as opposed to the accommodation booking services put forward by Mr. Lin (Certification Judgment at para 54). I also pointed out that it may look like a strange proposition to plead and argue that loss or damage could be established by a customer, based simply on a price differential between the lower and the higher price of a product, when the customer knew about both prices and nevertheless decided to accept the higher price and to proceed with the transaction (Certification Judgment at

para 83). I finally acknowledged that demonstrating and proving the existence of an actual loss or damage in these circumstances may present additional challenges for Mr. Lin and the Class members (Certification Judgment at para 83).

[43] All of these observations reflect the fact that the likelihood of success of Mr. Lin at the common issues trial was difficult to predict at the time of certification, and it remains so today. There is little to no jurisprudence on section 54 of the *Competition Act*, as well as considerable uncertainty in the law as to whether a trial judge would award damages in the context of this Class Action. It is also clear that the legal questions advanced by Mr. Lin were novel with no appellate jurisprudence, suggesting a strong likelihood of multiple levels of appeals after a decision at the merits trial.

[44] Third, there is also a risk with having to enforce a judgment against non-Canadian defendants, as is the case for some of the Airbnb entities.

[45] In sum, when the parties decided to conclude the Settlement Agreement, it was uncertain and questionable whether Mr. Lin's Class Action could be litigated successfully on the merits, given the state of the law on "double ticketing." Most of those factors are still relevant today. This, again, is a positive factor supporting the approval of the Settlement Agreement.

(c) *Expressions of support, and number and nature of objections*

[46] Turning to the expressions of support or objections to the proposed Settlement Agreement, Class Counsel has received a total of 84 correspondence from potential Class

members, further to the Notices sent by the Claims Administrator after the Notice Order. These responses can be categorized as follows: 43 were general inquiries; 23 members voiced their support for the Settlement Agreement; 14 expressed a wish to opt out; and 4 objected to the proposed settlement. I observe that the deadline for opting out or objecting to the Settlement Agreement – as set out in the Notices – has now passed. The opt-outs and objections were included as exhibits to the Counsel Affidavit.

[47] I agree with Mr. Lin that the number of opt-outs is small compared to the size of the Class. Furthermore, some of the opt-outs appear to have been sent due to confusion as to whether these Airbnb customers were included or not in the Class definition. With respect to the four objections, two complaints regarded the type of remedy available (i.e., a non-cash-convertible Credit to be used on the Airbnb Platform) and two objectors found the maximum amount of the Credit (i.e., $45) too low. One of the complainants who initially objected to the non-cash nature of the Credit distribution voiced some support after Class Counsel explained to him the rationale for the non-cash structure of the settlement. I note that none of the objectors attended the settlement approval hearing before this Court.

[48] I also agree with Mr. Lin that the few objections received do not detract from the fact that the proposed Settlement Agreement, for the Class as a whole, is fair and reasonable and in their best interests. Having considered all of the objections received, I am of the view that they are not sufficient to conclude that the Settlement Agreement should not be approved. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Condon* at para 69).

(d) *Degree and nature of communications between Class Counsel and Class members*

[49] The degree and nature of communications between Class Counsel and Class members is another important factor to consider for the approval of the Settlement Agreement. As will be discussed below in section III.B, it is also, in my view, a factor having an impact on the approval of Class Counsel Fees.

[50] In this case, there is no doubt that Class Counsel and Mr. Lin have evidently communicated well. With regard to the communications between Class Counsel and Class members more generally, since the commencement of this Class Action, Class Counsel has maintained and updated a website to publish basic information regarding the case, including a mailing list that allows interested individuals to subscribe for updates. Court documents and other records have been posted on this website for Class members' review. Prior to the publication of the Notices, there were 70 individuals subscribed to that mailing list, and that number increased to 673 individuals after the Notices announcing the settlement approval hearing were distributed.

[51] After the conclusion of the Settlement Agreement, the Notices were sent by e-mail to all the Class members who registered with Class Counsel and provided valid e-mail addresses. Class Counsel also posted the Notices and the Settlement Agreement on their dedicated website for the Class members. As indicated above, the Claims Administrator provided a report detailing the delivery of the Notices, which showed that the Notices were widely disseminated to Airbnb

customers. I agree with Mr. Lin that, in light of the foregoing, sufficient steps were taken to provide notice of the Settlement Agreement to the Class members.

[52] However, in determining the approval of a proposed class action settlement, the Court's analysis must not look solely at the existence of communications to class members and at the efforts deployed by class counsel to distribute such communications in an adequate way. In the exercise of its role, the Court must also review and consider the actual contents of the communications with class members, in light of the proposed settlement agreement and of the evidence provided at the settlement approval motion, and assess whether sufficient information has effectively been provided to the class members to allow them to make an informed decision about the proposed settlement.

[53] In this case, further to my review of the evidence provided by Mr. Lin on this motion, I must conclude that Class Counsel's communications with Class members fall short of the mark to meet the requirements of an adequate, full and frank disclosure of the contemplated Settlement Agreement. In other words, there were some important shortcomings in the informative value of the Notices sent to the Class members. I understand that Class members could have access to the Class Counsel's website and to the Settlement Agreement itself, and that they were invited to do so at the end of the Notices. However, the actual text of both the short-form and long-form Notices were short on details regarding several key features of the proposed Settlement Agreement. More specifically:

- the Notices did not specify that the total Settlement Amount was $6,000,000;

- the Notices did not provide information on the actual amount or on the percentage base of Class Counsel Fees;

- while they mentioned that the Credit of $45 was a maximum amount which could be lowered depending on the number of claimants, the Notices did not provide any additional detail on the likely or expected take-up rate or on the amount of the effective Credit likely or expected to be received by the Class members.

[54] To the extent that the purpose of the Notices was to properly inform the Class members of the Settlement Agreement in order to give them the means to decide to accept it, opt out or voice an objection, I find that, in light of the evidence now before me, the Notices sent to the Class members did not provide a sufficiently transparent, informative and adequate disclosure to the Class members. Of course, I cannot change the Notices retroactively. But, in class actions involving consumer-related issues such as this one, which involve thousands of ordinary consumers affected by pricing or marketing practices or other business conduct, communications of a proposed settlement agreement to the potential class members ought to be much more transparent and forthcoming for the class members than what has been done by Class Counsel in this case.

[55] In my view, in such class action settlement agreements, the notices to the class members should always at least disclose, in clear terms and in both the short-form and long-form versions of the notices, the following basic information about the proposed settlement agreement: i) the quantum of the total settlement amount; ii) the precise list of deductions from the total settlement amount (such as class counsel fees or administration expenses) when these impact the net settlement amount to be received by the class members; iii) the quantum of these various deductions (including the quantum of the class counsel fees); iv) the percentage of the total

settlement amount to be received by class counsel as legal fees; v) the maximum compensation amount to be received by each class member, if any; and vi) the likely or expected effective compensation amount, or range of compensation amounts, to be received by the class members, when class counsel has information or is able to estimate the expected take-up rate and/or the likely or expected net compensation amount to be received. Generally speaking, having access to such minimal information is needed by the class members in order for them to be able to make a well-informed decision about what a proposed settlement agreement actually offers, and on whether they shall support it, opt out or object to it. In the current case, most of these basic elements were not included in the Notices to Class members, though some of them could be gleaned from the actual Settlement Agreement made indirectly available to Class Counsel through the Class Counsel's website. In my opinion, to simply provide a link to a 27-page Settlement Agreement as was done in this case does not amount to a satisfactory disclosure of the above-mentioned information to the Class members, and can hardly be considered fair, reasonable, and in the best interests of the Class.

[56] Though it is impossible to measure what would have been the effect of the disclosure of the above-listed information in the Notices, it is fair to say that it would likely have had a certain impact on the reactions, expressions of support or objections of the Class members to the proposed Settlement Agreement.

[57] For those reasons, I conclude that the degree and nature of communications between Class Counsel and Class members is at best a neutral factor for the approval of the Settlement Agreement.

(e) *Amount and nature of pre-trial activities, including investigation, assessment of evidence and discovery*

[58] At the time the Settlement Agreement was executed, very limited investigation, discovery, evidence gathering and pre-hearing work had been completed by the parties, meaning that the amount and nature of pre-trial activities necessary to take the case to trial remained high. Moreover, Airbnb's evidence showed that Airbnb does not have precise records of Class members that reserved an accommodation matching the parameters of a previous search made by the individual on the Airbnb Platform, as the Class was defined in this Class Action.

[59] Therefore, an important amount of necessary pre-trial work still had to be completed, and the evidence before me indicates that the parties had a good sense of the extent of this significant remaining pre-trial work. In the circumstances, I am satisfied that the parties were properly positioned to understand the amount and nature of pre-trial activities linked to continued litigation at the time of choosing to settle. This factor thus supports the approval of the Settlement Agreement.

(f) *Arm's length bargaining between the parties and absence of collusion during negotiations*

[60] There is a strong presumption of fairness when a proposed class action settlement, which was negotiated at arm's-length by experienced counsel for the class, is presented for Court approval. Here, I am satisfied that the negotiations leading to the Settlement Agreement were arm's length and adversarial in nature between Class Counsel and counsel for Airbnb, spanning several months. This, again, supports the approval of the Settlement Agreement.

(g) *Recommendation and experience of Class Counsel*

[61] Class Counsel are of the view that the proposed Settlement Agreement is fair, reasonable and in the best interests of the Class members. They recommend approval by the Court.

[62] Class Counsel and their firms are experienced, well-regarded plaintiffs' class action counsel. They have a wealth of experience in a substantial number of class actions to draw upon. I have no doubt that their decision to settle this case reflects their best exercise of judgment. Class counsel's recommendations are significant and are given substantial weight in the process of approving a class action settlement (*Condon* at para 76). This is the case here.

(h) *Future expense and likely duration of litigation*

[63] Courts have recognized that an immediate payment to class members through a settlement agreement is a factor in support of a proposed settlement. In this case, if there is no settlement now, counsel for the parties anticipate that a long time will be needed for a trial on the merits and for potential appeals, with the need for expert evidence. I am satisfied that this is another factor militating in favour of finding that the proposed Settlement Agreement is fair and reasonable and in the best interests of the Class.

(i) *Any other relevant factor or circumstance*

[64] Mr. Lin submits that the Court should also take into account that all three goals of class actions will likely be achieved by way of this Settlement Agreement, namely, access to justice, judicial economy and behavioural modification. I agree.

[65] In terms of access to justice, eligible Class members will obtain some monetary compensation from Airbnb by way of the Credit though, as I will discuss in more detail in section III.B.2.b below, the evidence suggests that this compensation is expected to be extremely modest.

[66] Judicial economy will also be achieved, as a long litigation with potential appeals will be avoided and the procedure for the payment of the Credit to the Class members will be simple, with limited Court supervision being required.

[67] Finally, behavioural modification has already been accomplished due to the combination of this Class Action and the Quebec Action, as Airbnb modified its pricing display across Canada in June 2019 whilst Mr. Lin's Class Action was underway. Counsel for Mr. Lin also rightly points out that the Class Action also has an impact for actual and potential wrongdoers throughout the Canadian economy since, in the Certification Judgment, the Court released a comprehensive decision giving teeth to the dormant section 54 of the *Competition Act*, thereby also contributing to potential behaviour modification of other "drip-pricing" practices, to the benefit of Canadian consumers.

(3) Conclusion on the Settlement Agreement

[68] After considering all of the above-mentioned factors, I am satisfied that I was presented with sufficient evidence to allow me to make an objective, impartial and independent assessment of the fairness and reasonableness of the proposed Settlement Agreement (*Condon* at para 38). A settlement is never perfect, and the Court needs to keep in mind that a settlement is always the result of a compromise, but that it puts an end to the dispute between the parties and provides certainty and finality. In this case, I find that the Settlement Agreement is fair, reasonable, and in the best interests of the Class and ought to be approved, including the appointment of the Claims Administrator.

B. ***Class Counsel Fees***

[69] I now turn to the Class Counsel Fees. Here, Class Counsel request that the Court award them an amount of $1,980,000 plus applicable taxes for Class Counsel Fees, representing 33% of the Settlement Amount, to be paid from the Settlement Amount. Airbnb does not oppose this request. Rightly so, Class Counsel are not asking the Court to approve the fees payment of $2,000,000 referred to in the Settlement Agreement, an amount that, in any event, they would not have been entitled to receive under the Retainer Agreement.

(1) The law relating to approval of class counsel fees

[70] Rule 334.4 provides that all payments to counsel flowing from a class proceeding must be approved by the Court. The overarching test applicable to class counsel fees is that they have

to be “fair and reasonable in all of the circumstances” (*Condon* at para 81; *Manuge v Canada*, 2013 FC 341 [*Manuge*] at para 28).

[71] The Court has established a non-exhaustive list of factors to assist in the determination of whether the class counsel fees are fair and reasonable (*Wenham v Canada (Attorney General)*, 2020 FC 590 [*Wenham 2*] at para 33; *McLean v Canada*, 2019 FC 1077 [*McLean 2*] at para 25; *McCrea v Canada*, 2019 FC 122 at para 98; *Condon* at para 82; *Manuge* at para 28). Again, these factors are similar to the factors retained by the courts across Canada. They include, in what I view as their order of relative importance:

1) risk undertaken by class counsel;
2) results achieved;
3) time and effort expended by class counsel;
4) complexity and difficulty of the matter;
5) degree of responsibility assumed by class counsel;
6) fees in similar cases;
7) expectations of the class;
8) experience and expertise of class counsel;
9) ability of the class to pay; and
10) importance of the litigation to the plaintiff.

[72] As is the case for the factors governing the approval of settlement agreements, these factors are non-exhaustive, and their weight will vary according to the particular circumstances of each class action. However, the risk that class counsel undertook in conducting the litigation and the degree of success or results achieved for the class members through the proposed

settlement remain the two critical factors in assessing the fairness and reasonableness of a contingency fee request by class counsel (*Condon* at para 83). The risk undertaken by class counsel includes the risk of non-payment but also the risk of facing a contentious case and a difficult opposing party (*Wenham 2* at para 34).

[73] It has long been recognized by the courts that, for class proceedings legislation to achieve its policy goals, class counsel must be well rewarded for their efforts, and the contingency agreements they negotiate with plaintiffs should generally be respected. The percentage-based fee contained in a retainer agreement is presumed to be fair and should only be rebutted or reduced "in clear cases based on principled reasons" (*Condon* at para 85, citing *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 [*Cannon*] at para 8).

[74] That being said, it is also the Court's role to protect the class, and there may be circumstances where the Court has to substitute its view for that of class counsel, in the interest of the class. The Court must consider all the relevant factors and then ask, as a matter of judgment, whether the class counsel fees fixed by the proposed agreement are fair and reasonable and maintain the integrity of the profession (*LG Chem* at para 46). This is especially true where, as in this case, the amount of class counsel fees comes out of the global settlement amount available to class members. Here, it is clear that the Net Settlement Funds available for distribution to Class members represents the difference between the Settlement Amount and the sum of Administration Expenses, Class Counsel Fees, Honorarium and applicable taxes.

[75] In the same vein, where the fee arrangement with class counsel is part of the settlement agreement, the Court must decide on the fairness and reasonableness of the proposed fee arrangements in light of what class counsel has actually accomplished for the benefit of the class members. The class counsel fees must not leave the impression or bring about conditions of settlement that appear to be in the interests of the lawyers, but not in the best interests of the class members as a whole. Stated differently, there has to be some proportionality between the fees awarded to class counsel and the degree of success obtained for the class members.

[76] In this case, Class Counsel apply to this Court for fees in an amount representing 33% of the value of the Settlement Amount, or $1,980,000, plus applicable taxes. Class Counsel submit that this is "consistent with" the terms of the Retainer Agreement. I pause to observe that, in the Retainer Agreement signed by Mr. Lin and Class Counsel in October 2017, Section 10 provides that Class Counsel's legal fees "shall not exceed **thirty-three percent (33%)**" [both emphases in original] of the total amounts recovered by the Class. Two mathematical examples are given at Section 12 of the Retainer Agreement, where the words "shall not exceed" are again used and repeated for each example. In other words, while it is not incorrect to state that the Class Counsel Fees amount presented to the Court for approval is "consistent" with the Retainer Agreement, I must underline that it nonetheless represents the upper maximum limit of what was expressly contemplated in the Retainer Agreement signed by Class Counsel and Mr. Lin.

(2) Application to this case

(a) *Risk undertaken by Class Counsel*

[77] The risk factor refers to the risk undertaken by Class Counsel when the class proceeding is commenced. It is measured from the commencement of the action, not with the benefit of hindsight when the result looks inevitable. This risk includes all of the risks facing class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action or will not succeed on the merits (*Condon* at para 83). The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation.

[78] There is no doubt in this case that a significant risk was undertaken by Class Counsel. Class Counsel did not seek any third-party litigation funding and bore 100% of the litigation risk. Class Counsel also provided a full indemnification to Mr. Lin in the event of any adverse cost awards. More importantly, there were real risks related to the fact that Mr. Lin's Class Action could not be certified at all, considering the extremely limited history of section 54 and the novelty of the interpretation and approach proposed by Class Counsel in this proceeding.

[79] Class Counsel certainly deserves credit and recognition for having brought a recourse based on sections 36 and 54 of the *Competition Act* and for having developed an innovative interpretation of section 54 on "double ticketing," something that had never been done in a competition class action. Innovation is what took human beings from caves to computers, and it

certainly merits to be rewarded, given the risks that are always inherent to any form of innovation.

[80] In light of the foregoing, the risk undertaken by Class Counsel in this case is, of course, a positive factor supporting the approval of the Class Counsel Fees.

(b) *Results achieved*

[81] In terms of the results achieved for the Class members, I find that they are mixed. Here, the Court has to distinguish between the non-monetary results stemming from the Settlement Agreement, and the monetary results. I accept that, broadly speaking, the results captured in the Settlement Agreement, both monetary and non-monetary, somehow improved the situation for Class members. However, there is a huge difference in the relative gains for Class members in terms of non-monetary and monetary benefits.

(i) Non-monetary benefits

[82] In this case, I agree that there are significant non-monetary benefits to the Class members, to the Airbnb customers in general, and to Canadian consumers. The most significant benefit consists in the behavioural modification of Airbnb, as Airbnb adjusted the Airbnb Platform throughout Canada in June 2019. Airbnb now displays an all-inclusive price for all accommodation bookings, excluding applicable taxes, at every step of the search and booking process. In other words, the pricing display practice that prompted Mr. Lin's Class Action has now ceased. This is likely the most significant aftermath of Mr. Lin's Class Action, and it

reverberates from the Class members to all existent and future Airbnb customers. I point out, however, that this result cannot be said to be an immediate effect of the Settlement Agreement itself, as Airbnb's behavioural modification preceded it and was even implemented before the Certification Judgment in this case. I further observe that the Quebec Action was also an instrumental factor leading up to Airbnb's behavioural modification in June 2019. Nevertheless, I am satisfied that Mr. Lin's Class Action was certainly one of the contributing elements having led to Airbnb's behavioural modification. Such behavioural modification is one of the three well-entrenched objectives of class actions (*L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at para 6, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 15, *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27-29, and *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 1).

[83] In weighing the non-monetary results achieved by Class Counsel's work, it is also appropriate for the Court to consider to what extent the two other main objectives of class actions – namely, access to justice and judicial economy – have been met by the proposed Settlement Agreement. Mr. Lin's Class Action provided access to justice for hundreds of thousands of Class members where, absent the Class Action, the scope of the individual claims would not justify litigation. The class action regime in the Rules was designed to encourage class counsel to advance actions like this one, where the individual claims are relatively small because, on an aggregate basis, entrepreneurial class counsel can earn a fee that justifies the risks associated with advancing the class action and the time invested (*Condon* at paras 101-102).

[84] There are also non-monetary benefits that do not solely benefit the Class members but have positive repercussions on a larger scale, for all Canadian consumers. It is well accepted that a change in a business conduct (such as pricing or marketing practices) is a recognized objective of class actions. Here, Mr. Lin's Class Action will serve as a legal precedent and authority in "drip-pricing" practices more generally, bearing in mind that the Certification Judgment was issued in the context of the low-hurdle test at the certification stage, and that the determination of the merits of the legal arguments on section 54 of the *Competition Act* still remains uncertain. I also agree with Class Counsel that this matter will indirectly serve as a deterrent for potential wrongdoers in the Canadian marketplace, who will now have a better knowledge that "drip-pricing" is a practice that can run afoul of applicable laws in Canada.

[85] I further agree that Mr. Lin's Class Action has successfully revived and resurrected section 54 of the *Competition Act*, which had been dormant for several decades. Now, the Canadian public, including merchants and consumers, has guidance on how best to comply with this *Competition Act* provision on "double ticketing," even in the digital economy. As I indicated at the hearing before this Court, we do not know yet whether section 54 is simply on life support further to the Certification Judgment and whether it will be able to survive a test on the merits, but Mr. Lin's Class Action has certainly awakened a sleepy section 54.

[86] I am therefore satisfied that the non-monetary results reached in this case are a positive factor for the approval of the Class Counsel Fees.

(ii) Monetary benefits

[87] Moving to the monetary front, the results achieved by the Settlement Agreement for the Class members are much more humble. In fact, based on the evidence before me, the monetary success for Class members is expected to be somewhat anemic. This, in my view, is the Achilles' heel hampering the Class Counsel Fees' request in this case.

[88] True, the Settlement Agreement and the Notices refer to a Credit of "up to" $45 in value for each eligible Class member. However, the evidence on the record (mostly contained in the Counsel Affidavit) reveals that what Class members are likely to receive from the settlement will not be very substantial, and far lower than the publicized $45. First, the evidence on the Quebec Settlement indicates that the take-up rate in that matter was effectively about 30%, and translated into an actual credit of approximately $9.50 per individual Quebec class member, well below the maximum of $45 that was also set out in the Quebec Settlement. Class Counsel expects that the take-up rate will be similar in this Settlement Agreement, although it could be affected by some other factors, in particular the pandemic.

[89] Second, the evidence on the record of this motion allows the Court to calculate the likely Credit expected to be effectively received by each Class member. This approximate assessment goes as follows. Airbnb estimates that there will be approximately 1,473,952 eligible claimants in this matter. Assuming a take-up rate of 30% similar to the Quebec Settlement (which is what Class Counsel expects), that would translate into approximately 442,200 Class members exercising their right to claim a Credit. As to the Net Settlement Funds available to be distributed

among Class members, they can be estimated to revolve around $3,420,500 (i.e., the Settlement Amount of $6,000,000, less the requested $1,980,000 for Class Counsel Fees, $322,500 for Administration Expenses, and some $277,000 for applicable taxes). This would result in an effective Credit of just above $8 for each Class member (i.e. $3,420,500 divided by 442,200 Class members), far less than the maximum of $45 referred to in the Notices to the Class members. I acknowledge that this back-of-the-envelope calculation is only a rough estimate but, even if I factor in a sizeable margin of error, the evidence on the record certainly allows the Court to infer that the expected Credit to be distributed to eligible Class members is more likely to gravitate around $10 than the publicized maximum of $45.

[90] I make another observation. The success or result achieved in any class action settlement is not an absolute figure but rather a relative one. It always needs to be assessed in relation to what was the anticipated full recovery of the damages alleged to have been suffered by the class members in the class action. This is what allows the Court to determine the fairness and reasonableness of the expected compensation brought about by a settlement agreement. In the current case, the Court is in a difficult position to do so since Mr. Lin and Class Counsel have not provided any estimate of what would have been the expected full recovery of the damages claimed in the Class Action. There is no measure of what the alleged price difference between the first price and the final price posted on the Airbnb Platform during the Class period would amount to, for all Class members affected. Or even an indication of what was the average price difference for the Class members. In other words, the Court has no information on the expected full recovery for Class members. Broadly speaking, the Court always needs to know what would have been the estimated full recovery of a class action in order to assess the recovery rate of a

proposed settlement and to figure out the relative success achieved by the settlement. In this case, the only benchmark available to the Court is Mr. Lin's own example: based on Mr. Lin's personal situation as outlined in the Certification Judgment, his claim against Airbnb represented an amount of approximately $92. The maximum Credit of $45 would thus represent a recovery rate slightly below 50% for Mr. Lin, and the likely or expected compensation amount of less than $10 estimated above would represent a much paler recovery rate of about 10%.

[91] In sum, the evidence before me on this motion indicates that, no matter what metric is being used, the monetary compensation likely or expected to be received by the Class members through the Credit will be extremely modest, and will likely lie at the low end of the spectrum for Class members. For all those reasons, I am not satisfied that the monetary results achieved by the Settlement Agreement are a positive factor for the approval of the Class Counsel Fees. Quite the contrary.

(c) *Time expended by class counsel*

[92] The time expended by class counsel can also be a helpful factor in the approval of class counsel fees, even in cases where the class counsel fees are contingency fees.

[93] Over the years, the courts have expressed a preference for utilizing percentage-based fees in class actions (see, e.g., *Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para 52). A percentage-based fee is paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel (*Condon* at para 84). Contingency fees help to promote access to justice in that they allow class counsel, rather than

the plaintiff, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyers' fees based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Condon* at paras 90-91). This Court and the courts across Canada have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Condon* at paras 90-91).

[94] The percentage-based fee set out in a contingency fee retainer agreement is therefore presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Condon* at para 85, citing *Cannon* at para 8). Examples of "principled reasons" where a court may rebut the presumption that a percentage-based fee is fair include situations where: i) there is a lack of full understanding or true acceptance on the part of the representative plaintiff; ii) the agreed-to contingency amount is excessive; or iii) the presumptively valid contingency fee would result in a fee award so large as to be unseemly (*Condon* at para 85).

[95] I would add that situations where the class counsel fees are not commensurate with the gains of class members or are not aligned with the terms of the underlying retainer agreement with the representative plaintiff also qualify as other "principled reasons" where the courts may be justified to revisit a percentage-based contingency fee agreement. Importantly, the proposed class counsel fees need to be considered in relation to the actual result achieved for the Class

members, especially when the retainer agreement provides for the possibility of a range or margin of appreciation for the effective percentage-based fees to be paid.

[96] The main alternative to a percentage-based fee is applying a "multiplier" to class counsel's time spent in a matter. However, the use of a multiplier approach as the basis for approving class counsel fees has been criticized for, *inter alia*, encouraging inefficiency and duplication and discouraging early settlement (*Condon* at para 86). Nevertheless, it can serve as a "useful check" (*McLean 2* at para 37). According to Class Counsel, the range of multipliers generally accepted by the Canadian courts in class action settlements is approximately 1.5 to 3.5.

[97] Here, it is clear that Class Counsel have done extensive work over the past four years to reach the Settlement Agreement, including litigating certification through hearings before this Court and the FCA, and devising the settlement for the Class members. The evidence on this motion reveals that Class Counsel have collectively expended 1,628 hours in total up to the filing of the motion, with their services valued at $723,357.50. Class Counsel also expect that they will be required to spend a material number of additional hours to finalize the settlement, if the Settlement Agreement is approved. Class Counsel will notably have to oversee the publication and distribution of the notices of settlement approval; continue to implement and oversee the administration of this Class Action until the settlement distribution is complete; and liaise with the Class members who may have questions about the Settlement Agreement. There is nothing unreasonable in the details examined by the Court and I accept Class Counsel's evidence as an accurate reflection of the time value of the necessary professional services they rendered.

[98] Based on the requested Class Counsel Fees of $1,980,000, this would mean a multiplier varying between 2.3 and 2.7, depending on the additional work needed to implement the Settlement Agreement. Overall, I conclude that the time expended by Class Counsel is a positive factor supporting the approval of the Class Counsel Fees.

(d) *Complexity of issues*

[99] For the reasons discussed above, there is no question that this class action proceeding raised complex and difficult issues surrounding sections 36 and 54 of the *Competition Act*. To reiterate, in his Class Action, Mr. Lin brought forward an innovative argument on section 54 and the treatment of fragmented pricing or "drip-pricing" in the digital economy. Section 54 on "double ticketing" was created before the arrival of the digital economy and the emergence of online commerce, and the question of how the provision could extend and apply to current technologies and commercial practices is far from being simple and free from doubt. This is a positive factor for the Class Counsel Fees.

(e) *Degree of responsibility assumed by Class Counsel*

[100] Class Counsel, consisting of two small firms, took on full responsibility for this case, and bore 100% of the risk of the litigation. This, again, is a positive factor.

(f) *Fees in similar cases*

[101] Looking at the issue of fees in comparable cases, Class Counsel submit that, at 33%, the percentage of the Settlement Amount claimed as Class Counsel Fees is "comparable" to

percentages in settled class actions in the Canadian common law jurisdictions. With respect, I believe that this qualification deserves to be nuanced. I am instead of the view that a 33% contingency fee, while perhaps not unusual, nonetheless sits at the high end of the generally accepted range of court-approved fees for class counsel.

[102] The typical range for contingency fees has been recently described as being "15% to 33% of the award or settlement" in British Columbia (*Kett v Kobe Steel, Ltd*, 2020 BCSC 1977 [*Kobe Steel*] at para 54). In the precedent of this Court cited by Class Counsel in support of their claimed 33% contingency fees (i.e., *Condon*), the Court referred to a range of "up to 30%" and in fact affirmed a 30% contingency fee in that case, not 33% (*Condon* at paras 92, 111). I do not dispute that some cases confirmed the reasonableness of percentage-based fees of 33% (see, e.g., *McLean v Cathay Pacific Airways Limited*, 2021 BCSC 1456; *Cannon*; *Dwor et al v Car2Go et al*, VLC-S-S-205424, unreported settlement approved on September 20, 2021), but these matters appear to be the exception rather than the rule. Class Counsel also referred to precedents where the accepted contingency fee was at 30% or less in *Zouzout c Canada Dry Mott's Inc*, 2021 QCCS 1815, at about 31.5% in *Hurst c Air Canada*, 2019 QCCS 4614, and between 15% to 25% in *Abihsira c Stubhub inc*, 2020 QCCS 2593. Moreover, in the Quebec Settlement, the court-approved contingency fee was 25%. I am mindful of the fact that the Quebec Settlement was a pre-certification settlement with no contested certification hearing, and that it involved a different theory of liability based on legislations other than sections 36 and 54 of the *Competition Act*. Nonetheless, it remains the closest precedent to the current Class Action.

[103] As rightly pointed out by Class Counsel, the issue to be determined is whether the requested Class Counsel Fees are fair and reasonable in the circumstances. In this case, despite significant positive results in terms of behavioural modification, the Settlement Agreement brings about a fairly limited success for the Class members on the monetary front, with a large discrepancy between the Class Counsel Fees sought and the likely or expected recovery rate of the Class members. This is an important factor to take into account. In the circumstances of this case, I am therefore not convinced that the low expected monetary return to Class members through the Credit can justify and support a percentage-based contingency fee of 33% that would reside at the high end of the spectrum observed in comparable cases.

(g) *Expectation of the Class*

[104] Another factor to consider is the expectation of the Class members as to the amount of counsel fees. The fact that the representative plaintiff, Mr. Lin, supports the Class Counsel Fees request is no indicator of the Class members' expectations. Based on the limited evidence before me, I cannot tell what is the expectation of the Class on the legal fees front, as the Class members were not truly aware of the Class Counsel Fees claimed.

[105] As mentioned above, the Notices provided no details on Class Counsel Fees. It is true that there was no opposition from Class members on Class Counsel Fees, but it may well be because the Class members were kept in the dark with respect to this issue. I again acknowledge that the Class members could have accessed the Settlement Agreement itself, where the amount of the Class Counsel Fees were precisely laid out; but this is a 27-page document that the average Class member is unlikely to read. Providing a link to the full text of a 27-page

Settlement Agreement is not an acceptable substitute to an adequate, full and frank disclosure on the Class Counsel Fees in the Notices themselves. As indicated above at paragraph 55 of these Reasons, notices to class members need to be transparent on the key terms of proposed class action settlement agreements, including on the issue of class counsel fees, in order to allow the Court to properly assess the fairness and reasonableness of proposed settlements and class counsel fees. In this case, I do not know what would have happened if the proposed Class Counsel Fees had been openly disclosed to the Class members in the Notices. But, given that – even with the existing Notices – there were some objections to the low level of the publicized $45 Credit, it may well have triggered more objections from Class members had they been properly informed about the real magnitude of the Net Settlement Funds, the percentage fees of Class Counsel and the likely or expected monetary amount to be distributed to the Class members.

[106] In my view, in situations like this one, where the likely or expected recovery to class members is limited and resides at the low end of the spectrum, notices to class members should clearly set out the total amount of the class counsel fees and the percentage that class counsel are seeking to receive from a settlement agreement, so that class members can have a full understanding of the agreement presented to them for approval. Communications between class counsel and class members need to be transparent, including on class counsel fees, so that class members can be in a position to make a well-informed decision on their approval and support of both the proposed settlement agreement and class counsel fees. Especially in situations where, as here, Class Counsel Fees eat up an important portion of the Net Settlement Funds available to Class members.

[107] Therefore, I am not persuaded that the Class members could fairly weigh this issue of Class Counsel Fees when deciding whether to opt out or to participate in the lawsuit going forward (*Condon* at para 107). This is a neutral factor in assessing the fairness and reasonableness of the Class Counsel Fees.

(h) *Quality and experience of Class Counsel*

[108] There is no doubt as to Class Counsel's standing in the class action legal community and in the areas of law relevant to this litigation. Evidence was provided that Class Counsel have practised in class actions for many years. They have a breadth of experience in litigating class actions, and have collectively negotiated settlements of several class actions. This is, of course, a positive factor favouring the approval of the Class Counsel Fees.

(i) *Ability of the Class to pay*

[109] It is also obvious that Class members did not and do not have the ability to pay for the services of Class Counsel. This, once again, is a positive factor in the Court's assessment of the Class Counsel Fees.

(j) *Importance of litigation to the plaintiff*

[110] Finally, I find that this Class Action is of limited importance to Mr. Lin and is a neutral factor in the determination of the fairness and reasonableness of Class Counsel Fees. This case is of no outstanding importance to Mr. Lin or to the Class members, in the sense that it does not involve human rights violation or personal injury. It has an impact for consumer protection and

the deterrence of potential anti-competitive behaviour, but nothing allows me to conclude that this matter would qualify as being a “litigation of importance” to Mr. Lin or the Class members.

(3) Conclusion on the Class Counsel Fees

[111] Looking at all the above-mentioned factors cumulatively, I am not satisfied that the Class Counsel Fees requested to be approved by Class Counsel in this case can be qualified as fair and reasonable in the circumstances, when considered in light of the modest results achieved for the Class members on the monetary front. In other words, in the particular circumstances of this case, the requested 33% percentage-based fees cross too many redlines to be approved as such.

[112] Important “principled reasons” lead me to this conclusion. I cannot help but note that the proposed 33% contingency fee is not entirely “consistent” with the Retainer Agreement concluded at the commencement of the Class Action. The Retainer Agreement provided, in underlined and bolded terms, that the Class Counsel legal fees “shall not exceed” 33% of the recovered sums. Nevertheless, the Class Counsel Fees sought in this motion are at the extreme high end of what the Retainer Agreement envisaged. In addition, the requested 33% fee also sits at the top of the range of percentage-based fees awarded by the courts in comparable cases. In sum, the legal fees sought by Class Counsel on this motion are at the maximum contemplated by the Retainer Agreement and in comparable cases, in a context where the likely or expected monetary result for the Class members sits at the totally opposite end of the spectrum as far as their anticipated recovery is concerned. This is not fair and reasonable.

[113] I find it unjustifiable, in light of the highly modest success likely or expected to be achieved for the Class members on the monetary front, that Class Counsel could be entitled to receive what they themselves recognized as being the top end of the spectrum for their contingency fees in the Retainer Agreement. When class counsel agree to fees up to a certain amount in the context of class actions, it has to mean something, and it goes without saying that achieving a low or short result for the class members does not sound like a situation where it is fair and reasonable to be granted the maximum of contemplated fees.

[114] In view of the significant contrast between the Class Counsel Fees sought, which are at the very top of the range contemplated in the Retainer Agreement and in comparable cases, and the expected monetary benefit to Class members, which will likely grant them a very low rate of recovery, I find that the requested Class Counsel Fees are disproportionate in relation to the overall results achieved for the Class, notwithstanding the commendable success in terms of Airbnb's behavioural modification. Put differently, while the success achieved for Class members is at best modest, the fees requested by Class Counsel are anything but modest. This does not fit the definition of being "fair and reasonable in the circumstances."

[115] There is no magic formula to determine what should be the appropriate percentage-based fees of class counsel in a class action settlement. It is a matter of judgment, based on the particular circumstances of any given case and the interests of the class, bearing in mind – in the current case – the material non-monetary benefits in terms of behavioural modification and the need to adequately reward entrepreneurial Class Counsel who were willing to undertake important risks and spent significant resources on this litigation. In the circumstances, I will

therefore slightly reduce the Class Counsel Fees to 30% or $1,800,000, which will remain in the upper part of the range and close to the maximum set out in the Retainer Agreement. By any measure, Class Counsel will still be very well compensated for their efforts. I am mindful of the fact that this reduction in Class Counsel Fees will bring diminutive material benefit to each Class member in terms of an increase in the likely or expected average Credit to Class members. But, in my judgment, this reduction will at least bring the Class Counsel Fees within fair and reasonable territory.

[116] As the British Columbia Supreme Court recently stated in *Kobe Steel*, "[t]he integrity of the profession is a consideration when approving legal fees in the class action context" (*Kobe Steel* at para 58, referring to *Plimmer v Google, Inc*, 2013 BCSC 681 and *Endean v The Canadian Red Cross Society*; *Mitchell v CRCS*, 2000 BCSC 971, aff'd 2000 BCCA 638, leave to appeal dismissed, [2001] SCCA No 27). Sometimes, substantial rewards to class counsel can create the wrong impression or perception that the ultimate beneficiaries of class actions are class counsel, rather than the class members. Where, as here, the settlement amount likely or expected to be received by class members is minimal – and in fact abysmal when compared to the legal fees claimed by Class Counsel –, there could be such a perception. In such cases, it is the Court's duty to attempt to rectify this perception and to ensure that counsel do not leave the impression that the class action process serves "to obtain a result in which [class counsel] are the only or major beneficiaries" (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2018 BCSC 2091 at para 53). As the court reminded in *Kobe Steel*, "[t]he ultimate purpose of the class action vehicle is to benefit the class, not their lawyers. The payment to the lawyers is simply a way to achieve

the benefits for the class, not the other way around" (*Kobe Steel* at para 58, citing *Cardoso v Canada Dry Mott's Inc*, 2020 BCSC 1569 [*Cardoso*] at para 37).

C. ***Honorarium***

[117] Class Counsel finally request that the Court award a $5,000 Honorarium to Mr. Lin, the representative plaintiff, to be paid from the Settlement Amount. Airbnb has indicated that it is prepared to make that payment if ordered by the Court.

(1) Law relating to the approval of an honorarium

[118] No specific Rule provides for the payment of an honorarium to a representative plaintiff in class actions. However, this Court has the discretion to award honoraria to representative plaintiffs, and it has indeed done so on numerous occasions (see, e.g., *Wenham 1*; *McLean 2*; *Condon*; *Manuge*). Honoraria to representative plaintiffs are to be awarded sparingly, "as representative plaintiffs are not to benefit from the class proceeding more than other class members" (*McLean 2* at para 57, referring to *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at paras 13-22). In Ontario, the predominant view is that an honorarium is exceptional and that courts should only rarely approve an award of compensation to a representative plaintiff (*Park v Nongshim Co, Ltd*, 2019 ONSC 1997 at paras 84-86; *Markson v MBNA Canada Bank*, 2012 ONSC 5891 at paras 55-71). It requires an exceptional contribution that has resulted in success for the class.

[119] In other words, an honorarium is not to be awarded as a routine matter but is rather "a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice" (*Condon* at para 115). "Honorariums [*sic*] are given when the representative plaintiff(s) contribute more than the normal effort of such a position – for example, forfeiting their privacy to a high profile class litigation and participating in extensive community outreach" (*McLean 2* at para 57). It is only where representative plaintiffs can demonstrate "a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because they agreed to be a class representative that an honorarium will be justified" (*Casseres v Takeda Pharmaceutical Company*, 2021 ONSC 2846 at para 10). Representative plaintiffs are not entitled to receive additional compensation for simply doing their job as class representatives (see, e.g., *Cardoso* at paras 42-51).

[120] In determining whether the circumstances are exceptional, the Court may consider several factors, including: i) active involvement in the initiation of the litigation and retainer of counsel; ii) exposure to a real risk of costs; iii) significant personal hardship or inconvenience in connection with the prosecution of the litigation; iv) time spent and activities undertaken in advancing the litigation; v) communication and interaction with other class members; and vi) participation at various stages in the litigation, including discovery, settlement negotiations and trial (*LG Chem* at para 50). A review of the case law also indicates that the courts have approved the payment of an honorarium to a representative plaintiff when he or she rendered active and necessary assistance in the preparation or presentation of the case, and such assistance resulted in monetary success for the class.

[121] In addition, the Court must also ensure that "the amount of any separate payment to the representative plaintiff is not disproportionate to the benefit derived by the class members, the effort of the representative plaintiff, and the risks assumed by the representative plaintiff" (*Parsons v Coast Capital Savings Credit Union*, 2010 BCCA 311 at para 19).

(2) Application to this case

[122] For the reasons that follow, I am not persuaded that the payment of the requested $5,000 Honorarium to Mr. Lin is justified in this case.

[123] I first note that, contrary to the situation in *Condon* (expressly referred to by counsel for Mr. Lin in his submissions to the Court), the affidavit of Mr. Lin is virtually silent on details of his involvement in this case, and does not state or even suggest that he expended a significant amount of time carrying out his duties as representative plaintiff. On his work as representative plaintiff, the affidavit of Mr. Lin is limited to a meagre two-line paragraph (paragraph 5), which reads as follows: "I assisted Class Counsel throughout this litigation, including providing information, offering my opinion and instructions, and keeping updated on developments." This provides no helpful evidence to the Court. I acknowledge that a slightly more elaborate statement is provided in the Counsel Affidavit (at paragraph 140), but it does not emanate from Mr. Lin himself and it essentially offers generic descriptions with limited particulars regarding the actual work done by Mr. Lin in this matter. In fact, the list of tasks described in the Counsel Affidavit boils down to a recitation of the usual tasks expected to be undertaken by any representative plaintiff.

[124] It is not sufficient for class counsel to simply argue the exceptional work done by a representative plaintiff. There needs to be evidence, from the representative plaintiff, at a convincing level of particularity, allowing the Court to assess and measure the nature and the involvement of the class representative. No matter how eloquent arguments from counsel may be, they cannot replace the need for the representative plaintiff to provide clear, convincing and non-speculative evidence supporting the extent and exceptional nature of his or her involvement (*Jensen v Samsung Electronics Co, Ltd*, 2019 FC 373 at paras 41-43).

[125] Here, there is no evidence that Mr. Lin was intimately involved in the Class Action, that he initiated the action himself, or that he was a driving force behind it. Furthermore, this is not a high profile litigation or a situation where Mr. Lin's name was widely publicized, where he had exposure to the media, or where his privacy was invaded through the recitation of his personal story to advance the case. There is also no evidence of any community outreach and of public representations made by Mr. Lin about the case. Moreover, Mr. Lin did not have to prepare for or attend a cross-examination on his affidavit filed in support of the certification motion.

[126] I do not question Mr. Lin's contribution or commitment to the Class Action, and Mr. Lin certainly deserves acknowledgement for his role in the conduct of the proceeding. However, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. In this case, I find no clear and convincing evidence of exceptional or extraordinary circumstances to support the payment of the substantial Honorarium requested by Mr. Lin. In short, I cannot conclude, based on the evidence before me, that Mr. Lin's contribution, while laudatory, had any exceptional or extraordinary value.

[127] I further underline that the monetary compensation expected to be received by the Class members in this case will likely be excessively modest, in the form of a Credit which may not exceed $10. In these circumstances, to grant Mr. Lin an Honorarium of $5,000 would mean compensating him in an amount that would be more than 500 times the average benefit of each Class member. This would be preposterous and plainly unreasonable in the circumstances. What is more, an Honorarium of $5,000 would represent over 50 times the actual loss that Mr. Lin claimed to have suffered on his booking accommodation at the source of this Class Action. Again, nothing would justify such a massive Honorarium in a context where the benefits likely or expected to be received by the Class members are minuscule, and the evidence of any exceptional work done by Mr. Lin is absent.

(3) Conclusion on the Honorarium

[128] Having regard to the Credit awarded to the Class members from the Settlement Amount, the relevant authorities and the scant evidence on Mr. Lin's actual involvement in this proceeding, I find that the $5,000 Honorarium sought by Mr. Lin is unreasonable and unjustified in the circumstances. I instead determine that a nominal Honorarium of $1,000 is more appropriate and more commensurate with the Net Settlement Funds and the expected Credit and with the work done by Mr. Lin in this matter.

D. ***Rule 60***

[129] I take a moment to make a short remark on Rule 60, invoked by counsel for Mr. Lin in the form of an epilogue at the end of their written and oral submissions before the Court. It left

the impression that counsel was referring to this Rule to suggest that the Court might have some duty or obligation to inform Mr. Lin of gaps in his evidence or in his motion, and to provide him with an opportunity to correct any shortcomings. With respect, I do not agree that this is the purpose of Rule 60.

[130] Rule 60 provides that "[a]t any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just." Rule 60 does not create some sort of obligation on the part of the Court to point out how a party's case is incomplete or insufficient in terms of contents or evidence. It is well established that it is not the role of the courts to provide legal or tactical advice to litigants (*SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FCA 108 at para 9). Rather, Rule 60 is part of a group of provisions, namely, Rules 56 to 60, which address the consequences of a party's failure to comply with the Rules, and articulate a series of actions that may be taken by a party, or the Court, in such situations. As I indicated in *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at paragraphs 116-119, the objective of these Rules is to ensure that procedural irregularities can be rectified without necessarily resulting in the dismissal of a proceeding.

[131] Rule 60 is not a tool available to parties to obtain free legal advice from the Court or to ask the Court to do work that the parties themselves, or their counsel, may have failed to do.

IV. Conclusion

[132] For the reasons detailed above, I find that the Settlement Agreement is fair, reasonable and in the best interests of the Class as a whole, and that it shall be approved, along with the appointment of the Class Administrator.

[133] I find that the requested Class Counsel Fees are not fair and reasonable, and that they shall be adjusted downward to $1,800,000 plus applicable taxes.

[134] I find that the requested Honorarium for Mr. Lin is not fair, reasonable and justified, and that it shall be reduced to $1,000.

[135] An order will issue giving effect to these findings and substantially incorporating the language proposed by both parties in the draft orders submitted to the Court as part of the motion materials.

[136] No costs will be awarded.

ORDER in T-1663-17

THIS COURT ORDERS that:

A. General Terms

1. In addition to the definitions used elsewhere in these Reasons, for the purposes of this Order, the definitions set out in the Settlement Agreement attached as Schedule "A" to this Order apply to and are incorporated into this Order.

2. In the event of a conflict between the terms of this Order and the Settlement Agreement, the terms of this Order shall prevail.

B. Settlement Agreement

3. The Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class.

4. The Settlement Agreement is hereby approved pursuant to Rule 334.29 and shall be implemented and enforced in accordance with its terms.

5. All provisions of the Settlement Agreement (including its Recitals and Definitions) are incorporated by reference into and form part of this Order, and this Order, including the Settlement Agreement, is binding upon each member of the Settlement Class, including those Persons who are minors or mentally incapable, and the requirements of Rule 115 are dispensed with.

6. Upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

7. Upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee, whether pursuant to legislation or at common law or equity in respect of any Released Claim.

8. For purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Defendants attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

9. No Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement.

10. In the event that the Settlement Agreement is terminated in accordance with its terms, this Order shall be declared null and void and of no force and effect on subsequent motion made on notice.

11. Upon the Effective Date, the Proceeding shall be dismissed against the Defendants, with prejudice and without costs to the Defendants, Plaintiff, or Releasees, and that such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

C. Appointment of Claims Administrator

12. Deloitte is hereby appointed as Claims Administrator pursuant to the Settlement Agreement and the duties and obligations are as set out in the Settlement Agreement, and are binding on the Claims Administrator.

13. The Claims Administrator's estimated fees, disbursements and other costs are $320,500, all-inclusive, and these Administration Expenses will be paid by Airbnb Ireland Unlimited Company, and will be deducted from the Settlement Amount in accordance with Sections 10.1(6) and 10.1(7) of the Settlement Agreement.

14. Unless ordered by a court of competent jurisdiction, no documents or information received by the Claims Administrator by reason of the settlement or its administration and implementation, whether received directly or indirectly and whether received before or after this Order was made, are producible in any civil or criminal proceeding, administrative proceeding, grievance, or arbitration.

15. Unless ordered by a court of competent jurisdiction, neither the Claims Administrator nor its employees, agents, partners, or associates can be compelled to be a witness in any civil or criminal proceeding, administrative proceeding, grievance, or arbitration where the information sought relates, directly or indirectly, to information obtained

by the Claims Administrator by reason of the settlement or its administration and implementation.

16. No person may bring an action or take any proceeding against the Claims Administrator or its employees, agents, partners, associates, or successors for any matter in any way relating to the settlement or its implementation and administration, except with leave of this Court on notice to all affected parties.

D. Class Counsel Fees

17. The Retainer Agreement between the plaintiff and Class Counsel is approved.

18. Class Counsel Fees in the amount of $1,800,000 plus applicable taxes is approved under Rule 334.4.

19. Other than Class Counsel Fees, Class Counsel shall not claim any other payments for this Proceeding, including disbursements.

20. The defendants shall pay the aforementioned Class Counsel Fees in accordance with the Settlement Agreement.

E. Honorarium

21. An Honorarium in the amount of $1,000 is awarded to the plaintiff.

22. The Defendants shall pay the aforementioned Honorarium in accordance with the Settlement Agreement.

23. No costs are awarded on this motion.

"Denis Gascon"

Judge

Schedule A

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

Made as of August 27, 2021

Between

ARTHUR LIN

(the "**Plaintiff**")

and

AIRBNB INC., AIRBNB CANADA INC.,
AIRBNB IRELAND UNLIMITED COMPANY, and AIRBNB PAYMENTS UK LIMITED

(the "**Settling Defendants**")

ALSL

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

TABLE OF CONTENTS

AL SL

ALSC

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

RECITALS

A. WHEREAS the Proceeding was commenced by the Plaintiff in the Federal Court of Canada and the Plaintiff claims class-wide damages allegedly caused as a result of the conduct alleged therein;

B. WHEREAS the Proceeding alleges that some or all of the Releasees' booking platforms displayed prices to Settlement Class Members during the Class Period in a manner that was contrary to Part VI of the *Competition Act*, RSC 1985, c C-34;

C. WHEREAS the Proceeding was certified as a class action by the Court on December 5, 2019, following a contested hearing and the Plaintiff was appointed representative plaintiff of the Class, but notice of the certification and an opportunity to opt out of the Proceeding have not yet been provided;

D. WHEREAS the Releasees do not admit, through the execution of this Settlement Agreement or otherwise, any allegation of unlawful conduct alleged in the Proceeding, and otherwise deny all liability and assert that they have complete defences in respect of the merits of the Proceeding or otherwise;

E. WHEREAS the Plaintiff, Class Counsel and the Settling Defendants agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Releasees or evidence of the truth of any of the Plaintiff's allegations, which allegations are expressly denied by the Settling Defendants;

F. WHEREAS the Settling Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims asserted or which could have been asserted against the Releasees by the Plaintiff and the Settlement Class in the Proceeding, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

G. WHEREAS the Settling Defendants do not hereby attorn to the jurisdiction of the Court or any other court or tribunal in respect of any civil, criminal or administrative process except to the extent they have previously done so in the Proceeding or as expressly provided in this Settlement Agreement with respect to the Proceeding;

AL SL

H. WHEREAS Counsel for the Settling Defendants and Class Counsel have engaged in arm's-length settlement discussions and negotiations, resulting in this Settlement Agreement relating to Canada;

I. WHEREAS, on or around June 27, 2019, the Settling Defendants have adjusted the Airbnb Platform to display an all-inclusive price to Guests for the booking of Accommodations, at every step of the search and booking process;

J. WHEREAS as a result of these settlement discussions and negotiations, the Settling Defendants and the Plaintiff have entered into this Settlement Agreement, which embodies all of the terms and conditions of the settlement between the Settling Defendants and the Plaintiff, both individually and on behalf of the Settlement Class the Plaintiff represents, subject to approval of the Court;

K. WHEREAS the Quebec Action was commenced against certain of the Releasees by the Quebec Plaintiff, on behalf of the Quebec Class, and which action was settled in 2019 and finally approved by the Quebec Court in February 2020;

L. WHEREAS there is a pending motion before the Court where the Parties are in dispute as to the validity and/or enforceability of the settlement in the Quebec Action;

M. WHEREAS the Parties do not intend for any member of the Quebec Class to be eligible for benefits under this Settlement Agreement;

N. WHEREAS Class Counsel, on their own behalf and on behalf of the Plaintiff and the Settlement Class Members, have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiff's claims, having regard to the burdens and expense associated with prosecuting the Proceeding, including the risks and uncertainties associated with trials and appeals, and having regard to the value of the Settlement Agreement, have concluded that this Settlement Agreement is fair, reasonable and in the best interests of the Plaintiff and the Settlement Class he represents;

O. WHEREAS the Parties therefore wish to and hereby finally resolve on a national basis, without admission of liability, the Proceeding as against the Releasees, provided that members of the Quebec Class are not entitled to obtain recovery from this settlement; and

AL SA

P. WHEREAS the Parties agree to proceed to obtain approvals from the Court as provided for in this Settlement Agreement, on the express understanding that such agreement shall not derogate from the respective rights of the Parties in the event that this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Proceeding be settled and dismissed with prejudice as to the Settling Defendants, all without costs as to the Plaintiff, the Settlement Class Members, and the Settling Defendants, subject to the approval of the Court, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purposes of this Settlement Agreement, including the recitals and schedules hereto:

(1) ***Accommodation*** means the offering by third parties of vacation or other properties for use on the Airbnb Platform.

(2) ***Account*** means the Airbnb account of a Settlement Class Member, which is linked to such Member's email address.

(3) ***Administration Expenses*** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiff, Class Counsel, the Settling Defendants, or otherwise for the approval, implementation and operation of this Settlement Agreement, including the costs of notices, but excluding Class Counsel Fees and Class Counsel Disbursements.

(4) ***Airbnb Platform*** means collectively the Site, Application, and Airbnb Services.

(5) ***Airbnb Services*** means all services associated with the Site and the Application.

(6) ***Application*** means, collectively, the Airbnb mobile, tablet, and other smart device applications, and application program interfaces.

(7) ***Booking*** means a contract entered into directly between Hosts and Guests.

ALSC

(8) ***Bounce Back*** means an email that is returned to the sender because it cannot be delivered for some reason.

(9) ***Claim*** means any and all requests for a Redeemable Credit submitted by a Credit Eligible Class Member in accordance with this Settlement Agreement.

(10) ***Claims Administrator*** means Deloitte LLP.

(11) ***Claims Deadline*** means forty-five (45) days from the publication and dissemination of the notice of an approved settlement to Settlement Class Members described in Section 9.1.

(12) ***Class Counsel*** means Evolink Law Group, Sébastien A. Paquette and Jérémie John Martin.

(13) ***Class Counsel Disbursements*** include the disbursements and applicable taxes incurred by Class Counsel in the prosecution of the Proceeding.

(14) ***Class Counsel Fees*** means the legal fees of Class Counsel, and any applicable taxes or charges thereon, including any amounts payable as a result of the Settlement Agreement by Class Counsel or the Settlement Class Members to any other body or Person.

(15) ***Class Period*** means October 31, 2015 to June 25, 2019.

(16) ***Counsel for the Settling Defendants*** means Torys LLP.

(17) ***Court*** means the Federal Court of Canada.

(18) ***Credit*** means a credit-voucher to be used to make a Booking for Accommodation on the Airbnb Platform in the form of a single, one-time-use only, non-transferable, non-refundable and non-cash convertible credit of a value in Canadian dollars to be determined in accordance with Section 7.1(6).

(19) ***Credit Claiming Class Members*** means a Credit Eligible Class Member who claims a benefit under this Settlement Agreement in accordance with the procedure described in Section 7.1.

(20) ***Credit Eligible Class Members*** means a Settlement Class Member who meets all of the following criteria: (a) a resident of Canada but not a member of the Quebec Class; (b) used the

Airbnb Platform during the Class Period for the first time, for a purpose other than business travel; (c) was located in Canada (but not Quebec) at the time of the booking; and (d) has an active account at the time the credit is issued that has not been suspended or removed from the Airbnb Platform due to a violation of Airbnb's Terms of Service, policies or standards.

(21) ***Date of Execution*** means the date on the cover page as of which the Parties have executed this Settlement Agreement.

(22) ***Effective Date*** means the date when a Final Order has been received from the Court approving this Settlement Agreement.

(23) ***Final Order*** means a final order, judgment or equivalent decree entered by the Court approving this Settlement Agreement in accordance with its terms, once the time to appeal such order has expired without any appeal being taken, if an appeal lies, or if the order is appealed, once there has been affirmation of the order upon a final disposition of all appeals.

(24) ***Guests*** means third-party travelers seeking to book Accommodations.

(25) ***Hosts*** means third parties who offer Accommodations on the Airbnb Platform.

(26) ***Net Settlement Amount*** means the amount available for distribution to Credit Claiming Class Members as Credits, calculated by subtracting from the Settlement Amount the total of the amounts described in Section 3.1(2).

(27) ***Opt-Out Deadline*** means thirty (30) calendar days after the notices in Section 9.2 have been emailed to the Settlement Class Members.

(28) ***Party and Parties*** means the Settling Defendants, the Plaintiff, and, where necessary, the Settlement Class Members.

(29) ***Person*** means an individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, trustee, executor, beneficiary, unincorporated association, government or any political subdivision or agency thereof, and any other business or legal entity and their heirs, predecessors, successors, representatives, or assignees.

ALSC

(30) ***Plaintiff*** means Arthur Lin.

(31) ***Proceeding*** means the action commenced by the Plaintiff against the Settling Defendants in the Court, bearing Court File No. T-1663-17.

(32) ***Quebec Action*** means *Martin Preisler-Banoon v. AirBnb Ireland UC et al.* commenced in the Quebec Court, District of Montreal, bearing Court File No. 500-06-000884-177.

(33) ***Quebec Class*** means, in respect of the Quebec Action, every person residing in Quebec, who between August 22, 2014 and June 26, 2019, while located in the province of Quebec, made a booking for anywhere in the world, for a purpose other than business travel, using Airbnb's websites and/or mobile application and who paid a price higher than the price initially advertised by Airbnb (excluding the QST or the GST).

(34) ***Quebec Court*** means the Superior Court of Quebec.

(35) ***Quebec Plaintiff*** means Martin Preisler-Banoon.

(36) ***Redeemable Credit*** has the same meaning as Credit.

(37) ***Released Claims*** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages, known or unknown, suspected or unsuspected, actual or contingent, liquidated or unliquidated, in law, under statute or in equity, that any of the Releasors ever had or now has, relating in any way to the display of prices on the Airbnb Platform, including conduct alleged (or which could have been alleged) in the Proceeding.

(38) ***Releasees*** means, jointly and severally, individually and collectively, the Settling Defendants and all of their present and former direct and indirect parents, owners, subsidiaries, divisions, affiliates, associates (as defined in the *Canada Business Corporations Act*, RSC 1985, c C-44), partners, joint ventures, franchisees, dealers, insurers, and all other Persons, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, mandataries, shareholders, attorneys, trustees, servants and representatives, members, managers and the

ALSL

predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing.

(39) ***Releasors*** means, jointly and severally, individually and collectively, the Plaintiff and the Settlement Class Members, on behalf of themselves and any Person or entity claiming by or through them as a parent, subsidiary, affiliate, predecessor, successor, shareholder, partner, director, owner of any kind, agent, principal, employee, contractor, attorney heir, executor, administrator, insurer, devisee, assignee, or representative of any kind, other than Persons who validly and timely opted out of the Proceeding in accordance with the orders of the Court.

(40) ***Settlement Agreement*** means this agreement, including the recitals and schedules.

(41) ***Settlement Amount*** means CAD$6,000,000.

(42) ***Settlement Class*** means all individuals residing in Canada, other than Quebec, who, from October 31, 2015 to June 25, 2019: (a) reserved an accommodation for anywhere in the world using Airbnb; (b) whose reserved accommodation matched the parameters of a previous search made by the individual on the search results page of Airbnb; and (c) paid, for the reserved accommodation, a price (excluding applicable sales and/or accommodation taxes) that is higher than the price displayed by Airbnb on the said search results page for this accommodation. Individuals who reserved an accommodation primarily for business travel are excluded.

(43) ***Settlement Class Member*** means a member of the Settlement Class who has not opted out of the Proceeding.

(44) ***Settling Defendants*** means Airbnb, Inc., Airbnb Canada Inc., Airbnb Ireland Unlimited Company, and Airbnb Payments UK Limited.

(45) ***Site*** means the Airbnb website, including any subdomains thereof, and any other websites through which Airbnb makes its services available.

ALSC

SECTION 2 – SETTLEMENT APPROVAL

2.1 Best Efforts

(1) The Parties shall use their best efforts and act in good faith to implement this Settlement Agreement and to secure the prompt, complete and final dismissal with prejudice of the Proceeding as against the Settling Defendants.

2.2 Motions Seeking Approval of Notice and Certification

(1) The Plaintiff shall file a motion before the Court, as soon as practicable after the Date of Execution, for orders approving the notices described in Section 9.1(1).

(2) The order approving the notices described in Section 9.1(1) shall be substantially in the form attached as Schedule A.

2.3 Motions Seeking Approval of the Settlement Agreement

(1) The Plaintiff shall make best efforts to file a motion before the Court for an order approving this Settlement Agreement as soon as practicable after the expiry of the opt-out period in Section 4.1(5) and within the timelines permitted under the *Federal Courts Rules*

(2) The order approving this Settlement Agreement shall be substantially in the form attached as Schedule B.

2.4 Pre-Motion Confidentiality

(1) Until the first of the motions required by Section 2.2(1) is brought, the Parties shall keep all of the terms of the Settlement Agreement confidential and shall not disclose them without the prior consent of Counsel for the Settling Defendants and Class Counsel, as the case may be, except as required for the purposes of financial reporting, the preparation of financial records (including tax returns and financial statements), as necessary to give effect to its terms, or as otherwise required by law.

2.5 Settlement Agreement Effective

(1) This Settlement Agreement shall only become final on the Effective Date.

ALSC

SECTION 3 – SETTLEMENT BENEFITS

3.1 Redeemable Credits

(1) The Settling Defendants shall offer to compensate Credit Eligible Class Members by offering credits of a total gross value equal to the Settlement Amount to be used on the Airbnb Platform, subject to the deductions and conditions set out in this Settlement Agreement.

(2) The following fees and costs shall be paid from the Settlement Amount and will be deducted from the gross value of the credits:

(a) Administration Expenses;

(b) The cost of publication of any notices to Settlement Class Members that the Court may require;

(c) The plaintiff's honorarium as described in Section 11.4, to the extent approved by the Court; and

(d) Class Counsel Fees and Class Counsel Disbursements, plus any applicable sales taxes, to the extent approved by the Court and as provided in Section 11.3 below.

(3) The value of each Redeemable Credit to be distributed to Credit Claiming Class Members shall be determined at the expiry of the Claims Deadline in accordance with Section 7.1(6).

(4) The Settlement Amount and other consideration to be provided in accordance with the terms of this Settlement Agreement shall be provided in full satisfaction of the Released Claims against the Releasees.

(5) For greater certainty, the Settlement Amount shall be all-inclusive of all amounts, including interest, costs, any honorarium paid to the Plaintiff, Administration Expenses, Class Counsel Fees, Class Counsel Disbursements, and taxes.

(6) The Releasees shall have no obligation to pay any amount in addition to the Settlement Amount, for any reason, pursuant to or in furtherance of this Settlement Agreement or the Proceeding. In particular, after the Settlement Agreement has been implemented and executed, there shall be no surplus amount remaining for remittance, reparation or compensation to any

AL SC

Settlement Class Member, Class Counsel or Plaintiff other than the Redeemable Credits, and the payment of Class Counsel Fees.

SECTION 4 – OPTING OUT AND OBJECTIONS

4.1 Opt-Out and Objection Procedure

(1) Potential Settlement Class Members seeking to opt out of the Proceeding or object to the settlement must do so by sending a written notice, personally signed by the potential Settlement Class Member (or the potential Settlement Class Member's parent or guardian if he/she is legally incapable), by pre-paid mail, courier, fax or email to Class Counsel at an address to be identified in the notice described in Section 9.1(1).

(2) Any potential Settlement Class Member who validly opts out of the Proceedings shall not be able to participate in the Proceeding and no further right to opt out of the Proceedings will be provided.

(3) An election to opt out or notice of objection will only be valid if it is received on or before the Opt-Out Deadline to the designated address in the notice described in Section 9.1(1).

(4) The written election to opt out or notice of objection must contain the following information in order to be valid:

(a) the potential Settlement Class Member's full name, current address, telephone number, and the e-mail address for which they received the notice in Section 9;

(b) an acknowledgment that the Potential Settlement Class Member is a resident of Canada (except Quebec) and aware that he/she will no longer be entitled to participate in any benefits from this settlement; and

(c) in the case of a written election to opt out:

(i) a statement to the effect that the Person wishes to be excluded from the Proceedings; and

(ii) the reasons for opting out; or

(d) in the case of a notice of objection:

ALSC

(i) the grounds for the objection; and

(ii) whether the potential Settlement Class Member intends to appear at the approval hearing himself/herself, or through his/her lawyer (at the potential Settlement Class Member's own expense);

(5) Class Counsel may request potential Settlement Class Members that submit an election to opt out or notice of objection to provide their proof of residency and/or other proof that they are a potential Settlement Class Member.

(6) Within thirty (30) days of the Opt-Out Deadline, Class Counsel shall provide to the Settling Defendants a list containing the names, contact information, and reason provided for opting out for each individual who has submitted an opt-out request in accordance with Section 4.1(4) above.

(7) With respect to any potential Settlement Class Member who validly opts out from the Proceedings, the Settling Defendants reserve all of their legal rights and defences.

(8) The Plaintiff through Class Counsel expressly waives his right to opt-out of the Proceeding.

SECTION 5 – TERMINATION OF SETTLEMENT AGREEMENT

5.1 Right of Termination

(1) In the event that the Court:

(a) declines to dismiss the Proceeding as against the Settling Defendants as provided in Section 6.3(1);

(b) declines to approve this Settlement Agreement or any material part, or approves this Settlement Agreement in a materially modified form; or

(c) issues a settlement approval order that is materially inconsistent with the terms of the Settlement Agreement or not substantially in the form attached to this Settlement Agreement as Schedule B;

or in the event any order approving this Settlement Agreement does not become a Final Order, the Plaintiff and the Settling Defendants shall each have the right to terminate this Settlement

Agreement by delivering a written notice pursuant to Section 12.15, within ten (10) days following an event described above.

(2) In addition, if the Credits are not provided to Credit Claiming Class Members in accordance with Sections 3.1(1) and 7.1, the Plaintiff shall have the right to terminate this Settlement Agreement by delivering a written notice pursuant to Section 12.15 or move before the Courts to enforce the terms of this Settlement Agreement.

(3) If more than 100 Settlement Class Members validly exercise their right to opt out in accordance with Section 4, the Settling Defendants shall have the right to terminate this Settlement Agreement by delivering a written notice pursuant to Section 12.15, within five (5) days of being provided with the opt out report described in Section 4.1(5).

(4) Except as provided for in Section 5.4, if the Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, the Settlement Agreement shall be null and void and have no further force or effect, and shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

(5) Any order, ruling or determination made or rejected by the Court with respect to Class Counsel Fees shall not be deemed to be a material modification of all, or a part, of this Settlement Agreement and shall not provide any basis for the termination of this Settlement Agreement.

5.2 If Settlement Agreement is Terminated

(1) If this Settlement Agreement is not approved, is terminated in accordance with its terms, or otherwise fails to take effect for any reason:

(a) no motion to approve this Settlement Agreement that has not been decided shall proceed;

(b) the Parties will cooperate in seeking to have all issued order(s), in the Court or the Federal Court of Appeal, on the basis of the Settlement Agreement or approving this Settlement Agreement set aside and declared null and void and of no force or effect, and any Person shall be estopped from asserting otherwise;

ALSC

(c) within ten (10) days of such termination having occurred, Class Counsel shall make reasonable efforts to destroy all documents or other materials provided by the Settling Defendants and/or Counsel for the Settling Defendants under this Settlement Agreement or containing or reflecting information derived from such documents or other materials received from the Settling Defendants and/or Counsel for the Settling Defendants and, to the extent Class Counsel has disclosed any documents or information provided by the Settling Defendants and/or Counsel for the Settling Defendants to any other Person, shall make reasonable efforts to recover and destroy such documents or information. Class Counsel shall provide Counsel for the Settling Defendants with a written certification by Class Counsel of such destruction. Nothing contained in this Section 5.2 shall be construed to require Class Counsel to destroy any of their work product. However, any documents or information provided by the Settling Defendants and/or Counsel for the Settling Defendants, or received from the Settling Defendants and/or Counsel for the Settling Defendants in connection with this Settlement Agreement, may not be disclosed to any Person in any manner or used, directly or indirectly, by Class Counsel or any other Person in any way for any reason, without the express prior written permission of the relevant Settling Defendants. Class Counsel shall take appropriate steps and precautions to ensure and maintain the confidentiality of such documents, information and any work product of Class Counsel derived from such documents or information; and

(d) With respect to the Settling Defendants' motion to exclude the Quebec Class from this Action, the Plaintiff and the Quebec Class reserve all of their legal rights and defences.

5.3 Payments Following Termination

(1) If the Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendants shall be under no obligation to make any Credits available to Credit Eligible Class Members or make any other payments under this Settlement Agreement.

ALSK

5.4 Survival of Provisions After Termination

(1) If this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the provisions of Sections 5.1(4), 5.2, 5.3, 5.4, 8.1, and 8.2 and the definitions and Schedules applicable thereto shall survive the termination and continue in full force and effect. The definitions and Schedules shall survive only for the limited purpose of the interpretation of Sections 5.1(4), 5.2, 5.3, 5.4, 8.1, and 8.2 within the meaning of this Settlement Agreement, but for no other purposes. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

SECTION 6 – RELEASES AND DISMISSALS

6.1 Release of Releasees

(1) Upon the Effective Date, subject to Section 6.2, and in consideration of making available the Redeemable Credits and for other valuable consideration set forth in the Settlement Agreement, the Releasors forever and absolutely release and forever discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, or now have.

(2) The Plaintiff and Settlement Class Members acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Settlement Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release shall be and remain in effect notwithstanding the discovery or existence of additional or different facts.

6.2 No Further Claims

(1) Upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee, whether pursuant to legislation or at common law or equity in respect of any Released Claim. For greater certainty and without limiting the generality of the foregoing, the Releasors shall not assert or pursue a Released Claim, against any Releasee under the laws of any foreign jurisdiction.

ALSC

6.3 Dismissal of the Proceedings and Appeal

(1) Upon the Effective Date, the Proceeding shall be dismissed with prejudice and without costs as against any party.

(2) Upon the Execution Date, the Parties shall inform the Federal Court of Appeal to hold the appeal A-464-19 in abeyance until the Court has heard and decided the approval of this settlement.

(3) If the Court approves the settlement, and upon the Effective Date, the parties shall execute any necessary order(s) to dismiss the appeal in A-464-19.

(4) If the Court does not approve the settlement, the Parties shall promptly inform the Federal Court of Appeal.

6.4 Material Term

(1) The releases, covenants, and dismissals contemplated in this Section shall be considered a material term of the Settlement Agreement and the failure of the Court to approve the releases, covenants, and dismissals contemplated herein shall give rise to a right of termination pursuant to Section 5.1 of the Settlement Agreement.

SECTION 7– DISTRIBUTION AND CONDITIONS OF CREDITS

7.1 Distribution Process

(1) Credit Eligible Class Members will be able to obtain a Redeemable Credit through a claim process as further described in this Section 7.

(2) Within ten (10) days of the Effective Date, a notice will be sent to Settlement Class Members notifying them that the settlement has been approved and containing a hyperlink for Credit Eligible Class Members to click on if they wish to claim a Redeemable Credit. The online claims process shall allow for the identification of each Credit Eligible Class Member who clicks on said hyperlink as a Credit Claiming Class Member. The Credit Eligible Class Members shall not be required to provide any further information or take any further action. Should any email sent to a Settlement Class Member or Credit Eligible Class Member result in a Bounce Back, no additional steps will be required from the Parties to communicate with the relevant class member.

ALSC

(3) All Claims by Credit Eligible Class Members must be submitted and received by the Claims Deadline. The Claims Deadline shall be clearly set forth in the notice and on the website of Class Counsel. As part of the claims process, the relevant Credit Eligible Class Member shall acknowledge that they fit the criteria for being a Credit Eligible Class Member.

(4) Credit Eligible Class Members who do not submit a Claim by the Claims Deadline shall no longer be eligible to receive benefits under this Settlement Agreement but will be bound by the remaining terms.

(5) Within ten (10) days of the Claims Deadline, the Claims Administrator shall provide a list of Credit Claiming Class Members along with the information collected through the automated process described above to Counsel for the Settling Defendants.

(6) Within sixty (60) days of the Claims Deadline, the Settling Defendants shall deliver to each Credit Claiming Class Member a Redeemable Credit to his or her Account, available to be redeemed automatically at the next check-out, of a value in Canadian Dollars equivalent to a *pro rata* share of the Net Settlement Amount. By way of illustrative example only, if there are 100,000 Credit Claiming Class Members, and the total fees, expenses, and taxes in Section 3.1(2) is CAD$2,500,000, then the Net Settlement Amount would be CAD$3,500,000 (i.e., $6,000,000 minus $2,500,000), and each Credit Claiming Class Member would receive a credit of CAD$35.

(7) For greater certainty, in the event that a Credit Claiming Class Member has made more than one booking during the Class Period, he or she will only be entitled to one Redeemable Credit.

(8) The Redeemable Credits may be used on the Airbnb Platform, within twenty-four (24) months from the date of issuance, for making Bookings of Accommodations in any location worldwide, after which period the Redeemable Credit will expire. The Redeemable Credits are one-time use only (and any amount not used on the transaction is extinguished), non-transferable, non-cash convertible, non-refundable, and cannot be combined with any other offer, discount, credit or coupon. It is also understood that a Credit Claiming Class Member must agree to the most recent version of the Terms of Service in order to meet the criteria to make a Booking of an Accommodation offered on the Airbnb Platform.

(9) Notwithstanding anything in this Section 7.1, in no event shall any Credit Claiming Class Member be entitled to a Redeemable Credit in an amount greater than CAD$45.

AL SC

(10) If the CAD $45 cap described in Section 7.1(9) is triggered and as a result a portion of the Net Settlement Amount remains undistributed, the Settling Defendants shall pay in the form of cash or cheque, on a *cy pres* basis, to an organization agreed to by the Parties and approved by the Court.

(11) It is expressly agreed and understood by the Parties that unused, unredeemed or unclaimed Redeemable Credits shall not constitute, nor may they under any circumstances give rise to, a remaining balance for any purpose, including for a claim for reparation or compensation by Settlement Class Members or for the payment of a charge, levy or toll by any third party, including a charge, levy or toll contemplated by any regulation. For greater certainty and without limitation, the Settling Defendants may terminate this Settlement Agreement in the event any court recognizes the existence of a remaining balance.

7.2 Responsibility for Administration or Fees

(1) Except as otherwise provided for in this Settlement Agreement, the Settling Defendants shall not have any responsibility, financial obligations or liability whatsoever with respect to the administration of the Settlement Agreement including, but not limited to, Administration Expenses.

SECTION 8 – EFFECT OF SETTLEMENT

8.1 No Admission of Liability

(1) The Plaintiff and the Releasees expressly reserve all of their rights if the Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason. Further, whether or not the Settlement Agreement is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by the Releasees, or of the truth of any of the claims or allegations contained in the Proceedings, any Other Actions, or any other pleading filed by the Plaintiffs.

ALSL

8.2 Agreement Not Evidence

(1) The Parties agree that, whether or not it is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be referred to, offered as evidence or received in evidence in any pending or future civil, criminal or administrative action or proceeding, except in a proceeding to approve and/or enforce this Settlement Agreement, to defend against the assertion of Released Claims, as necessary in any insurance-related proceeding, or as otherwise required by law.

8.3 Confidentiality of Settlement Negotiations

(1) Class Counsel or anyone currently or hereafter employed by or a partner with Class Counsel may not divulge to anyone for any purpose any information obtained in the course of the Proceeding on a confidential basis or the negotiation and preparation of this Settlement Agreement, except to the extent such information was, is or becomes otherwise publicly available or unless ordered to do so by a court.

SECTION 9 – NOTICE TO SETTLEMENT CLASS

9.1 Notices Required

(1) The Settlement Class Members shall be given notice of: (i) the hearing at which the Court will be asked to approve the Settlement Agreement and/or Class Counsel Fees, including the procedure for opting out or commenting on the proposed settlement; (ii) the Court's approval of the settlement; and (iii) if the proposed settlement is not approved or otherwise fails to take effect, notice that the proposed settlement was not approved and the litigation shall continue.

9.2 Form and Distribution of Notices

(1) The notices shall be in a form agreed upon by the Parties and approved by the Court or, if the Parties cannot agree on the form of the notices, the notices shall be in a form ordered by the Court.

ALSC

(2) The notices shall be disseminated by a method agreed upon by the Parties and approved by the Courts or, if the Parties cannot agree on a method for disseminating the notices, the notices shall be disseminated by a method ordered by the Courts.

SECTION 10 – ADMINISTRATION AND IMPLEMENTATION

10.1 Mechanics of Administration

(1) Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the Court on motions brought by Class Counsel.

(2) The Parties agree that any information provided by the Settling Defendants in accordance with this Section shall be kept confidential, shall be used only for purposes of administering the Settlement Agreement, and shall not be used for marketing or any other purposes.

(3) The Claims Administrator will be required to (i) go through Airbnb's security review process for third-party vendors (including completing a vendor intake form) and be approved by Airbnb, and (ii) sign Airbnb's standard Controller/Processor Data Privacy Addendum. Should these conditions not be met, the Parties agree to replace the Claims Administrator with another that meets these requirements.

(4) The Claims Administrator shall administer the terms of this Settlement Agreement in a cost-effective and timely manner.

(5) The Claims Administrator shall maintain records of all Claims submitted for two years after the Claims Deadline, and such records will be made available upon request to Counsel for the Parties. The Claims Administrator shall also provide such reports and such other information to the Court as it or the Parties may require.

(6) The Administration Expenses will be paid out of the Settlement Amount, as directed by the Court. Should the Settlement Agreement not be approved by the Court or otherwise becomes null and void, no Administration Expenses shall be owed.

ALSC

(7) The Parties anticipate that no sales taxes will be payable in respect of Administration Expenses. To the extent any such taxes are payable, they will be paid from the Settlement Amount in accordance with Section 3.1.

10.2 Information and Assistance

(1) The Settling Defendants will provide to the Claims Administrator a list of the names and email addresses of Persons located in Canada, other than Quebec, who had Airbnb accounts during the Class Period.

(2) It is acknowledged that the Settling Defendants cannot precisely identify Settlement Class Members, any account lists provided under this Section 10.2 for the purpose of providing notice are overinclusive, and the fact a Person is included on such a list does not indicate he or she is a Settlement Class Member or Credit Eligible Class Member.

(3) The name and address information required by Section 10.2 shall be delivered to the Claims Administrator no later than ten (10) days after the orders required by Section 2.2(1) have been obtained, or at a time mutually agreed upon by the Parties.

(4) The Claims Administrator shall be bound by the same confidentiality obligations set out in Section 10.1(2). If this Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, all information provided by the Settling Defendants pursuant to Section 10.2(1) shall be dealt with in accordance with Section 5.2(1)(c) and no record of the information so provided shall be retained by Class Counsel, any Court-appointed notice-provider and/or the Claims Administrator in any form whatsoever.

(5) The Settling Defendants will make themselves reasonably available to respond to questions respecting the information provided pursuant to Section 10.2(1) from the Claims Administrator. The Settling Defendants' obligations to make themselves reasonably available to respond to questions as particularized in this Section shall not be affected by the release provisions contained in Section 6 of this Settlement Agreement. Unless this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendants' obligations to cooperate pursuant to this Section 10.2 shall cease when all settlement funds or court awards have been distributed.

ALSC

(6) The Settling Defendants shall bear no liability with respect to the completeness or accuracy of the information provided pursuant to this Section 10.2.

SECTION 11 – CLASS COUNSEL FEES AND PLAINTIFF'S HONORARIUM

11.1 Responsibility for Fees and Taxes and Plaintiff's Honorarium

(1) The Settling Defendants, jointly and severally, agree to pay from the Settlement Amount the Class Counsel Fees, Class Counsel Disbursements, the Plaintiff's Honorarium, and applicable taxes, that are approved by the Court.

11.2 Responsibility for Costs of Notices

(1) The Settling Defendants shall be responsible for distribution of notices, which is part of the Administration Expenses and payable from the Settlement Amount. The Releasees shall not have any responsibility for the costs of the notices.

11.3 Court Approval for Class Counsel Fees and Disbursements

(1) Class Counsel Fees represent any and all claimable fees by Class Counsel that are to be approved by the Court. It is understood by the Parties that Class Counsel will seek approval of the Court for the Settling Defendants' payment of Class Counsel Fees in the amount of CAD$2 million, plus applicable taxes.

(2) The Settling Defendants will represent to the Court that they do not oppose approval of the Class Counsel Fees described in Section 11.3(1).

(3) Class Counsel will not seek approval for any additional payments (including any Class Counsel Disbursements).

(4) Class Counsel may seek the Court's approval to pay Class Counsel Fees contemporaneous with seeking approval of this Settlement Agreement. The Settling Defendants shall pay the Class Counsel Fees out of the Settlement Amount within ten (10) days of the Effective Date, by way of cheque and/or wire transfer, at Class Counsel's option.

11.4 Court Approval for Plaintiff's Honorarium

(1) Class Counsel may seek Court approval of an honorarium for the Plaintiff not exceeding five-thousand ($5,000) dollars CAD.

(2) The Settling Defendants will represent to the Court that they do not oppose approval of the honorarium described in Section 11.4(1).

(3) The Settling Defendants shall pay Plaintiff's Court-approved honorarium out of the Settlement Amount within ten (10) days of the Effective Date, by way of cheque payable to the Plaintiff, and delivered to Class Counsel's office.

SECTION 12 – MISCELLANEOUS

12.1 Motions for Directions

(1) Class Counsel or the Settling Defendants may apply to the Court as may be required for directions in respect of the interpretation, implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties, except for those applications concerned solely with the implementation and administration of the Distribution Protocol.

12.2 Headings, etc.

(1) In this Settlement Agreement:

(a) the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and

(b) the terms "this Settlement Agreement," "hereof," "hereunder," "herein," and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement.

12.3 Computation of Time

(1) In the computation of time in this Settlement Agreement, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and

ALSC

including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday as "holiday" is defined in the *Interpretation Act*, RSC 1985, c. I-21, the act may be done on the next day that is not a holiday.

12.4 Governing Law

(1) This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

12.5 Entire Agreement

(1) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

12.6 Amendments

(1) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Court.

12.7 Binding Effect

(1) This Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiff, the Settlement Class Members, the Settling Defendants, the Releasors, the Releasees and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiff shall be binding upon all Releasors and each and every covenant and agreement made herein by the Settling Defendants shall be binding upon all of the Releasees.

ALSC

12.8 Counterparts

(1) This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

12.9 Negotiated Agreement

(1) This Settlement Agreement has been the subject of negotiations and discussions among the undersigned, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

12.10 Language

(1) The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés en anglais.

12.11 Recitals

(1) The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

12.12 Schedules

(1) The schedules annexed hereto form part of this Settlement Agreement.

12.13 Acknowledgements

(1) Each of the Parties hereby affirms and acknowledges that:

(a) he, she or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;

ALSC

(b) the terms of this Settlement Agreement and the effects thereof have been fully explained to him, her or the Party's representative by his, her or its counsel;

(c) he, she or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

(d) no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms of the Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

12.14 Authorized Signatures

(1) Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified above their respective signatures and their law firms.

12.15 Notice

(1) Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another Party, such notice, communication or document shall be provided by email, facsimile or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

ALSC

For the Plaintiff and for Class Counsel in the Proceedings:

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6
Tel: 604.620.2666
Email: simonlin@evolinklaw.com

Jérémie John Martin and Sébastien A. Paquette
Champlain Avocats
1434 Sainte-Catherine Street West, Suite 200
Montreal, Quebec H3G 1R4
Tel: 514.944.7344
Email: jmartin@champlainavocats.com
spaquette@champlainavocats.com

For the Settling Defendants:

Sylvie Rodrigue and James Gotowiec
Torys LLP
79 Wellington St. West, 30th Floor
Toronto, ON M5K 1N2
Tel: 416.865.0040
Email: srodrigue@torys.com
jgotowiec@torys.com

12.16 Date of Execution

(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

ARTHUR LIN on his own behalf and on behalf of the Settlement Class that he represents:

_____

AIRBNB INC.

Name of Authorized Signatory: David Bernstein
Chief Accounting Officer

Signature of Authorized Signatory: _____

AIRBNB CANADA INC.

Name of Authorized Signatory: David Bernstein
President

Signature of Authorized Signatory: _____

ALSC

AIRBNB IRELAND UNLIMITED COMPANY

Name of Authorized Signatory: Killian Pattwell
Director, EMEA Tax

Signature of Authorized Signatory: Killian Pattwell

AIRBNB PAYMENTS UK LIMITED

Name of Authorized Signatory: David Bernstein
Director

Signature of Authorized Signatory:

SIMON LIN LAW CORPORATION

Per: _____

Name: Simon Lin
I have authority to bind the Corporation

JÉRÉMIE JOHN MARTIN

Per: _____

Name: Jérémie John Martin

SÉBASTIEN A. PAQUETTE

Per: _____

Name: Sébastien A. Paquette

ALSP

For the Plaintiff and for Class Counsel in the Proceedings:

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6
Tel: 604.620.2666
Email: simonlin@evolinklaw.com

Jérémie John Martin and Sébastien A. Paquette
Champlain Avocats
1434 Sainte-Catherine Street West, Suite 200
Montreal, Quebec H3G 1R4
Tel: 514.944.7344
Email: jmartin@champlainavocats.com
spaquette@champlainavocats.com

For the Settling Defendants:

Sylvie Rodrigue and James Gotowiec
Torys LLP
79 Wellington St. West, 30th Floor
Toronto, ON M5K 1N2
Tel: 416.865.0040
Email: srodrigue@torys.com
jgotowiec@torys.com

12.16 Date of Execution

(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

ARTHUR LIN on his own behalf and on behalf of the Settlement Class that he represents:

Arthur Lin

AIRBNB INC.

Name of Authorized Signatory: David Bernstein
Chief Accounting Officer

Signature of Authorized Signatory:

AIRBNB CANADA INC.

Name of Authorized Signatory: David Bernstein
President

Signature of Authorized Signatory:

ALSC

AIRBNB IRELAND UNLIMITED COMPANY

Name of Authorized Signatory: Killian Pattwell
Director, EMEA Tax

Signature of Authorized Signatory: _____

AIRBNB PAYMENTS UK LIMITED

Name of Authorized Signatory: David Bernstein
Director

Signature of Authorized Signatory: _____

SIMON LIN LAW CORPORATION

Per: Simon Lin

Name: Simon Lin
I have authority to bind the Corporation

JÉRÉMIE JOHN MARTIN

Per: Jérémie J. Martin

Name: Jérémie John Martin

SÉBASTIEN A. PAQUETTE

Per: _____

Name: Sébastien A. Paquette

ALSL

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1663-17
STYLE OF CAUSE:	ARTHUR LIN v AIRBNB, INC., AIRBNB CANADA INC., AIRBNB IRELAND UNLIMITED COMPANY, AIRBNB PAYMENTS UK LIMITED
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 1, 2021
ORDER AND REASONS:	GASCON J.
DATED:	NOVEMBER 19, 2021

APPEARANCES:

Simon Lin	FOR THE PLAINTIFF
Jérémie John Martin Sébastien A. Paquette	FOR THE PLAINTIFF
Sylvie Rodrigue James Gotowiec	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE PLAINTIFF
Champlain Avocats Montréal, Quebec	FOR THE PLAINTIFF
Torys LLP Toronto, Ontario	FOR THE DEFENDANTS

TAB 25

Federal Court  Cour fédérale

Date: 20211222

Manitoba Court of Queen's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

Citation: 2021 FC 1415

Ottawa, Ontario, December 22, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

Docket: CI-19-01-24661

TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

(Class Proceeding commenced under *The Class Proceedings Act*, CCSM c C 130)

AND BETWEEN:

Docket: T-1673-19

CURVE LAKE FIRST NATION AND CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

(Class Proceeding commenced under Part 5.1 of the *Federal Courts Rules*, SOR/98-106)

ORDER AND REASONS

I. Introduction

[1] This is a motion to approve the First Nations Drinking Water Settlement Agreement [Settlement Agreement or Settlement] pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] and section 35(1) of *The Class Proceedings Act*, CCSM, c C130 [*The Class Proceedings Act*]. The underlying actions are class proceedings. The Settlement Agreement compensates First Nation individuals who have lived under a drinking water advisory for a year or more. It also provides First Nations with compensation and assistance in securing safe drinking water through future infrastructure funding.

[2] Both the Federal Court and the Manitoba Court of Queen's Bench [Courts] have jurisdiction over this proceeding. On October 11, 2019, Curve Lake First Nation [Curve Lake], Chief Emily Whetung, Neskantaga First Nation [Neskantaga], and Former Chief Christopher Moonias filed a statement of claim in the Federal Court [Federal Action]. On November 20, 2019, Tataskweyak Cree Nation [Tataskweyak] and Chief Doreen Spence filed a Statement of Claim in the Manitoba Court of Queen's Bench [Manitoba Action, and together with the Federal Action, the Actions]. After the Actions were certified, the Courts appointed these individuals and First Nations as the Representative Plaintiffs. The current Chief of Neskantaga, Wayne Moonias, represents the collective interests of Neskantaga. The defendant in both Actions was the Attorney General of Canada [Defendant or Canada]. McCarthy Tétrault LLP [McCarthy Tétrault] and Olthuis Kleer Townshend [OKT] are class counsel [Class Counsel]. The parties finalized the Settlement on September 15, 2021.

[3] The Representative Plaintiffs now bring a motion for an Order:

a. that the proposed Settlement Agreement be approved and its terms given effect;
b. that the Defendant pay the funds contemplated in the proposed Settlement Agreement, and that said funds be distributed in accordance with the proposed Settlement Agreement;
c. that Class Members (defined below) be notified of the approval of the proposed Settlement Agreement as set out in Schedule M and N of the Settlement Agreement; and
d. that the Actions be discontinued on a without costs basis.

[4] The Courts jointly case managed and heard the motion for settlement approval, as contemplated by the Canadian Bar Association's "Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice" (2018), online: *The Canadian Bar Association* <www.cba.org>. The Courts exercised their jurisdiction to hear this motion jointly pursuant to Rules 3 and 4 of the *Rules* and section 12 of *The Class Proceedings Act*.

[5] The two Courts exercised their respective jurisdiction to jointly hear the motion for the approval of the Settlement Agreement. However, as required, each Court separately and independently addressed the governing legal test as it relates to the issue before the Courts and the Actions that were certified in their respective jurisdictions.

[6] The reasons for Settlement and Fee Approval have been released separately but concurrently by each Court. After a full analysis, the two Courts are in complete agreement with the result and the reasons therefore. Accordingly, the reasons released by each Court to a large

extent replicate the reasons of the other. This represents what the Courts wish to underscore as complete concurrence.

[7] The Settlement Agreement is historic. It is the first Settlement to tackle the problem of drinking water advisories on First Nation reserves. Additionally, this proceeding marks the first time the Federal Court and another Superior Court have sat together. Most importantly, however, the record before the Courts demonstrates that the Settlement Agreement we are being asked to approve represents what many hope will be a turning point for Canada and First Nations. Both parties acknowledge that an agreement of this nature is long overdue. Although the parties reached the Settlement in just under two years, the Courts acknowledge that Indigenous communities have been advocating for decades to ensure future generations' access to safe water. Those tireless efforts, the willingness of the government, and the expertise and focus of legal counsel have now brought the parties to this promising and hopeful turning point.

[8] For all the reasons outlined below, the Courts approve the proposed Settlement Agreement.

II. Background

A. *Drinking water advisories on First Nation reserves in Canada*

[9] Authorities issue drinking water advisories when testing indicates that the water supply is or may be unsafe. There are three types of drinking water advisories: boil before use, do not consume, and do not use. Long-term drinking water advisories are those that have been in place for more than one year. The Settlement Agreement only applies to individuals residing on First

Nations that have been subject to a long-term drinking water advisory and to those First Nation communities.

[10] The affidavit of Peter Gorham, an expert actuary jointly retained by both parties, states that from 1995-2007, there were 713 recorded long-term drinking water advisories that affected some 257 First Nations. Class Counsel submitted a January 28, 2021 report by Dr. Melanie O'Gorman, a professor of economics and scholar in water infrastructure and long-term drinking water advisories in First Nations. That report states that in comparison to municipal and private water systems, First Nations disproportionately experience long-term drinking water advisories.

[11] As discussed in more detail below, the Actions alleged that Canada is responsible for the establishment of drinking water systems on reserves and that Canada has chronically underfunded First Nations' water needs. As a result, Canada has failed to ensure that Class Members have access to potable water of adequate quality and quantity. Class Counsel pointed out that in a press conference on November 24, 2021, Minister of Indigenous Services, the Honourable Marc Miller, stated that the deficits pertaining to drinking water infrastructure on reserve are a result of systemic racism.

B. *Experiences of Representative Plaintiffs & Class Members*

[12] The Representative Plaintiffs and other Class Members filed affidavits in support of settlement approval, which outlined the status of drinking water on their respective First Nations. All of those affidavits explained the importance of safe water for the physical, spiritual, emotional, psychological, cultural, or economic health of individuals and communities. In

particular, many of the affidavits, including the affidavits of Elder Richard Allen Keeper and Anne Taylor, emphasized the role water plays in ceremony and how contaminated water results in the breakdown of knowledge transmission. Class Members also discussed the tragic relationship between poor drinking water, mental health, and youth suicide. Likewise, they noted that contaminated water has forced members to relocate, which perpetuates the history of displacement of Indigenous peoples from their lands and the separation of families. Class Member Roderick Richard Spence explains:

> Now that I live in Winnipeg, I can drink the water that comes out of my tap, just like other Canadians. But I have lost a piece of who I am. It seems like an awful trade to have to make. I certainly hope that my grandchildren get better treatment. I dream for this, pray for this, and cry for this.

[13] The frustration, stress, and loss of dignity that Class Members have experienced is palpable. As detailed in their affidavits discussed below, members of the Representative First Nations have and continue to suffer unacceptable hardships.

(a) *Curve Lake*

[14] Curve Lake is an Ojibway First Nation located 15 kilometers outside of Peterborough, Ontario. Chief Whetung was elected Chief on June 18, 2019. She is Michi Saagiig of the Anishnaabe nation. She is a 36-year old lawyer and a mother of two. Chief Whetung's affidavit explains that Curve Lake experiences 10 to 15 boil-water advisories every year, some of which have lasted for more than one year. Her affidavit and the affidavit of Shawn Williams, a member of Curve Lake, state that the water treatment plant on Curve Lake inadequately disinfects water and only services 56 of the 550 homes in the community. Canada constructed it in the early 1980s and intended it to be temporary. The remaining homes on the First Nation are not

connected to a public water system and rely on private wells. Members of the community, including Chief Whetung's entire family, have contracted E.coli due to the contaminants in their drinking water. Others have become gravely sick, suffered rashes, and more.

[15] Mr. William's affidavit explains that for decades Curve Lake has been negotiating with Indigenous Services Canada [ISC] to get a new water treatment plant. He describes the process as a "hamster wheel": "the First Nation is constantly running, working to provide proposals, obtain necessary studies, seek funding, only to be in the exact same position decades later." He explains that since Canada provides the funding, the federal government's sign off is needed at every stage of development. He attributes the delay to ISC's habit of providing "funding for studies, small projects, and other lower cost items as a means to appease First Nations while they wait for the big ticket funding to actually address their needs, if that day ever arrives."

[16] The affidavit of Katie Young-Haddlesey, the Economic Development Coordinator of Curve Lake, states that the water crisis has "strangled Curve Lake's economic development." She explains that for every business proposal, Curve Lake must consider whether "there will be enough water and whether the quality will impact the business." Proposals for businesses like laundromats, car washes, restaurants, and hotels are not feasible because there is simply not enough water in the community.

[17] Chief Whetung spoke passionately before both Courts on December 8, 2021. She explained that Curve Lake has been fighting for clean drinking water since before she was born.

For her, the Settlement not only means that the First Nation will have clean water in the near future, but that her children will be able to stay and grow up in their community.

(b) *Neskantaga*

[18] Neskantaga is an Oji-Cree remote fly-in community in northern Ontario and is situated along Lake Attawapiskat. Neskantaga is subject to the longest drinking water advisory in Canada – the First Nation has not had safe drinking water for over 26 years. Members of Neskantaga have had to evacuate their community twice in the past three years because of their water.

[19] Christopher Moonias was the Chief of Neskantaga from 2019 to 2021. He now acts as special advisor to Neskantaga and remains a Representative Plaintiff. Chief Wayne Moonias is the current Chief of Neskantaga. He took office on April 1, 2021 and continues the work of Former Chief Christopher Moonias with respect to these Actions.

[20] The affidavit of Chief Wayne Moonias describes the traumatic effect the drinking water advisory has had on both individuals and the community and emphasizes its adverse effect on community members' mental health. As explained by the Community of Neskantaga in the Joint Press Release dated July 20, 2021, "[o]ur symptoms are real, and result in kids committing suicide, getting rashes, and suffering severe eczema. The skin conditions are particularly awful. They make our people feel like they have to hide themselves, and furthers their loss of dignity, on top of already feeling like maybe they don't deserve clean water."

[21] Class Members from Neskantaga also submitted affidavits supporting the Settlement and detailing their stories. Those Class Members included Former Chief Peter Moonias, Dorothy Sakanee, Maggie Sakanee, Marcus Moonias, and Amy Moonias. Maggie Sakanee's affidavit details the skin rashes and sores that her grandchildren developed due to the water, which only cleared up after being evacuated to Thunder Bay. Amy Moonias' affidavit tells a very similar story. Due to the expense of bottled water (a 4-litre bottle of water in Neskantaga costs 16 dollars), Amy Moonias often had to choose between feeding and bathing her baby. Likewise, Dorothy Sakanee sometimes had to choose between buying bottled water and essentials like food or diapers. When she had to boil water, it came at the expense of spending time with her children. Former Chief Peter Moonias' affidavit states that he declared a State of Emergency in the early 2000s because a cancer-causing chemical was found in the water. Dorothy Sakanee's affidavit explains that her youngest daughter died in 1988 from brain cancer. She states that she suspects that the cancer was caused from the water in Neskantaga.

(c) *Tataskweyak*

[22] Tataskweyak is located in northern Manitoba and has 4000 members, 2300 of whom live on the reserve. Chief Spence is Split Lake Cree and is the Chief of Tataskweyak, where she has lived most of her life. She was elected on November 6, 2016 and is the first female Chief. She is a mother of three and a grandmother of one. In her affidavit, Chief Spence states that Tataskweyak has been under a boil water advisory for three years. She explains that the community sources its tap water from Split Lake, which has been contaminated by upstream development and recurring flooding. The affidavit of Tataskweyak member, Robert Spence,

further explains that sewage is periodically released into Split Lake. Split Lake is contaminated with E.coli and large-scale blue-green algae blooms known to cause serious illness in humans.

[23] Accordingly, in 2006 and 2019, Tataskweyak sent Canada feasibility studies for a new water intake system, which would draw from Assean Lake. Instead, Canada upgraded the filtration and UV system in the existing water plant, which left the water tasting and smelling like chemicals. Chief Spence explained that occasionally, when the water line breaks, the tap water runs brown. The affidavit of Roderick Richard Spence, another member of Tataskweyak, similarly describes the tap water as smelling like chlorine and looking like "lemonade." Even after Canada's upgrades, the water remains unsafe to drink without boiling. In May 2020, Chief Spence obtained Canada's commitment to pay for bottled water delivery and enhanced water testing. Prior to this, however, community members who could not afford bottled water had to drink tap water or haul buckets of water from Assean Lake. In comparison, residents of the City of Thompson, which is upriver from Tataskweyak, enjoy virtually unlimited potable water.

[24] Similar to Curve Lake and Neskantaga, skin rashes are the norm for members of Tataskweyak. Class Members Lydia Garson and Clara Flett detailed their children's rashes that resulted from bathing in the contaminated water. Lydia Garson's son was covered in scrapes, sores, and scabs. At one point, despite his mother's dedication, his condition got so bad that his face would bleed. Likewise, although she took special care, Clara Flett's son had to be hospitalized due to his rashes. Class Member Elizabeth Keeper similarly contracted H. pylori infection (a stomach infection) from the contaminated water in Tataskweyak. Chief Spence

explains that illnesses related to contaminated drinking water have been exacerbated by inadequate access to healthcare, overcrowded housing, and the COVID-19 pandemic.

C. *Nature of the Claims & Defences*

[25] In the Statements of Claim filed in both Actions, the Representative Plaintiffs submitted that Canada failed to provide Class Members with potable drinking water. Accordingly, they sought orders and declarations that Canada has: breached its duty of care and acted negligently; contravened the honour of the Crown; breached its fiduciary duties; violated section 36 of the *Constitution Act, 1982*; and committed violations of sections 2(1), 7, and 15 of the *Charter*, which are not saved by section 1. They submitted that as a result, Class Members are denied adequate access to clean drinking water; unable to adequately wash and care for themselves and their families; and prevented from performing traditional ceremonies and spiritual practices.

[26] The Representative Plaintiffs submitted that Canada has always taken responsibility for water systems on reserves but has never provided adequate funding. Furthermore, Canada knew that its funding was inadequate. The Representative Plaintiffs maintain that for most First Nations, federal funding is the only means of constructing and maintaining water infrastructure on reserve but Canada has tied funding to compliance with a complex system of specifications. Accordingly, Canada controls what infrastructure is built, where, how, when, and by whom.

[27] The Representative Plaintiffs in the Federal Action requested damages in the amount of 2.1 billion dollars, plus costs. Of particular note, they also sought an interim or interlocutory injunction and a permanent injunction requiring Canada to construct or approve and fund

construction of appropriate water systems to ensure Class Members have adequate access to potable water.

[28] The Defendant did not file Statements of Defence because the Settlement was reached relatively early in the proceeding. Initially, Canada opposed the relief sought by the Class stating that it had no liability to the Class. The affidavit of John P. Brown, a lawyer for Class Counsel, explains that Canada's public position "was that it funded water systems on reserves rather than manage[ing] them, and that it could not be liable for funding decisions that reflected a core policy." On December 7, 2021, during the Motion for Settlement Approval, Class Counsel explained that their team anticipated that Canada's defence would be similar to that in *Okanagan Indian Band v Attorney General of Canada*, Vancouver T-1328-19 (FC) [*Okanagan*]. *Okanagan* is an ongoing Federal Court case dealing with similar claims.

D. *Procedural History of the Action*

[29] The Manitoba Court of Queen's Bench certified the Manitoba Action on July 14, 2020. On September 16, 2020, with the consent of the Defendant, the Representative Plaintiffs in the Federal Action brought a motion for certification. The Federal Court certified the Federal Action on October 8, 2020 pursuant to Rules 334.16 and 334.17.

[30] The Courts certified the following common issues:

> (a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class Members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

> (b) If the answer to the First Stage common issue is "yes", did Canada breach its duties or obligations to members of the sub-group?
>
> (c) If the answer to common issue (a) is yes, is any breach of the *Charter* saved by s. 1 of the Charter?
>
> (d) If the answer to common issue (a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class Members' or their First Nations' use and enjoyment of their lands?
>
> (e) If the answer to common issue (a) is "yes" and the answer to common issue (b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?
>
> (f) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?
>
> (g) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?
>
> (h) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?
>
> (i) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?
>
> (j) If so, what measures should be ordered?

[31] The Courts appointed McCarthy Tétrault and OKT as Class Counsel. CA2 Inc. was appointed as administrator for the purpose of giving notice of certification. CA2 Inc. gave notice in accordance with the certification orders. Individuals were included in the Class unless they opted out. There were no opt-outs within the opt-out period, which ended on March 29, 2021. First Nations were included in the Class if they opted in.

[32] On December 30, 2020, the Representative Plaintiffs brought a motion for summary judgment on behalf of the Class. Summary judgment was set to be heard before both Courts,

sitting together, on October 4 to 7, 2021. In advance of the summary judgment motion, more than 120 First Nations opted in to the Actions. The Representative Plaintiffs summonsed witnesses and were prepared to proceed with cross-examinations. However, on June 20, 2021, the Parties reached an Agreement in Principle. The Agreement in Principle was executed on July 29, 2021 and the Settlement was finalized on September 15, 2021.

[33] On October 5, 2021, Class Counsel brought a motion to approve the Short and Long Form Notices of the Settlement Approval Hearing, as well as a plan for the distribution of these notices. By way of Order dated October 8, 2021, the notices and the plan for distribution were approved. CA2 Inc. was appointed as administrator to give notice and it did so in accordance with the Courts' orders. CA2 Inc. gave Notice of the Settlement Approval Hearing on October 16, 2021. That Notice of Settlement contemplated a 45-day late opt-out period for First Nations that first experienced long-term drinking water advisories after the Actions were certified. There were no late opt-outs.

[34] On November 17 and 18, 2021, respectively, the Courts provisionally appointed Deloitte LLP as the Administrator for the Settlement Agreement [Administrator].

E. *Settlement Agreement: Key Provisions*

(1) Basics

[35] Importantly, the Settlement Agreement contemplates and ensures both retrospective and prospective compensation. The Settlement Agreement provides First Nations and individuals resident on those First Nations with compensation for lack of regular access to safe drinking

water. The Settlement also commits Canada to work with First Nations to provide access to clean water and requires Canada to construct and fund appropriate water systems for First Nation communities. The key terms and provisions are set out below.

(a) *Class & Class Period*

[36] The Class Period runs from November 20, 1995 to present. The Class includes (a) Individual Class Members and (b) First Nation Class Members [collectively, Class Members]. Mr. Gorham's affidavit states there are approximately 142,300 Individual Class Members, of which more than 60,000 are minors, and 258 eligible First Nation Class Members.

[37] Individual Class Members include individuals, other than Excluded Persons, who are members of a band [First Nation] as defined by the *Indian Act*, RSC 1985, c, I-5 [*Indian Act*], whose lands are subject to the *Indian Act* or the *First Nations Land Management Act*, SC 1999, c 24, and whose lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present [Impacted First Nation]. Those individuals must not have died before November 20, 2017 and must have ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year.

[38] First Nation Class Members include Tataskweyak, Curve Lake, Neskantaga, and any other Impacted First Nation that elects to join this action in a representative capacity.

[39] "Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, the Okanagan Indian Band, and Michael Darryl Isnardy. These persons are excluded from the Settlement because they have ongoing actions related to drinking water on reserves. When the Actions were initiated, these persons requested that they be excluded so that their ongoing litigation would not be affected.

(b) *Retrospective Compensation*

[40] Under the Settlement Agreement, Canada has agreed to pay individual Class Members a total of 1.438 billion dollars into a trust fund to be distributed to the Class Members, including by paying individual damages in accordance with Article 8, section 8.01(2)(a). Individual Class Members will be paid:

a. 2000 dollars per year for people in remote First Nations under long-term drinking advisories;
b. 2000 dollars per year for people in non-remote First Nations under do not use advisories;
c. 1650 dollars per year for people in non-remote First Nations under do not consume advisories; and
d. 1300 dollars per year for people in non-remote First Nations under boil water advisories.

[41] Damages for Individual Class Members will be subject to how many individuals make a claim and how many First Nations join the class action. Prorated amounts will be paid for any partial years after the first full year. Furthermore, damages for Individual Class Members are subject to a synthetic federal limitation period. This means that individuals born after 1995 can claim for all the years and portions of the years between November 20, 1995 and June 20, 2021

while they were ordinarily resident on reserve during a drinking water advisory that lasted a year or more. Individuals born before November 20, 1995 can claim for all years and portions of years between November 20, 2013 and June 20, 2021 where they were ordinarily resident on reserve during a drinking water advisory that lasted a year or more.

[42] Individuals who have suffered specified injuries because of drinking water advisories can claim additional compensation from a specified injuries compensation fund totalling 50 million dollars (Article 5). To claim damages for a specified injury a person must have been ordinarily resident on a reserve under a drinking water advisory for at least a year while the advisory was in place. Furthermore, the injury must have occurred during that time. Individuals suffering specified injuries will only be able to claim for injuries that happened or continued during drinking water advisories after November 2013. Individuals born after November 20, 1995 will be able to claim for injuries going back to that date. The person making the claim must show that they suffered the injury and that the injury was caused by using the water in accordance with the drinking water advisory or by restricted access to safe water caused by the advisory.

[43] Finally, 400 million dollars will be used to establish a First Nations Economic and Cultural Restoration Fund. From that fund, First Nation Class Members will receive a base payment of 500,000 dollars and an amount equal to 50% of the damages, not including specified injuries, paid to individual Class Members living on that First Nation’s reserve. The retrospective compensation received by First Nation Class Members reflects the harms to the community, which are different from the harms to its individual members. First Nations are free to use that money for any purpose.

(c) *Prospective Relief*

[44] In addition to compensating First Nations and their members, Canada has also agreed to provide funding to fix the problem moving forward. The stated intention of the parties is that the future never again resembles the past. Concretely, Canada has committed to taking all reasonable steps to remove long-term drinking water advisories affecting Class Members, including doing everything set out in their Long-Term Drinking Water Advisory Action Plan [Action Plan], which will be updated on an ongoing basis. Formerly a political promise, Class Counsel submits that the Action Plan becomes a legally enforceable obligation under the Settlement.

[45] Additionally, the Settlement requires Canada to take "all reasonable efforts" to ensure that Class Members have regular access to safe drinking water in their homes [the Commitment]. This water must meet either federal or provincial water quality standards, whichever is stricter. The amount of water must be enough that it allows people to use water for all the usual things people in Canada use water for, like drinking, bathing and showering, making food, washing dishes, and cleaning their home and clothes. In support of the Commitment, Canada is required to spend at least 6 billion dollars through March 31, 2030 at a rate of at least 400 million per year on water and wastewater on First Nation reserves. Class Counsel described this 6 billion as the "floor" rather than the "ceiling." Under the Settlement, Canada must use this money to fund the actual cost of construction, upgrading, operation and maintenance of water infrastructure on First Nation reserves.

[46] Further, Canada has committed to take reasonable efforts to repeal the *Safe Drinking Water for First Nations Act*, SC 2013, c 21 and replace it with legislation that is developed

through consultation with First Nations. The Settlement also requires Canada to spend 20 million dollars in funding through 2025 for a First Nations Advisory Committee on Safe Drinking Water. That Committee will work with ISC to support forward-looking policy initiatives and provide strategic advice. Additionally, Canada will provide 9 million dollars in funding through 2025 for Class Members' water governance initiatives and 50 million for the cost of administering the Settlement Agreement.

(2) Alternative dispute resolution process for Commitment disputes

[47] The Settlement Agreement and Schedule K contemplate different stages of dispute resolution. Any disputes related to the Commitment (i.e., where Canada and a First Nation cannot agree on whether Canada is meeting its Commitment under the Settlement Agreement and about proposed plans for meeting its Commitment) proceed through a specific alternative dispute resolution process [ADR Process]. Class Counsel submitted that the ADR Process integrates Indigenous Legal Traditions. It should be noted that the ADR Process promotes the use of Indigenous languages and where necessary, will occur on the First Nations' respective reserves while utilizing certain protocols such as gift giving, Elder participation, and traditional teachings. Engagement with the ADR Process entails the following steps:

1. If a First Nation determines that Canada is not meeting or has ceased meeting the Commitment, the First Nation must let Canada know (section 9.06 (1)).
2. Canada then has an obligation to consult with the First Nation to try to meet the Commitment as soon as possible. Canada must also pay the costs of any technical advice the First Nation needs to determine what Canada must do to meet the Commitment (sections 9.06(2), (3)).

3. Canada must make all reasonable efforts to reach an agreement with the First Nation that identifies the steps Canada will take to fix the issues (section 9.06(4)).
4. If Canada does not comply with the agreement or if the parties do not reach an agreement within three months, the First Nation can start the ADR Process. The ADR Process proceeds through negotiations, mediation, and, if no agreement can be reached, arbitration (section 9.07).

[48] In short, on a matter of such great and fundamental importance — the provision of safe drinking water — Canada will not be the final arbiter respecting its own efforts in relation to the Commitment outlined in the Settlement Agreement. Further, all of the phases outlined above must be completed within strict timelines.

[49] Under the Settlement, Canada will pay the reasonable costs of convening the ADR Process, together with the reasonable fees and disbursements of any mediator or arbitrator. Canada will also pay half of the reasonable costs and disbursements of a First Nation's participation in the ADR Process.

(3) Supervisory Role of the Courts

[50] Under Article 1, section 1.16 of the Settlement, the Courts maintain jurisdiction to supervise the implementation of the Agreement in accordance with its terms, including the adoption of protocols and statements of procedure and may give any directions or make any orders that are necessary for those purposes.

(4) Claims Process

(a) *First Nation Class Member Damages*

[51] To participate in the Settlement, First Nation Class Members must give notice of acceptance to the Administrator. The Parties have provided the Administrator with a list [List] identifying, to the best of the Parties' knowledge, the First Nations eligible to become First Nations Class Members. Inclusion on the List is conclusive proof that the First Nation is eligible to be a First Nation Class Member. If the First Nation is not on the List, the Administrator shall consult with the Settlement Implementation Committee before determining whether the First Nation is eligible to be a First Nation Class Member. The Administrator may request additional information or evidence before making the determination as to whether a First Nation is eligible to be a First Nation Class Member.

(b) *Individual Class Member Damages*

[52] Individual Class Members wishing to make a claim for retrospective compensation (including a claim for a specified injury) must submit a claims form. The claims form is simple and requires the following: identifying and contact information; what First Nations the claimant is a part of; dates of residence on reserves experiencing long-term drinking water advisories; representative information; declaration and consent; and details about a specified claim, if applicable.

[53] Section 17 of Schedule F of the Settlement outlines the Claim Process. Schedule F states that for those making a specified injuries claim, a claimant may submit some or all of the following to the Administrator in support of their claim:

a. Medical records of the injury and its cause;

b. Other records, including written records, photographs, and videos, of the injury and its cause;

c. A written statement; and

d. Oral testimony.

[54] Section 18 of Schedule F states, “the process of claiming compensation for Specified Injuries is intended to be non-traumatizing and section 17 of this Schedule F does not prevent a Claimant from establishing their eligibility for Specified Injuries Compensation on the basis of their Claims Form alone.” The burden of proof for establishing a specified injury is on the balance of probabilities.

[55] The claims process will commence within 60 days of settlement approval. The Administrator will promptly review each claims form, band council confirmation, and other relevant information to determine if the claimant is eligible and calculate the claimant’s entitlement. When the Administrator pays compensation to the claimant, the Administrator must also explain how the amount was calculated and that the claimant may appeal the Administrator’s decision to the Third-Party Assessor.

(c) *Third Party Assessor*

[56] When an individual or First Nation claimant wants to appeal a decision of the Administrator, the claimant must provide a written statement to the Administrator within sixty days of receiving the Administrator’s decision. That written statement must explain how the Administrator erred. The Administrator will forward the materials to the Third Party Assessor.

When considering an appeal, the Third-Party Assessor may consult the claimant, the Administrator, and the Settlement Implementation Committee. The Third-Party Assessor may also request further evidence to support the claim. The Third Party Assessor's decision is final and not subject to appeal or review.

(5) Counsel Fees

[57] Class Counsel's fees are severable from the rest of the Settlement and subject to a different Order and Reasons issued separately but concurrently by both Courts. In other words, the Courts can approve the Settlement separate from the approval of Class Counsel's fees. The Courts' refusal to approve Class Counsel's fees would have no effect on the implementation of the Settlement Agreement. Additionally, Class Counsel's fees were negotiated after the Settlement was reached and do not take money away from Class Members.

(6) Appeal Period

[58] Following the approval of the Settlement, a Class Member may appeal the Orders of the Courts within thirty days. Under Rule 334.31(2) of the *Rules* there is an additional thirty days for a Class Member to apply for leave to appeal to exercise the right of a Representative Plaintiff's right of appeal if no Representative Plaintiff commences an appeal within the first thirty days. This means that the earliest Implementation Date, as defined in the Settlement, is sixty days from the Courts' Orders. Thereafter, the Proposed Settlement Agreement will become binding on all Individual Class Members. The Proposed Settlement Agreement will become binding on First Nations as they formally accept its terms.

(7) Release

[59] Importantly, in exchange for everything discussed above and as set forth in the Settlement, Class Members agree to release Canada in respect of any liability for failing to provide, or fund the provision of safe drinking water on their reserves through the end of the Class Period.

III. Issue

[60] The sole issue on this motion is whether the Courts should approve the Settlement Agreement. Mindful of the governing law and legal test, that issue reduces to the following question: is the Settlement Agreement fair and reasonable and in the best interests of the Class?

[61] It should be noted that a separate set of reasons, also concurrently released by each Court, assesses the question of whether the Court should approve Class Counsel fees.

IV. Analysis

A. *Legal Framework*

[62] Rule 334.29 of the *Rules* and section 35(1) of *The Class Proceedings Act* state that class proceedings may only be settled with the approval of a judge. The relevant test for approving a settlement is whether the Settlement is "fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533 at para 16; *Toth v Canada*, 2019 FC 125 at para 37; *McLean v Canada*, 2019 FC 1075 at para 65 [*McLean*]; *Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988 at para 36 [*Tk'emlúps*]; *Gray v Great-West Lifeco Inc*, 2011 MBQB 13 at para 58). Recently, in *Tk'emlúps*, Justice McDonald summarized the appropriate approach that should inform a court's application of the governing legal test:

> [37] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo*, at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo*, at para 17; *Manuge v Canada*, 2013 FC 341 at para 5).
>
> [39] …as noted in *McLean* (para 68), the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[63] To reject a settlement, the Courts must conclude that the settlement does not fall within a zone or range of reasonable outcomes (*Dabbs v Sun Life Assurance Company of Canada* (1998), 40 OR (3d) 429 (Gen Div) at 440-44; *Haney Iron Works v Manufacturers Life Insurance Co* (1998), 169 DLR (4th) 565 (SC) at para 44). A zone of reasonable outcomes reflects the fact that "settlements rarely give all parties exactly what they want" and are a result of compromise (*Nunes v Air Transat AT Inc*, 2005 CanLII 21681 (ON SC) at para 7 [*Nunes*]; *McLean* at para 9).

[64] The Court should consider the following non-exhaustive factors when assessing if a settlement is fair and reasonable and in the best interests of the class (*Condon v Canada*, 2018 FC 522 at para 19; *McLean* at para 66; *Tk'emlúps* at para 38]:

> a. The likelihood of recovery or likelihood of success;
>
> b. The amount and nature of discovery, evidence or investigation;
>
> c. The terms and conditions of the Settlement;
>
> d. The number of objectors and nature of objections;
>
> e. The presence of arm's length bargaining and the absence of collusion;
>
> f. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

g. Communications with Class Members during litigation; and

h. The recommendation and experience of counsel.

[65] These factors are to be given varying weight depending on the circumstances (*McLean* at para 67). The respective factors are addressed below.

B. *Factors*

(1) Likelihood of recovery or likelihood of success

[66] The risks associated with litigating the Actions created a high degree of uncertainty, particularly at the beginning of the proceeding. Those risks included but were not limited to the novelty of the claims; delays due to appeals; possible defences raised by Canada; limitation periods; evidentiary issues associated with proving semi-historical wrongs; and the 2021 federal election. As a result, it is fair to say that the likelihood of success was uncertain. Additionally and always, there are significant and ongoing human costs associated with litigation. Separate from the inevitable frustrations and stresses attached to any Court process, the Courts cannot ignore that, as noted by Class Counsel, “every day without water compounds the harms Class Members experience.”

[67] If Class Counsel successfully established the first common issue, there would be significant evidentiary hurdles to establish that Canada breached their duties. Doing so would require proceeding on a First Nation by First Nation basis, incurring further delay and expense. Furthermore, Class Members would have to testify, which may be re-traumatizing.

[68] Novel claims pose a significant challenge for litigants (*Tk'emlúps* at para 41). At the time of filing, there was uncertainty in the law regarding the ability of collective entities to assert *Charter* claims. Furthermore, there remains uncertainty about the Courts' ability to compel the type of prospective relief contemplated in the Settlement. For example, the Representative Plaintiffs asked the Courts to compel government spending on a go-forward basis to ensure access to safe drinking water.

[69] As time went on, the Representative Plaintiffs' case became stronger and there were some assurances of success. For example, the first class-wide award of aggregate *Charter* damages was confirmed by the Court of Appeal for Ontario after the Actions were commenced (*Reddock v Canada (Attorney General)*, 2019 ONSC 3196; aff'd in *Brazeau v Canada (Attorney General)*, 2020 ONCA 184). However, the delays and scope of available remedies still loomed large. In that same Ontario Court of Appeal case, the Court reversed an order directing Canada to spend money on inmate mental health to correct ongoing *Charter* violations in its prisons. While this ruling may have posed significant challenges for the plaintiffs, it is well to note Justice Phelan's words in *McLean*. In the *McLean* settlement, there was prospective relief in the form of a 'Legacy Fund' to promote healing for Indian Day School survivors. Justice Phelan wrote, "[t]here is uncertainty that a court could order such a creation but, no doubt for another day, if Aboriginal issues and litigation are *sui generis*, remedies available might likewise be *sui generis*" *(McLean* at para 103*)*.

[70] Ultimately, in the present case, the Class did not shoulder the risk alone. The outcome was also uncertain for Canada. Canada was required to contemplate an outcome in which the

Courts may have settled the law in favour of the Plaintiffs (*McLean* at paras 94-95). Put simply, uncertainty in the law meant that both parties faced a real and present risk of failure.

[71] In the end, we are of the view that like *McLean*, this too is a "case which cries out for settlement" (*McLean* at para 79). The Settlement reduces risk and delay. It simplifies the compensation process, enhances access to justice, and most importantly, provides funding to fix the problem. It creates a degree of certainty that First Nations will be able to lift water advisories in the near future. That is an assurance that litigation could not promise.

(2) The amount and nature of discovery, evidence, or investigation

[72] Over the entire course of the Actions, Class Counsel consulted with fourteen experts including First Nation Elders and knowledge keepers, hydrologists, infectious disease experts, aquatic toxicologists, history professors, and more. The parties also jointly retained and instructed an actuary to determine the size and distribution of the Class. In addition to consulting with experts, the affidavit of John P. Brown explains that Class Counsel reviewed thousands of pages of publically available documentation from Canada and extensively researched relevant legal and factual issues, including causes of action and theories of damages.

[73] As stated above, prior to reaching the Settlement, the parties completed the record for a summary judgment motion. Class Counsel did not file their record but it apparently consisted of 2800 pages, 8 experts, and 24 witnesses. The parties exchanged the evidentiary records for summary judgment and were ready to begin cross-examinations. It was at this point, after both sides put in a high degree of investigation and the strength of the case became apparent, that

negotiations began to intensify. The parties reached the Settlement less than a month before the summary judgment motion was scheduled. The Courts agree with Class Counsel that by that time, a great deal of work had been undertaken to prepare this matter for judgment on the merits.

[74] The Courts are satisfied that Class Counsel put in great effort to gather relevant facts, assess liability and damages, and had a clear understanding of the strengths and weaknesses of the Actions.

(3) Terms and conditions of the Settlement

[75] These reasons have already provided an overview of the Settlement's important terms and provisions at paragraphs 35-59, above. In considering the governing test, it is the view of both Courts that some of the more significant features of the Settlement that "underpin its fairness" include:

- The relief contemplated is not just compensatory in nature – it looks forward to actually solving the root causes of drinking water advisories on reserves and is legally enforceable;
- The 6 billion dollars in prospective relief must adhere to a nine-year timeline, thus ensuring expedient resolution of those root causes;
- Compensation for Individual Class Members is relative to the duration of the advisory, type of advisory, and the remoteness of a First Nation. Factoring in remoteness acknowledges the increased cost of living in remote areas, including the price of bottled water, and that remote communities like Neskantaga have had to evacuate;
- With respect to Class Members claiming specified injuries:

° The paper based claims process is simple;

° The burden of proof is low;

° Claims are assessed through a harms grid;

° There is a presumption of truthfulness and good faith;

° All reasonable inferences must be drawn in favour of claimants; and

° There is a low likelihood of re-traumatization.

(See *McLean* at para 107; *Tk'emlúps* at para 49; *Riddle v Canada*, 2018 FC 641 at para 36).

- Specified injuries include mental health injuries;
- If the specified claims exceed 50 million dollars, the Settlement is structured in such a way that any trust surplus will go toward supplementing specified injuries;
- First Nation Class Members receiving an amount equal to 50% of the total damages paid to individual Class Members living on that reserve can use that money for *any* purpose;
- The ADR Process draws on the Indigenous legal traditions specific to and defined by the relevant First Nation;
- Canada is responsible for paying 100% of the reasonable costs of convening the ADR process and 50% of the reasonable costs of a First Nation's participation in that process;
- The Administrator is "experienced and renowned" (*McLean* at para 107);
- Legal fees are not payable from the settlement funds, meaning that Class Counsel is not taking money away from Class Members **(***Tk'emlúps* at para 51);

- Legal fees were negotiated after the Settlement was reached, ensuring that "the issue of legal fees did not inform or influence" the terms of the Settlement **(***Tk'emlúps* at para 51)
- The release is proportionate to the claims being resolved in this action. Class members retain their rights for several liability of third parties and claims arising after June 20, 2021.

[76] On balance, the benefits of the Settlement outweigh the concessions that the Class had to make. In their affidavits, the Representative Plaintiffs voiced disappointment that the base rate of compensation for Individual Class Members (ranging between 1300-2000 dollars for every year living under a water advisory) was too low. Additionally, the application of a limitations period significantly curtails the retrospective compensation that community members – particularly elders – will receive. In their Factum, Class Counsel noted that the application of the limitations period was particularly difficult in light of the Truth and Reconciliation Call to Action #26. However, those same affidavits recognized that the primary objective of the litigation was to ensure future generations' access to safe drinking water. They also state that no amount of money can compensate for the harms experienced while living under drinking water advisories. The Courts agree with the Representative Plaintiffs that these concessions are tough compromises. However, overall, the Settlement offers significant benefits for the Class and certainly falls within the zone of reasonableness.

(4) Future expense and likely duration of litigation

[77] Due to the novel claims advanced in the Actions, it is reasonable to expect that if this litigation did not settle, it would be long, involved, and expensive. The issues presented in this

case are likely questions of significant and general public importance to the country as a whole. It is not outside the realm of possibility that certain issues could be appealed to the Supreme Court of Canada, protracting litigation. Furthermore, if litigation ensued, evidence of individual communities would have to be collected and presented.

[78] Class Counsel pointed to the *Okanagan* action to support their position that if the Crown aggressively defended the Actions, litigation would be drawn out. That case advances similar claims but did not reach settlement. It has been ongoing for over 6 years. Likewise, the trial in *Tk'emlúps*, another recent mega-settlement involving Indigenous class members, was set down for 74 days (*Tk'emlúps* at para 52).

[79] The expected future expenses and likely duration of the litigation weigh in favour of approving the Settlement.

(5) Recommendations of neutral third parties

[80] For the purposes of settlement approval, the following experts submitted affidavits and reports:

a. Kerry Black, Assistant Professor and Canada Research Chair in the Department of Civil Engineering and the Centre of Environmental Research and Education at the University of Calgary;
b. Ian Halket, President of Halket Environmental Consultants Inc.;
c. Peter Gorham, President and Actuary of JDM Actuarial Expert Services Inc. and Fellow of Canadian Institute of Actuaries and the Society of Actuaries;

d. Jillian Campbell, toxicologist and senior project manager with over 15 years of experience in human health and ecological risk assessment, toxicology, and contaminated site investigation;
e. Gary Chaimowitz, Head of Service at the Forensic Psychiatry Program at St. Joseph's Healthcare Hamilton, a Professor of Psychiatry at McMaster University, and the President of the Canadian Academy of Psychiatry and the Law;
f. James Reynolds, historian and author on the relationship between the Crown and Indigenous Peoples in Canada;
g. Adele Perry, Distinguished Professor of History and the Director of the Centre for Human Rights Research at the University of Manitoba; and
h. Brittany Luby, Assistant Professor of History in the College of Arts at the University of Guelph.

[81] Some of these reports did not offer opinions about the Settlement Agreement itself. Rather, they provided valuable information describing the history, causes, and current state of drinking water advisories on First Nation reserves.

[82] Jillian Campbell's affidavit, however, confirmed that Article 8, section 8.02 and Schedule H of the Settlement Agreement adequately incorporates the types of injuries that result from drinking contaminated or untreated water, the symptoms of those injuries, and the likely effect on Class Members if they suffered those injuries. Gary Chaimowitz similarly confirmed in his affidavit that the 'Mental Health' row in Schedule H and Appendix H-1 to the Settlement

accurately identifies the types of mental health injuries Class Members may have suffered and the primary symptoms of those injuries.

[83] Further, Kerry Black submitted an affidavit dated November 21, 2021 expressing her support for settlement approval. For over a decade, Dr. Black has worked with Indigenous groups to understand their water infrastructure needs. In her opinion, the Settlement adequately addresses the objectives of First Nations.

[84] After canvassing some of the key provisions of the Settlement, Dr. Black stated that in her opinion, the Settlement will "address the water crisis in Canada in an historic, comprehensive and meaningful way." Further, it will "have an immeasurable and in many cases life-changing impact on the lives of First Nations members and their communities across Canada." In particular, Dr. Black confirmed that the minimum spend of 6 billion dollars over the next nine years in prospective relief is a reasonable amount to remedy water systems on First Nations. Furthermore, she noted the significance of including private water systems in the Commitment because Canada has historically excluded the cost of that type of infrastructure when providing funding to First Nations. Finally, she notes that it is significant that Canada has committed to funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on reserves for First Nations because Canada has chronically underfunded these aspects of water infrastructure for decades.

[85] In our opinion, these objective third-party opinions reinforce the fairness of the Settlement.

(6) Number of objectors and nature of objections

[86] Eric Khan, the Director of CA2 Inc., swore an affidavit on December 6, 2021 that CA2 Inc. had not received any opt-out coupons or notices of objections. At the Settlement Approval Hearing, throughout the day, potential Class Members had the opportunity voice their objections but no one came forward.

[87] While there were no formal objections raised, Class Counsel submitted correspondence and newspaper articles to alert the Courts to potential criticisms of the Settlement. In that regard, Class Counsel submitted a letter dated November 23, 2021 from counsel of a First Nation that intended to object to the Settlement. That letter expressed two concerns: (a) the Settlement relies on Canada's list of drinking water advisories and (b) the Settlement excludes First Nations with short-term drinking water advisories. After speaking with Class Counsel about these concerns, the First Nation withdrew their objection. Similarly, another lawyer voiced his concerns to the media. Those concerns related to (a) uncertainty about who is included in the Class; (b) the exclusion of First Nations with short-term drinking water advisories; and (c) ambiguity about what advisories are counted and what authorities get to declare those advisories.

[88] At the Settlement Approval hearing on December 7, 2021, Class Counsel addressed each of these criticisms.

[89] First, it is untrue that the Settlement only relies on Canada's records to determine what First Nations have been subject to a drinking water advisory. Sections 10-12 of Schedule F of the Settlement state that if a Class Member makes a claim and their First Nation is not included on

the existing List of Eligible First Nations, the Settlement Implementation Committee shall determine if that First Nation should be added to the List and may request further information or evidence before making their decision. Class Counsel explained that the intent of this provision to ensure inclusivity and that the List is, in fact, subject to change.

[90] Second, Class Counsel acknowledged that there is a prevalence of short-term drinking water advisories on First Nations, some of which have occurred on and off for long periods of time. With that said, however, it need also be acknowledged that in class proceedings, class members must suffer a common harm. When determining that commonality, Class Counsel's opinion was that long-term advisories were more clearly linked to government underfunding that resulted in an infrastructure gap. This class proceeding does not affect the ability of First Nations experiencing short-term drinking water advisories to commence their own actions.

[91] Finally, with respect to the criticisms voiced in the media, Article 1, Section 1.01 of the Settlement Agreement clearly defines who is included in the Class (see also paragraph 37, above) and who constitutes "Excluded Persons." These definitions were also included in the Short and Long Form Notices. Additionally, the same section defines an "Advisory Body" as "provincial, territorial, regional, municipal, or First Nation government or governmental authority, chief, band council, health authority, or any executive, judicial, regulatory or administrative body or similar body or its delegate, in each case that issues Drinking Water Advisories." Any of these bodies may issue any one of the three types of drinking water advisories that may bring a First Nation or Individual Class Member into the Settlement

Agreement. Again, this definition is intended to foster inclusion and ensure that First Nations are not dependent on government definitions or data in order to benefit from the Settlement.

[92] It should also be noted that the law firm representing the "Excluded Persons" in the Settlement inquired with Class Counsel about how the Settlement will affect their clients and whether the 6 billion dollars in prospective relief will apply to all First Nations or only those who opt in to the Settlement. Class Counsel replied indicating that the Settlement does not apply to the "Excluded Persons" and that as a result, they are free to continue pursuing their own actions related to drinking water.

[93] In airing all of the concerns noted above, Class Counsel fulfilled its obligation to provide the Courts with full and frank disclosure relevant to the settlement approval. In our view, in the absence of any formal objections, the support of the Representative Plaintiffs and other Class Members need be seen as unchallenged. Numerous affidavits included in the Motion Record expressed support for the Settlement, including community members of Curve Lake, Neskantaga, and Tataskweyak. The Representative Plaintiffs all expressed their support for the Settlement and unanimously voiced their opinion that the Settlement Agreement achieves their litigation objectives.

(7) Presence of arm's length bargaining, absence of collusion, and the positions taken by the parties during negotiation

[94] It is appropriate to address these factors together because in this case, the positions taken by the parties during the negotiation demonstrate the presence of arm's length bargaining and absence of collusion.

[95] Class Counsel's strategy in this proceeding was to pursue a "two track approach" where they aggressively pursued litigation and negotiation simultaneously. In our opinion, this approach demonstrates that the proceeding was always adversarial in nature and that Class Counsel's primary goal was to advance the Class' interests. Clearly, such a historic Settlement would be impossible without cooperation on both sides. Although the parties cooperated wherever possible, both parties were prepared to proceed to litigation. The parties consented to an expedited litigation timeline and the Representative Plaintiffs aggressively advanced motions for summary judgment.

[96] It is also significant to note that negotiations lasted for just under a year. In our view, this timeline evidences what John P. Brown referred to as "hard bargaining sessions" where counsel advanced their respective clients' positions. Indeed, the affidavit of Chief Whetung stated that at times, negotiations broke down and she felt ready to "walk away" and push forward with litigation.

[97] We have no concerns that the Settlement Agreement was anything other than the result of good strategy, dedication, and compromise. We are satisfied that the parties always engaged in good faith negotiations and that there has been no collusion in reaching the Settlement. We note that there is a strong presumption of fairness when a proposed settlement was negotiated at arm's-length by Class Counsel (*Nunes* at para 7).

(8) Communication with Class Members

[98] In advance of the summary judgment motions, Class Counsel reached out to various First Nations to have them opt-in in support of the Actions. Clearly, these efforts were effective as more than 120 First Nations joined the Representative Plaintiffs in seeking judgment. Furthermore, Class Counsel created a dedicated webpage to provide Class Members with access to information and documents related to the Actions. The webpages included a case description, new developments, news releases and reports, case documents, FAQs, and contact details. They also promoted the Actions to the media as a way of communicating with Class Members.

[99] Similarly, throughout settlement negotiations, Class Counsel stayed in close contact with the Representative Plaintiffs and Class Members. The affidavit of Christopher Moonias confirms that Class Counsel worked closely with the Representative Plaintiffs, who, in turn, consulted with their respective band councils and/or community members regarding the Agreement in Principle and the Settlement Agreement. Likewise, Class Counsel engaged directly with Class Members by visiting communities, answering Class Members' questions, listening to their stories, and "socializing" the Agreement.

[100] The Courts approved the Settlement Notice Plan on October 8, 2021. CA2 Inc. published the Short Form Notice in fifteen daily newspapers and The First Nation Drum. Similarly, on or about October 16, 2021 CA2 Inc. distributed legal notices of settlement approval to Curve Lake, Neskantaga, Tataskweyak, the Assembly of First Nations, and 713 Chiefs and Band Offices that have been affected by drinking water advisories. Finally, the October 8, 2021 Order required CA2 Inc. to set up a toll-free support line to answer Class Members' questions and to provide the

Short and Long Form Notice to any member that requested it. These materials were provided in both English and French.

[101] Statements of support and objection can indicate that Class Counsel sufficiently communicated with the Class (*McLean* at para 116). While no objections were made at the Settlement Approval Hearing, the Motion Record demonstrates that various First Nations and/or their legal counsel reached out to Class Counsel to ask questions about the Settlement. Additionally, it is clear that Representative Plaintiffs and Class Counsel spoke with other First Nations and Indigenous governance organizations. We are satisfied that in this circumstance the absence of objections indicates that potential Class Members understand and support the Agreement. It is also telling that 18 Class Members submitted affidavits indicating their support for the Agreement.

[102] Overall, we are satisfied that Class Counsel provided a "robust, clear and accessible" notice of the Settlement to potential Class Members (*Tk'emlúps* at para 72).

(9) Recommendations and experience of counsel

[103] Both Class Counsel and counsel for the Defendant recommend settling. In Class Counsel's view, continued negotiation would not have led to a better result for the Class, particularly with respect to retrospective compensation. Further, Class Counsel stated that compensation was within the range expected on judgment, without the uncertainty of outcome or delay. Class Counsel similarly felt that litigation would not have achieved a better result for the

Class. As already discussed, it is uncertain whether courts would be able to order the same type of prospective relief reached in the Settlement Agreement.

[104] Overall, Class Counsel felt that the Settlement addressed the Representative Plaintiffs' litigation objectives (*Tk'emlúps* at para 73). Indeed, the affidavits of the Representative Plaintiffs confirmed as much, placing particular emphasis on the prospective relief guaranteed in the Settlement.

[105] Class Counsel states that its recommendation is based on its experience in class actions, Indigenous rights, and Aboriginal law. McCarthy Tétrault is recognized nationally as having one of Canada's leading and largest class actions team. McCarthy Tétrault also enlisted the assistance of lawyers at their firm who specialize in contract drafting, tax, trusts, and estate law matters. OKT is Canada's largest law firm specializing in Aboriginal law and Indigenous rights. It serves northern and Indigenous clients in every territory and most provinces in Canada. Class Counsel also collaborated with First Peoples Law and Erickson's LLP. Both firms have close connections with various First Nation communities.

[106] Notably, members of Class Counsel at both firms included Indigenous lawyers and students at law. In our view, these team members, in addition to their professional expertise, provide valuable lived experience that uniquely enables them to understand the needs and objectives of Class Members.

[107] For all the reasons already discussed, the record demonstrates that Class Counsel has been alert and alive to the needs of the Class and the risk reward-balance unique to this proceeding. The simplified claims process, which has a low burden of proof in an effort to avoid re-traumatization, demonstrates that Class Counsel has applied the lessons from past class actions involving Indigenous Class Members. Overall, the large, diverse, and competent team constructed by Class Counsel demonstrates a commitment to carry out the Settlement in a good way using the necessary infrastructure and personnel to do so (*McLean* at para 113).

V. Conclusion

[108] For decades, members of First Nations have endured harm while living under drinking water advisories. Canada's failure to provide safe drinking water has resulted in deep frustration and relationships being tainted by mistrust. We share Chief Whetung's hope that the Settlement will result in Indigenous communities being able "to turn their taps on just like non-Indigenous communities in Canada and drink and bathe in the water without fear for our health." It is also our hope that this Settlement symbolizes a step down the long trail towards healing the relationship between Canada and First Nations.

[109] The Courts agree that the Settlement is fair and reasonable and in the best interests of the Class as a whole. In the form of the attached Order, the Courts approve the Settlement Agreement and order that the Actions against the Defendant be discontinued.

[110] The Courts retain jurisdiction over this case and specifically, over the Order and Settlement. The Order specifies the retention of jurisdiction and it may be amended as circumstances dictate.

ORDER in T-1673-19

Without any admission of wrongdoing or liability by the Defendant, which denies any wrongdoing and disclaims any liability to the Class, this Court orders:

1. That the Parties' settlement agreement dated September 15, 2021, including the first addendum dated October 8, 2021 (together, the "Proposed Settlement Agreement"), is fair, reasonable, and in the best interests of the Class.

2. That the Proposed Settlement Agreement, attached hereto as Appendix "1" in English and Appendix "2" in French, is approved and its terms shall be given effect.

3. That the Defendant shall pay the funds set out in the Proposed Settlement Agreement, and that said funds be distributed in accordance with the Proposed Settlement Agreement.

4. That Class Members, as defined in the Proposed Settlement Agreement, be notified of the approval of the Proposed Settlement Agreement substantially as set out in Schedule M and N of the Proposed Settlement Agreement, and in accordance with the Notice Plan attached hereto as Appendix "3", with such modifications as the Parties may agree, and with the Defendant to pay the cost.

5. That, without affecting the finality of this Order or the dismissal of these Actions, the Court retains continuing jurisdiction as set out in the Proposed Settlement Agreement to interpret, supervise, construe, and enforce the Proposed Settlement Agreement, as applicable, for the mutual benefit of the Parties.

6. That the within Action be discontinued on a without costs basis.

"Paul Favel"

Judge

APPENDIX 1

PROPOSED SETTLEMENT AGREEMENT

Manitoba Court of Queen's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

SETTLEMENT AGREEMENT

THE QUEEN'S BENCH, Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE, on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under *The Class Proceedings Act*, CCSM. c. C. 130

- and -

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under Part 5.1 of the *Federal Court Rules*, SOR/98-106

SETTLEMENT AGREEMENT

THIS AGREEMENT is made as of September 15, 2021

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE, on their own behalf and on behalf of all INDIVIDUAL CLASS MEMBERS (as defined herein)

(together, the "**Manitoba Action Plaintiffs**")

AND:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG, on their own behalf and on behalf of all INDIVIDUAL CLASS MEMBERS (as defined herein)

(together, the "**Curve Lake First Nation Plaintiffs**")

AND:

NESKANTAGA FIRST NATION and CHIEF WAYNE MOONIAS and FORMER CHIEF CHRISTOPHER MOONIAS, each on his own behalf and on behalf of all INDIVIDUAL CLASS MEMBERS (as defined herein)

(together, the "**Neskantaga First Nation Plaintiffs**", and collectively with the Curve Lake First Nation Plaintiffs, the "**Federal Action Plaintiffs**")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

("**Canada**")

WHEREAS:

A. The Federal Action Plaintiffs commenced the action styled as *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, Court File No. T-1673-19 in the Federal Court on October 11, 2019 (the "**Federal Action**");

B. The Manitoba Action Plaintiffs commenced the action styled *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, Court File No. CI-19-01-24661 in the Manitoba Court of Queen's Bench on November 20, 2019 (the "**Manitoba Action**", and together with the Federal Action, the "**Actions**");

C. The Manitoba Court of Queen's Bench certified the Manitoba Action as a class proceeding on July 14, 2020, and the Federal Court certified the Federal Action as a class proceeding on October 8, 2020;

D. The "**Class**" in each of the Actions is as follows:

(a) all persons, other than Excluded Persons, who:

(i) are members of a First Nation;

(ii) had not died before November 20, 2017; and

(iii) during the Class Period ordinarily resided in an Impacted First Nation for at least one year while it was subject to a Long-Term Drinking Water Advisory; and

(b) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other First Nation that gives notice of Acceptance in accordance with the terms of this Agreement;

E. Notice of the certification of the Actions was given in the form approved by the Courts and in the manner directed by the Courts. Individual Class Members were given the opportunity to Opt Out of the Class for a period of one hundred and twenty (120) days following the first publication of notice of certification (the "**Opt-Out Period**");

F. The Opt-Out Period expired March 29, 2021. None of the Individual Class Members Opted Out of the Actions;

G. The Class has suffered considerable hardships as a result of being deprived of safe drinking water and such hardships have seriously harmed both individuals and their communities;

H. Canada acknowledges the hardships faced by Class Members and wishes to support Class Members in securing regular access to safe drinking water;

I. Class Counsel and Canada concluded an agreement in principle dated June 20, 2021, which set out in principle the terms on which Canada was prepared to settle the Actions, and which Class Counsel would recommend to the Manitoba Action Plaintiffs and the Federal Action Plaintiffs (together, the "**Representative Plaintiffs**");

J. Chief Wayne Moonias has succeeded Christopher Moonias as Chief of Neskantaga First Nation and will seek leave of the Federal Court to replace him as a Representative Plaintiff;

K. The Representative Plaintiffs and Canada concluded an agreement in principle dated July 29, 2021 which set out the principal terms of their agreement to settle the Actions, and which forms the basis for this Agreement;

L. In drafting this Agreement, the Parties:

(a) intend there to be a fair, comprehensive and lasting settlement of claims related to Class Members' deprivation of safe drinking water and their hardships resulting therefrom;

(b) desire the implementation of concrete measures to prevent a recurrence of the harms suffered by Class Members;

(c) acknowledge the importance of providing First Nations with funding for projects related to water and wastewater, economic development, and cultural activities, and respect the autonomy of First Nations to choose the use to which such funds are directed;

(d) desire to promote healing, education, commemoration, and reconciliation; and

(e) intend to include Modern Treaty First Nations, as applicable, but recognize the uniqueness of each Modern Treaty First Nation, its lands, peoples, and relationship with Canada, and therefore agree that the specific details of the participation of any Modern Treaty First Nation will be developed in consultation with the Parties and the applicable Modern Treaty First Nation.

NOW THEREFORE, in consideration of the mutual agreements, covenants, and undertakings set out herein, the Parties agree as follows:

ARTICLE 1 – INTERPRETATION

1.01 **Definitions**

In this Agreement, the following definitions apply:

"**Acceptance**" means acceptance of this Agreement by a First Nation Class Member:

(a) pursuant to a Band Council Acceptance Resolution that is provided to the Administrator; or

(b) otherwise in accordance with the Settlement Approval Orders;

"**Acceptance Deadline**" means the date two hundred and seventy (270) days after the Implementation Date or such other date as the Parties may agree;

"**Action Plan**" means Indigenous Services Canada's Long-Term Drinking Water Advisory Action Plan detailing corrective measures to be undertaken by Canada to end Long-Term Drinking Water Advisories, attached as Schedule J, as it may be amended from time to time to reflect the addition of new commitments or the completion of existing commitments;

"**Actions**" has the meaning set out in the Recitals, and "**Action**" means either of them;

"**Administrator**" means the administrator appointed by the Courts and its successors appointed from time to time pursuant to the provisions of Section 3.01;

"**Advisory Body**" means a federal, provincial, territorial, regional, municipal, or First Nation government or governmental authority, chief, band council, health authority, or any executive,

judicial, regulatory or administrative body or similar body or its delegate, in each case that issues Drinking Water Advisories;

"**Advisory Year**" has the meaning set out in Section 8.01(1);

"**Aggregate Specified Injuries Compensation Amount**" has the meaning set out in Section 8.02(4);

"**Agreement**" means this Settlement Agreement, including the Schedules attached hereto;

"**Agreement in Principle**" means the Agreement in Principle dated July 29, 2021, attached hereto as Schedule A;

"**Auditors**" means the auditors appointed by the Courts and their successors appointed from time to time pursuant to the provisions of Section 17.01;

"**Band Classification Manual**" means the 2005 Band Classification Manual published by the Corporate Information Management Directorate Information Management Branch of Indigenous and Northern Affairs Canada;

"**Band Council Acceptance Resolution**" means a band council resolution of a First Nation Class Member confirming Acceptance, substantially in the form set out in Schedule D, or another form acceptable to Canada and Class Counsel;

"**Band Council Confirmation**" means an optional declaration by a First Nation Class Member that identifies Individual Class Members and the dates during the Class Period that they were Ordinarily Resident on a Reserve of such First Nation Class Member while a Long-Term Drinking Water Advisory was in effect on that Reserve, substantially in the form set out in Schedule E or another form acceptable to Canada and Class Counsel, and is provided to the Administrator;

"**Base Payment**" has the meaning set out in Section 8.03(1)(a);

"**Boil Water Advisory**" means a notification issued by an Advisory Body to warn the public that they should bring their tap water to a rolling boil before they drink the water or use the water for other purposes such as to cook, feed pets, brush their teeth, and similar activities, and that tap water should not be used to bathe those who need help, such as infants, toddlers and the elderly, who should instead be given sponge baths, or some similar advisory;

"**Business Day**" means a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the province or territory in which the person who needs to take action pursuant to this Agreement is ordinarily resident or a holiday under the federal laws of Canada applicable in the said province or territory;

"**Canada**" has the meaning set out in the preamble;

"**Claim**" means a claim for compensation made by (a) an Individual Class Member, or by an Estate Executor, Estate Claimant or Personal Representative on behalf of an Individual Class Member or their estate, by submitting a Claims Form to the Administrator in accordance with this Agreement, or (b) a band council on behalf of an Individual Class Member, by identifying that Individual Class Member in a Band Council Confirmation;

"**Claimant**" means (a) a person who makes a Claim by completing and submitting a Claims Form to the Administrator, or on whose behalf a Claim is made by such Class Member's Estate Executive, Estate Claimant or Personal Representative, or (b) a person identified as an Individual Class Member in a Band Council Confirmation;

"**Claims Deadline**" means the date that is one (1) year following the Implementation Date or such other date as the Parties agree and the Courts approve, and any reference to the Claims Deadline includes any extension thereto;

"**Claims Form**" means a simplified written declaration in respect of a Claim by an Individual Class Member, in the form attached hereto as Schedule I, or such other form as may be recommended by the Administrator and agreed by the Parties, without supporting documentation except as agreed upon by the Parties;

"**Claims Process**" means the process outlined in this Agreement, including in Schedule F and related forms, or such other process as may be recommended by the Administrator and agreed by the Parties, for the determination of Class membership, submission of Claims, and assessment, determination and payment of compensation to Class Members;

"**Class**" has the meaning set out in the Recitals;

"**Class Counsel**" means, together, McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP;

"**Class Member**" means an Individual Class Member or a First Nation Class Member, as applicable, and "**Class Members**" means all of them, collectively;

"**Class Period**" means the period from and including November 20, 1995, to June 20, 2021;

"**Commitment**" has the meaning set out in Section 9.02(1);

"**Commitment Dispute Resolution Process**" has the meaning set out in Section 9.07;

"**Commitment Expenditures**" has the meaning set out in Section 9.02(2);

"**Confirmed Individual Class Member**" has the meaning set out in Section 7.02(5);

"**Constitution Act, 1982**" means the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11;

"**Courts**" means, collectively, the Federal Court and the Manitoba Court of Queen's Bench;

"**Curve Lake First Nation Plaintiffs**" has the meaning set out in the preamble to this Agreement;

"**Deceased Individual Class Member**" has the meaning set out in Section 13.01(1);

"**Dispute**" has the meaning set out in Section 19.01(1);

"**Do Not Consume Advisory**" means a notification issued by an Advisory Body to warn the public that they should not use their tap water to cook, drink, feed pets, brush their teeth, and/or similar activities, and that tap water should not be used to bathe those who need help, such as

infants, toddlers and the elderly, who should instead be given sponge baths, or some similar advisory;

"**Do Not Use Advisory**" means a notification issued by an Advisory Body to warn the public that they should not use their tap water for any reason, or some similar advisory;

"**Drinking Water Advisory**" means a Boil Water Advisory, Do Not Consume Advisory, Do Not Use Advisory, or similar advisory with respect to the use of drinking water;

"**Eligibility Decision**" has the meaning set out in Section 7.02(1);

"**Eligible Class Member Address Search Plan**" means the Eligible Class Member Address Search Plan attached hereto as Schedule Q;

"**Estate Claimant**" has the meaning set out in Section 13.02(1);

"**Estate Executor**" means the executor, administrator, trustee or liquidator of a deceased Individual Class Member's estate;

"**Estate Representation Claim**" has the meaning set out in Section 13.02(1);

"**Excluded Person**" is any member of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band, and Michael Darryl Isnardy;

"**Federal Action**" has the meaning set out in the Recitals;

"**Federal Action Plaintiffs**" has the meaning set out in the preamble to this Agreement;

"**Federal Certification Order**" means the order of the Federal Court dated October 8, 2020, certifying the Federal Action as a class proceeding, a copy of which is attached at Schedule B;

"**Financial Administration Act**" means the *Financial Administration Act*, R.S.C., 1985, c. F-11;

"**First Nation**" means a band, as defined in subsection 2(1) of the Indian Act, the disposition of whose lands is subject to that Act or the First Nations Land Management Act, or a Modern Treaty First Nation;

"**First Nation Class Member**" means an Impacted First Nation that provides the Administrator with notice of Acceptance in accordance with this Agreement;

"**First Nation Damages**" has the meaning set out in Section 8.03(1)(b);

"**First Nation Water and Wastewater Systems**" means water and wastewater systems on Reserves;

"**First Nations Advisory Committee on Safe Drinking Water**" or "**FNAC**" has the meaning set out in Section 9.04(1);

"**First Nations Economic and Cultural Restoration Fund**" has the meaning set out in Section 6.01(2);

"**First Nations Land Management Act**" means the *First Nations Land Management Act*, S.C. 1999, c. 24;

"**First Nations Lands**" means lands of a First Nation, the disposition of which is subject to the Indian Act, the First Nations Land Management Act or a Modern Treaty;

"**Fund**" has the meaning set out in Section 16.02(a);

"**Funds Held in Trust for Ongoing Fees**" has the meaning set out in Section 18.02(1);

"**Impacted First Nations**" means First Nations whose First Nations Lands were subject to a Drinking Water Advisory that lasted at least one year between November 20, 1995 and June 20, 2021;

"**Implementation Date**" means the later of:

(a) the day following the last day on which a Class Member may appeal or seek leave to appeal the Settlement Approval Orders; and

(b) the date on which the last of any appeals of the Settlement Approval Orders is finally determined;

"**Income Tax Act**" means the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp);

"**Indian Act**" means the *Indian Act*, R.S.C. 1985, c. I-5;

"**Individual Class Member**" means a natural person who is a member of the Class and has not Opted Out of the Actions, and "**Individual Class Members**" means all such persons collectively;

"**Individual Damages**" has the meaning set out in Section 8.01(2);

"**Individual Damages Formula**" has the meaning set out in Section 8.01(2);

"**Joint Committee**" means a committee of three (3) persons appointed by the Courts in accordance with Section 15.01 and composed of one (1) Class Counsel representative from Olthuis Kleer Townshend LLP and two (2) Class Counsel representatives from McCarthy Tétrault LLP;

"**Late Claims Period**" has the meaning set out in Section 4.03(3)(c);

"**Late Opt-Out**" means the right to Opt Out in accordance with Section 12.02;

"**Long-Term Drinking Water Advisory**" means a Drinking Water Advisory for a Reserve or a part of a Reserve that lasted at least one (1) year;

"**Manitoba Action**" has the meaning set out in the Recitals;

"**Manitoba Action Plaintiffs**" has the meaning set out in the preamble to this Agreement;

"**Manitoba Certification Order**" means the order of the Manitoba Court of Queen's Bench dated July 14, 2020, certifying the Manitoba Action as a class proceeding, a copy of which is attached at Schedule C;

"**Member**" has the meaning set out in Section 14.01(1);

"**Missing Eligible Class Member**" has the meaning set out in Schedule Q;

"**Modern Treaty**" means a land claims agreement within the meaning of section 35 of the Constitution Act, 1982, entered into on or after January 1, 1973;

"**Modern Treaty First Nations**" means aboriginal peoples of Canada, other than the Inuit or Métis aboriginal peoples of Canada, with a Modern Treaty;

"**Neskantaga First Nation Plaintiffs**" has the meaning set out in the preamble to this Agreement;

"**Non-Remote First Nation**" means every Reserve that is not a Remote First Nation;

"**Notice Plan**" means the Notice Plan substantially in the form attached as Schedule L or as otherwise recommended by the Administrator and agreed by the Parties;

"**Ongoing Fees**" has the meaning set out in Section 18.02(1);

"**Opt Out**" means (a) the delivery by an Individual Class Member to CA2 Inc., being the administrator for notice of certification and notice of settlement, of an opt-out coupon or a written request to be removed from the Actions within the Opt-Out Period; (b) after the Opt-Out Period, an Individual Class Member obtaining leave of the Courts to opt out of the Actions; or (c) a Late Opt-Out, any of which has the effect of excluding an Individual Class Member from the Actions, and "**Opted Out**" has a corresponding meaning;

"**Opt-Out Period**" has the meaning set out in the Recitals and such period expired on March 29, 2021;

"**Ordinarily Resident**" has the meaning set out in Section 8.01(1);

"**Parties**" means:

(a) prior to the Implementation Date, the Manitoba Action Plaintiffs and the Federal Action Plaintiffs, on behalf of the Class, and Canada; and

(b) after the Implementation Date, the Class Members, as represented by the Joint Committee, and Canada;

"**Person Under Disability**" means:

(a) a minor as defined by the legislation of that individual's province or territory of residence; or

(b) an individual who is unable to manage or make reasonable judgments or decisions in respect of their affairs by reason of mental incapacity and for whom

a Personal Representative has been appointed pursuant to the applicable provincial or federal legislation;

"**Personal Representative**" means the Person appointed pursuant to the applicable provincial or federal legislation to manage or make reasonable judgments or decisions in respect of the affairs of a Person Under Disability and includes an administrator for property;

"**Recitals**" means the recitals to this Agreement;

"**Releasees**" has the meaning set out in Section 10.03(1);

"**Releasors**" has the meaning set out in Section 10.03(1);

"**Remediation Plan**" has the meaning set out in Section 9.06(4);

"**Remote First Nation**" means every Reserve that is classified as Zone 3 or 4 in the Band Classification Manual, being Reserves deemed either "Remote" or "Isolated and require Special Access", respectively, or if a Reserve is not classified in the Band Classification Manual, it is either (i) more than 350 kilometers from the nearest service centre with year round road access; or (ii) without year round road access to a service centre;

"**Replacement Legislation**" has the meaning set out in Section 9.03(1)(b);

"**Representative Plaintiffs**" has the meaning set out in the Recitals;

"**Reserve**" means a discrete tract of First Nations Lands that has been set apart by Her Majesty the Queen in Right of Canada for the use and benefit of one or more First Nations, or an analogous discrete tract of land that is subject to a Modern Treaty;

"**Restoration Fund Account**" has the meaning set out in Section 6.01(1);

"**Safe Drinking Water Trust**" has the meaning set out in in Section 16.01;

"**Schedule I Canadian Bank**" means a Canadian chartered bank listed on Schedule I to the *Bank Act*, S.C. 1991, c. 46;

"***SDWFNA***" has the meaning set out in Section 9.03(1)(a);

"**Settlement Approval Hearing**" means a joint hearing of the Courts to determine a motion to approve this Agreement and Class Counsel's fees;

"**Settlement Approval Orders**" means the orders of the Courts approving this Agreement, substantially in the form set out in Schedule O;

"**Settlement Implementation Committee**" or "**Settlement Implementation Committee and its Members**" means the committee established pursuant to Section 14.01 and the persons who are appointed as members thereof, being two (2) representatives of the Joint Committee, two (2) representatives of Canada, and two (2) representatives of the FNAC;

"**Source Water**" means untreated water from surface water sources such as lakes, ponds, or rivers;

"**Specified Injuries**" has the meaning set out in Section 8.02(1);

"**Specified Injuries Compensation**" has the meaning set out in Section 8.02(2);

"**Specified Injuries Compensation Account**" has the meaning set out in Section 5.01(1);

"**Specified Injuries Compensation Fund**" has the meaning set out in Section 5.01(2);

"**Specified Injuries Compensation Grid**" means the Specified Injuries Compensation Grid set out in Schedule H attached hereto, or such other Specified Injuries Compensation Grid as the Courts may approve;

"**Specified Injuries Decision**" has the meaning set out in Section 7.02(1);

"**Third-Party Assessor**" means the person or persons appointed by the Courts to carry out the duties of the Third-Party Assessor as specified in this Agreement and in the Claims Process and their successors appointed from time to time pursuant to the provisions of Section 3.03;

"**Trust Account**" has the meaning set out in in Section 4.01(1);

"**Trust Fund**" has the meaning set out in in Section 4.01(2);

"**Trust Fund Surplus**" has the meaning set out in Section 4.03(1);

"**Trustee**" means the trustee appointed by the Courts for the purposes of this Agreement;

"**Ultimate Claims Deadline**" has the meaning set out in Section 13.02(1);

"**Underserviced First Nation**" has the meaning set out in in Section 9.06(1); and

"**Water Governance Fund**" has the meaning set out in in Section 9.05(1).

1.02 **Headings**

The division of this Agreement into paragraphs and the use of headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement.

1.03 **Extended Meanings**

In this Agreement, words importing the singular number include the plural and *vice versa*, words importing any gender or no gender include all genders and words importing persons include First Nations. The term "including" means "including without limiting the generality of the foregoing". Any reference to a government ministry, department or position shall include any successor government ministry, department or position.

1.04 **Interpretation**

The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that there shall be no presumptive rule of construction to the effect that any ambiguity in this Agreement is to be resolved in favour of any particular Party.

1.05 **Statutory References**

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as enacted on the date of such reference and not as the statute may from time to time be amended, re-enacted, or replaced, and the same applies to any regulations made thereunder.

1.06 **Day For Any Action**

Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

1.07 **Currency**

All references to currency herein are to lawful money of Canada.

1.08 **Compensation Inclusive**

The amounts payable to Class Members under this Agreement are inclusive of any prejudgment or post-judgment interest.

1.09 **Schedules**

The following Schedules to this Agreement are incorporated into and form part of this Agreement:

Schedule A	Agreement in Principle
Schedule B	Federal Certification Order
Schedule C	Manitoba Certification Order
Schedule D	Form of Band Council Acceptance Resolution
Schedule E	Form of Band Council Confirmation
Schedule F	Claims Process
Schedule G	Individual Damages Compensation Grid
Schedule H	Specified Injuries Compensation Grid
Schedule I	Claims Form
Schedule J	Indigenous Services Canada's Long-Term Drinking Water Advisory Action Plan
Schedule K	Commitment Dispute Resolution Process (and Appendix)
Schedule L	Notice Plan

Schedule M	Notice of Settlement Approval Hearing (Long and Short Forms)
Schedule N	Notice of Settlement Agreement Approval (Long and Short Forms)
Schedule O	Form of Federal Court Approval Order and Manitoba Court Approval Order
Schedule P	Form of Band Council Acceptance Resolution Approving Private Water Systems on Reserve
Schedule Q	Eligible Class Member Address Search Plan

1.10 No Effect on Treaties or Existing Agreements

Nothing in this Agreement shall cancel or supersede any treaty between Canada and any one or more Class Members, or any existing agreement between Canada and any one or more Class Members with respect to First Nation Water and Wastewater Systems, Long-Term Drinking Water Advisories, or similar matters, save and except for the Agreement in Principle, which this Agreement shall supersede.

1.11 No Derogation from Constitutional Rights

This Agreement is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them.

1.12 Benefit of the Agreement

This Agreement will inure to the benefit of and be binding upon the Parties, and for Canada and First Nation Class Members, upon their respective successors, and for Individual Class Members, upon their estates, heirs, Estate Executors, Estate Claimants, and Personal Representatives.

1.13 Applicable Law

This Agreement will be governed by the laws of Canada together with the laws of Manitoba, as applicable, or alternatively, at the election of a Class Member, the laws of Canada together with the laws of the province or territory where the Class Member is ordinarily resident, as applicable.

1.14 Counterparts

This Agreement may be executed electronically and in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

1.15 **Official Languages**

Class Counsel shall prepare a French translation of this Agreement for use at the Settlement Approval Hearing. Following the Settlement Approval Orders, such French version shall be of equal weight and force at law.

1.16 **Ongoing Supervisory Role of the Courts**

Notwithstanding any other provision of this Agreement, the Courts shall maintain jurisdiction to supervise the implementation of this Agreement in accordance with its terms, including the adoption of protocols and statements of procedure, and the Parties attorn to the jurisdiction of the Courts for that purpose. The Courts may give any directions or make any orders that are necessary for the purposes of this Section.

ARTICLE 2 – EFFECTIVE DATE OF AGREEMENT

2.01 **Date when Binding and Effective**

On the Implementation Date, this Agreement will become binding on all Individual Class Members. This Agreement will become binding on all First Nation Class Members on the later of (a) the date of their Acceptance and (b) the Implementation Date. If a First Nation Class Member does not give notice of Acceptance by the Acceptance Deadline, this Agreement will not bind the First Nation Class Member and the First Nation Class Member will not be entitled to any benefit hereunder unless the Courts order otherwise.

2.02 **Effective Upon Approval**

Subject to Section 2.03, none of the provisions of this Agreement will become effective unless and until the Courts approve this Agreement.

2.03 **Legal Fees Severable**

Class Counsel's fees for prosecuting the Actions have been negotiated separately from this Agreement and remain subject to approval by the Courts. The Courts' refusal to approve Class Counsel's fees will have no effect on the implementation of this Agreement. In the event that the Courts refuse to approve the fees of Class Counsel set out in Section 18.01, (a) the remainder of the provisions of this Agreement shall remain in full force and effect and in no way shall be affected, impaired or invalidated, and (b) Section 18.01 shall be modified to reflect such Class Counsel fees as are approved by the Courts, while otherwise effecting the original intent of the Parties as closely as possible.

ARTICLE 3 – ADMINISTRATION

3.01 **Designation of Administrator**

On the recommendation of the Parties, the Courts shall appoint an Administrator to administer the Claims Process with such powers, rights, duties and responsibilities as are set out in Section 3.02 and such other powers, rights, duties and responsibilities as are determined by the Joint Committee and approved by the Courts. On the recommendation of the Parties, or of their own motion, the Courts may replace the Administrator at any time.

3.02 **Duties of the Administrator**

The Administrator's duties and responsibilities include the following:

(a) developing, installing, and implementing systems, forms, information, guidelines and procedures for processing Claims and making decisions on Claims in accordance with this Agreement;

(b) developing, installing, and implementing systems and procedures for making payments of compensation in accordance with this Agreement;

(c) receiving funds from the Safe Drinking Water Trust and the Trustee to make payments to Class Members in accordance with this Agreement;

(d) providing personnel in such reasonable numbers as are required for the performance of its duties under this Agreement, and training and instructing those personnel;

(e) retaining community liaisons in Impacted First Nations and liaisons at tribal councils to facilitate the implementation of the Notice Plan and the Claims Process;

(f) keeping or causing to be kept accurate accounts of its activities and its administration and preparing such financial statements, reports, and records as are required by the Courts;

(g) reporting to the Settlement Implementation Committee on a monthly basis respecting:

(i) Claims received and determined;

(ii) Claims deemed ineligible and the reason(s) for that determination; and

(iii) appeals from the Administrator's decisions and the outcomes of those appeals;

(h) responding to inquiries respecting Claims and Claims Forms,

(i) reviewing Claims Forms and Band Council Confirmations, and determining, subject to Section 7.02(2) in the case of a Band Council Confirmation:

(i) a Claimant's membership in the Class;

(ii) the dates and places a Claimant was Ordinarily Resident;

(iii) a Claimant's entitlement to Individual Damages, if any; and

(iv) a Claimant's entitlement to Specified Injuries Compensation, if any;

(j) reviewing Acceptances and determining whether a First Nation submitting an Acceptance is eligible to be a First Nation Class Member and each First Nation Class Member's entitlement to First Nation Damages, if any;

(k) giving notice of decisions made in accordance with this Agreement;

(l) communicating with Claimants in either English or French, as the Claimant elects, and if a Claimant expresses the desire to communicate in a language other than English or French, making best efforts to accommodate such Claimant; and

(m) such other duties and responsibilities as the Courts or the Parties may from time to time direct.

3.03 **Appointment of the Third-Party Assessor**

On the recommendation of the Parties, the Courts shall appoint one or more Third-Party Assessors. On the recommendation of the Parties, or of their own motion, the Courts may replace a Third-Party Assessor at any time. The Third-Party Assessor shall perform the duties of the Third-Party Assessor set out in this Agreement.

3.04 **Responsibility for Costs**

Canada shall pay:

(a) the costs of giving notice in accordance with the Notice Plan and any additional notice ordered by the Courts;

(b) the costs and reasonable disbursements of the Administrator, the Third-Party Assessor, the Trustee, the Auditors, and the Settlement Implementation Committee (except Joint Committee Members), up to a maximum of fifty million dollars in the aggregate ($50,000,000), and thereafter the Administrator shall pay such costs out of the Trust Fund on approval by the Courts;

(c) the costs of the First Nations Advisory Committee on Safe Drinking Water in accordance with Section 9.04;

(d) the costs of the Water Governance Fund in accordance with Section 9.05;

(e) the costs of technical advice relating to the Commitment in accordance with Section 9.06(3); and

(f) the costs of the Commitment Dispute Resolution Process in accordance with Section 9.08.

ARTICLE 4 – TRUST FUND

4.01 **Establishment of the Trust Fund**

(1) As soon as practicable after its appointment and after the settlement of the Safe Drinking Water Trust in accordance with Section 16.01, the Trustee shall establish an interest-

bearing trust account at a Schedule I Canadian Bank for purposes of the Trust Fund (the "**Trust Account**").

(2) No later than sixty (60) days following the Implementation Date, and in accordance with the terms of Article 16 , Canada shall make a contribution to the Safe Drinking Water Trust by paying one billion four-hundred and thirty-eight million dollars ($1,438,000,000) into the Trust Account, with such payment being a distinct fund (the "**Trust Fund**") within the Safe Drinking Water Trust.

4.02 **Distribution of the Trust Fund**

The Trustee shall authorize the Administrator to, and the Administrator shall, distribute the Trust Fund for the benefit of the Class Members in accordance with this Agreement, including by paying Individual Damages in accordance with Section 8.01(2)(a).

4.03 **Trust Fund Surplus**

(1) On the advice of an actuary or a similar advisor, the Joint Committee may determine at any time or from time to time that it is more likely than not that there are unallocated or surplus funds in the Trust Fund (a "**Trust Fund Surplus**").

(2) The Joint Committee shall propose a distribution of any Trust Fund Surplus for the direct or indirect benefit of the Class Members in accordance with this Section 4.03.

(3) A distribution of a Trust Fund Surplus shall include distributions to effect one or more of the following, in descending order of priority, and such other uses as the Joint Committee may determine in consultation with the FNAC:

(a) transferring up to four hundred million dollars ($400,000,000) to the First Nations Economic and Cultural Restoration Fund, as needed;

(b) paying Specified Injuries Compensation if the Specified Injuries Compensation Fund is insufficient to pay the Aggregate Specified Injuries Compensation Amount;

(c) paying Individual Damages or First Nation Damages to Claimants who filed valid Claims during a specified period after the Claims Deadline, if any (a "**Late Claims Period**"), as the Joint Committee considers appropriate;

(d) paying increased Individual Damages or First Nation Damages, as the Joint Committee considers appropriate; and

(e) funding programming to promote education, cultural or spiritual practices, study, or healing in connection with Long-Term Drinking Water Advisories, as the Joint Committee considers appropriate.

(4) The Joint Committee shall propose any distribution of Trust Fund Surplus and bring motions in the Courts for approval of the proposed distribution of any Trust Fund Surplus.

(5) An allocation of a Trust Fund Surplus shall require approval of both Courts, and it shall be effective on the later of:

(a) the day following the last day on which a Class Member may appeal or seek leave to appeal either of the approval orders in respect of such allocation; and

(b) the date on which the last of any appeals of either of the approval orders in respect of such allocation is finally determined.

(6) For greater certainty, in no event shall any amount from the Trust Fund, including any Trust Fund Surplus, revert to Canada, and Canada shall not be an eligible recipient of any Trust Fund Surplus.

ARTICLE 5 – SPECIFIED INJURIES COMPENSATION FUND

5.01 Establishment of the Specified Injuries Compensation Fund

(1) As soon as practicable after its appointment and after the settlement of the Safe Drinking Water Trust in accordance with Section 16.01, the Trustee shall establish an interest-bearing trust account at a Schedule I Canadian Bank for purposes of the Specified Injuries Compensation Fund (the "**Specified Injuries Compensation Account**").

(2) No later than sixty (60) days following the Implementation Date, and in accordance with the terms of Article 16 , Canada shall make a contribution to the Safe Drinking Water Trust by paying fifty million dollars ($50,000,000) into the Specified Injuries Compensation Account, with such payment being a distinct fund (the "**Specified Injuries Compensation Fund**") within the Safe Drinking Water Trust.

5.02 Distribution of the Specified Injuries Compensation Fund

(1) The Trustee shall authorize the Administrator to, and the Administrator shall, pay Specified Injuries Compensation from the Specified Injuries Compensation Fund in accordance with Section 8.02.

(2) If, following the Ultimate Claims Deadline and the payment of the Specified Injuries Compensation as set out in Section 8.02, any funds remain in the Specified Injuries Compensation Fund, the Trustee shall transfer such remaining funds into the Trust Fund.

(3) For greater certainty, in no event shall any amount from the Specified Injuries Compensation Fund revert to Canada, and Canada shall not be an eligible recipient of any amount from the Specified Injuries Compensation Fund.

ARTICLE 6 – FIRST NATIONS ECONOMIC AND CULTURAL RESTORATION FUND

6.01 Establishment of the First Nations Economic and Cultural Restoration Fund

(1) As soon as practicable after its appointment and after the settlement of the Safe Drinking Water Trust in accordance with Section 16.01, the Trustee shall establish an interest-bearing trust account at a Schedule I Canadian Bank for purposes of the First Nations Economic and Cultural Restoration Fund (the "**Restoration Fund Account**").

(2) No later than sixty (60) days following the Implementation Date, and in accordance with the terms of Article 16 , Canada shall make a contribution to the Safe Drinking

Water Trust by paying four hundred million dollars ($400,000,000) into the Restoration Fund Account, with such payment being a distinct fund (the "**First Nations Economic and Cultural Restoration Fund**") within the Safe Drinking Water Trust.

(3) The purpose of the First Nations Economic and Cultural Restoration Fund is to provide First Nation Class Members with funds to use on projects related to water and wastewater, economic development, and cultural activities. The Parties respect the autonomy of First Nations to choose the use to which funds distributed from the Restoration Fund Account are directed.

6.02 **Distribution of the First Nations Economic and Cultural Restoration Fund**

(1) The Trustee shall authorize the Administrator to, and the Administrator shall, pay First Nation Damages from the First Nations Economic and Cultural Restoration Fund in accordance with Section 8.03(1).

(2) If, following the Ultimate Claims Deadline and the payment of the First Nations Damages set out in Section 8.03(1), any funds remain in the First Nations Economic and Cultural Restoration Fund, the Trustee shall transfer such remaining funds into the Trust Fund.

(3) For greater certainty, in no event shall any amount from the First Nations Economic and Cultural Restoration Fund revert to Canada, and Canada shall not be an eligible recipient of any amount from the First Nations Economic and Cultural Restoration Fund.

ARTICLE 7 – CLAIMS PROCESS

7.01 **Principles Governing Claims Administration**

(1) The Claims Process is intended to be expeditious, cost-effective, user-friendly, culturally sensitive, trauma-informed, and non-traumatizing to participants. The Administrator shall identify and implement service times for the Claims Process no later than sixty (60) days after the Implementation Date.

(2) The Administrator, the Third-Party Assessor, and the Settlement Implementation Committee and its Members shall, in the absence of reasonable grounds to the contrary, assume that a Claimant is acting honestly and in good faith with respect to any Claim.

(3) In considering a Claims Form or a Band Council Confirmation, the Administrator, the Third-Party Assessor, and the Settlement Implementation Committee and its Members shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

7.02 **Eligibility Decisions and Specified Injuries Decisions**

(1) The Administrator shall review each Claims Form, Band Council Confirmation, and/or such other information as the Administrator considers relevant to determine, subject to Section 7.02(2) in the case of a Band Council Confirmation, whether each Claimant is an Individual Class Member and the period of time that they were Ordinarily Resident on a Reserve during a Long-Term Drinking Water Advisory (an "**Eligibility Decision**") and, if applicable, the validity of a Claim for Specified Injuries Compensation (a "**Specified Injuries Decision**"). For greater certainty, the Administrator may provide a Claimant with an Eligibility Decision or a

Specified Injuries Decision before the Administrator has calculated the Claimant's entitlement, if any, to Individual Damages or Specified Injuries Compensation.

(2) A Band Council Confirmation is intended to be optional. Where provided, and in the absence of evidence to the contrary, a Band Council Confirmation shall constitute sufficient evidence of the Individual Class Members identified therein being Ordinarily Resident on a Reserve during a Long-Term Drinking Water Advisory for the purpose of an Eligibility Decision and shall be sufficient to make Claims for Individual Damages on behalf of such Individual Class Members without such Individual Class Members being required to submit Claims Forms. Notwithstanding the foregoing, an Individual Class Member identified in a Band Council Confirmation, or an Estate Executor, Estate Claimant or Personal Representative on their behalf, shall be entitled to submit a Claims Form, and a Band Council Confirmation is not intended to override any Claims Form submitted by or on behalf of an Individual Class Member, whether or not such Individual Class Member is identified in a Band Council Confirmation. In the event of a conflict between a Band Council Confirmation and a Claims Form, the Claims Form shall prevail. Any Claimant who desires to make a Claim for Specified Injuries Compensation shall be required to submit a Claims Form in respect of their Specified Injuries.

(3) The Administrator shall give written notice to each Claimant setting out the results of its Eligibility Decision and, if applicable, Specified Injuries Decision. If the Administrator determines that the Claimant is an Individual Class Member, the Eligibility Decision will state the period of time that such Claimant was Ordinarily Resident on an applicable Reserve during a Long-Term Drinking Water Advisory, what kind of Drinking Water Advisory applied, and whether the Reserve was in a Remote First Nation.

(4) The Administrator shall provide written reasons to a Claimant in any case of:

(a) an Eligibility Decision that a Claimant is not an Individual Class Member, or that the Claimant was not Ordinarily Resident on an applicable Reserve for the entire period claimed in the Claimant's Claims Form; or

(b) a Specified Injuries Decision that a Claimant is not eligible for the Specified Injuries Compensation claimed in the Claimant's Claims Form.

(5) Only a Claimant confirmed by an Eligibility Decision (including, for greater certainty, by being identified as an Individual Class Member in a Band Council Confirmation) to be an Individual Class Member (a "**Confirmed Individual Class Member**") may be entitled to compensation pursuant to Section 8.01 and, if applicable, Section 8.02.

(6) A Claimant shall have sixty (60) days to commence an appeal to the Third-Party Assessor in accordance with the Claims Process after receiving:

(a) an Eligibility Decision that a Claimant is not an Individual Class Member or that the Claimant was not Ordinarily Resident on an applicable Reserve for the entire period claimed in the Claimant's Claims Form or a Band Council Confirmation; or

(b) a Specified Injuries Decision that a Claimant is not entitled to the Specified Injuries Compensation claimed in the Claimant's Claims Form.

(7) The Third-Party Assessor's decision on an appeal pursuant to Section 7.02(6) will be final and not subject to appeal or review.

(8) Class Counsel shall assist Claimants or their representatives, as reasonably requested, in making Claims for Specified Injuries Compensation or in appealing a Specified Injuries Decision at no cost to Canada or the Claimant other than, for certainty, Class Counsel's fees as separately negotiated or as approved by the Courts and payable in accordance with Section 18.02.

7.03 **First Nation Damages Decisions**

Within thirty (30) days following receipt by a First Nation Class Member of the Administrator's determination of its eligibility for a Base Payment or the Administrator's calculation of its First Nation Damages in accordance with the Claims Process, the First Nation Class Member may appeal such decision(s) in accordance with the Claims Process. The decision of the Third-Party Assessor on such an appeal will be final and not subject to appeal or review.

7.04 **Referrals to Settlement Implementation Committee**

(1) The Administrator shall refer a Claims Form to the Settlement Implementation Committee where the harms described in the Claims Form are not contemplated in the Specified Injuries Compensation Grid, and where the Settlement Implementation Committee has not already declined to extend Specified Injuries Compensation in substantially similar circumstances.

(2) The decision of the Settlement Implementation Committee on a Claims Form referred under this Section 7.04 will be final and not subject to appeal or review.

7.05 **Finality of Decisions**

Except as set out in this Article 7 and in the Claims Process, all decisions of the Administrator are final and binding upon a Claimant and not subject to appeal or review.

ARTICLE 8 – RETROSPECTIVE COMPENSATION

8.01 **Individual Damages**

(1) In determining where a Claimant was Ordinarily Resident for the purpose of this Agreement, the Administrator shall consider each year during the Class Period that a Reserve was subject to a Long-Term Drinking Water Advisory, beginning on the date that the advisory was imposed (each such year, an "**Advisory Year**"), and a Claimant shall have been "**Ordinarily Resident**" on an affected Reserve, for the purposes of this Agreement, if:

(a) the Claimant lived on the affected Reserve for a greater portion of an Advisory Year (or, after the first Advisory Year, the applicable portion of such subsequent Advisory Year that a Long-Term Drinking Water Advisory was in effect if the Long-Term Drinking Water Advisory terminated before the end of the Advisory Year) than the Claimant lived elsewhere; and

(b) notwithstanding the foregoing, in the case of any Claimant who was eighteen (18) years of age or younger at the applicable time, such Claimant habitually lived on an affected Reserve but lived elsewhere for a portion of the Advisory Year to attend an educational facility.

(2) The Administrator shall calculate damages for each Confirmed Individual Class Member ("**Individual Damages**") in accordance with the following formula (the "**Individual Damages Formula**"):

(a) in the case of a Confirmed Individual Class Member who had not yet reached the age of eighteen (18) years on November 20, 2013, for:

(i) every Advisory Year; and

(ii) after the first Advisory Year, every portion of an Advisory Year in accordance with Section 8.01(4),

during the Class Period that such Confirmed Individual Class Member was Ordinarily Resident on a Reserve where a Long-Term Drinking Water Advisory was in effect;

(b) in the case of a Confirmed Individual Class Member who had reached the age of eighteen (18) years before November 20, 2013, but was incapable of commencing a proceeding in respect of their Claim because of their physical, mental or psychological condition, for:

(i) every Advisory Year (and, after the first Advisory Year, every portion of an Advisory Year in accordance with Section 8.01(4)) prior to November 20, 2019, for which the Confirmed Individual Class Member had reached the age of eighteen (18) years and had been capable of commencing a proceeding in respect of that Advisory Year (or portion thereof) for a cumulative period of less than six (6) years as of November 20, 2019; and

(ii) every Advisory Year (and, after the first Advisory Year, every portion of an Advisory Year in accordance with Section 8.01(4)) subsequent to November 20, 2019,

during the Class Period that such Confirmed Individual Class Member was Ordinarily Resident on a Reserve where a Long-Term Drinking Water Advisory was in effect; or

(c) in the case of a Confirmed Individual Class Member who had reached the age of eighteen (18) years before November 20, 2013, other than a person described in Section 8.01(2)(b), for:

(i) every Advisory Year; and

(ii) after the first Advisory Year, every portion of an Advisory Year in accordance with Section 8.01(4),

between November 20, 2013, and the end of the Class Period that such Confirmed Individual Class Member was Ordinarily Resident on a Reserve where a Long-Term Drinking Water Advisory was in effect.

(3) The Joint Committee, acting on the advice of an actuary or a similar advisor, shall determine the rates at which Individual Damages will be paid. Subject to (a) the availability

of sufficient funds in the Trust Fund and (b) the availability of sufficient funds in the First Nations Economic and Cultural Restoration Fund to pay First Nation Damages in an amount equal to fifty percent (50%) of the Individual Damages, Individual Damages shall be paid at the rates set out in Schedule G, or as close to those rates as the sufficiency of the Trust Fund and the First Nations Economic and Cultural Restoration Fund allows.

(4) Individual Damages for any partial Advisory Years after the first Advisory Year shall be calculated for each Confirmed Individual Class Member by multiplying:

(a) the Individual Damages such Confirmed Individual Class Member would have been entitled to for a full Advisory Year, calculated in accordance with Section 8.01(2); by

(b) a fraction, the numerator of which is the number of days in the applicable partial Advisory Year after the first Advisory Year during which a Long-Term Drinking Water Advisory remained in effect on a Reserve where the Class Member was Ordinarily Resident and the denominator of which is three hundred and sixty-five (365).

(5) Except as otherwise provided in this Agreement, within one hundred and twenty (120) days following the Claims Deadline, the Administrator shall pay Individual Damages in Accordance with this Agreement. The Administrator shall request such funds from the Trustee, the Trustee shall provide such funds to the Administrator, and the Administrator shall pay such funds in accordance with this Agreement.

8.02 **Specified Injuries Compensation**

(1) In addition to Individual Damages, an Individual Class Member may indicate on their Claims Form that they claim damages for one or more of the specified medical conditions listed on Schedule H that were caused by using treated or tap water in accordance with a Long-Term Drinking Water Advisory on a Reserve where such Individual Class Member was Ordinarily Resident, or by restricted access to treated or tap water caused by a Long-Term Drinking Water Advisory on a Reserve where such Individual Class Member was Ordinarily Resident ("**Specified Injuries**"). For greater certainty, medical conditions caused by using water in a manner that is contrary to an applicable Long-Term Drinking Water Advisory or using Source Water will not constitute Specified Injuries.

(2) Confirmed Individual Class Members will be entitled to compensation for Specified Injuries in the amount set out in Schedule H (the "**Specified Injuries Compensation**"), provided that the Claimant establishes that the injury was caused by using treated or tap water in accordance with a Long-Term Drinking Water Advisory, or by restricted access to treated or tap water caused by a Long-Term Drinking Water Advisory, in accordance with the Claims Process and Schedule H.

(3) Confirmed Individual Class Members must establish a Specified Injury by the means set out in Schedule H and the Claims Process, unless the Settlement Implementation Committee directs otherwise. Each amount set out in in Schedule H will be paid only once to a particular Claimant, even if the Claimant suffered multiple Specified Injuries of the same nature or kind.

(4) Within one hundred and twenty (120) days following the Claims Deadline, the Administrator shall determine whether there are sufficient funds in the Specified Injuries Compensation Fund to pay the aggregate Specified Injuries Compensation for each valid and established Claim for Specified Injuries Compensation (the "**Aggregate Specified Injuries Compensation Amount**") established in accordance with the Claims Process, and:

(a) if there are sufficient funds in the Specified Injuries Compensation Fund to pay the Aggregate Specified Injuries Compensation Amount, the Administrator shall pay Specified Injuries Compensation in accordance with this Agreement; or

(b) if there are insufficient funds in the Specified Injuries Compensation Fund to pay the Aggregate Specified Injuries Compensation Amount, the Administrator shall pay each Confirmed Individual Class Member in accordance with this Agreement their *pro rata* share of the Specified Injuries Compensation Fund in proportion to the Specified Injuries Compensation to which such Confirmed Individual Class Member would be entitled if the Aggregate Specified Injuries Compensation Amount was equal to the Specified Injuries Compensation Fund; and

(c) in either case, the Administrator shall request such funds from the Trustee, the Trustee shall provide such funds to the Administrator, and the Administrator shall pay such funds in accordance with this Agreement.

8.03 **First Nation Class Member Damages**

(1) The Administrator shall calculate First Nation Class Members' damages in accordance with the following entitlement of each First Nation Class Member:

(a) a base payment of five hundred thousand dollars ($500,000) (the "**Base Payment**"); and

(b) an amount equal to fifty percent (50%) of the Individual Damages paid to Confirmed Individual Class Members who were Ordinarily Resident on such First Nation Class Member's Reserve or Reserves during a Long-Term Drinking Water Advisory on such First Nation Class Member's Reserve or Reserves ("**First Nation Damages**").

(2) The Administrator shall pay the Base Payment to each First Nation Class Member from the First Nations Economic and Cultural Restoration Fund within ninety (90) days following the later of (a) the Implementation Date, and (b) the date on which such First Nation Class Member gives written notice of Acceptance to Class Counsel. The Administrator shall request such funds from the Trustee, the Trustee shall provide such funds to the Administrator, and the Administrator shall pay such funds in accordance with this Agreement.

(3) Every six (6) months after the Base Payment is made pursuant to Section 8.03(2), the Administrator shall pay each First Nation Class Member from the First Nations Economic and Cultural Restoration Fund, without duplication, any accrued but unpaid First Nation Damages to date for such First Nation Class Member. The Administrator shall request such funds from the Trustee, the Trustee shall provide such funds to the Administrator, and the Administrator shall pay such funds in accordance with this Agreement.

ARTICLE 9 – PROSPECTIVE RELIEF

9.01 **Action Plan for First Nation Class Members**

(1) Canada shall make all reasonable efforts to support the removal of Long-Term Drinking Water Advisories that affect Class Members, including by taking the steps set out in the Action Plan within the project timeframes set out therein.

(2) Canada shall update the Action Plan regularly, and no less than quarterly, so as to reflect progress against the Action Plan.

(3) The Action Plan shall be amended to reflect additional commitments made by Canada, including commitments in Remediation Plans.

(4) Within thirty (30) Business Days following any update or amendment to the Action Plan, Canada shall provide the Joint Committee with a copy of the updated or amended Action Plan.

(5) For greater certainty, nothing in this Agreement limits Canada to taking the measures set out in the Action Plan or prevents Canada from taking additional measures not contemplated in the Action Plan for the benefit of Class Members.

9.02 **Commitment to Additional Measures**

(1) In addition to the measures set out in the Action Plan, Canada shall make all reasonable efforts to ensure that Individual Class Members living on Reserves have regular access to drinking water in their homes, whether from a public water system or a private water system approved by a band council resolution substantially in the form set out in Schedule P, or another form acceptable to Canada and Class Counsel, including on-site systems, that meets the stricter of the federal requirements or provincial standards governing residential water quality (the "**Commitment**"). For greater certainty:

(a) such "regular access" shall be of a nature and quantity sufficient to permit all usual and necessary uses of water in a similarly situated Canadian home, including but not limited to drinking water, bathing and personal hygiene, food preparation and dishwashing, sanitation, and laundry;

(b) the Commitment is limited to Canada's reasonable efforts, including the provision of actual cost funding, training, planning, and technical assistance;

(c) if, despite Canada making all reasonable efforts, such regular access cannot be achieved, Canada is not required to warranty such regular access in an Individual Class Member's home; and,

(d) factors that may be considered in any determination of reasonable efforts include, but are not limited to:

(i) the views of the particular First Nation;

(ii) any federal requirements or provincial standards and protocols relating to water;

(iii) whether monitoring and testing are performed on the water system; and

(iv) the physical location of the home, including proximity to centralized water systems and remoteness.

(2) Canada shall spend at least six billion dollars ($6,000,000,000) between June 20, 2021, and March 31, 2030, to meet the Commitment, at a rate of at least four hundred million dollars ($400,000,000) per fiscal year ending March 31, by funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on Reserves for First Nations ("**Commitment Expenditures**").

(3) Canada shall provide the Joint Committee with an annual statement of all Commitment Expenditures actually made each fiscal year through March 31, 2030, which statement shall be provided no later than ninety (90) days after the end of the applicable fiscal year.

(4) Upon request, Canada shall promptly provide any First Nation Class Member with a statement of the Commitment Expenditures in respect of such First Nation Class Member's Reserves.

9.03 **Repeal and Replacement of *Safe Drinking Water for First Nations Act***

(1) Canada shall make all reasonable efforts to:

(a) introduce legislation repealing the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21 (the "***SDWFNA***") on or before March 31, 2022;

(b) develop and introduce replacement legislation for the *SDWFNA* ("**Replacement Legislation**"), in consultation with First Nations; and

(c) introduce the Replacement Legislation by December 31, 2022.

(2) The objectives of the Replacement Legislation shall be to:

(a) ensure sustainable First Nation Water and Wastewater Systems, premised upon:

(i) defining minimum standards of water quality for First Nation Water and Wastewater Systems, with reference to standards that are directly applicable to First Nation communities; and

(ii) defining minimum capacity standards for the delivery of water to First Nation communities, in terms of volume per individual community member;

(b) create a transparent approach to building, improving, and providing drinking water and wastewater services for First Nations;

(c) confirm adequate and sustainable funding for First Nation Water and Wastewater Systems; and

(d) support the voluntary assumption of water and wastewater infrastructure by First Nations.

(3) Notwithstanding Canada's commitment to introduce the Replacement Legislation, Canada shall support the development of First Nations governance initiatives as described in Section 9.05, below.

9.04 **First Nations Advisory Committee on Safe Drinking Water**

(1) Canada shall provide twenty million dollars ($20,000,000) in funding through the fiscal year ending March 31, 2026, for the creation of the First Nations Advisory Committee on Safe Drinking Water (the "**FNAC**").

(2) The FNAC's membership shall reflect Canada's diversity of First Nation Class Member communities, languages, genders, geographies, skills, expertise, and experience with water insecurity.

(3) The members of the FNAC shall be appointed by agreement of the Parties, on the recommendation of the Joint Committee, and failing agreement, the members shall be appointed by the Courts. The Parties may agree to remove any member of the FNAC, and such removal will be effective upon approval of the Courts.

(4) The primary functions of the FNAC shall be to:

(a) work with First Nation Class Members to provide oversight, guidance, and recommendations to Indigenous Services Canada to support the development and implementation of forward-looking policy initiatives, including:

(i) the development of Indigenous Services Canada's Long Term Strategy for Water and Wastewater on First Nation Class Members' Reserves; and

(ii) the development of the Replacement Legislation;

(b) contribute strategic advice and perspectives to Indigenous Services Canada in order to advance the long-term sustainability of safe drinking water in First Nation communities; and

(c) support the identification and prioritization of funding for water and wastewater in First Nations communities.

(5) The terms of reference for the FNAC shall be developed jointly by the Parties.

9.05 **First Nations Governance Initiatives**

(1) Canada shall provide nine million dollars ($9,000,000) in funding for First Nations to pursue governance initiatives and by-law development through the fiscal year ending March 31, 2026 (the "**Water Governance Fund**"). Indigenous Services Canada shall administer the Water Governance Fund in accordance with its terms of reference.

(2) The funding for the Water Governance Fund shall continue through the fiscal year ending March 31, 2026, regardless of whether the Replacement Legislation is enacted within the anticipated time frame or at all.

(3) The Water Governance Fund shall assist First Nation Class Members that wish to develop their own water-related governance initiatives, including by funding:

(a) research;

(b) technical advice;

(c) by-law drafting; and

(d) the implementation of pilot projects on Reserves.

(4) The terms of reference for the Water Governance Fund shall be developed jointly by the Parties.

9.06 **Agreement on Required Measures**

(1) If a First Nation determines that the Commitment is not met or ceases to be met on its Reserve or Reserves or if a First Nation determines that Canada is not complying with a Remediation Plan (each such First Nation is an "**Underserviced First Nation**"), it shall give written notice to Canada, directed to the Deputy Minister of Indigenous Services, describing the way in which the Commitment is not met or ceases to be met or the way in which Canada is not complying with a Remediation Plan.

(2) Canada shall promptly consult with each Underserviced First Nation, with a view to meeting the Commitment as soon as possible.

(3) Canada shall pay the reasonable cost of an Underserviced First Nation obtaining technical advice to determine what steps are required to meet the Commitment on the Underserviced First Nation's Reserve or Reserves.

(4) Canada shall make all reasonable efforts to reach an agreement with the Underserviced First Nation detailing the steps that are required to meet the Commitment (a "**Remediation Plan**").

(5) Canada and the Underserviced First Nation shall each comply with the Remediation Plan.

9.07 **Dispute Resolution for Required Measures**

If Canada does not comply with an existing Remediation Plan or Canada and an Underserviced First Nation fail to agree upon a Remediation Plan within three (3) months following the Underserviced First Nation delivering notice as set out in Section 9.06 or such other time period as the Parties may agree, the Underserviced First Nation may invoke the dispute resolution process set out on Schedule K (the "**Commitment Dispute Resolution Process**"), in which case Canada and the Underserviced First Nation shall submit the existing Remediation Plan or their respective proposed forms of Remediation Plan to the Commitment Dispute Resolution Process.

9.08 **Costs of Commitment Dispute Resolution Process**

(1) Canada shall pay fifty percent (50%) of the reasonable costs and disbursements of any Underserviced First Nation Class Member's participation in the Commitment Dispute Resolution Process, including reasonable legal fees and disbursements, provided that Canada shall pay one hundred percent (100%) of the reasonable costs of convening collaborative negotiations, mediations, and arbitrations in accordance with the Commitment Dispute Resolution Process, together with the reasonable fees and disbursements of any mediator or arbitrator appointed in accordance with the Commitment Dispute Resolution Process; and

(2) For greater certainty, the costs and disbursements set out in Section 9.08(1) are separate and distinct from the fees and disbursements payable to Class Counsel and the Joint Committee pursuant to Article 18 .

ARTICLE 10 – EFFECT OF AGREEMENT

10.01 **No Provision for Continued Damages**

This Agreement makes no provision for any damages that may accrue to Class Members in respect of Long-Term Drinking Water Advisories that begin or continue after June 20, 2021, and Class Members shall not release any claims to any such damages.

10.02 **Canada's Liability**

The Parties specifically agree that once Canada has complied with the terms of this Agreement, it shall have no further liability to Class Members for damages that they incurred prior to June 20, 2021 in respect of or arising from Canada's failure to provide, or fund the provision of, safe drinking water on the Reserve or Reserves of such First Nation Class Members, or on which such Individual Class Members were Ordinarily Resident during a Long-Term Drinking Water Advisory.

10.03 **Releases**

(1) The Settlement Approval Orders issued by the Courts will declare that, except as set forth in Section 10.01 and Section 10.04, and in consideration for Canada's obligations and liabilities under this Agreement, each Individual Class Member or their Estate Executor, Estate Claimant, or Personal Representative on behalf of such Individual Class Member or their estate and each First Nation Class Member (hereinafter collectively the "**Releasors**") has fully, finally and forever released Canada and its servants, agents, officers and employees, predecessors, successors, and assigns (hereinafter collectively the "**Releasees**"), from any and all actions, causes of action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasors had, now have or may in the future have against the Releasees in respect of or arising from Canada's failure to provide, or fund the provision of, safe drinking water on the Reserve or Reserves of such First Nation Class Member, or on which such Individual Class Member was Ordinarily Resident during a Long-Term Drinking Water Advisory, in each case prior to the conclusion of the Class Period.

(2) The Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim arises against the Releasees for contribution or indemnity or other relief over, whether by statute,

common law, or Quebec civil law, in relation to the claims released in Section 10.03(1), above, the Releasors shall expressly limit their claims so as to exclude any portion of Canada's liability.

(3) Upon a final determination of a Claim made under and in accordance with the Claims Process, the Releasors are also deemed to fully and finally release:

(a) the Parties, Class Counsel, counsel for Canada, the Settlement Implementation Committee and its Members, the FNAC and its members, the Joint Committee and its members, the Administrator, and the Third-Party Assessor with respect to any claims that have arisen, arise, or could arise out of the application of the Claims Process, including any claims relating to the calculation of Individual Damages, Specified Injuries Compensation, and First Nation Damages, the sufficiency of the compensation received, and the allocation and distribution of Trust Fund Surplus;

(b) any band council that submitted a Band Council Confirmation in respect of any claims that have arisen, arise, or could arise out of the Band Council Confirmation, including any claims in respect of the completeness or accuracy thereof; and

(c) any band council that adopts a band council resolution approving private water systems, substantially in the form set out in Schedule P or in another form acceptable to Canada and Class Counsel, in respect of any claims that have arisen, arise, or could arise out of the band council resolution approving private water systems, including any claims in respect of the completeness or accuracy thereof, and the adoption or failure to adopt a band council resolution approving private water systems shall not have the effect of making a First Nation or its band council responsible or liable for any water system described therein.

(4) The Parties, Class Counsel, counsel for Canada, the Settlement Implementation Committee and its Members, the FNAC and its members, the Joint Committee and its members, the Administrator, and the Third-Party Assessor shall have no liability to a Missing Eligible Class Member with respect to any claims that have arisen, arise, or could arise in respect of the payment or non-payment of any amount in accordance with this Agreement once the Administrator has complied with the Eligible Class Member Address Search Plan set out in Schedule Q.

(5) For greater certainty:

(a) any living Individual Class Member who does not submit a valid Claims Form to the Administrator, or on whose behalf a valid Claim is not made in the form of a Band Council Confirmation, or, in the case of a Class Member who is a Person Under Disability, on whose behalf a valid Claims Form is not submitted by such Class Member's Personal Representative; and

(b) any Deceased Individual Class Member who did not submit a valid Claims Form prior to their death, or whose Estate Executor or Estate Claimant does not submit a valid Claims Form on behalf of such Deceased Individual Class Member, together with any other information required by this Agreement,

in each case on or prior to the Ultimate Claims Deadline shall have no right to Individual Damages or Specified Injuries Compensation under this Agreement, and the Administrator shall reject any Claim submitted following the Ultimate Claims Deadline. Each Individual Class Member shall continue to be bound by the release set out in this Section 10.03 notwithstanding their failure to submit a valid Claims Form on or prior to the Ultimate Claims Deadline.

(6) For greater certainty any Impacted First Nation that does not give notice of Acceptance by the Acceptance Deadline shall forfeit any right to any benefit under this Agreement, including First Nation Damages, and the Administrator shall reject any notice of Acceptance submitted following the Acceptance Deadline.

10.04 **Continuing Remedies**

(1) The Parties acknowledge and agree that, notwithstanding Section 10.03 or any other provision of this Agreement, Class Members do not release, and specifically retain, their claims or causes of action for any breach by Canada of this Agreement.

(2) The Parties acknowledge and agree that irreparable harm would occur for which money damages would not be an adequate remedy at law in the event Canada failed to perform its obligations under Section 3.04, Article 4 Article 5 Article 6 or Article 9 . It is accordingly agreed that, subject to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, the Parties shall be entitled to injunctive and other equitable relief to prevent breaches or threatened breaches of this Agreement, and to enforce compliance with the terms of this Agreement, without any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief, this being in addition to damages and any other remedy to which the Parties may be entitled at law or in equity.

10.05 **Canadian Income Tax and Social Benefits**

(1) Canada shall make best efforts to ensure that any Class Member's entitlement to federal social benefits or social assistance benefits will not be negatively affected by receipt of any payment in accordance with this Agreement, and no such payment will be considered taxable income within the meaning of the Income Tax Act.

(2) Canada shall make best efforts to obtain agreement with provincial and territorial governments to the effect that the receipt of any payment in accordance with this Agreement will not affect the amount, nature, or duration of any social benefits or social assistance benefits available or payable to any Class Member.

ARTICLE 11 – IMPLEMENTATION OF THIS AGREEMENT

11.01 **Settlement Approval Orders**

(1) The Parties agree that the Settlement Approval Orders will be sought from the Courts substantially in the form attached as Schedule O.

(2) The Parties shall consent to the entry of the Settlement Approval Orders.

(3) The Parties shall take all reasonable measures to cooperate in requesting that the Courts issue the Settlement Approval Orders.

(4) The Parties shall schedule the Settlement Approval Hearing as soon as practicable considering the requirements of the Notice Plan and the Courts' availability.

11.02 **Notice Plan**

(1) The Parties agree that they shall jointly seek approval from the Courts of the Notice Plan as the means by which Class Members will be provided with notice of settlement and settlement approval, as well as the Late Opt-Out, as applicable.

(2) Canada agrees to fund the implementation of the Notice Plan and any subsequent notice ordered by the Courts.

ARTICLE 12 – OPTING OUT

12.01 **Opting Out**

No Individual Class Member may Opt Out of the Actions without leave of the Courts, and each Individual Class Member shall be bound by this Agreement if it is approved by the Courts.

12.02 **Late Opt-Out**

Notwithstanding Section 12.01, Individual Class Members who are Ordinarily Resident in Mitaanjigaming First Nation, North Caribou Lake, Ministikwan Lake Cree Nation, Oneida of the Thames, and Deer Lake First Nation shall have a right to Opt Out by providing the Administrator with written notice within forty-five (45) days of the date on which notice of settlement is first published. The First Nations named in this Section 12.02 first experienced a Long-Term Drinking Water Advisory after the commencement of the Opt-Out Period. Save and except for the Late Opt-Out in this Section 12.02, Individual Class Members shall have no right to Opt Out under this Agreement and may only exclude themselves from the Actions with leave of the Courts in accordance with Section 12.01.

12.03 **Automatic Exclusion for Individual Claims**

Any Individual Class Member who does not, before the expiry of the time to Opt Out, discontinue a proceeding that raises questions of law or fact that are common to the Actions, is deemed to have Opted Out.

ARTICLE 13 – PAYMENTS FOR DECEASED INDIVIDUAL CLASS MEMBERS AND PERSONS UNDER DISABILITY

13.01 **Compensation if Deceased: Grant of Authority or the Like**

(1) If an Individual Class Member died or dies on or after November 20, 2017 (any such Individual Class Member, a "**Deceased Individual Class Member**"), and:

(a) the Deceased Individual Class Member has been identified in a Band Council Confirmation;

(b) a Claims Form has been submitted to the Administrator by such Deceased Individual Class Member or their Personal Representative prior to their death; or

(c) a Claims Form has been submitted to the Administrator by their Estate Executor after their death,

and the Estate Executor of such Deceased Individual Class Member has submitted the evidence required by Section 13.01(2) to the Administrator, the Administrator shall pay such Deceased Individual Class Member's Estate Executor the compensation to which such Deceased Individual Class Member was entitled under the Claims Process, with such payment made payable to "the estate of" such Deceased Individual Class Member.

(2) In support of a Claim made pursuant to Section 13.01(1), the Estate Executor for the Deceased Individual Class Member shall submit to the Administrator, in each case in a form acceptable to the Administrator:

(a) a Claims Form (if a Claims Form was not submitted by such Deceased Individual Class Member or their Personal Representative prior to their death and such Deceased Individual Class Member was not identified in a Band Council Confirmation);

(b) evidence that such Deceased Individual Class Member is deceased and of the date on which such Deceased Individual Class Member died; and

(c) evidence in the following form identifying such representative as having the legal authority to receive compensation on behalf of the estate of the Deceased Individual Class Member:

(i) if the claim is based on a will or other testamentary instrument or on intestacy, a copy of a grant of probate or a grant and letters testamentary or other document of like import or a grant of letters of administration or other document of like import, purporting to be issued by any court or authority in Canada; or

(ii) if the claim is based on a Quebec notarial will, an authenticated copy thereof.

13.02 **Compensation if Deceased: No Grant of Authority or the Like**

(1) If a Claims Form has been submitted to the Administrator by a Deceased Individual Class Member or by their Personal Representative prior to their death, or by their Estate Executor or another representative of such Deceased Individual Class Member (an "**Estate Claimant**") after their death, but the estate of such Deceased Individual Class Member has not submitted all of the evidence required by Section 13.01(2) to the Administrator, the Estate Executor or Estate Claimant must submit the evidence required by Section 13.01(2)(a) and Section 13.01(2)(b) to the Administrator, together with evidence identifying the basis on which the Estate Executor or Estate Claimant represents the estate of such Deceased Individual Class Member in accordance with Section 13.02(3) (in totality, an "**Estate Representation Claim**"), by the date that is the later of the Claims Deadline and the end of any Late Claims Period (the "**Ultimate Claims Deadline**") and otherwise in accordance with this Agreement, and:

(a) if only one Estate Representation Claim has been submitted in respect of such Deceased Individual Class Member on or prior to the Ultimate Claims Deadline,

the Administrator shall pay the compensation to which such Deceased Individual Class Member is entitled to the Estate Executor or Estate Claimant identified in the Estate Representation Claim on behalf of the estate; or

(b) if more than one Estate Representation Claim has been submitted in respect of such Deceased Individual Class Member on or prior to the Ultimate Claims Deadline, the Administrator shall:

(i) if the Estate Executors or Estate Claimants identified in all such Estate Representation Claims submit to the Administrator a signed agreement directing the payment of the compensation to which such Deceased Individual Class Member is entitled and provide a release in a form acceptable to the Administrator, pay such compensation to the estate in accordance with such agreement; or

(ii) if the Estate Executors or Estate Claimants identified in all such Estate Representation Claims do not submit to the Administrator an agreement in accordance with Section 13.02(1)(b)(i), require one of the Estate Executors or Estate Claimants identified in one of the Estate Representation Claims to submit to the Administrator the evidence set out in Section 13.01(2)(c) and pay such person on behalf of the estate the compensation to which such Deceased Individual Class Member is entitled, provided that if no person submits to the Administrator the evidence set out in Section 13.01(2)(c) within two (2) years of the Ultimate Claims Deadline, the Claim on behalf of such Deceased Individual Class Member and their estate will be extinguished, the Administrator will have no further obligation to make any payment in respect of such Deceased Individual Class Member or to their estate, and all Claims by or on behalf of such Deceased Individual Class Member and their estate shall be deemed to be released and discharged in accordance with Section 10.03.

(2) If a Claims Form is submitted to the Administrator by, or on behalf of, a Deceased Individual Class Member but no Estate Representation Claim is submitted to the Administrator in respect of such Deceased Individual Class Member in accordance with Section 13.01(1) within ninety (90) days of the Administrator receiving the Claims Form, the Administrator shall make reasonable efforts to send a notice to the last known address of the Deceased Individual Class Member or the Estate Executor or Estate Claimant of such Deceased Individual Class Member, as applicable, requiring the submission of an Estate Representation Claim. If no person submits to the Administrator an Estate Representation Claim in respect of a given Deceased Individual Class Member within two (2) years of the Ultimate Claims Deadline, the Claim on behalf of such Deceased Individual Class Member and their estate will be extinguished, the Administrator will have no further obligation to make any payment in respect of such Deceased Individual Class Member or to their estate, and any Claim by or on behalf of such Deceased Individual Class Member and their estate shall be deemed to be released and discharged in accordance with Section 10.03.

(3) In support of an Estate Representation Claim made pursuant to Section 13.02(1), the Estate Executor or Estate Claimant for the Deceased Individual Class Member, as applicable, shall submit to the Administrator the following evidence that they represent the estate of such Deceased Individual Class Member, in each case in a form acceptable to the Administrator:

(a) if the Deceased Individual Class Member had a will:

(i) a copy of the will appointing the Estate Executor or Estate Claimant, as applicable, to represent the estate of such Deceased Individual Class Member; and

(ii) an attestation or declaration signed by the Estate Executor or Estate Claimant, together with one other person who knew the Deceased Individual Class Member personally, confirming that they believe the will to be valid, do not know the will to have been revoked, know of no later will of the Deceased Individual Class Member, and know of no executor, administrator, trustee, or liquidator that has been appointed by a court; or

(b) if the Deceased Individual Class Member did not have a will:

(i) an attestation or declaration signed by the Estate Executor or Estate Claimant, together with one other person who knew the Deceased Individual Class Member personally, confirming that they do not know such Deceased Individual Class Member to have had a will and that no executor, administrator, trustee, or liquidator has been appointed by a court;

(ii) proof of the relationship of such Estate Executor or Estate Claimant, as applicable, to the Deceased Individual Class Member in a form reasonably acceptable to the Administrator;

(iii) an attestation or declaration signed by the Estate Executor or Estate Claimant, together with one other person who knew the Deceased Individual Class Member personally:

A. confirming that they know of no higher priority heir of such Deceased Individual Class Member in accordance with Section 13.02(4); and

B. either:

(I) confirming that they know of no equal priority heir of such Deceased Individual Class Member in accordance with Section 13.02(4), or

(II) if there is any equal priority heir of such Deceased Individual Class Member in accordance with Section 13.02(4), listing the persons at the same priority level; and

(iv) if there are heirs of such Deceased Individual Class Member of equal priority to the Estate Executor or Estate Claimant in accordance with Section 13.02(4), all such persons' signed consent for such Estate Executor or Estate Claimant, as applicable, to act for the estate of such Deceased Individual Class Member.

(4) For purposes of Section 13.02(3)(b), the priority level of heirs shall follow the provisions of the Indian Act in respect of distribution of property on intestacy, and such priority level of heirs from highest to lowest priority is as follows:

(a) surviving spouse or common-law partner;

(b) children;

(c) grandchildren;

(d) parents;

(e) siblings; and

(f) children of siblings.

All terms in this Section 13.02(4) used but not defined in this Agreement have the definitions set out in the Indian Act.

13.03 **Person Under Disability**

If an Individual Class Member who submitted a Claims Form to the Administrator prior to the Claims Deadline, or was identified in a Band Council Confirmation, is or becomes a Person Under Disability prior to their receipt of compensation, and the Administrator is advised that such Individual Class Member is a Person Under Disability prior to paying compensation, the Administrator shall pay the Personal Representative of such Individual Class Member the compensation to which the Individual Class Member would have been entitled under the Claims Process, and if the Administrator is not so advised, the Administrator shall make such payment payable to such Individual Class Member. If an Individual Class Member is or becomes a Person Under Disability prior to submitting a Claims Form to the Administrator, the Personal Representative of the Individual Class Member may submit a Claims Form on behalf of such Individual Class Member prior to the Claims Deadline and the Personal Representative of the Individual Class Member shall be paid the compensation to which the Individual Class Member would have been entitled under the Claims Process.

13.04 **Canada, Administrator, Class Counsel, Joint Committee, Third-Party Assessor, Settlement Implementation Committee, and FNAC Held Harmless**

Canada and its counsel, the Administrator, Class Counsel, the Joint Committee and its members, the Third-Party Assessor, the Settlement Implementation Committee and its Members, and the FNAC shall be held harmless from any and all claims, counterclaims, suits, actions, causes of action, demands, damages, penalties, injuries, setoffs, judgments, debts, costs, expenses (including legal fees and expenses) or other liabilities of every character whatsoever by reason of or resulting from a payment or non-payment to or on behalf of a Deceased Individual Class Member or a Person Under Disability, or to an Estate Executor, Estate Claimant, estate, or Personal Representative pursuant to this Agreement, and this Agreement shall be a complete defence.

ARTICLE 14 – SETTLEMENT IMPLEMENTATION COMMITTEE

14.01 **Settlement Implementation Committee**

(1) There shall be a Settlement Implementation Committee appointed by the Courts consisting of two (2) members of the Joint Committee, two (2) representatives of Canada, and two (2) members of the FNAC, each of whom is herein defined as a "**Member**" for the purposes of this Agreement. One of the members of the Joint Committee will be appointed as President of the Settlement Implementation Committee.

(2) The Settlement Implementation Committee shall endeavour to reach consensus. If consensus is not possible, the Settlement Implementation Committee shall decide by majority. If majority cannot be reached, the President shall cast the deciding vote.

(3) Any of the Members of the Settlement Implementation Committee may be substituted by the Courts or by agreement of the Parties so long as the composition of the Settlement Implementation Committee remains as set out in Section 14.01(1) above.

(4) The Settlement Implementation Committee is a monitoring body established under this Agreement with the following responsibilities:

(a) monitoring the work of the Administrator and the Claims Process;

(b) receiving and considering reports from the Administrator, including on administrative costs;

(c) giving such directions to the Administrator or the Third-Party Assessor as may, from time to time, be necessary in accordance with the mandate of the Settlement Implementation Committee;

(d) receiving and deciding requests for an extension to the Claims Deadline, which extension shall require an order of the Courts;

(e) proposing for the Courts' approval such protocols as may be necessary for the implementation of this Agreement;

(f) considering Claims Forms referred to it by the Administrator; and

(g) addressing any other matter referred to the Settlement Implementation Committee by the Courts or any one of them.

(5) For greater certainty, the Settlement Implementation Committee has no jurisdiction to consider appeals or applications or similar process from a Claimant or Class Member. No Class Member or other person may apply to the Settlement Implementation Committee for relief of any sort and the Settlement Implementation Committee shall not entertain any such applications or similar process.

14.02 **Decisions Are Final and Binding**

The decisions of the Settlement Implementation Committee shall be final and binding and shall not be subject to appeal or review.

14.03 **Costs of Settlement Implementation Committee**

In accordance with Section 3.04(b), Canada shall pay the costs of participation in the Settlement Implementation Committee of Members who are not also members of the Joint Committee. The costs of members of the Joint Committee shall be paid in accordance with Section 15.01(8). Canada shall pay the reasonable disbursements that all Members incur to participate in the Settlement Implementation Committee.

ARTICLE 15 – JOINT COMMITTEE

15.01 **Joint Committee**

(1) There shall be a Joint Committee of three (3) members recommended by Class Counsel and appointed by the Courts, with such powers, rights, duties and responsibilities as are required to perform its obligations under this Agreement. The Joint Committee shall consist of one (1) Class Counsel representative from Olthuis Kleer Townshend LLP and two (2) Class Counsel representatives from McCarthy Tétrault LLP.

(2) Subject to Section 15.01(1), on the recommendation of the Joint Committee, or of their own motion, the Courts may substitute any member of the Joint Committee in the best interests of the Class.

(3) The Joint Committee shall make reasonable efforts to reach consensus. If consensus is not possible, the Joint Committee shall decide by majority.

(4) The Joint Committee shall represent the Class Members and act in the best interests of the Class Members as a whole in performing the functions set out in this Agreement.

(5) The Joint Committee shall consult with the FNAC and Class Members, or a subset of them, as required by this Agreement or as the Joint Committee considers appropriate.

(6) The Joint Committee may bring or respond to whatever motions or institute whatever proceedings it considers necessary to advance the interests of Class Members.

(7) The Joint Committee may divide its work among its members and their law firms, or retain other counsel, in which case the fees and disbursements of such other counsel, together with applicable taxes, shall be a disbursement of the Joint Committee.

(8) The Joint Committee's fees and reasonable disbursements shall be paid in accordance with Section 18.02, unless there are insufficient Funds Held in Trust for Ongoing Fees, in which case the Administrator shall pay the Joint Committee's fees and reasonable disbursements from the Trust Fund on approval by the Courts.

(9) If any member of the Joint Committee believes that the majority of the Joint Committee has taken a decision that is not in the best interest of the Class, that member may refer the decision to confidential and binding arbitration to determine, on a balance of probabilities, whether the majority's decision is not in the best interest of the Class, with a determination to be rendered expeditiously and summarily, and without a right of appeal. If the members of the Joint Committee cannot agree on an arbitrator, they may ask the Courts to appoint one. The costs of the arbitration shall be a disbursement of the Joint Committee.

(10) The Joint Committee shall meet quarterly, or more frequently as required.

ARTICLE 16 – TRUSTEE AND TRUST

16.01 **Trust**

No later than thirty (30) days following the appointment by the Courts of the Trustee, Canada will settle a single trust (the "**Safe Drinking Water Trust**") with ten dollars ($10), to be held by the Trustee in accordance with the terms of this Agreement.

16.02 **Trustee**

On the recommendation of the Joint Committee, the Courts will appoint the Trustee to act as the trustee of the Safe Drinking Water Trust, with such powers, rights, duties and responsibilities as the Courts direct. Without limiting the generality of the foregoing, the duties and responsibilities of the Trustee will include:

(a) to hold each of the Trust Fund, the Specified Injuries Compensation Fund and the First Nations Economic and Cultural Restoration Fund (each, a "**Fund**") in the Safe Drinking Water Trust;

(b) if the Trustee determines that it is in the best interests of Class Members, to invest the funds of each Fund (or any of them) with a view to achieving a maximum rate of return without material risk of loss, having regard to the ability of the Safe Drinking Water Trust and each Fund to meet its financial obligations;

(c) to provide such amounts from the Safe Drinking Water Trust to the Administrator and any other person described in Section 3.04 and Section 15.01(8), as required from time to time in order to give effect to any provision of this Agreement, including the payment of Individual Damages, Specified Injuries Compensation, and First Nation Damages;

(d) to engage the services of professionals to assist in fulfilling the Trustee's duties;

(e) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

(f) to keep such books, records and accounts as are necessary or appropriate to document the assets held in the Safe Drinking Water Trust and each Fund, and each transaction of the Safe Drinking Water Trust and each Fund;

(g) to take all reasonable steps and actions required under the Income Tax Act as set out in the Agreement;

(h) to report to the Administrator and Canada and the Joint Committee on a quarterly basis the assets held in the Safe Drinking Water Trust and each Fund at the end of each such quarter, or on an interim basis if so requested; and

(i) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry on the activities of the Safe Drinking Water Trust or to carry out the provisions of this Agreement.

16.03 **Trustee Fees**

Canada shall pay the fees, disbursements and other costs of the Trustee in accordance with Section 3.04(b).

16.04 **Nature of the Safe Drinking Water Trust**

The Safe Drinking Water Trust will be established for the following purposes:

(a) to acquire the applicable funds payable by Canada;

(b) to hold the Trust Fund, the Specified Injuries Compensation Fund and the First Nations Economic and Cultural Restoration Fund, as separate funds in the Safe Drinking Water Trust;

(c) to make any necessary disbursements;

(d) to invest cash in investments in the best interests of Class Members, as provided in this Agreement; and

(e) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry out the provisions of this Agreement.

16.05 **Legal Entitlements**

The legal ownership of the assets of the Safe Drinking Water Trust, including each Fund, and the right to conduct the activities of the Safe Drinking Water Trust, including the activities with respect to each Fund, will be, subject to the specific limitations and other terms contained herein, vested exclusively in the Trustee, and the Class Members and other beneficiaries of the Safe Drinking Water Trust have no right to compel or call for any partition, division or distribution of any of the assets of the Safe Drinking Water Trust except in an action to enforce the provisions of this Agreement. No Class Member or any other beneficiary of the Safe Drinking Water Trust will have or is deemed to have any right of ownership in any of the assets of the Safe Drinking Water Trust.

16.06 **Records**

The Trustee shall keep such books, records and accounts as are necessary or appropriate to document the assets of the Safe Drinking Water Trust and each transaction of the Safe Drinking Water Trust. Without limiting the generality of the foregoing, the Trustee shall keep, at its principal office, records of all transactions of the Safe Drinking Water Trust and a list of the assets held in trust, including each Fund, and a record of each Fund's account balance from time to time.

16.07 **Quarterly Reporting**

The Trustee shall deliver to the Administrator, Canada and the Joint Committee, within thirty (30) days after the end of each calendar quarter, a quarterly report setting forth the assets held as at the end of such quarter in the Safe Drinking Water Trust and each Fund (including

the term, interest rate or yield and maturity date thereof) and a record of the Safe Drinking Water Trust's account balance during such quarter.

16.08 **Annual Reporting**

The Auditors shall deliver to the Administrator, the Trustee, Canada, the Joint Committee, and the Courts, within sixty (60) days after the end of each anniversary of the date that the Safe Drinking Water Trust was funded, which date shall be the fiscal year-end for the Safe Drinking Water Trust:

(a) the audited financial statements of the Safe Drinking Water Trust, segmented by each Fund, for the most recently completed fiscal year, together with the report of the Auditors thereon; and

(b) a report setting forth a summary of the assets held in trust as at the end of the fiscal year for each Fund and the disbursements made by the Safe Drinking Water Trust during the preceding fiscal year.

16.09 **Method of Payment**

The Trustee shall have sole discretion to determine whether any amount paid or payable out of the Safe Drinking Water Trust is paid or payable out of the income of the Safe Drinking Water Trust or the capital of the Safe Drinking Water Trust.

16.10 **Additions to Capital**

Any income of the Safe Drinking Water Trust not paid out in a fiscal year will at the end of such fiscal year be added to the capital of the Safe Drinking Water Trust.

16.11 **Tax Elections**

For each taxation year of the Safe Drinking Water Trust, the Trustee shall file any available elections and designations under the Income Tax Act and equivalent provisions of the income tax act of any province or territory and take any other reasonable steps such that the Safe Drinking Water Trust and no other person is liable to taxation on the income of the Safe Drinking Water Trust, including the filing of an election under subsection 104(13.1) of the Income Tax Act and equivalent provisions of the income tax act of any province or territory for each taxation year of the Safe Drinking Water Trust and the amount to be specified under such election will be the maximum allowable under the Income Tax Act or the income tax act of any province or territory, as the case may be.

16.12 **Canadian Income Tax**

(1) Canada shall make best efforts to exempt any income earned by the Safe Drinking Water Trust from federal taxation, and Canada shall have regard to the measures that it took in similar circumstances for the class action settlements addressed in section 81(g.3) of the Income Tax Act.

(2) The Parties agree that the payments to Class Members are in the nature of personal injury damages and are not taxable income and Canada shall make best efforts to

obtain an advance ruling to this effect, or failing that a technical interpretation to the same effect, in either case from the Income Tax Rulings Directorate of the Canada Revenue Agency.

16.13 **Investment Advisors**

On request of the Trustee, the Joint Committee may ask the Courts to appoint investment advisors to provide the Trustee with advice on the investment of the funds held in each Fund of the Safe Drinking Water Trust. The Trustee shall pay the reasonable fees of any investment advisors out of the applicable Fund of the Safe Drinking Water Trust.

ARTICLE 17 – AUDITORS

17.01 **Appointment of Auditors**

On the recommendation of the Joint Committee, the Courts shall appoint Auditors with such powers, rights, duties and responsibilities as the Courts direct. On the recommendation of the Parties, or of their own motion, the Courts may replace the Auditors at any time. Without limiting the generality of the foregoing, the duties and responsibilities of the Auditors will include:

(a) to audit the accounts for the Safe Drinking Water Trust in accordance with generally accepted auditing standards on an annual basis;

(b) to provide the reporting set out in Section 16.08; and

(c) to file the financial statements of the Safe Drinking Water Trust together with the Auditors' report thereon with the Courts and deliver a copy thereof to Canada, the Joint Committee, the Administrator, and the Trustee within sixty (60) days after the end of each financial year of the Safe Drinking Water Trust.

17.02 **Payment of Auditors**

Canada shall pay the reasonable fees, disbursements and other costs of the Auditors in accordance with Section 3.04(b).

ARTICLE 18 – LEGAL FEES

18.01 **Class Counsel Fees**

Subject to approval by the Courts, and within sixty (60) days of the Implementation Date, Canada shall pay Class Counsel the amount of fifty-three million dollars ($53,000,000), plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance.

18.02 **Ongoing Fees**

(1) Subject to approval by the Courts, within sixty (60) days after the Implementation Date, Canada shall pay to Class Counsel the additional sum of five million dollars ($5 million), plus applicable taxes, in trust ("**Funds Held in Trust for Ongoing Fees**") for fees and disbursements for services to be rendered by Class Counsel and the Joint Committee in accordance with this Agreement, including the implementation and administration of this

Agreement, for a period of four (4) years after the Settlement Approval Hearing ("**Ongoing Fees**").

(2) Class Counsel shall maintain appropriate records and seek Court approval for payment of the Ongoing Fees from the Funds Held in Trust for Ongoing Fees.

(3) Class Counsel shall report the balance of the Funds Held in Trust for Ongoing Fees to the Courts and Canada on a semi-annual basis.

(4) Class Counsel shall apply to the Courts for orders directing the payment of any Funds Held in Trust for Ongoing Fees that remain in trust four (4) years after the Settlement Approval Hearing.

18.03 **Ongoing Legal Services**

(1) Class Counsel shall divide the work of providing ongoing legal services to Class Members among themselves, or otherwise as directed by the Joint Committee.

(2) To the extent that Class Counsel's fees, disbursements, and applicable taxes are paid pursuant to Section 18.01 or Section 18.02, they shall not charge Class Members any additional amounts for legal services rendered in accordance with this Agreement.

(3) Following the Implementation Date, responsibility for representing the interests of the Class as a whole (as distinct from assisting a particular Class Member or Class Members, as reasonably requested) will pass from Class Counsel to the Joint Committee, and Class Counsel shall have no further obligations in that regard.

(4) For greater certainty, the Joint Committee and its members, and counsel appointed by the Joint Committee, shall be paid their fees, applicable taxes, and disbursements in accordance with Section 15.01(8).

(5) Neither Class Counsel nor the Joint Committee will be responsible for representing First Nation Class Members in the Commitment Dispute Resolution Process unless they are separately retained for that purpose, in which case they may represent First Nation Class Members in the Commitment Dispute Resolution Process, but their fees will not be paid pursuant to Section 18.01 or Section 18.02.

18.04 **Choice of Counsel**

Nothing in this Agreement prevents a Class Member from retaining separate counsel, other than Class Counsel, at their own cost. However, no such separate counsel shall be entitled to any payment under this Article 18 . Furthermore, no such separate counsel shall be entitled to receive any payment of any kind from any Class Member in connection with this Agreement, whether direct or indirect, unless the payment is approved by the Courts.

ARTICLE 19 – GENERAL DISPUTE RESOLUTION

19.01 **Initial Referral to Third-Party Assessor**

(1) Subject to Section 19.03, where a dispute arises regarding any right or obligation under this Agreement except a dispute regarding the Claims Process or a dispute to which

Section 9.07 applies (each such dispute other than a dispute regarding the Claims Process or a dispute to which Section 9.07 applies, a "**Dispute**"), the parties to the Dispute shall meet and make reasonable, good-faith efforts to resolve the Dispute within thirty (30) days.

(2) If a Dispute cannot be resolved within thirty (30) days, Canada, the Joint Committee, or any Class Member may refer the Dispute to the Third-Party Assessor.

(3) The Third-Party Assessor shall decide the referred Dispute summarily and issue written reasons.

19.02 **Subsequent Referral to the Courts**

(1) Canada and the Joint Committee may appeal a decision rendered under Section 19.01(3) to the Courts, and the Courts shall review the decision of the Third-Party Assessor on a standard of reasonableness.

(2) A decision of the Courts may be appealed in accordance with the rules of each Court.

19.03 **Claims Process Decisions and Remediation Plans Excluded**

For greater certainty, Article 19 shall not apply to disputes regarding the Claims Process, including eligibility for membership in the Class and the compensation due to any Class Member, or in respect of a Remediation Plan, including its content or Canada's compliance, and any such disputes shall be resolved in accordance with this Agreement.

ARTICLE 20 – TERMINATION AND OTHER CONDITIONS

20.01 **Termination of Agreement**

(1) Except as set forth in Section 20.01(2), this Agreement shall continue in full force and effect until all obligations under this Agreement are fulfilled.

(2) Notwithstanding any other provision in the Agreement:

(a) the Commitment shall survive the termination of this Agreement and shall continue in force, together with Section 9.06, Section 9.07, and Section 9.08 and the Commitment Dispute Resolution Process; and

(b) Section 10.02 and Section 10.03 shall survive the termination of this Agreement; and

(c) Article 21 shall survive the termination of this Agreement.

20.02 **Amendments**

Except as expressly provided in this Agreement, no amendment may be made to this Agreement unless agreed to by the Parties in writing, and if the Courts have issued the Settlement Approval Orders, then any amendment shall only be effective once approved by the Courts.

20.03 **No Assignment**

(1) No amount payable under this Agreement can be assigned and any such assignment is null and void except as expressly provided for in this Agreement.

(2) Subject to Section 20.03(3) and Section 18.04, any payment to which a Claimant is entitled will be made to such Claimant in accordance with the direction that such Claimant provides to the Administrator unless a court of competent jurisdiction has ordered otherwise.

(3) Any payments in respect of a Deceased Individual Class Member or a Person Under Disability will be made in accordance with Article 13 .

ARTICLE 21 – CONFIDENTIALITY

21.01 **Confidentiality**

Any information provided, created or obtained in the course of implementing this Agreement will be kept confidential and will not be used for any purpose other than this Agreement unless otherwise agreed by the Parties.

21.02 **Destruction of Class Member Information and Records**

Two (2) years after completing the payment of Individual Damages, Specified Injuries Compensation, and First Nation Damages, the Administrator shall destroy all Class Member information and documentation in its possession, unless a Class Member or their Estate Executor or Estate Claimant specifically requests the return of such information within the two (2)-year period. Upon receipt of such request, the Administrator shall forward the Class Member information as directed. Before destroying any information or documentation in accordance with this Section, the Administrator shall prepare an anonymized statistical analysis of the Class in accordance with Section 39 of the Claims Process.

21.03 **Confidentiality of Negotiations**

Save as may otherwise be agreed between the Parties, the undertaking of confidentiality as to the discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to the Agreement in Principle and this Agreement continues in force.

ARTICLE 22 – COOPERATION

22.01 **Cooperation on Settlement Approval and Implementation**

Upon execution of this Agreement, the Representative Plaintiffs in the Actions, Class Counsel and Canada shall make best efforts to obtain approval of this Agreement by the Courts and to support and facilitate participation of Class Members in all aspects of this Agreement. If this Agreement is not approved by the Courts, the Parties shall negotiate in good faith to cure any defects identified by the Courts.

22.02 **Public Announcements**

Upon the issuance of the Settlement Approval Orders, the Parties shall release a joint public statement announcing the settlement in a form to be agreed by the Parties and, at a

mutually agreed time, will make public announcements in support of this Agreement. The Parties will continue to speak publicly in favour of the Agreement as reasonably requested by any Party.

[The remainder of this page is left intentionally blank. Signature pages follow.]

SCHEDULE A

AGREEMENT IN PRINCIPLE

See attached.

Manitoba Court of Queen's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under *The Class Proceedings Act*, CCSM. c. C. 130

- and -

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under Part 5.1 of the *Federal Court Rules*, SOR/98-106

AGREEMENT IN PRINCIPLE (the "AGREEMENT")

WHEREAS the Plaintiffs commenced the action styled as *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, Court File No. T-1673-19 in the Federal Court on October 11, 2019 (the "**Curve Lake Action**") and the action styled *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, Court File No. CI 19-01-24661 in the Manitoba Court of Queen's Bench on November 20, 2019 (the "**Tataskweyak Action**", and with the Curve Lake Action, the "**Actions**");

AND WHEREAS the Manitoba Court of Queen's Bench certified the Tataskweyak Action as a class proceeding on July 14, 2020 and the Federal Court certified the Curve Lake Action as a class proceeding on October 8, 2020;

AND WHEREAS the "**Class**" in the Actions is defined as follows:

(a) All persons who:

(i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the First Nations Land Management Act, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to June 20, 2021 ("**Impacted First Nations**");

(ii) had not died before November 20, 2017; and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(b) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other First Nation that elects to join this action in a representative capacity;

"**Excluded Persons**" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band, and Michael Darryl Isnardy.

AND WHEREAS the Class has suffered considerable hardships as a result of being deprived of clean drinking water and these hardships have seriously harmed both individuals and their communities;

AND WHEREAS the Class has moved for summary judgment on the first common issue concerning the existence and scope of Canada's obligation to provide Class Members with clean drinking water;

AND WHEREAS none of the Individual Class Members have opted out of the Actions and some one-hundred-and-twenty-two (122) First Nation Class Members have opted into the Actions;

AND WHEREAS the Defendant ("**Canada**") acknowledges the hardships faced by Class members and wishes to support them in securing regular access to clean drinking water;

AND WHEREAS Canada is prepared to settle the Actions on the terms set out below, subject to negotiating a definitive settlement agreement (the "**Settlement Agreement**");

AND WHEREAS Chief Doreen Spence, Tataskweyak Cree Nation, Chief Emily Whetung, Curve Lake First Nation, Former Chief Christopher Moonias, and Neskantaga First Nation (together, the "**Representative Plaintiffs**") are prepared to settle the Actions on the terms set out below, subject to incorporating them into the Settlement Agreement, and recommend that First Nation Class Members accept these terms;

NOW THEREFORE Canada and the Plaintiffs shall negotiate in good faith and make all reasonable efforts to execute the Settlement Agreement no later than August 27, 2021, subject to the Parties' agreement to any extension.

ARTICLE 1 GENERAL

1.01 **Definitions**

(1) **Acceptance**: Indication of acceptance of the Settlement Agreement by a First Nation Class Member in a form to be agreed upon by the Parties and before a date certain to be agreed upon by the Parties.

(2) **Action Plan:** Indigenous Services Canada's Long-Term Drinking Water Advisory Action Plan, attached as **Schedule "A"**, detailing the corrective measures to be undertaken by Canada to end the Long-Term Drinking Water Advisories.

(3) **Administrator:** An appropriately qualified claims administrator selected by agreement of the Parties, or failing that by the Courts, to perform the duties set out in the Agreement.

(4) **Band Council Confirmation**: A declaration by a First Nation Class Member identifying the Individual Class Members ordinarily resident on its Reserve and the dates that such Individual Class Members were ordinarily resident on its Reserve while a Long-Term Drinking Water Advisory was in effect.

(5) **Base Payment**: Five-hundred thousand dollars ($500,000).

(6) **Canada:** The Defendant.

(7) **Class Counsel:** McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP.

(8) **Claims Deadline**: Two (2) years following the resolution of appeals or such other date agreed upon by the Parties.

(9) **Claim Form:** A simplified written declaration to be completed by Individual Class Members and submitted to the Administrator, without supporting documentation except as agreed upon by the Parties.

(10) **Class**:

(a) All persons who:

(i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the First Nations Land Management Act, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) had not died before November 20, 2017; and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(b) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other First Nation that elects to join this action in a representative capacity;

(11) **Class Period:** November 20, 1995 to June 20, 2021.

(12) **Commitment**: has the meaning set out in Section 3.02(1).

(13) **Commitment Dispute Resolution Process**: has the meaning set out in Section 3.07.

(14) **Commitment Expenditures**: has the meaning set out in Section 3.02(1)(d)(iv).

(15) **Courts:** The Manitoba Court of Queen's Bench and the Federal Court.

(16) **Curve Lake Action**: The action styled as *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, Court File No. T-1673-19 in the Federal Court commenced on October 11, 2019.

(17) **Eligibility Decision:** has the meaning set out in Section 1.05(1).

(18) **Excess Funds:** has the meaning set out in Section 1.04(4).

(19) **First Nation:** A band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5, the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24.

(20) **First Nation Class Member**: A First Nation that meets the definition for membership in the Class and provides Class Counsel with notice of Acceptance.

(21) **First Nation Damages**: has the meaning set out in Section 2.04.

(22) **First Nation Damages Formula**: has the meaning set out in Section 2.04.

(23) **First Nations Advisory Committee on Safe Drinking Water or FNAC**: has the meaning set out in Section 3.04.

(24) **First Nations Economic and Cultural Restoration Fund**: has the meaning set out in Section 1.04.

(25) **Fund Transfer**: Monies transferred from the Trust Fund to the First Nations Economic and Cultural Restoration Fund.

(26) **First Nations Lands**: Lands subject to the *Indian Act*, R.S.C. 1985, c, I-5 or the *First Nations Land Management Act*, S.C. 1999, c. 24.

(27) **Individual Class Members:** natural persons who are members of the Class and have not opted out of the Actions.

(28) **Individual Damages:** has the meaning set out in Section 2.01(2).

(29) **Individual Damages Formula:** has the meaning set out in Section 2.01.

(30) **Long-Term Drinking Water Advisory:** A drinking water advisory for a Reserve or a part of a Reserve that lasts for more than one (1) year.

(31) **Parties:** The Plaintiffs, on behalf of the Class, and Canada, each one of which is a "**Party**".

(32) **Plaintiffs:** Doreen Spence, Tataskweyak Cree Nation, Emily Whetung, Curve Lake First Nation, Christopher Moonias, and Neskantaga First Nation.

(33) **Remediation Agreement**: has the meaning set out in Section 3.06(2).

(34) **Remote First Nation:** Every Reserve that is classified as Zone 3 or 4 by Indigenous and Northern Affairs Canada in the 2005 Band Classification Manual published by the Corporate Information Management Directorate Information Management Branch, being Reserves deemed either "Remote" or "Isolated and require Special Access".

(35) **Replacement Legislation:** has the meaning set out in Section 3.03(2).

(36) **Reserve:** lands whose disposition is subject to the *Indian Act*, R.S.C. 1985, c, I-5 or the *First Nations Land Management Act*, S.C. 1999, c. 24.

(37) **Restoration Fund Account:** has the meaning set out in Section 1.04(2).

(38) **Settlement Agreement**: A final, legally binding settlement agreement to be executed by the Defendant and the Plaintiffs no later than August 27, 2021, or such other date as the Parties may agree, which incorporates terms of the Agreement, except as otherwise agreed by the Parties.

(39) **Specified Injuries:** has the meaning set out in Section 2.03(1).

(40) **Specified Injuries Compensation:** has the meaning set out in Section 2.03(2).

(41) **Specified Injuries Compensation Account:** has the meaning set out in Section 2.03(3).

(42) **Specified Injuries Compensation Fund:** has the meaning set out in Section 2.03(4).

(43) **Specified Injuries Decision:** has the meaning set out in Section 2.03(5)(b).

(44) **Surplus**: has the meaning set out in Section 1.03(3).

(45) **Tataskweyak Action:** The action styled as *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, Court File No. CI 19-01-24661 in the Manitoba Court of Queen's Bench commenced on November 20, 2019.

(46) **Trust Account:** has the meaning set out in Section 1.03(1).

(47) **Trust Fund:** has the meaning set out in Section 1.03(2).

(48) **Underserviced First Nation:** has the meaning set out in Section 3.06(1).

(49) **Water Governance Fund:** has the meaning set out in Section 3.05(1).

1.02 **Administration**

(1) The Parties shall agree to the selection of the Administrator. If the Parties cannot reach agreement, any Party may bring a motion for directions in the Courts.

(2) The Administrator shall be appointed by the Courts.

(3) Canada shall be solely responsible for paying the Administrator's reasonable fees and disbursements, including any applicable taxes.

1.03 **Trust Fund**

(1) As soon as practicable after its appointment, the Administrator shall establish an interest-bearing trust account at a Schedule I Canadian Bank (the "**Trust Account**").

(2) Canada shall settle the **Trust Fund** by paying one billion four-hundred and thirty-eight million dollars ($1,438,000,000) into the Trust Account within sixty (60) days of the date on which the orders approving the Settlement Agreement become final, including any appeals.

(3) If Class Counsel, on the advice of an expert actuary, determine that there are unallocated funds in the Trust Fund (the "**Surplus**"), those funds shall be distributed for the direct or indirect benefit of the Class.

(4) Class Counsel, with the guidance of Class Members or a representative committee thereof, shall propose an allocation of the Surplus, which may include the following:

(i) Transfer of up to four hundred million dollars ($400,000,000) to the First Nation Economic and Cultural Restoration Fund;

(ii) Increased Individual Damages or First Nation Damages;

(iii) Individual Damages or First Nation Damages for late claimants who filed valid claims after the Claims Deadline;

(iv) Specified Injuries Compensation if the Specified Injuries Compensation Fund was insufficient to pay the Specified Injuries Compensation for all valid claims; or

(v) Programming to promote education, cultural or spiritual practices, study, or healing in connection with Long-Term Drinking Water Advisories.

(b) Class Counsel shall bring motions for directions in the Courts for approval of the proposed distribution of the Surplus.

(5) For greater certainty, there shall be no reversion to Canada from the Trust Fund and Canada shall not be an eligible recipient of the Surplus.

1.04 **First Nation Economic and Cultural Restoration Fund**

(1) The Parties acknowledge the importance of providing First Nations with funds for use on projects related to water and wastewater, economic development, and cultural activities. The Parties respect the autonomy of First Nations to choose the use to which funds are directed.

(2) As soon as practicable after its appointment, the Administrator shall establish an interest-bearing trust account at a Schedule I Canadian Bank (the "**Restoration Fund Account**").

(3) Canada shall fund the **First Nation Economic and Cultural Restoration Fund** by paying four-hundred million dollars ($400,000,000) into the Restoration Fund Account within sixty (60) days of the date on which the orders approving the Settlement Agreement become final, including any appeals.

(4) If funds remain in the Restoration Fund Account after the Claims Deadline has passed and the Administrator has paid all of the First Nation Damages (the "**Excess Funds**"), those funds shall be distributed for the direct or indirect benefit of the Class.

(5) Class Counsel, with the guidance of Class Members, shall propose an allocation of the Excess Funds, which may include the following:

(i) Enhanced Individual Damages or First Nation Damages;

(ii) Individual Damages or First Nation Damages for late claimants who filed valid claims after the Claims Deadline;

(iii) Specified Injuries Compensation if the Specified Injuries Compensation Fund was insufficient to pay the Specified Injuries Compensation for all valid claims; or

(iv) Programming to promote education, cultural or spiritual practices, study, or healing in connection with Long-Term Drinking Water Advisories.

(b) Class Counsel shall bring motions for directions in the Courts for approval of the proposed distribution of the Excess Funds.

(6) There shall be no reversion to Canada from the First Nation Economic and Cultural Restoration Fund and Canada shall not be an eligible recipient of the Excess Funds.

1.05 **Eligibility**

(1) The Administrator shall review each Claim Form,Band Council Confirmation, or such other information as the Administrator considers relevant, to identify eligible Individual Class Members (the "**Eligibility Decision**"). The Administrator shall issue written reasons when it determines that a claimant is not a Class Member.

(2) Within thirty (30) days of the receipt of an Eligibility Decision denying membership in the Class, the claimant and any Party may appeal the Eligibility Decision.

(3) The procedure for an appeal from an Eligibility Decision shall be decided by the Parties.

ARTICLE 2 RETROSPECTIVE COMPENSATION

2.01 **Calculation of Individual Class Member damages**

(1) The Administrator shall calculate Individual Class Members' damages in accordance with the information set out in a valid Claim Form, Band Council Confirmation, or such other information as the Administrator considers relevant, pursuant to the formula set out below (the "**Individual Damages Formula**").

(2) Individual Class Members shall be paid damages ("**Individual Damages**") for:

(a) If the Individual Class Member had not yet reached the age of 18 on November 20, 2013, every year during the Class Period that they were ordinarily resident on a Reserve while a Long-Term Drinking Water Advisory was in effect; or

(b) If the Individual Class Member had reached the age of 18 before November 20, 2013, every year from November 20, 2013 to the end of the Class Period that they were ordinarily resident on a Reserve while a Long-Term Drinking Water Advisory was in effect.

(3) Individual Damages shall be paid at approximately the following rates, with the actual rates to be determined by Class Counsel on the advice of an expert actuary:

(a) One-thousand three-hundred dollars ($1,300) per year for a Boil Water Advisory that is not in a Remote First Nation;

(b) One-thousand six-hundred and fifty ($1,650) per year for a Do Not Consume Advisory that is not in a Remote First Nation;

(c) Two-thousand dollars ($2,000) per year for a Do Not Use Advisory that is not in a Remote First Nation; and

(d) Two-thousand dollars ($2,000) per year for any Drinking Water Advisory in a Remote First Nation.

(4) Individual Damages shall be paid *pro rata* for any portion of a year for which they are due.

2.02 **Payment of Individual Class Member Damages**

(1) Within a reasonable period to be determined by the Parties in consultation with the Administrator, the Administrator shall pay each Individual Class Member the Individual Damages from the Trust Fund in accordance with the Individual Damages Formula.

2.03 **Specified Injuries Compensation Fund**

(1) In addition to Individual Damages, Individual Class Members may indicate on their Claim Form that they claims damages for specified medical conditions that were caused by a Long-Term Drinking Water Advisory on a Reserve where they were ordinarily resident ("**Specified Injuries**"). For greater certainty, the claimant must establish that the injury was caused by using water, other than source water, in accordance with a Long-Term Drinking Water Advisory or by a lack of clean water during a Long-Term Drinking Water Advisory.

(2) The Parties shall determine the list of Specified Injuries, together with the compensation for each Specified Injury (the "**Specified Injuries Compensation**") .

(3) The Administrator shall establish an interest-bearing trust account at a Schedule I Canadian Bank (the "**Specified Injuries Compensation Account**").

(4) Canada shall settle the **Specified Injuries Compensation Fund** by paying fifty million dollars ($50,000,000) into the Specified Injuries Compensation Account within sixty (60) days of the date on which the orders approving the Settlement Agreement become final, including any appeals.

(5) The Parties shall agree upon:

(a) The means of proving a Specified Injury in a non-adversarial, culturally sensitive manner that is designed so as not to re-traumatize claimants;

(b) Appropriate timelines for the Administrator to determine the validity of a Specified Injuries Compensation claim (a "**Specified Injuries Decision**"); and

(c) An appropriate appeal mechanism and timeline;

(6) Class Counsel shall assist Individual Class Members or their representatives, as requested, in making a claim for Specified Injuries Compensation or in appealing a Specified Injuries Decision at no cost to Canada or the Individual Class Member.

(7) Within ninety (90) days following the Claims Deadline, the Administrator shall determine whether there are sufficient funds in the Specified Injuries Compensation Fund to pay the Specified Injuries Compensation for each valid claim.

(a) If there are sufficient funds in the Specified Injuries Compensation Fund, the Administrator shall pay Individual Class Members their Specified Injuries Compensation; or

(b) If there are insufficient funds in the Specified Injuries Compensation Fund, the Administrator shall pay Individual Class Members their *pro rata* share of the Specified Injuries Compensation Fund, in proportion to the Specified Injuries Compensation that they would be due.

(8) There shall be no reversion to Canada from the Specified Injuries Compensation Fund.

(9) If any funds remain in the Specified Injuries Compensation Fund after paying all of the claims for Specified Injuries Compensation, the Administrator shall pay such funds into the Trust Fund.

2.04 **Calculation of First Nation Class Member Damages**

(1) The Administrator shall calculate First Nation Class Members' damages pursuant to the formula set out below (the "**First Nation Damages Formula**").

(2) Each First Nation Class Member shall be paid a base payment of five-hundred thousand dollars ($500,000) (the "**Base Payment**").

(3) In addition to the Base Payment, First Nations shall be paid an amount equal to fifty percent (50%) of the Individual Damages paid to Individual Class Members in respect of Drinking Water Advisories on the First Nation Class Member's Reserve or Reserves ("**First Nation Damages**").

2.05 **Payment of First Nation Class Member Damages**

(1) The Administrator shall pay the Base Payment and the First Nation Damages from the First Nation Economic and Cultural Restoration Fund.

(2) The Administrator shall pay the Base Payment to every First Nation Class Member within ninety (90) days of the later of the approval of the Settlement Agreement by the Courts, including all appeals, and a First Nation Class Member giving notice of Acceptance to Class Counsel.

(3) Every six (6) months after the Base Payment is made pursuant to Section 2.05(2) the Administrator shall pay the First Nation Class Member the First Nation Damages that have accrued to date.

2.06 **No provision for continued damages**

(1) The Agreement makes no provision for any damages that may accrue to Class Members in respect of Long-Term Drinking Water Advisories that begin or continue after June 20, 2021, and Class Members shall not release any claims to any such future damages.

2.07 **Canada's Liability**

(1) The Parties specifically agree that upon making the payments contemplated in the Settlement Agreement, Canada's liability to Individual Class Members and First Nation Class Members that have accepted the Settlement Agreement for damages to June 20, 2021, arising from Canada's failure to provide clean drinking water is at an end.

(2) The Parties shall agree on specific release language for the Settlement Agreement.

ARTICLE 3 PROSPECTIVE RELIEF

3.01 **Action Plan for First Nation Class Members to be implemented**

(1) Canada shall make all reasonable efforts to support the removal of Long-Term Drinking Water Advisories that affect Class Members, including by taking the steps set out in the Action Plan, within the Project timeframes set out therein.

(2) The Action Plan may be amended on consent of the Parties, in addition to being regularly updated by Canada as progress is made.

(3) Nothing in the Agreement bars Canada from taking additional measures to benefit Class Members, which measures are not contemplated in the Action Plan.

3.02 **Commitment to additional measures**

(1) In addition to the Action Plan, the Defendant shall make all reasonable efforts to ensure that Individual Class Members living on Reserves have regular access to drinking water in their homes, whether from a public water system or a private water system approved by a Band Council Resolution, including on-site systems, that meets the stricter of the federal requirements or provincial standards governing residential water quality (the "**Commitment**"). For the sake of greater certainty:

(a) regular access shall permit all usual and necessary uses of water in a similarly situated Canadian home, including but not limited to drinking water, bathing and personal hygiene, food preparation and dish washing, sanitation, and laundry;

(b) the Commitment is limited to Canada's reasonable efforts, including the provision of actual cost funding, training, planning, and technical assistance;

(c) if, despite Canada's reasonable efforts, regular access cannot be achieved, Canada is not required to warranty regular access in an Individual Class Member's home; and,

(d) Factors that may be considered in any determination of reasonable efforts include, but are not limited to:

(i) the views of the First Nation;

(ii) any federal requirements or provincial standards and protocols relating to water;

(iii) whether monitoring and testing are performed on the water system; and

(iv) the physical location of the home, including proximity to centralized water systems and remoteness.

(2) Canada shall spend at least six billion dollars ($6,000,000,000) through 2030 as contemplated by Indigenous Services Canada's Main Estimates, at a rate of at least four hundred million dollars ($400,000,000) per year, to meet the Commitment by funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on reserve for First Nations (**"Commitment Expenditures"**).

(a) Canada shall provide Class Counsel with an annual statement of all Commitment Expenditures through 2030.

(b) Upon request, Canada shall provide any First Nation Class Member with a statement of the Commitment Expenditures that it has received.

3.03 **Repeal and replacement of *Safe Drinking Water for First Nations Act***

(1) Canada shall make all reasonable efforts to introduce legislation repealing the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21 (the **"*SDWFNA*"**) on or before March 31, 2022.

(2) Canada shall make all reasonable efforts to develop and introduce replacement legislation for the *SDWFNA* ("Replacement Legislation"), in consultation with First Nations, and to introduce this legislation by December 31, 2022.

(3) The objectives of the Replacement Legislation shall be:

(a) Ensure sustainable First Nation Water Systems, premised upon:

(i) Defining minimum standards of water quality for First Nation Water Systems, with reference to standards that are directly applicable to First Nation communities, and;

(ii) Defining minimum capacity standards for the delivery of water to First Nation communities, in terms of volume per individual community member;

(b) Create a transparent approach to building, improving, and providing drinking water and wastewater services for First Nations;

(c) Confirm adequate and sustainable funding for First Nation Water and Wastewater Systems; and,

(d) Support the voluntary assumption of water and wastewater infrastructure by First Nations.

(4) Notwithstanding Canada's commitment to introduce the Replacement Legislation, Canada shall support the development of First Nations governance initiatives as described in Article 3.04, below.

3.04 **First Nations Advisory Committee**

(1) Canada shall provide twenty million dollars ($20,000,000) in funding through the 2025/2026 Fiscal Year for the creation of the First Nations Advisory Committee on Safe Drinking Water ("FNAC").

(2) The FNAC's membership shall reflect Canada's diversity of First Nation Class Member communities, languages, genders, geographies, skills, expertise, and experience with water insecurity.

(3) The primary functions of the FNAC shall be to:

(a) Work with First Nation Class Members to provide oversight, guidance, and recommendations to Indigenous Services Canada to support the development and implementation of forward-looking policy initiatives, including, without limitation:

(i) The development of Indigenous Services Canada's Long Term Strategy for Water and Wastewater on First Nation Class Member's Reserves;

(ii) The development of the Replacement Legislation.

(b) Contribute strategic advice and perspectives to Indigenous Services Canada in order to advance the long-term sustainability of safe drinking water in First Nation communities; and,

(c) Support the identification and prioritization of funding for water and wastewater in First Nations communities.

(4) The terms of reference for the FNAC shall be developed jointly by the Parties.

3.05 **First Nations governance initiatives**

(1) Canada shall make available nine million dollars ($9,000,000) in funding for First Nations to pursue governance initiatives and by-law development through the 2025/2026 Fiscal Year (the "**Water Governance Fund**").

(2) The funding for the Water Governance Fund shall continue through the stated period, regardless of whether the Replacement Legislation is enacted within the anticipated time frame or at all.

(3) The Water Governance Fund shall assist First Nation Class Members that wish to develop their own water-related governance initiatives, including for research, technical advice, by-law drafting, and the implementation of pilot projects in First Nation communities.

(4) The terms of reference for the Water Governance Fund shall be developed jointly by the Parties.

3.06 **Agreement on required measures**

(1) Canada shall promptly consult with each First Nation Class Member that gives notice to Canada that the Commitment is not met or ceases to be met (each an "**Underserviced First Nation**") with a view to meeting the Commitment.

(2) Canada shall make all reasonable efforts to reach an agreement with the Underserviced First Nation detailing the steps that are required to meet the Commitment (a "**Remediation Agreement**").

(3) Canada and the Underserviced First Nation shall comply with the Remediation Agreement.

3.07 **Dispute resolution for required measures**

(1) If Canada fails to reach a Remediation Agreement with an Underserviced First Nation after six (6) months, Canada and the Underserviced First Nation shall each submit their proposed form of Remediation Agreement to a dispute resolution process (the "**Commitment Dispute Resolution Process**").

(2) The Commitment Dispute Resolution Process shall be developed jointly by the Parties, and it shall incorporate Indigenous dispute resolution practices.

[This space intentionally left blank]

SCHEDULE "A"

[illegible]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

ON	Mississaugas of Scugog Island First Nation	Scugog Community Water System 1 Public Water System (#220000) (Work since October 2008)	[redacted]	[redacted]	0	0	Treatment systems do not meet requirements for DBPs	Long-term: New treatment plant, elevated storage and main feeder system Short-term: N/A	- Construction of new well and treatment plant, elevated storage, watermain upgrades, and wastewater system complete; minor landscaping and other deficiencies were expected to be addressed spring 2022 - IPHC engaged and commencing system head commission requirements - Final inspection of WTP and Contractors workings are underway, several non-deficiencies remain (landscaping, etc.) and some work being completed by contractor to address; new items are anticipated May 31, 2021 - First Nation requires 70 homes currently on private wells to be connected to new system before filing delivery; homes were never hooked; COVID related delays have been experienced - Meeting with Chief and council Dec 2020, watermain contractor expected to be doing connections in Cycle 1 and water works contract to start up 30 homes; plan was to be completed by May 31, 2021; Chief requested ISC funding support for the connection services of approximately $150,000; ISC approved the additional funding	$10,000
ON	Mississaugas of Scugog Island First Nation	Scugog Community Water System 2 Public Water System (#220000) (Work since October 2008)	[redacted]	[redacted]	0	0				$10,000
ON	Mississaugas of Scugog Island First Nation	Scugog Band Office and 4 Public Water System #s (Work since October 2008)	[redacted]	[redacted]	0	1			- Work since delays due to COVID restrictions; Chief and Council presented work; Until February 11, 2021 due to safety concerns about work never ended; PWT meeting held Feb 18, 2021 to confirm plan as a practical and watch and utilize perimeters; work was not considered to be completed until July 2021 - Chief noted has begun with contractor contacting Environmental King at various properties in the community and installing water service connections to curb stops - April 22, 2021: Chief and Council advised community Well test for Mississaugh COVID restrictions; no water can be performed in homes until they receive positive results; due to province confinement communities, contractor's return to site will not occur until August 2021 - Operations supports are being provided through ISC Funded Contracted Water and Wastewater Operating Services by the Nawaashin First Council	$10,000
ON	Mississaugas of Scugog Island First Nation	Scugog Health Centre Semi-Public Water System #6 (1121) (Work since October 2008)	[redacted]	[redacted]	0	1				$10,000
ON	Wahnapitae First Nation	Wahnapitae Public Water System (Work since May 2020)	[redacted]	[redacted]	30	0	Treatment required to support construction activity to upgrade the facility	Long-term: Upgrades to treatment and distribution systems, structural improvements to existing electrical and mechanical upgrades Short-term: N/A	- 2020-21 project support (low priority) related to upgrades, including fiber media replacements - 2020 contractor in place due to challenges operating with new treatment train; issues with total fluoride content resolved - Upgrades to pitch and treatment processes continue; filter media replaced and biological layer in new area sand filter media developed - Jan 13, 2021 PWT meeting; contractor advised of further delays as equipment failures last until 2. Detailed 100 list list, awaiting response for some new signals - May 31, 2021 contractor determined that e.g. moisture content in concrete and sediment adjustment. Contractor worked with sub-contractor to complete adjustments, and planned to work and start up procedure on March 23, 2021 - Information advised that work up and tests were successful, as 70 KVA was achievable. We will have system programmed and ready, start up was scheduled for April 28, 2021 however further issues with LCV control valve identified and parts required had not yet arrived on site. Start up delayed to May 5, 2021 successful re-analysis, and monitoring as designed. Letter sent March 31, 2021, but was unacceptable - Recent occurred week of May 17, 2021, however performance test failed to some system did not meet requirements for maximum design flow, work underway on line to address performance issues. As of June 15, 2021, PWT advised that contractor continues to work on software issues with the pump generator, as complete provided for the work to be completed and for start up and performance testing to be re-tested. PWT meeting has been scheduled for week of July 12, 2021 - Operational supports provided to community by ISC Funded Contracted Water and Wastewater Operating Services by Pur-O-Flow Eng Corp Limited	TBD - Project ongoing as delays

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

ON	Northwest Angle No. 33	Well Three House Plant Public Water System (part of Angle Inlet Public Water System, #PTW) (NAN since April 2021)	[redacted]	[redacted]	27	4	Iron Processing Unit/Plant Malfunction	Long-term: New wastewater water treatment plant at Angle Inlet Short-term: N/A	- Intent to submit an alternate advisory could not be determined to be neither feasible, nor cost-effective. - Design and tendering for new plant complete; equipment pre-purchased and made/parts sets - Community closed on March 2020, plans were delayed due to COVID-19. Tender is expected in May & construction awarded - Construction continued as progress on WTP. COVID-19 delays resulted in non-occupied of ELDW - March 2021, contractor indicated that they aim to meet the July 2021 substantial, given that the building shell will be dry-closed in. All equipment difficult and will have any single unit that could cause not be considered on-site schedule - April 12, 2021, contractor issued revised schedule calling for substantial completion in the 2021, contractor, chief and the balance of the contractors continued on-site to install issues not at fault of the First Nation to COVID on request for delays. Contractor made several on-site visits to ensure that works were on-going and making progress, project management and First Nation representatives and on-site meetings by the contractor, Contractor submitted this and working to identify issues as soon as possible. - on April 28 PMT meeting, contractor advised of new site visits, and delivery and site supervisor. Contractor commissioner advised that construction was on-going and no major issues were expected. - On request of ON, PMT agreed to continue to weekly meetings to support on-site management, meetings were previously monthly. PMT meeting occurred June 10, 2021, and project appeared to remain on track to remain schedule. - Water/sewer supports are being provided to the community through the 10 Trusted Contracted Water and Wastewater Unit being delivered by the WWC Tribal Council. Community working with them to train contract operators in advance from Days 1 to Days 5 commission, and 3 other candidates in advance 5/7	[redacted]
ON	Northwest Angle No. 33	Hole Washbrook Portal House Public Water System (#2TH2) (NAN since April 2021)	[redacted]	[redacted]	5	5	Water not meeting microbiological standards for disinfection			[redacted]
ON	Eabametoong First Nation	Eaglegate Depot Drive Alarm Public Water System (NAN since April 2008)	[redacted]	[redacted]	4	1	Turbidity level exceed guidelines	Long-term: Point of entry treatment unit to be installed Short-term: N/A	- Training and physical work to re-commission been completed through OFP Nov 21 2019, including chemical/septic property - Consultant assessment Nov 2020 recommended new well and treatment work to start effected building, detailed design completed January 2021 - New water tanked for community buildings in Oct 2020 survey and building work completed - Training included good practice, new water, with higher consideration for management machinery required. - Boil/Bac Issued/Lifted from commission February 26, 2021, chemical and daily sampling and alarm on-site. Contractor advised some materials delayed, expect short issues rendering analysis of communities water, since warnings being reviewed by consulting engineer PMT last week of April 21, 2021, contractor advised each required if needed to complete - May 11, 2021, commission has not received materials, supplier contacted delivery expected by end of May. - Contractor advised waiting on last of key materials, including needed damaged filter must be installed first, other parts, including pump and a mainly starting. Initial information on delivery promised by supplier - Commission confirmed mobilization to site scheduled for June 14 for installation of Health Canada Water System, anticipating to require a week to complete, equipment (chlorine contact tanks) expected to complete Drive and Borehole pump chamber system to follow last week. Arrived, Contracted to resolve available until end of June - First chemical analysis will be required, along with other testing to resume mid-August - First Nation concerned with residential wells and has sought funding from Investing in Canada - Water Stream program administered by Province of Ontario. First Nation has sought contribution from ISC to support project shared Area - Hydrant approach - Water/Well support is provided by community through the 10 Trusted Unit being delivered by [redacted]	[redacted]
ON	Eabametoong First Nation	Eaglegate Depot Drive Alarm Public Water System (NAN since April 2008)	[redacted]	[redacted]	4	1	Total coliform present and present in water from the well			[redacted]
ON	Fichers of the Thames	Shamrock Public Water System #PTW) (NAN since September 2019)	[redacted]	[redacted]	108	80	Treatment system does not meet required levels for DBPs	Long-term: To be determined through feasibility study Short-term: Ongoing operations and maintenance	- Feasibility Study kick-off meeting held Sept 2020, interim solution could not be designed and commissioned prior to March 2021. - Project also reviewed approaches to address long-term viability of current groundwater source, would included groundwater well/aquifer source water investigation/approvals. - Consultant initiated investigations of current flow to municipal systems in area. - Consultant should test investigations in the interim solutions, options include: series of mobile maintenance vessels, provision of wastewater capacity to handle hauled water and significant treated leg (only treatment not certified at existing water treatment facility), interim solution may not be technically or financially feasible. - PMT meeting held Feb 1, 2021 to discuss options analysis, consultant advised that municipal connection could be investigated as source as an interim solution. First Nation expressed support for municipal connection. Many services (municipal connection options, garage interest in interim solution, details of discussion and comments are shared with ON. - Through conversations with community project representatives, ISC advised that Chief and Council are making moves on INFRA solution. First Nation accepting First Nations Water, May 26, 2021 moves with ISC, community water, sewer and wastewater to be served by week 30, 2021 - ON working on schedule meetings to advance project. Follow-up underway	TBC - Project schedule not yet defined

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]

Short-Term Drinking Water Advisories on Public Systems Financially Supported by ISC (i.e. Advisories that have been in effect for 2 to 12 months)										
Region	First Nation	System Name	Date first [DD/MM/YYYY]	Date Advisory Lifted, Became a Long-Term Issue, OR Cancelled [DD/MM/YYYY]	Number of Homes Affected*	Number of Individuals Affected*	Issue	Corrective Measure(s)	Current Status	Non-Compliance Date**
ON	Big Grassy	Big Grassy Public Water System (WWS since March 2021)	[redacted]	[redacted]	80	1	Water line joint deterioration and pressure loss	Installation of a new water treatment plant (Membrane unit)	- Community experiencing challenges with current plant, with three operators in Within 3 into past 12 months, current WWS due to pressure loss in distribution, suspected leak - Lead detection complete, recommended treatment (Water Canada) as a result of upgrades and work on-in-in-new treatment equipment and systems continued to present unforeseen challenges in maintaining safe drinking water production - First Nation leadership has decided to keep the WWS in place until upgrades and expansion project is completed, under construction since March 2020 - Contractor completed date for substantial completion in August 2021, with commissioning planned for commence in mid-2 2021 - ISET meetings were monthly, with more weeks in May 21, 2021, and next scheduled for June 30, 2021, as May ISET meeting - Contractor advised First Nation Chief/Council for Variable Frequency Drives (VFD) and Water Level to assist ISET) are affecting project work - start-up of new filter plant planned for June 21, 2021, pending receipt of April evidence 2021 - Operational issues were identified through ISET meetings, with the plant not working as a substantial plant with and to have new operators begin to service for commissioning - Operational support designed and kept through ISC funded Technical Water and Wastewater Trial being delivered by the ISET Trial Council	[redacted]
ON	Kitchenuhmaykoosib	Kasabonika Lake First Nation Public Water System (WWS since September 2020)	[redacted]	[redacted]	unknown	unknown	Treatment system does not meet reg. turbidity requirements - Wastewater sampling not meeting	[redacted] - Upgrades to treatment system [redacted] - [redacted]	- Will water advisory is unless an treatment system does not meet reg. turbidity requirements, water quality information is not supported for adequate water sampling and testing routines - Long-term design of upgrades to treatment system completed as part of the Kitchenuhmaykoosib Inc Process System project - Current construction schedule identifies upgrades to be completed by July 2021. 70 HP/unit were requested an updated schedule from the contractor to be issued, estimates estimated updated schedule(s) in May 28, 2021 indicating the date for completion of the first new water system to be online	[redacted]
ON	Kitchenuhmaykoosib	Kitchenuhmaykoosib (KIK) Public Water System (WWS since January 2021)	[redacted]	[redacted]	71	4	Dry plant to meet quality monitoring - operational issues	[redacted] - Upgrade and expansion of water treatment plant - Different monitoring approaches identified through plant assessment (survey, Water Canada) and subsequent and improve operations	- Operational challenges - inconsistent water and water quality monitoring and issues for WWS - Assessment of plant identified maintenance deficiencies (pumps, electrical, instruments). Phase 1B has approved funding to support immediate work to address these maintenance issues. - RFP for proposals for a consulting engineer completed, and contract awarded, on-site testing consultant assumed during the week of March 29, 2021. Engineer's Assessment report (phase) (phase) issue with Band Member membership, treatment supplier to assess week of May 17, 2021, updated assessment report that includes findings and recommendations of treatment supplier expected to be issued May 31, 2021. As of June 21, 2021, report will be re-issued to ISC as consulting engineer has requested that treatment supplier (Wayne Reid) be able to submit for assessment and recommendations. Report work anticipated to be complete by end of August 2021, however, given this delay to the treatment supplier, timelines to March 31 of ongoing - Operational supports provided by ISC Facilities Dedicated Water and Wastewater Trial delivered by [redacted] - Training (O/M) support initiated by Trial program in supporting technical operations - Long-term solution determined through feasibility study, project is currently unfunded	[redacted]

[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]
ON	Iskatewizaagegan No. 39	Iskatewizaagegan No. 39 Water Treatment Plant	• Iskatewizaagegan No. 39 currently does not have a drinking water advisory in effect. In June 2016, Ineo (TEMA) on the Iskatewizaagegan No. 39 Administration Building was lifted. • Iskatewizaagegan No. 39 is currently under a drinking water advisory in effect. In June 2016, Ineo (TEMA) on the Iskatewizaagegan No. 39 Administration Building was lifted. • Iskatewizaagegan No. 39 currently does not have a drinking water advisory in effect. In June 2016, Ineo (TEMA) on the Iskatewizaagegan No. 39 Administration Building was lifted.
ON	Neskantaga	Truck Out Trips	• ISC&B will support Greater than "Truck Out Trips" proposed for 125MB in Neskantaga, which is a Community Wellness Planning Plan that focuses on substance misuse, culture education, including self-esteem, and identifying other community approaches wellness strategies. This proposal arose from the need to address psychological and structural impact of the 7 TSSA which only compounds the ongoing trauma and mental health challenges experienced by the community. • ISC&B ISC's initial funding will be used to support the community engagement and capacity support in developing the Community Wellness Planning Plan, as well as a short-mental health support for the community engagement and review their data and from those sessions. • The initial community engagement (approved in February 2021) will be implemented by the First Nation's TMHW continues to be available to support the First Nation as they advance the implementation of the project. • ISC&B will be committed to funding the implementation and delivery of the Community Wellness Planning Plan that is developed through the community engagement process in consultation with TMHW.

SCHEDULE B

FEDERAL CERTIFICATION ORDER

See attached.

Federal Court  Cour fédérale

Date: 20201008

Docket: T-1673-19

Ottawa, Ontario, October 8, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CURVE LAKE FIRST NATION AND CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

THIS MOTION for certification, brought by the Plaintiffs, was heard on September 16, 2020.

ON READING the motion record of the Plaintiffs and the consent of the Defendant.

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to the *Federal Courts Rules*, 334.16 and 334.17.

2. **THIS COURT ORDERS AND DECLARES** that the Class is defined as:

(a) *All persons other than Excluded Persons who:*

(i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) had not died before November 20, 2017; and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(b) *Curve Lake First Nation, Neskantaga First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").*

"**Excluded Persons**" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band, and Michael Darryl Isnardy.

3. **THIS COURT ORDERS AND DECLARES** that until the claims asserted in this class proceeding are fully and finally decided, settled, discontinued, or abandoned, including the exhaustion of all rights of appeal, leave of the Court is required to commence any other proceeding on behalf of any member of the Class in respect of the claims asserted in this action, save and except for proceedings commenced on behalf of those members of the Class who opt out of this class proceeding in the manner prescribed below.

4. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of the Class as a whole:

(a) *From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or*

ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. **THIS COURT ORDERS AND DECLARES** that a sub-group be and is hereby recognized for the members of each Impacted First Nation, and the First Nation itself, if it is a Participating Nation;

6. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of each sub-group:

(a) *If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?*

(b) *If the answer to common issue 6(a) is yes, is any breach of the Charter of Rights and Freedoms ("**Charter**") saved by s. 1 of the Charter?*

(c) *If the answer to common issue 6(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?*

(d) *If the answer to common issue 6(a) is "yes" and the answer to common issue 6(b) is "no", are damages available to members of the sub-group under s. 24(1) of the Charter?*

(e) *Can the causation of any damages suffered by members of the sub-group be determined as a common issue?*

(f) *Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?*

(g) *Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?*

(h) *Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?*

(i) If so, what measures should be ordered?

7. **THIS COURT ORDERS AND DECLARES** that Chief Emily Whetung, Curve Lake First Nation, Chief Christopher Moonias, and Neskantaga First Nation are hereby appointed as Representative Plaintiffs for the Class.

8. **THIS COURT ORDERS AND DECLARES** that McCarthy Tétrault LLP and Olthuis Kleer Townshend are hereby appointed as class counsel ("**Class Counsel**").

9. **THIS COURT ORDERS AND DECLARES** that the Plaintiffs and the Defendant shall make reasonable efforts to agree on the appointment of an administrator for the purpose of giving notice of the certification of this class proceeding (the "**Administrator**"). The Parties shall advise the Court of the appointment of the Administrator within sixty (60) days of the date of this Order, failing which the Court shall appoint an appropriately qualified Administrator.

10. **THIS COURT ORDERS** that class members shall be notified that this action has been certified as a class proceeding as follows, which shall be and is hereby deemed adequate notice:

(a) *by posting the Short Form Notice set out in **Schedule "A"** and Long Form Notice set out in **Schedule "B"**, and the French language translations of these documents, as agreed upon by the parties, on the respective websites of Class Counsel, the Defendant, and the Administrator;*

(b) *by the Administrator publishing the Short Form Notice in the newspapers set out in **Schedule "C"** attached hereto, in ¼ of a page size in the weekend edition of each newspaper, if possible;*

(c) *by the Administrator distributing the Short Form Notice to all offices of Curve Lake First Nation, Neskantaga First Nation, and the Assembly of First Nations;*

(d) *by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;*

(e) *by the Administrator forwarding the Short Form Notice and Long Form Notice to the Chiefs of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons;*

(f) *by the Administrator forwarding the Short Form Notice and Long Form Notice to the band office or similar office of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons, together with a request that they be posted in a prominent place;*

(g) *by the Administrator establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.*

11. **THIS COURT ORDERS** that the Defendant shall be responsible for the cost of giving notice of the certification of a class proceeding as set out in paragraph 10, above.

12. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiffs and the Defendant shall exchange a list setting out their best information on the names of the First Nations that are eligible to opt into the Class, and taken together these lists shall constitute the means of identifying the First Nations that are entitled to direct notice for the purpose of paragraphs 10(e) and 10(f), above.

13. **THIS COURT ORDERS** that a class member may opt out of this class proceeding by delivering a signed opt-out coupon, a form of which is attached as **Schedule "D"**, or some other legible signed request to opt out, within one-hundred-and-twenty (120) days of the date on which notice is first published in accordance with paragraph 10(b), above (the "**Opt Out Deadline**"), to the Administrator. The Short Form Notice and Long Form Notice shall state the Opt Out Deadline and the address of the Administrator for the purpose of receiving opt-out coupons.

14. **THIS COURT ORDERS** that no Class Member may opt out of this class proceeding after the Opt Out Deadline, except with leave of the Court.

15. **THIS COURT ORDERS** that the Administrator shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

16. **THIS COURT ORDERS** that any Impacted First Nation may opt into this class proceeding by retaining Class Counsel no fewer than one-hundred-and-twenty (120) days before the disposition of any of the common issues (the "**Opt In Deadline**"), to Class Counsel, at the address set out in paragraph 11, above.

17. **THIS COURT ORDERS** that no Class member may opt into this class proceeding after the Opt In Deadline, except with leave of the Court.

18. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the Court, within sixty (30) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

19. **THIS COURT DECLARES** that the Litigation Plan attached hereto as Appendix 1 is a workable method of advancing the class proceeding on behalf of the Class.

20. **THIS COURT ORDERS** that each party shall bear its own costs of the within motion for certification of this class proceeding.

"Paul Favel"
Judge

Schedule A

Legal Notice

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

A Lawsuit May Affect You and Your First Nation. Please Read this Carefully.

You could be affected by class action litigation regarding the lack of access to clean drinking water on First Nations reserves.

The Manitoba Court of Queen's Bench and the Federal Court of Canada decided that a class action on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. There is no money available now and no guarantee that the class action will succeed.

The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.

What is this case about?

This class action asserts that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The class action asserts that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The class action asserts that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Court has not decided whether any of these assertions are true. If there is no settlement, the Plaintiffs will have to prove their claims in Court.

If you have questions about this class action, you can contact **Eric Khan** 1(800) 538-0009 or info@classaction2.com.

Who represents the class?

The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent the Class as "Class Counsel". You do not have to pay Class Counsel, or anyone else, to participate. If Class Counsel obtains money or benefits for the Class they may ask for lawyers' fees and costs, which would be deducted from any money or benefits recovered for Class members.

Individuals Class Members: Who is included and who is excluded?

Band Members Included: The Class includes band members (as defined by the *Indian Act*): (a) whose reserve was subject to a drinking water advisory (such as a boil water advisory, etc.) that lasted at least one year at any time from November 20, 1995 to the present; (b) had not died before November 20, 2017; and (c) ordinarily lived on their reserve.

Band Members Excluded: Members of the Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Michael Darryl Isnardy are excluded from this class action.

Individuals: What are your options?

Stay in the Class: To stay in the Class, you do not have to do anything. If the Class obtains money or benefits, Class Counsel will give notice about how to ask for your share. You will be legally bound by all orders and judgments, and you will not be able to sue Canada about the legal claims in this case.

Staying in the Class will not impact the supports received from community-based agencies that are funded by any government.

Get out of the Class: If you do not want to participate in this class action litigation, you need to remove yourself by opting out. If you opt out, you cannot get money or benefits from this litigation. To opt out, please visit **[NTD: Insert Administrator's website for this action]** to obtain an opt out coupon, or write to CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 requesting to be removed from this class action. Please include your name, address, telephone number, and signature. **Your request to opt out must be sent by [NTD: 90 days from the date of the first publication of notice].**

First Nations: What are your options?

Elect to join the Class: First Nations that wish to join the Class and assert claims on behalf of their community must take action to opt in. To opt in, or to seek more information, please contact the Administrator at 1(800)538-0009 or info@classaction2.com. First Nations may also contact Class Counsel Stephanie Willsey (toll free:1-877-244-7711; swillsey@mccarthy.ca) or Class Counsel Kevin Hille ((416) 598-3694; khille@oktlaw.com). **Your request to opt in must be sent no later than 120 days before Class members' claims are determined.**

How Can I Get More Information?

Name of Administrator: CA2
Contact Information: 1(800)538-0009 or info@classaction2.com

Getting Information To People Who Need It

The representative Plaintiffs and Class Counsel ask for the help of health care workers, social workers, First Nations community leaders, family members, caregivers and friends of Class members in getting information to Class members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule B

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

If YES, A Class Action May Affect Your Rights and the Rights of First Nations

A court authorized this notice

- You could be affected by a class action involving access to clean drinking water in your First Nation Communities.
- The Manitoba Court of Queen's Bench and the Federal Court of Canada has decided that class actions on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.
- The Courts have not decided whether Canada did anything wrong, and there still has to be a Court case about whether Canada did anything wrong. There is no money available now and no guarantee there will ever be any money. However, your rights are affected, and you have a choice to make now. This notice is to help you and your First Nation make that choice.

INDIVIDUAL BAND MEMBERS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
DO NOTHING: KEEP YOUR RIGHTS UNDER THE CLASS ACTION	**Stay in these lawsuits and wait for the outcome. Share in possible benefits from the outcome but give up certain individual rights.** By doing nothing, you keep the possibility of receiving money or other benefits that may come from a trial or settlement. But, you give up any rights to sue Canada on your own about the same legal claims in this lawsuit.
REMOVE YOURSELF (OPT OUT)	**Get out of these lawsuits and get no benefits from it. Keep rights.** If you ask to opt out and money or benefits are later awarded to Class members, you won't get a share. But, you keep any rights to sue Canada on your own about the same legal claims in this lawsuit.
FIRST NATIONS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
CHOOSE TO JOIN THE CLASS (OPT IN)	**Join the Class. If you join, your First Nations might share in money and benefits from the outcome.** By joining the Class (opting in), First Nations might receive money or other benefits, including water infrastructure, that may come from a trial or settlement in the Class Action. Opting in is an easy process, and there is no cost to opt in.

QUESTIONS? CALL TOLL-FREE 1-800-538-0009 OR VISIT HTTPS://CLASSACTION2.COM/

DO NOTHING: LOSE YOUR FIRST NATION'S RIGHTS UNDER THE CLASS ACTION	**By doing nothing, your First Nation will lose the possibility of receiving money and other benefits if the Class Action succeeds.** If First Nations do not join the Class (opt in) and money or benefits are later awarded, your First Nation won't share in those. By not opting-in, your First Nation may keep any rights to sue Canada about the same legal claims in this litigation.

- Lawyers must prove the claims against Canada at a trial or a settlement must be reached. If money or benefits are obtained you will be notified about how to ask for your share.

- Your options are explained in this notice. To be removed from the litigation, individual band members must ask to be removed by **[NTD: 90 days from the first publication of notice.]**. To join the Class Action, First Nations must send their opt in notice no later than 120 days before Class members' claims are to be determined.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. Why is there a notice?

The Courts have "certified" Class Actions. This means that the lawsuits meets the requirements for class actions and may proceed to trial. If you are included, you may have legal rights and options before the Courts decide whether the claims being made against Canada on your behalf are correct. This notice attempts to explain all of these things.

Chief Justice Joyal of the Manitoba Court of Queen's Bench is currently overseeing the case known as *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Justice Favel of the Federal Court of Canada is currently overseeing the case known as *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias v. Canada*. The persons who sued are called the Plaintiffs. Canada is the Defendant. A link to the latest version of the Statement of Claim (the legal document that makes the allegations against Canada) can be found here: https://www.mccarthy.ca/en/class-action-litigation-drinking-water-advisories-first-nations-0

2. What is this litigation about?

These Class Actions assert that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The Class Actions also assert that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The Class Actions assert that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Courts have not decided (and Canada has not admitted) that any of these assertions are true. If there is no settlement with Canada, the Plaintiffs will have to prove their claims in Court.

If you are having a difficult time dealing with these issues, or have questions about the Class Action, you can call 1 (800) 538-0009 for assistance.

3. Why is this a class action?

In a class action, the "representative plaintiffs" (in this case, Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias) sued on behalf of individual band members and First Nations who have similar claims. All of these individual band members are part of the "Class" or "Class Members", as are First Nations who choose to join the Class Action. The Court resolves the issues for all Class Members in one case, except (in the case of individual band members) for those who remove themselves from (opt out of) the Class and (in the case of First Nations) for those that do not join (opt into) the Class Action.

4. Who is a member of the Class?

The Class includes and excludes the following:

All persons, other than "Excluded Persons" who:

(i) are members of a band, as defined in subsection 2(1) of the Indian Act, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) were not dead two years prior to the commencement of this action (that is, by November 20, 2017); and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(iv) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

"Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Okanagan Indian Band and Michael Darryl Isnardy.

5. What are the Plaintiffs asking for?

The Plaintiffs are asking for money and other benefits for the Class, including water infrastructure. The Plaintiffs are also asking for legal fees and costs, plus interest.

6. Is there any money available to Class Members now?

No money or benefits are available now because the Court has not yet decided whether Canada did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits will ever be obtained. If money or other benefits become available, notice will be provided about how to ask for your share.

YOUR RIGHTS AND OPTIONS

Individual band members must decide whether to stay in the Class, and you have to decide this by **[NTD: 90 days from the first publication of notice]**. First Nations must decide whether they want to join the class by **no later than 120 days before the Class members' claims are determined.**

7. What happens if I do nothing at all? What happens if the First Nation does nothing at all?

Individuals Band Members: if you do nothing, you will automatically remain in the Class Action. You will be bound by all Court orders, good or bad. If any money or other benefits are awarded, you may need to take action after notice to you to receive any benefits.
First Nations: First Nations must chose to join the Class Action to receive the potential benefits and to be bound by all Court orders, good or bad.

8. What if I don't want to be in the Lawsuit? What if a First Nation wants to join the Lawsuit?

Individual Band Members: If you do not want to be in the lawsuit, you must remove yourself – this is referred to as "opting out." If you remove yourself, you will not receive any benefit that may be obtained from the Class Action. You will not be bound by any Court orders and you keep your right to sue Canada as an individual regarding the issues in this case.

To remove yourself, send a communication that says you want to be removed from the Class in *Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias v. Canada* Court File No. CI-19-01-2466. Include your name, address, telephone number, and signature. You can also get an Opt Out Form at **[insert Administrator web link].** You must deliver your removal request by **[NTD: 90 days from the first publication of notice]** to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 or info@classaction2.com.

Call **1 (800) 538-0009** if you have any questions about how to get out of the Class Action.

First Nations: First Nations that wish to join the Class Action and assert claims on behalf of their band or community must take action to join – this is referred to as "opting in." To opt in, or to seek more information, please contact the Administrator **1(800)538-0009** or info@classaction2.com. First Nations may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca) or Kevin Hille at khille@oktlaw.com or (416) 598-3694. **Requests by First Nations to opt in must be sent no later than 120 days before Class members' claims are determined.**

THE LAWYERS REPRESENTING YOU

10. Do Individual Band Members have a lawyer in the case?

Yes. The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent you and other Class Members as "Class Counsel." You will not be charged legal or other fees or expenses for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense.

11. How will the lawyers be paid?

Class Counsel will only be paid if they win judgement or if there is a settlement. The Court has to also approve their request to be paid. The fees and expenses could be deducted from any money obtained for the Class, or paid separately by the Defendant.

A TRIAL

12. How and when will the Court decide who is right?

If the Class Action is not dismissed or settled, the Plaintiffs must prove their claims at a motion for summary judgement or a trial that will take place in Ottawa, Ontario. During the motion or trial, the Court will hear all of the evidence, so that a decision can be reached about whether the Plaintiffs or Canada is right about the claims in the Class Action. There is no guarantee that the Plaintiffs will win any money or benefits for the Class.

13. Will I get money after the trial?

If the Plaintiffs obtain money or benefits as a result of a trial or settlement, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now. Important information about the case will be posted on the website **[NTD: insert Administrator website]** as it becomes available.

GETTING MORE INFORMATION

14. How do I get more information? How to I get information to people who need it?

You can get more information at **https://classaction2.com/** by calling toll free at 1(800)538-0009, by writing to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2, or by emailing: **info@classaction2.com**.

First Nations and Individual Band Members may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca or 66 Wellington Street West, Toronto, Ontario, M5K 1E6) or Class Counsel Kevin Hille at khille@oktlaw.com or (416) 598-3694 or 250 University Avenue, 8th floor, Toronto, Ontario, M5H 3E5.

Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, Chief Christopher Moonias, Tataskweyak Cree Nation, Chief Doreen Spence, and Class Counsel kindly ask for the help of health care workers, social workers, First Nation community leaders, family members, caregivers and friends of Class members in getting information to Class Members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator or Class Counsel. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule C

List of Newspapers

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Montreal Gazette
Montreal La Presse (digital edition)
Halifax Chronicle-Herald
Moncton Times and Transcript

First Nations Drum

Schedule D

FORM OF OPT OUT COUPON

To: **[Insert Claim Administrator Address]**
[Insert Administrator Email Address]

This is **NOT** a claim form. Completing this **OPT OUT COUPON** will exclude you from receiving any compensation or other benefits arising out of any settlement or judgment in the class proceeding named below:

Note: To opt out, this coupon must be properly completed and sent to the above-address no later than **[INSERT DATE THAT IS 90 DAYS FROM THE FIRST NOTICE PUBLICATION]**

Court File No.: T-1673-19

CURVE LAKE FIRST NATIONAL and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

I understand that by opting out of this class proceeding, I am confirming that I do not wish to participate in this class proceeding.

I understand that any individual claim I may have must be commenced within a specified limitation period or that claim will be legally barred.

I understand that the certification of this class proceeding suspended the running of the limitation period from the time the class proceeding was filed. The limitation period will resume running against me if I opt out of this class proceeding.

I understand that by opting out, I take full responsibility for the resumption of the running of any relevant limitation period legal steps to protect any claim I may have.

Date: _____

Name of Class Member: _____

Signature of Witness	Signature of Class Member Opting Out

Name of Witness:

Appendix 1

Court File No. T-1673-19

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *Federal Courts Rules, 334.16 and 334.17*

LITIGATION PLAN

FOR COMMON ISSUES, CERTIFICATION AND SUMMARY JUDGMENT MOTIONS

1. Attached as **Schedule "A"** is the parties' consent timetable. This Litigation Plan is intended to address the Plaintiffs' motions for certification and summary judgement.

2. If the motion for summary judgement is successful, a further plan will be proposed to address any remaining issues, depending on the outcome.

3. Alternatively, if the motion for summary judgement is not successful, the Plaintiffs will propose a further plan for the trial of the common issues.

4. The Plaintiffs seek certification of the following common issue to be resolved on behalf of the class as a whole ("**Stage 1 Common Issue**"):

   (a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. If the Defendant consents to certification of a class proceeding, the Plaintiffs will negotiate with the Defendant to resolve the common issues. If the negotiations fail, the Plaintiffs will require the delivery of a Statement of Defence, following which they will deliver a record in support of a motion for summary judgement on the Stage 1 Common Issue. At a pre-trial conference following delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule a hearing of their motion.

6. If the Defendant opposes the certification of a class proceeding, the Plaintiffs will require the Defendant to deliver a Statement of Defence. The Plaintiffs will then deliver a record in support of motions for certification and summary judgement on the Stage 1 Common Issue. At a pre-trial conference following the delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule the hearing of their motion for summary judgement together with the hearing of their motion for certification.

7. At the certification motion, the Plaintiffs will also seek certification of the following common issues to be resolved on behalf of each Impacted First Nation sub-group, being the members of that First Nation and the First Nation itself, if it is a Participating First Nation ("**Stage 2 Common Issues**"):

(a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?

(b) If the answer to common issue 7(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("***Charter***") saved by s. 1 of the *Charter*?

(c) If the answer to common issue 7(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

(d) If the answer to common issue 7(a) is "yes" and the answer to common issue 7(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?

(e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(b) publishing the notice in designated newspapers;

(c) distributing the notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations.

(d) forwarding the notice to any Class member who requests it and the Chiefs of every First Nation that is eligible to opt into the class, as well as each band office;

(e) establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

(a) And by such other notice as the Court directs.

14. The Plaintiffs will ask the Court to approve opt-out and opt-in forms to be used by class members wishing to opt out of, or opt into, the class action, which will require the Class member to provide sufficient information to establish their membership in the Class.

LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS

Notice of Resolution of Common Issues

15. The Plaintiffs will ask that the Court settle the form and content for notification of the resolution of the Stage 1 and Stage 2 Common Issues ("**Resolution Notice Plan**") and the means by which Class members will file claims ("**Claim Forms**") by a fixed date with the Administrator. The Plaintiffs will also ask that the Court settle an appropriate process to determine any remaining individual issues.

Valuation of Damages

16. If the Common Issues are resolved in favour of the Plaintiffs, the Plaintiffs propose two (2) methods for assessing and distributing damages for the class members as follows:

(a) Aggregate damages that accrue to individual Class members on a *pro rata* basis or on a *pro rata* basis within a sub-group;

(b) Aggregate damages that accrue to Participating First Nations on a community basis; and

17. Following the determination of aggregate damages, including punitive damages, additional damages may be awarded in individual issues proceedings.

(g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(i) If so, what measures should be ordered?

8. If the Stage 1 Common Issue is determined in favour of the Plaintiffs, the parties will conclude a discovery plan to manage the Defendant's timely production of relevant documents in respect of the Stage 2 Common Issues for each Impacted First Nation sub-group.

9. Upon assessing the Defendant's productions, the Plaintiffs will decide whether to bring motions for summary judgement on the Stage 2 Common Issues for some or all of the Impacted First Nation sub-groups, or alternatively, to schedule a trial of these common issues.

NOTIFICATION OF CERTIFICATION AND OPT OUT PROCEDURE

10. On the motion for certification, the Plaintiffs will ask that the Court settle the form and content for notification of the certification of this action (the "**Notice of Certification**"), the timing and manner of providing Notice of Certification ("**Notice Program**") and set out an opt-out date as being three (3) months following the date of the Certification Order ("**Opt-Out Date**"), and an opt-in date as being six (6) months prior to the commencement of the determination of the Stage 2 Common Issues.

11. If a motion for summary judgement is being heard together with a motion for certification, the Plaintiffs will ask the court to render its decision on certification first, direct that notice issue if a class proceeding is certified, and then render its decision on the Stage 1 Common Issue following the Opt-Out Date.

12. The Plaintiffs will ask the Court to order that the defendant pay the costs of the Notice Program, including the cost of the Administrator.

13. The Plaintiffs will seek an order for the distribution of notice of certification as follows:

(a) posting the notice on the respective websites of Class Counsel, the Defendant, and the Administrator;

(b) publishing the notice in designated newspapers;

(c) distributing the notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations.

(d) forwarding the notice to any Class member who requests it and the Chiefs of every First Nation that is eligible to opt into the class, as well as each band office;

(e) establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

(a) And by such other notice as the Court directs.

14. The Plaintiffs will ask the Court to approve opt-out and opt-in forms to be used by class members wishing to opt out of, or opt into, the class action, which will require the Class member to provide sufficient information to establish their membership in the Class.

LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS

Notice of Resolution of Common Issues

15. The Plaintiffs will ask that the Court settle the form and content for notification of the resolution of the Stage 1 and Stage 2 Common Issues ("**Resolution Notice Plan**") and the means by which Class members will file claims ("**Claim Forms**") by a fixed date with the Administrator. The Plaintiffs will also ask that the Court settle an appropriate process to determine any remaining individual issues.

Valuation of Damages

16. If the Common Issues are resolved in favour of the Plaintiffs, the Plaintiffs propose two (2) methods for assessing and distributing damages for the class members as follows:

(a) Aggregate damages that accrue to individual Class members on a *pro rata* basis or on a *pro rata* basis within a sub-group;

(b) Aggregate damages that accrue to Participating First Nations on a community basis; and

17. Following the determination of aggregate damages, including punitive damages, additional damages may be awarded in individual issues proceedings.

Assessment of Number of Claimants

18. After the deadline for submitting Claim Forms has expired, the Administrator shall calculate the total number of claimants for the purpose of any *pro rata* distribution of aggregate damages.

19. The Parties may also retain an actuary to assist with the determination of Class size and the demographics of the Class.

Global Punitive Damages Distribution

20. Should the Court award aggregate damages to the Class or a sub-group, the total amount of damages will be apportioned to the class in a manner to be determined by the Court within a fixed period of time set by the Court from the Notice of Resolution.

Funds not Distributed

21. Any monies not distributed will be distributed *cy-près* as the Court directs. The Plaintiffs propose that any residual amounts be distributed *cy-près* to community organizations that assist with water infrastructure in Impacted First Nations.

Resolution of the Individual Issues

22. Within thirty (30) days of the issuance of the judgment on the common issues, the parties will convene to settle a protocol to resolve any individual issues. If the parties cannot settle such a protocol, the Plaintiffs will move for directions from the Court within sixty (60) days.

MISCELLANEOUS REQUIREMENTS OF THE LITIGATION PLAN

Funding

23. Class Counsel have entered into an agreement with the Representative Plaintiffs with respect to legal fees and disbursements. This agreement provides that counsel will not receive payment for their work unless and until the class proceeding is successful or costs are recovered from the Defendant.

24. Class Counsel's legal fees are subject to court approval.

Claims Administration

25. The Administrator will provide the claims administration for any settlement or judgement achieved. The Administrator will distribute notice in accordance with the Resolution Notice Plan. If a settlement is achieved and a settlement fund is provided, or if judgement results in an award in favour of Class members, the Administrator will administer payments out of the fund to claimants based on the procedures set out above, after approval and/or modification by the Court.

Class Action Website

26. From time to time, Class Counsel will post relevant pleadings and court filings, the latest documents and summaries of the latest developments, anticipated timelines, frequently asked questions and answers, and contact information for class counsel for the information of class members.

Conflict Management

27. Class Counsel and the Plaintiffs have taken appropriate measures to determine that no conflict of interest exists among the members of the Class, and no such conflict is anticipated. Should a conflict arise, McCarthy Tétrault LLP will represent one sub-group, and Olthuis Kleer Townshend LLP will represent the other. Should any conflict arise as between First Nations and their members, which is not anticipated given their commonality of interest, McCarthy Tétrault LLP will represent the members and Olthuis Kleer Townshend LLP will represent the First Nations.

Applicable Law

28. The applicable law is the *Constitution Act, 1982*, the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21, the *Indian Act*, R.S.C. 1985, c, I-5, the *First Nations Land Management Act*, S.C. 1999, c. 24, *The Federal Courts Act*, R.S.C., 1985 c. F-7 as well as applicable regulations, the common law and the law of Canada.

Coordination of proceedings

29. On July 14, 2020 the Manitoba Court of Queen's Bench certified a related class proceeding in the matter styled *Tataskweyak Cree Nation v. Canada*, Court File No. 19-01¬24661 (the

"**Tataskweyak Action**"). The representative plaintiffs in the Tataskweyak Action have pledged to work collaboratively with the Plaintiffs to advance their common interests. Pursuant to the *Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice*, the Plaintiffs will ask the Federal Court and the Manitoba Court of Queen's Bench to convene joint case management conferences, as appropriate, to ensure coordination between the two proceedings and to promote efficiency. In order to ensure consistent results, the Plaintiffs may ask that the Federal Court and the Manitoba Court of Queen's Bench sit together to hear any motion for summary judgement or any trial of the Tataskweyak Action and this action.

Schedule A

Timetable

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Statement of Defence	Defendant	To be delivered on 60 days' notice by the Plaintiffs
Delivery of Reply, if any	Plaintiffs	To be delivered 15 days after delivery of Statement of Defence
Delivery of Summary Judgement Record	Plaintiffs	June 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Pre-trial to assess summary judgement	All parties	July 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Responding Record	Defendant	October 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Reply Record, if any	Plaintiffs	December 16, 2020 (or 45 days after delivery of Responding Record, whichever is later)
Cross-examinations	All parties	To be completed 75 days after delivery of Reply Record, if any, or 120 days after delivery of Responding Record
Refusals Motions, if any	All parties	To be completed 30 days after completion of cross-examinations
Delivery of answers to undertakings	All parties	To be completed 15 days after refusals motion

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Moving Factum	Plaintiffs	To be delivered 45 days after completion of answers to undertakings
Delivery of Responding Factum	Defendant	To be delivered 45 days after delivery of Moving Factum
Delivery of Reply Factum	Plaintiffs	To be delivered 15 days after delivery of Responding Factum
Hearing of possible Summary Judgement Motion	All parties	July-August 2021

Court File No. T-1673-19

FEDERAL COURT

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

LITIGATION PLAN

(Filed this 8th day of September, 2020)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K

eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Tel: 416-601-7831
Fax: 416-868-0673

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8th Floor
Toronto ON M5H 3E5
The Honourable Harry S. LaForme LSO#19338D
hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S
khille@oktlaw.com
Tel: 416-981-9330
Fax: 416-981-9350

Lawyers for the Plaintiffs

SCHEDULE C

MANITOBA CERTIFICATION ORDER

See attached.

File No. CI-19-01-24661

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and –

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M.c. C. 130

ORDER

THIS MOTION for certification, brought by the Plaintiffs was heard on July 14, 2020 at 408 York Ave in Winnipeg, Manitoba.

ON READING the motion record of the Plaintiffs and the consent of the Defendant.

AND ON BEING ADVISED that the parties consent to this order.

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to *The Class Proceedings Act*, C.C.S.M.c. C. 130.

2. **THIS COURT ORDERS AND DECLARES** that the Class is defined as:

   (a) All persons other than Excluded Persons who:

      (i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject

to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) had not died before November 20, 2017; and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(b) Tataskweyak Cree Nation and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

"**Excluded Persons**" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band, and Michael Daryl Isnardy.

3. **THIS COURT ORDERS AND DECLARES** that until the claims asserted in this class proceeding are fully and finally decided, settled, discontinued, or abandoned, including the exhaustion of all rights of appeal, leave of the Court is required to commence any other proceeding on behalf of any member of the Class in respect of the claims asserted in this action, save and except for proceedings commenced on behalf of those members of the Class who opt out of this class proceeding in the manner prescribed below.

4. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of the Class as a whole:

(a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. **THIS COURT ORDERS AND DECLARES** that a sub-group be and is hereby recognized for the members of each Impacted First Nation, and the First Nation itself, if it is a Participating Nation;

6. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of each sub-group:

(a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?

(b) If the answer to common issue 6(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("***Charter***") saved by s. 1 of the *Charter*?

(c) If the answer to common issue 6(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

(d) If the answer to common issue 6(a) is "yes" and the answer to common issue 6(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?

(e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(i) If so, what measures should be ordered?

7. **THIS COURT ORDERS AND DECLARES** that Chief Doreen Spence and Tataskweyak Cree Nation are hereby appointed as Representative Plaintiffs for the Class.

8. **THIS COURT ORDERS AND DECLARES** that McCarthy Tétrault LLP and Olthuis Kleer Townshend are hereby appointed as class counsel ("**Class Counsel**").

9. **THIS COURT ORDERS AND DECLARES** that the Plaintiffs and the Defendant shall make reasonable efforts to agree on the appointment of an administrator for the purpose of giving notice of the certification of this class proceeding (the "**Administrator**"). The Parties shall advise the Court of the appointment of the Administrator within sixty (60) days of the date of this Order, failing which the Court shall appoint an appropriately qualified Administrator.

10. **THIS COURT ORDERS** that class members shall be notified that this action has been certified as a class proceeding as follows, which shall be and is hereby deemed adequate notice:

(a) by posting the Short Form Notice set out in **Schedule "A"** and Long Form Notice set out in **Schedule "B"**, and the French language translations of these documents, as agreed upon by the parties, on the respective websites of Class Counsel, the Defendant, and the Administrator;

(b) by the Administrator publishing the Short Form Notice in the newspapers set out in **Schedule "C"** attached hereto, in ¼ of a page size in the weekend edition of each newspaper, if possible;

(c) by the Administrator distributing the Short Form Notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations;

(d) by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;

(e) by the Administrator forwarding the Short Form Notice and Long Form Notice to the Chiefs of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons;

(f) by the Administrator forwarding the Short Form Notice and Long Form Notice to the band office or similar office of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons, together with a request that they be posted in a prominent place;

(g) by the Administrator establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

11. **THIS COURT ORDERS** that the Defendant shall be responsible for the cost of giving notice of the certification of a class proceeding as set out in paragraph 10, above.

12. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiffs and the Defendant shall exchange a list setting out their best information on the names of the First Nations that are eligible to opt into the Class, and taken together these lists shall constitute the means of identifying the First Nations that are entitled to direct notice for the purpose of paragraphs 10(e) and 10(f), above.

13. **THIS COURT ORDERS** that a class member may opt out of this class proceeding by delivering a signed opt-out coupon, a form of which is attached as **Schedule "D"**, or some other legible signed request to opt out, within one-hundred-and- twenty-days (120) days of the date on which notice is first published in accordance with paragraph 10(b), above (the "**Opt Out Deadline**"), to the Administrator. The Short Form Notice and Long Form Notice shall state the Opt Out Deadline and the address of the Administrator for the purpose of receiving opt-out coupons.

14. **THIS COURT ORDERS** that no Class Member may opt out of this class proceeding after the Opt Out Deadline, except with leave of the Court.

15. **THIS COURT ORDERS** that the Administrator shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

16. **THIS COURT ORDERS** that any Impacted First Nation may opt into this class proceeding by retaining Class Counsel no fewer than one-hundred-and-twenty (120) days before

the disposition of any of the common issues (the "**Opt In Deadline**"), to Class Counsel, at the address set out in paragraph 11, above.

17. **THIS COURT ORDERS** that no Class member may opt into this class proceeding after the Opt In Deadline, except with leave of the Court.

18. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

19. **THIS COURT DECLARES** that the Litigation Plan attached hereto as Appendix 1 is a workable method of advancing the class proceeding on behalf of the Class.

20. **THIS COURT ORDERS** that each party shall bear its own costs of the within motion for certification of this class proceeding.

July 14 , 2020

G.D. JOYAL

The Honourable Chief Justice Joyal

CONSENTED TO AS TO FORM AND CONTENT:

Per: _____
Stephanie Willsey for Catharine Moore/Scott Farlinger
The Attorney General of Canada

Per: _____
Stephanie Willsey
Tataskweyak Cree Nation and Chief Doreen Spence

Schedule A

Legal Notice

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

A Lawsuit May Affect You and Your First Nation. Please Read this Carefully.

You could be affected by class action litigation regarding the lack of access to clean drinking water on First Nations reserves.

The Manitoba Court of Queen's Bench and the Federal Court of Canada decided that a class action on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. There is no money available now and no guarantee that the class action will succeed.

The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.

What is this case about?

This class action asserts that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The class action asserts that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The class action asserts that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Court has not decided whether any of these assertions are true. If there is no settlement, the Plaintiffs will have to prove their claims in Court.

If you have questions about this class action, you can contact **Eric Khan** 1(800) 538-0009 or info@classaction2.com.

Who represents the class?

The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent the Class as "Class Counsel". You do not have to pay Class Counsel, or anyone else, to participate. If Class Counsel obtains money or benefits for the Class they may ask for lawyers' fees and costs, which would be deducted from any money or benefits recovered for Class members.

Individuals Class Members: Who is included and who is excluded?

Band Members Included: The Class includes band members (as defined by the *Indian Act*): (a) whose reserve was subject to a drinking water advisory (such as a boil water advisory, etc.) that lasted at least one year at any time from November 20, 1995 to the present; (b) had not died before November 20, 2017; and (c) ordinarily lived on their reserve.

Band Members Excluded: Members of the Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Michael Darryl Isnardy are excluded from this class action.

Individuals: What are your options?

Stay in the Class: To stay in the Class, you do not have to do anything. If the Class obtains money or benefits, Class Counsel will give notice about how to ask for your share. You will be legally bound by all orders and judgments, and you will not be able to sue Canada about the legal claims in this case.

Staying in the Class will not impact the supports received from community-based agencies that are funded by any government.

Get out of the Class: If you do not want to participate in this class action litigation, you need to remove yourself by opting out. If you opt out, you cannot get money or benefits from this litigation. To opt out, please visit **[NTD: Insert Administrator's website for this action]** to obtain an opt out coupon, or write to CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 requesting to be removed from this class action. Please include your name, address, telephone number, and signature. **Your request to opt out must be sent by [NTD: 120 days from the date of the first publication of notice].**

First Nations: What are your options?

Elect to join the Class: First Nations that wish to join the Class and assert claims on behalf of their community must take action to opt in. To opt in, or to seek more information, please contact the Administrator at 1(800)538-0009 or info@classaction2.com. First Nations may also contact Class Counsel Stephanie Willsey (toll free:1-877-244-7711; swillsey@mccarthy.ca) or Class Counsel Kevin Hille ((416) 598-3694; khille@oktlaw.com). **Your request to opt in must be sent no later than 120 days before Class members' claims are determined.**

How Can I Get More Information?

Name of Administrator: CA2
Contact Information: 1(800)538-0009 or info@classaction2.com

Getting Information To People Who Need It

The representative Plaintiffs and Class Counsel ask for the help of health care workers, social workers, First Nations community leaders, family members, caregivers and friends of Class members in getting information to Class members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule B

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

If YES, A Class Action May Affect Your Rights and the Rights of First Nations

A court authorized this notice

- You could be affected by a class action involving access to clean drinking water in your First Nation Communities.
- The Manitoba Court of Queen's Bench and the Federal Court of Canada has decided that class actions on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.
- The Courts have not decided whether Canada did anything wrong, and there still has to be a Court case about whether Canada did anything wrong. There is no money available now and no guarantee there will ever be any money. However, your rights are affected, and you have a choice to make now. This notice is to help you and your First Nation make that choice.

INDIVIDUAL BAND MEMBERS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
DO NOTHING: KEEP YOUR RIGHTS UNDER THE CLASS ACTION	**Stay in these lawsuits and wait for the outcome. Share in possible benefits from the outcome but give up certain individual rights.** By doing nothing, you keep the possibility of receiving money or other benefits that may come from a trial or settlement. But, you give up any rights to sue Canada on your own about the same legal claims in this lawsuit.
REMOVE YOURSELF (OPT OUT)	**Get out of these lawsuits and get no benefits from it. Keep rights.** If you ask to opt out and money or benefits are later awarded to Class members, you won't get a share. But, you keep any rights to sue Canada on your own about the same legal claims in this lawsuit.
FIRST NATIONS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
CHOOSE TO JOIN THE CLASS (OPT IN)	**Join the Class. If you join, your First Nations might share in money and benefits from the outcome.** By joining the Class (opting in), First Nations might receive money or other benefits, including water infrastructure, that may come from a trial or settlement in the Class Action. Opting in is an easy process, and there is no cost to opt in.

QUESTIONS? CALL TOLL-FREE 1-800-538-0009 OR VISIT HTTPS://CLASSACTION2.COM/

DO NOTHING: LOSE YOUR FIRST NATION'S RIGHTS UNDER THE CLASS ACTION	**By doing nothing, your First Nation will lose the possibility of receiving money and other benefits if the Class Action succeeds.** If First Nations do not join the Class (opt in) and money or benefits are later awarded, your First Nation won't share in those. By not opting-in, your First Nation may keep any rights to sue Canada about the same legal claims in this litigation.

- Lawyers must prove the claims against Canada at a trial or a settlement must be reached. If money or benefits are obtained you will be notified about how to ask for your share.
- Your options are explained in this notice. To be removed from the litigation, individual band members must ask to be removed by **[NTD: 120 days from the first publication of notice.]**. To join the Class Action, First Nations must send their opt in notice no later than 120 days before Class members' claims are to be determined.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. Why is there a notice?

The Courts have "certified" Class Actions. This means that the lawsuits meets the requirements for class actions and may proceed to trial. If you are included, you may have legal rights and options before the Courts decide whether the claims being made against Canada on your behalf are correct. This notice attempts to explain all of these things.

Chief Justice Joyal of the Manitoba Court of Queen's Bench is currently overseeing the case known as *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Justice Favel of the Federal Court of Canada is currently overseeing the case known as *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias v. Canada*. The persons who sued are called the Plaintiffs. Canada is the Defendant. A link to the latest version of the Statement of Claim (the legal document that makes the allegations against Canada) can be found here: https://www.mccarthy.ca/en/class-action-litigation-drinking-water-advisories-first-nations-0

2. What is this litigation about?

These Class Actions assert that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The Class Actions also assert that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The Class Actions assert that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Courts have not decided (and Canada has not admitted) that any of these assertions are true. If there is no settlement with Canada, the Plaintiffs will have to prove their claims in Court.

If you are having a difficult time dealing with these issues, or have questions about the Class Action, you can call 1 (800) 538-0009 for assistance.

3. Why is this a class action?

In a class action, the "representative plaintiffs" (in this case, Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias) sued on behalf of individual band members and First Nations who have similar claims. All of these individual band members are part of the "Class" or "Class Members", as are First Nations who choose to join the Class Action. The Court resolves the issues for all Class Members in one case, except (in the case of individual band members) for those who remove themselves from (opt out of) the Class and (in the case of First Nations) for those that do not join (opt into) the Class Action.

4. Who is a member of the Class?

The Class includes and excludes the following:

All persons, other than "Excluded Persons" who:

(i) are members of a band, as defined in subsection 2(1) of the Indian Act, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) were not dead two years prior to the commencement of this action (that is, by November 20, 2017); and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(iv) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

"Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Okanagan Indian Band and Michael Darryl Isnardy.

5. What are the Plaintiffs asking for?

The Plaintiffs are asking for money and other benefits for the Class, including water infrastructure. The Plaintiffs are also asking for legal fees and costs, plus interest.

6. Is there any money available to Class Members now?

No money or benefits are available now because the Court has not yet decided whether Canada did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits will ever be obtained. If money or other benefits become available, notice will be provided about how to ask for your share.

YOUR RIGHTS AND OPTIONS

Individual band members must decide whether to stay in the Class, and you have to decide this by **[NTD: 120 days from the first publication of notice]**. First Nations must decide whether they w ant to join the class by **no later than 120 days before the Class members' claims are determined.**

7. What happens if I do nothing at all? What happens if the First Nation does nothing at all?

Individuals Band Members: if you do nothing, you will automatically remain in the Class Action. You will be bound by all Court orders, good or bad. If any money or other benefits are awarded, you may need to take action after notice to you to receive any benefits.
First Nations: First Nations must chose to join the Class Action to receive the potential benefits and to be bound by all Court orders, good or bad.

8. What if I don't want to be in the Lawsuit? What if a First Nation wants to join the Lawsuit?

Individual Band Members: If you do not want to be in the lawsuit, you must remove yourself – this is referred to as "opting out." If you remove yourself, you will not receive any benefit that may be obtained from the Class Action. You will not be bound by any Court orders and you keep your right to sue Canada as an individual regarding the issues in this case.

To remove yourself, send a communication that says you want to be removed from the Class in *C urve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher M oonias v. Canada* Court File No. CI-19-01-2466. Include your name, address, telephone number, and signature. You can also get an Opt Out Form at **[insert Administrator web link].** You must deliver your removal request by **[NTD: 120 days from the first publication of notice]** to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 or info@classaction2.com.

Call **1 (800) 538-0009** if you have any questions about how to get out of the Class Action.

First Nations: First Nations that wish to join the Class Action and assert claims on behalf of their band or community must take action to join – this is referred to as "opting in." To opt in, or to seek more information, please contact the Administrator **1(800)538-0009** or info@classaction2.com. First Nations may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca) or Kevin Hille at khille@oktlaw.com or (416) 598-3694. **Requests by First Nations to opt in must be sent no later than 120 days before Class members' claims are determined.**

THE LAWYERS REPRESENTING YOU

10. Do Individual Band Members have a lawyer in the case?

Yes. The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent you and other Class Members as "Class Counsel." You will not be charged legal or other fees or expenses for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense.

11. How will the lawyers be paid?

Class Counsel will only be paid if they win judgement or if there is a settlement. The Court has to also approve their request to be paid. The fees and expenses could be deducted from any money obtained for the Class, or paid separately by the Defendant.

A TRIAL

12. How and when will the Court decide who is right?

If the Class Action is not dismissed or settled, the Plaintiffs must prove their claims at a motion for summary judgement or a trial that will take place in Ottawa, Ontario. During the motion or trial, the Court will hear all of the evidence, so that a decision can be reached about whether the Plaintiffs or Canada is right about the claims in the Class Action. There is no guarantee that the Plaintiffs will win any money or benefits for the Class.

13. Will I get money after the trial?

If the Plaintiffs obtain money or benefits as a result of a trial or settlement, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now. Important information about the case will be posted on the website **[NTD: insert Administrator website]** as it becomes available.

GETTING MORE INFORMATION

14. How do I get more information? How to I get information to people who need it?

You can get more information at **https://classaction2.com/** by calling toll free at 1(800)538-0009, by writing to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2, or by emailing: **info@classaction2.com**.

First Nations and Individual Band Members may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca or 66 Wellington Street West, Toronto, Ontario, M5K 1E6) or Class Counsel Kevin Hille at khille@oktlaw.com or (416) 598-3694 or 250 University Avenue, 8th floor, Toronto, Ontario, M5H 3E5.

Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, Chief Christopher Moonias, Tataskweyak Cree Nation, Chief Doreen Spence, and Class Counsel kindly ask for the help of health care workers, social workers, First Nation community leaders, family members, caregivers and friends of Class members in getting information to Class Members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator or Class Counsel. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule C

List of Newspapers

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Montreal Gazette
Montreal La Presse (digital edition)
Halifax Chronicle-Herald
Moncton Times and Transcript

First Nations Drum

Schedule D

FORM OF OPT OUT COUPON

To: **[Insert Claim Administrator Address]**
[Insert Administrator Email Address]

This is **NOT** a claim form. Completing this **OPT OUT COUPON** will exclude you from receiving any compensation or other benefits arising out of any settlement or judgment in the class proceeding named below:

***Note: To opt out, this coupon must be properly completed and sent to the above-address no later than* [INSERT DATE THAT IS 120 DAYS FROM THE FIRST NOTICE PUBLICATION]**

Court File No.: T-1673-19

CURVE LAKE FIRST NATIONAL and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

I understand that by opting out of this class proceeding, I am confirming that I do not wish to participate in this class proceeding.

I understand that any individual claim I may have must be commenced within a specified limitation period or that claim will be legally barred.

I understand that the certification of this class proceeding suspended the running of the limitation period from the time the class proceeding was filed. The limitation period will resume running against me if I opt out of this class proceeding.

I understand that by opting out, I take full responsibility for the resumption of the running of any relevant limitation period legal steps to protect any claim I may have.

Date: _____

Name of Class Member: _____

Signature of Witness

Signature of Class Member Opting Out

Name of Witness:

Appendix 1

File No. CI-19-01-24661

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and –

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M.c. C. 130

LITIGATION PLAN

FOR COMMON ISSUES, CERTIFICATION AND SUMMARY JUDGMENT MOTIONS

1. Attached as **Schedule "A"** is the parties' consent timetable, as ordered by the Court. This Litigation Plan is intended to address the Plaintiffs' motions for certification and summary judgement.

2. If the motions are successful, a further plan will be proposed to address any remaining issues, depending on the outcome.

3. Alternatively, if the motion for summary judgement is not successful, the Plaintiffs will propose a further plan for the trial of the common issues.

4. At the certification motion, the Plaintiffs will seek certification of the following common issue to be resolved on behalf of the class as a whole ("**Stage 1 Common Issue**"):

(a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. If the Defendant consents to certification of a class proceeding, the Plaintiffs will negotiate with the Defendant to resolve the common issues. If the negotiations fail, the Plaintiffs will require the delivery of a Statement of Defence, following which they will deliver a record in support of a motion for summary judgement on the Stage 1 Common Issue. At a pre-trial conference following delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule a hearing of their motion.

6. If the Defendant opposes the certification of a class proceeding, the Plaintiffs will require the Defendant to deliver a Statement of Defence. The Plaintiffs will then deliver a record in support of motions for certification and summary judgement on the Stage 1 Common Issue. At a pre-trial conference following the delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule the hearing of their motion for summary judgement together with the hearing of their motion for certification.

7. At the certification motion, the Plaintiffs will also seek certification of the following common issues to be resolved on behalf of each Impacted First Nation sub-group, being the members of that First Nation and the First Nation itself, if it is a Participating First Nation ("**Stage 2 Common Issues**"):

(a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?

(b) If the answer to common issue 7(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("***Charter***") saved by s. 1 of the *Charter*?

(c) If the answer to common issue 7(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

(d) If the answer to common issue 7(a) is "yes" and the answer to common issue 7(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?

(e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(i) If so, what measures should be ordered?

8. If the Stage 1 Common Issue is determined in favour of the Plaintiffs, the parties will conclude a discovery plan to manage the Defendant's timely production of relevant documents in respect of the Stage 2 Common Issues for each Impacted First Nation sub-group.

9. Upon assessing the Defendant's productions, the Plaintiffs will decide whether to bring motions for summary judgement on the Stage 2 Common Issues for some or all of the Impacted First Nation sub-groups, or alternatively, to schedule a trial of these common issues.

NOTIFICATION OF CERTIFICATION AND OPT OUT PROCEDURE

10. On the motion for certification, the Plaintiffs will ask that the Court settle the form and content for notification of the certification of this action (the "**Notice of Certification**"), the timing and manner of providing Notice of Certification ("**Notice Program**") and set out an opt-out date as being three (3) months following the date of the Certification Order ("**Opt-Out Date**"), and an opt-in date as being six (6) months prior to the commencement of the determination of the Stage 2 Common Issues.

11. If a motion for summary judgement is being heard together with a motion for certification, the Plaintiffs will ask the court to render its decision on certification first, direct that notice issue if a class proceeding is certified, and then render its decision on the Stage 1 Common Issue following the Opt-Out Date.

12. The Plaintiffs will ask the Court to order that the defendant pay the costs of the Notice Program, including the cost of the Administrator.

13. The Plaintiffs will seek an order for the distribution of notice of certification as follows:

(a) posting the notice on the respective websites of Class Counsel, the Defendant, and the Administrator;

(b) publishing the notice in designated newspapers;

(c) distributing the notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations.

(d) forwarding the notice to any Class member who requests it and the Chiefs of every First Nation that is eligible to opt into the class, as well as each band office;

(e) establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

(a) And by such other notice as the Court directs.

14. The Plaintiffs will ask the Court to approve opt-out and opt-in forms to be used by class members wishing to opt out of, or opt into, the class action, which will require the Class member to provide sufficient information to establish their membership in the Class.

LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS

Notice of Resolution of Common Issues

15. The Plaintiffs will ask that the Court settle the form and content for notification of the resolution of the Stage 1 and Stage 2 Common Issues ("**Resolution Notice Plan**") and the means by which Class members will file claims ("**Claim Forms**") by a fixed date with the Administrator. The Plaintiffs will also ask that the Court settle an appropriate process to determine any remaining individual issues.

Valuation of Damages

16. If the Common Issues are resolved in favour of the Plaintiffs, the Plaintiffs propose two (2) methods for assessing and distributing damages for the class members as follows:

(a) Aggregate damages that accrue to individual Class members on a *pro rata* basis or on a *pro rata* basis within a sub-group;

(b) Aggregate damages that accrue to Participating First Nations on a community basis; and

17. Following the determination of aggregate damages, including punitive damages, additional damages may be awarded in individual issues proceedings.

Assessment of Number of Claimants

18. After the deadline for submitting Claim Forms has expired, the Administrator shall calculate the total number of claimants for the purpose of any *pro rata* distribution of aggregate damages.

Global Punitive Damages Distribution

19. Should the Court award aggregate damages to the Class or a sub-group, the total amount of damages will be apportioned to the class in a manner to be determined by the Court within a fixed period of time set by the Court from the Notice of Resolution.

Funds not Distributed

20. Any monies not distributed will be distributed *cy-près* as the Court directs. The Plaintiffs propose that any residual amounts be distributed *cy-près* to community organizations that assist with water infrastructure in Impacted First Nations.

Resolution of the Individual Issues

21. Within thirty (30) days of the issuance of the judgment on the common issues, the parties will convene to settle a protocol to resolve any individual issues. If the parties cannot settle such a protocol, the Plaintiffs will move for directions from the Court within sixty (60) days.

MISCELLANEOUS REQUIREMENTS OF THE LITIGATION PLAN

Funding

22. Class Counsel has entered into an agreement with the Representative Plaintiffs with respect to legal fees and disbursements. This agreement provides that counsel will not receive payment for their work unless and until the class proceeding is successful or costs are recovered from the Defendant.

23. Class Counsel's legal fees are subject to court approval under the *Class Proceedings Act*.

Claims Administration

24. The Administrator will provide the claims administration for any settlement or judgement achieved. The Administrator will distribute notice in accordance with the Resolution Notice Plan. If a settlement is achieved and a settlement fund is provided, or if judgement results in an award in favour of Class members, the Administrator will administer payments out of the fund to claimants based on the procedures set out above, after approval and/or modification by the Court.

Class Action Website

25. From time to time, Class Counsel will post relevant pleadings and court filings, the latest documents and summaries of the latest developments, anticipated timelines, frequently asked questions and answers, and contact information for class counsel for the information of class members.

Conflict Management

26. Class Counsel and the Plaintiffs have taken appropriate measures to determine that no conflict of interest exists among the members of the Class, and no such conflict is anticipated. Should a conflict arise, McCarthy Tétrault LLP will represent one sub-group, and Olthuis Kleer Townshend LLP will represent the other. Should any conflict arise as between First Nations and their members, which is not anticipated given their commonality of interest, McCarthy Tétrault LLP will represent the members and Olthuis Kleer Townshend LLP will represent the First Nations.

Applicable Law

27. The applicable law is the *Constitution Act, 1982*, the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21, the

Indian Act, R.S.C. 1985, c, I-5, the *First Nations Land Management Act*, S.C. 1999, c. 24, *The Class Proceedings Act*, C.C.S.M. c. C130, as well as applicable regulations, the common law and the law of Manitoba.

Schedule "A"

Timetable

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Statement of Defence	Defendant	To be delivered on 60 days' notice by the Plaintiffs
Delivery of Reply, if any	Plaintiffs	To be delivered 15 days after delivery of Statement of Defence
Delivery of Certification/Summary Judgement Record	Plaintiffs	June 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Pre-trial to assess summary judgement	All parties	July 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Responding Record	Defendant	October 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Reply Record, if any	Plaintiffs	December 16, 2020 (or 45 days after delivery of Responding Record, whichever is later)
Cross-examinations	All parties	To be completed 75 days after delivery of Reply Record, if any, or 120 days after delivery of Responding Record
Refusals Motions, if any	All parties	To be completed 30 days after completion of cross-examinations
Delivery of answers to undertakings	All parties	To be completed 15 days after refusals motion

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Moving Factum	Plaintiffs	To be delivered 45 days after completion of answers to undertakings
Delivery of Responding Factum	Defendant	To be delivered 45 days after delivery of Moving Factum
Delivery of Reply Factum	Plaintiffs	To be delivered 15 days after delivery of Responding Factum
Hearing of Certification and possible Summary Judgement Motion	All parties	July-August 2021

Court File No.: CI 19-01-24661

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proposed Class Proceeding commenced under Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C. 130

LITIGATION PLAN

(Filed this 2nd day of July, 2020)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tel: 416-601-7831
Fax: 416-868-0673
Lawyers for the Plaintiffs

Court File No.: CI 19-01-24661

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proposed Class Proceeding commenced under Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C. 130

ORDER

(July 14, 2020)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tel: 416-601-7831
Fax: 416-868-0673
Lawyers for the Plaintiffs

File No. CI-19-01-24661

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and –

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M.c. C. 130

ORDER

THIS MOTION for certification, brought by the Plaintiffs was heard on July 14, 2020 at 408 York Ave in Winnipeg, Manitoba.

ON READING the motion record of the Plaintiffs and the consent of the Defendant.

AND ON BEING ADVISED that the parties consent to this order.

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to *The Class Proceedings Act*, C.C.S.M.c. C. 130.

2. **THIS COURT ORDERS AND DECLARES** that the Class is defined as:

   (a) All persons other than Excluded Persons who:

      (i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject

to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) had not died before November 20, 2017; and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(b) Tataskweyak Cree Nation and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

"**Excluded Persons**" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band, and Michael Daryl Isnardy.

3. **THIS COURT ORDERS AND DECLARES** that until the claims asserted in this class proceeding are fully and finally decided, settled, discontinued, or abandoned, including the exhaustion of all rights of appeal, leave of the Court is required to commence any other proceeding on behalf of any member of the Class in respect of the claims asserted in this action, save and except for proceedings commenced on behalf of those members of the Class who opt out of this class proceeding in the manner prescribed below.

4. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of the Class as a whole:

(a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. **THIS COURT ORDERS AND DECLARES** that a sub-group be and is hereby recognized for the members of each Impacted First Nation, and the First Nation itself, if it is a Participating Nation;

6. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of each sub-group:

(a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?

(b) If the answer to common issue 6(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("***Charter***") saved by s. 1 of the *Charter*?

(c) If the answer to common issue 6(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

(d) If the answer to common issue 6(a) is "yes" and the answer to common issue 6(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?

(e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(i) If so, what measures should be ordered?

7. **THIS COURT ORDERS AND DECLARES** that Chief Doreen Spence and Tataskweyak Cree Nation are hereby appointed as Representative Plaintiffs for the Class.

8. **THIS COURT ORDERS AND DECLARES** that McCarthy Tétrault LLP and Olthuis Kleer Townshend are hereby appointed as class counsel ("**Class Counsel**").

9. **THIS COURT ORDERS AND DECLARES** that the Plaintiffs and the Defendant shall make reasonable efforts to agree on the appointment of an administrator for the purpose of giving notice of the certification of this class proceeding (the "**Administrator**"). The Parties shall advise the Court of the appointment of the Administrator within sixty (60) days of the date of this Order, failing which the Court shall appoint an appropriately qualified Administrator.

10. **THIS COURT ORDERS** that class members shall be notified that this action has been certified as a class proceeding as follows, which shall be and is hereby deemed adequate notice:

(a) by posting the Short Form Notice set out in **Schedule "A"** and Long Form Notice set out in **Schedule "B"**, and the French language translations of these documents, as agreed upon by the parties, on the respective websites of Class Counsel, the Defendant, and the Administrator;

(b) by the Administrator publishing the Short Form Notice in the newspapers set out in **Schedule "C"** attached hereto, in ¼ of a page size in the weekend edition of each newspaper, if possible;

(c) by the Administrator distributing the Short Form Notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations;

(d) by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;

(e) by the Administrator forwarding the Short Form Notice and Long Form Notice to the Chiefs of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons;

(f) by the Administrator forwarding the Short Form Notice and Long Form Notice to the band office or similar office of every Impacted First Nation identified in accordance with paragraph 12, below, except for Excluded Persons, together with a request that they be posted in a prominent place;

(g) by the Administrator establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

11. **THIS COURT ORDERS** that the Defendant shall be responsible for the cost of giving notice of the certification of a class proceeding as set out in paragraph 10, above.

12. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiffs and the Defendant shall exchange a list setting out their best information on the names of the First Nations that are eligible to opt into the Class, and taken together these lists shall constitute the means of identifying the First Nations that are entitled to direct notice for the purpose of paragraphs 10(e) and 10(f), above.

13. **THIS COURT ORDERS** that a class member may opt out of this class proceeding by delivering a signed opt-out coupon, a form of which is attached as **Schedule "D"**, or some other legible signed request to opt out, within one-hundred-and- twenty-days (120) days of the date on which notice is first published in accordance with paragraph 10(b), above (the "**Opt Out Deadline**"), to the Administrator. The Short Form Notice and Long Form Notice shall state the Opt Out Deadline and the address of the Administrator for the purpose of receiving opt-out coupons.

14. **THIS COURT ORDERS** that no Class Member may opt out of this class proceeding after the Opt Out Deadline, except with leave of the Court.

15. **THIS COURT ORDERS** that the Administrator shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

16. **THIS COURT ORDERS** that any Impacted First Nation may opt into this class proceeding by retaining Class Counsel no fewer than one-hundred-and-twenty (120) days before

the disposition of any of the common issues (the "**Opt In Deadline**"), to Class Counsel, at the address set out in paragraph 11, above.

17. **THIS COURT ORDERS** that no Class member may opt into this class proceeding after the Opt In Deadline, except with leave of the Court.

18. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

19. **THIS COURT DECLARES** that the Litigation Plan attached hereto as Appendix 1 is a workable method of advancing the class proceeding on behalf of the Class.

20. **THIS COURT ORDERS** that each party shall bear its own costs of the within motion for certification of this class proceeding.

July 14 , 2020

The Honourable Chief Justice Joyal

CONSENTED TO AS TO FORM AND CONTENT:

Per: _____
Stephanie Willsey for Catharine Moore/Scott Farlinger
The Attorney General of Canada

Per: _____
Stephanie Willsey
Tataskweyak Cree Nation and Chief Doreen Spence

Schedule A

Legal Notice

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

A Lawsuit May Affect You and Your First Nation. Please Read this Carefully.

You could be affected by class action litigation regarding the lack of access to clean drinking water on First Nations reserves.

The Manitoba Court of Queen's Bench and the Federal Court of Canada decided that a class action on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. There is no money available now and no guarantee that the class action will succeed.

The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.

What is this case about?

This class action asserts that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The class action asserts that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The class action asserts that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Court has not decided whether any of these assertions are true. If there is no settlement, the Plaintiffs will have to prove their claims in Court.

If you have questions about this class action, you can contact **Eric Khan** 1(800) 538-0009 or info@classaction2.com.

Who represents the class?

The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent the Class as "Class Counsel". You do not have to pay Class Counsel, or anyone else, to participate. If Class Counsel obtains money or benefits for the Class they may ask for lawyers' fees and costs, which would be deducted from any money or benefits recovered for Class members.

Individuals Class Members: Who is included and who is excluded?

Band Members Included: The Class includes band members (as defined by the *Indian Act*): (a) whose reserve was subject to a drinking water advisory (such as a boil water advisory, etc.) that lasted at least one year at any time from November 20, 1995 to the present; (b) had not died before November 20, 2017; and (c) ordinarily lived on their reserve.

Band Members Excluded: Members of the Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Michael Darryl Isnardy are excluded from this class action.

Individuals: What are your options?

Stay in the Class: To stay in the Class, you do not have to do anything. If the Class obtains money or benefits, Class Counsel will give notice about how to ask for your share. You will be legally bound by all orders and judgments, and you will not be able to sue Canada about the legal claims in this case.

Staying in the Class will not impact the supports received from community-based agencies that are funded by any government.

Get out of the Class: If you do not want to participate in this class action litigation, you need to remove yourself by opting out. If you opt out, you cannot get money or benefits from this litigation. To opt out, please visit **[NTD: Insert Administrator's website for this action]** to obtain an opt out coupon, or write to CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 requesting to be removed from this class action. Please include your name, address, telephone number, and signature. **Your request to opt out must be sent by [NTD: 120 days from the date of the first publication of notice].**

First Nations: What are your options?

Elect to join the Class: First Nations that wish to join the Class and assert claims on behalf of their community must take action to opt in. To opt in, or to seek more information, please contact the Administrator at 1(800)538-0009 or info@classaction2.com. First Nations may also contact Class Counsel Stephanie Willsey (toll free:1-877-244-7711; swillsey@mccarthy.ca) or Class Counsel Kevin Hille ((416) 598-3694; khille@oktlaw.com). **Your request to opt in must be sent no later than 120 days before Class members' claims are determined.**

How Can I Get More Information?

Name of Administrator: CA2
Contact Information: 1(800)538-0009 or info@classaction2.com

Getting Information To People Who Need It

The representative Plaintiffs and Class Counsel ask for the help of health care workers, social workers, First Nations community leaders, family members, caregivers and friends of Class members in getting information to Class members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule B

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

If YES, A Class Action May Affect Your Rights and the Rights of First Nations

A court authorized this notice

- You could be affected by a class action involving access to clean drinking water in your First Nation Communities.
- The Manitoba Court of Queen's Bench and the Federal Court of Canada has decided that class actions on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. The Courts appointed Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias to act as representative Plaintiffs for the Class.
- The Courts have not decided whether Canada did anything wrong, and there still has to be a Court case about whether Canada did anything wrong. There is no money available now and no guarantee there will ever be any money. However, your rights are affected, and you have a choice to make now. This notice is to help you and your First Nation make that choice.

INDIVIDUAL BAND MEMBERS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
DO NOTHING: KEEP YOUR RIGHTS UNDER THE CLASS ACTION	**Stay in these lawsuits and wait for the outcome. Share in possible benefits from the outcome but give up certain individual rights.** By doing nothing, you keep the possibility of receiving money or other benefits that may come from a trial or settlement. But, you give up any rights to sue Canada on your own about the same legal claims in this lawsuit.
REMOVE YOURSELF (OPT OUT)	**Get out of these lawsuits and get no benefits from it. Keep rights.** If you ask to opt out and money or benefits are later awarded to Class members, you won't get a share. But, you keep any rights to sue Canada on your own about the same legal claims in this lawsuit.
FIRST NATIONS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
CHOOSE TO JOIN THE CLASS (OPT IN)	**Join the Class. If you join, your First Nations might share in money and benefits from the outcome.** By joining the Class (opting in), First Nations might receive money or other benefits, including water infrastructure, that may come from a trial or settlement in the Class Action. Opting in is an easy process, and there is no cost to opt in.

QUESTIONS? CALL TOLL-FREE 1-800-538-0009 OR VISIT HTTPS://CLASSACTION2.COM/

DO NOTHING: LOSE YOUR FIRST NATION'S RIGHTS UNDER THE CLASS ACTION	**By doing nothing, your First Nation will lose the possibility of receiving money and other benefits if the Class Action succeeds.** If First Nations do not join the Class (opt in) and money or benefits are later awarded, your First Nation won't share in those. By not opting-in, your First Nation may keep any rights to sue Canada about the same legal claims in this litigation.

- Lawyers must prove the claims against Canada at a trial or a settlement must be reached. If money or benefits are obtained you will be notified about how to ask for your share.
- Your options are explained in this notice. To be removed from the litigation, individual band members must ask to be removed by **[NTD: 120 days from the first publication of notice.]**. To join the Class Action, First Nations must send their opt in notice no later than 120 days before Class members' claims are to be determined.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. Why is there a notice?

The Courts have "certified" Class Actions. This means that the lawsuits meets the requirements for class actions and may proceed to trial. If you are included, you may have legal rights and options before the Courts decide whether the claims being made against Canada on your behalf are correct. This notice attempts to explain all of these things.

Chief Justice Joyal of the Manitoba Court of Queen's Bench is currently overseeing the case known as *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Justice Favel of the Federal Court of Canada is currently overseeing the case known as *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias v. Canada*. The persons who sued are called the Plaintiffs. Canada is the Defendant. A link to the latest version of the Statement of Claim (the legal document that makes the allegations against Canada) can be found here: https://www.mccarthy.ca/en/class-action-litigation-drinking-water-advisories-first-nations-0

2. What is this litigation about?

These Class Actions assert that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The Class Actions also assert that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The Class Actions assert that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Courts have not decided (and Canada has not admitted) that any of these assertions are true. If there is no settlement with Canada, the Plaintiffs will have to prove their claims in Court.

If you are having a difficult time dealing with these issues, or have questions about the Class Action, you can call 1 (800) 538-0009 for assistance.

3. Why is this a class action?

In a class action, the "representative plaintiffs" (in this case, Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias) sued on behalf of individual band members and First Nations who have similar claims. All of these individual band members are part of the "Class" or "Class Members", as are First Nations who choose to join the Class Action. The Court resolves the issues for all Class Members in one case, except (in the case of individual band members) for those who remove themselves from (opt out of) the Class and (in the case of First Nations) for those that do not join (opt into) the Class Action.

4. Who is a member of the Class?

The Class includes and excludes the following:

All persons, other than "Excluded Persons" who:

(i) are members of a band, as defined in subsection 2(1) of the Indian Act, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year from November 20, 1995 to present ("**Impacted First Nations**");

(ii) were not dead two years prior to the commencement of this action (that is, by November 20, 2017); and

(iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and

(iv) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

"Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Okanagan Indian Band and Michael Darryl Isnardy.

5. What are the Plaintiffs asking for?

The Plaintiffs are asking for money and other benefits for the Class, including water infrastructure. The Plaintiffs are also asking for legal fees and costs, plus interest.

6. Is there any money available to Class Members now?

No money or benefits are available now because the Court has not yet decided whether Canada did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits will ever be obtained. If money or other benefits become available, notice will be provided about how to ask for your share.

YOUR RIGHTS AND OPTIONS

Individual band members must decide whether to stay in the Class, and you have to decide this by **[NTD: 120 days from the first publication of notice]**. First Nations must decide whether they want to join the class by **no later than 120 days before the Class members' claims are determined.**

7. What happens if I do nothing at all? What happens if the First Nation does nothing at all?

Individuals Band Members: if you do nothing, you will automatically remain in the Class Action. You will be bound by all Court orders, good or bad. If any money or other benefits are awarded, you may need to take action after notice to you to receive any benefits.
First Nations: First Nations must chose to join the Class Action to receive the potential benefits and to be bound by all Court orders, good or bad.

8. What if I don't want to be in the Lawsuit? What if a First Nation wants to join the Lawsuit?

Individual Band Members: If you do not want to be in the lawsuit, you must remove yourself – this is referred to as "opting out." If you remove yourself, you will not receive any benefit that may be obtained from the Class Action. You will not be bound by any Court orders and you keep your right to sue Canada as an individual regarding the issues in this case.

To remove yourself, send a communication that says you want to be removed from the Class in *C urve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher M oonias v. Canada* Court File No. CI-19-01-2466. Include your name, address, telephone number, and signature. You can also get an Opt Out Form at **[insert Administrator web link].** You must deliver your removal request by **[NTD: 120 days from the first publication of notice]** to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 or info@classaction2.com.

Call **1 (800) 538-0009** if you have any questions about how to get out of the Class Action.

First Nations: First Nations that wish to join the Class Action and assert claims on behalf of their band or community must take action to join – this is referred to as "opting in." To opt in, or to seek more information, please contact the Administrator **1(800)538-0009** or info@classaction2.com. First Nations may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca) or Kevin Hille at khille@oktlaw.com or (416) 598-3694. **Requests by First Nations to opt in must be sent no later than 120 days before Class members' claims are determined.**

THE LAWYERS REPRESENTING YOU

10. Do Individual Band Members have a lawyer in the case?

Yes. The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent you and other Class Members as "Class Counsel." You will not be charged legal or other fees or expenses for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense.

11. How will the lawyers be paid?

Class Counsel will only be paid if they win judgement or if there is a settlement. The Court has to also approve their request to be paid. The fees and expenses could be deducted from any money obtained for the Class, or paid separately by the Defendant.

A TRIAL

12. How and when will the Court decide who is right?

If the Class Action is not dismissed or settled, the Plaintiffs must prove their claims at a motion for summary judgement or a trial that will take place in Ottawa, Ontario. During the motion or trial, the Court will hear all of the evidence, so that a decision can be reached about whether the Plaintiffs or Canada is right about the claims in the Class Action. There is no guarantee that the Plaintiffs will win any money or benefits for the Class.

13. Will I get money after the trial?

If the Plaintiffs obtain money or benefits as a result of a trial or settlement, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now. Important information about the case will be posted on the website **[NTD: insert Administrator website]** as it becomes available.

GETTING MORE INFORMATION

14. How do I get more information? How to I get information to people who need it?

You can get more information at **https://classaction2.com/** by calling toll free at 1(800)538-0009, by writing to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2, or by emailing: **info@classaction2.com**.

First Nations and Individual Band Members may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca or 66 Wellington Street West, Toronto, Ontario, M5K 1E6) or Class Counsel Kevin Hille at khille@oktlaw.com or (416) 598-3694 or 250 University Avenue, 8th floor, Toronto, Ontario, M5H 3E5.

Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, Chief Christopher Moonias, Tataskweyak Cree Nation, Chief Doreen Spence, and Class Counsel kindly ask for the help of health care workers, social workers, First Nation community leaders, family members, caregivers and friends of Class members in getting information to Class Members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator or Class Counsel. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

Schedule C

List of Newspapers

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Montreal Gazette
Montreal La Presse (digital edition)
Halifax Chronicle-Herald
Moncton Times and Transcript

First Nations Drum

Schedule D

FORM OF OPT OUT COUPON

To: **[Insert Claim Administrator Address]**
[Insert Administrator Email Address]

This is **NOT** a claim form. Completing this **OPT OUT COUPON** will exclude you from receiving any compensation or other benefits arising out of any settlement or judgment in the class proceeding named below:

***Note: To opt out, this coupon must be properly completed and sent to the above-address no later than* [INSERT DATE THAT IS 120 DAYS FROM THE FIRST NOTICE PUBLICATION]**

Court File No.: T-1673-19

CURVE LAKE FIRST NATIONAL and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

I understand that by opting out of this class proceeding, I am confirming that I do not wish to participate in this class proceeding.

I understand that any individual claim I may have must be commenced within a specified limitation period or that claim will be legally barred.

I understand that the certification of this class proceeding suspended the running of the limitation period from the time the class proceeding was filed. The limitation period will resume running against me if I opt out of this class proceeding.

I understand that by opting out, I take full responsibility for the resumption of the running of any relevant limitation period legal steps to protect any claim I may have.

Date: _____

Name of Class Member: _____

Signature of Witness	Signature of Class Member Opting Out

Name of Witness:

Appendix 1

File No. CI-19-01-24661

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and –

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M.c. C. 130

LITIGATION PLAN

FOR COMMON ISSUES, CERTIFICATION AND SUMMARY JUDGMENT MOTIONS

1. Attached as **Schedule "A"** is the parties' consent timetable, as ordered by the Court. This Litigation Plan is intended to address the Plaintiffs' motions for certification and summary judgement.

2. If the motions are successful, a further plan will be proposed to address any remaining issues, depending on the outcome.

3. Alternatively, if the motion for summary judgement is not successful, the Plaintiffs will propose a further plan for the trial of the common issues.

4. At the certification motion, the Plaintiffs will seek certification of the following common issue to be resolved on behalf of the class as a whole ("**Stage 1 Common Issue**"):

(a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. If the Defendant consents to certification of a class proceeding, the Plaintiffs will negotiate with the Defendant to resolve the common issues. If the negotiations fail, the Plaintiffs will require the delivery of a Statement of Defence, following which they will deliver a record in support of a motion for summary judgement on the Stage 1 Common Issue. At a pre-trial conference following delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule a hearing of their motion.

6. If the Defendant opposes the certification of a class proceeding, the Plaintiffs will require the Defendant to deliver a Statement of Defence. The Plaintiffs will then deliver a record in support of motions for certification and summary judgement on the Stage 1 Common Issue. At a pre-trial conference following the delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule the hearing of their motion for summary judgement together with the hearing of their motion for certification.

7. At the certification motion, the Plaintiffs will also seek certification of the following common issues to be resolved on behalf of each Impacted First Nation sub-group, being the members of that First Nation and the First Nation itself, if it is a Participating First Nation ("**Stage 2 Common Issues**"):

(a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?

(b) If the answer to common issue 7(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("***Charter***") saved by s. 1 of the *Charter*?

(c) If the answer to common issue 7(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

(d) If the answer to common issue 7(a) is "yes" and the answer to common issue 7(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?

(e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(i) If so, what measures should be ordered?

8. If the Stage 1 Common Issue is determined in favour of the Plaintiffs, the parties will conclude a discovery plan to manage the Defendant's timely production of relevant documents in respect of the Stage 2 Common Issues for each Impacted First Nation sub-group.

9. Upon assessing the Defendant's productions, the Plaintiffs will decide whether to bring motions for summary judgement on the Stage 2 Common Issues for some or all of the Impacted First Nation sub-groups, or alternatively, to schedule a trial of these common issues.

NOTIFICATION OF CERTIFICATION AND OPT OUT PROCEDURE

10. On the motion for certification, the Plaintiffs will ask that the Court settle the form and content for notification of the certification of this action (the "**Notice of Certification**"), the timing and manner of providing Notice of Certification ("**Notice Program**") and set out an opt-out date as being three (3) months following the date of the Certification Order ("**Opt-Out Date**"), and an opt-in date as being six (6) months prior to the commencement of the determination of the Stage 2 Common Issues.

11. If a motion for summary judgement is being heard together with a motion for certification, the Plaintiffs will ask the court to render its decision on certification first, direct that notice issue if a class proceeding is certified, and then render its decision on the Stage 1 Common Issue following the Opt-Out Date.

12. The Plaintiffs will ask the Court to order that the defendant pay the costs of the Notice Program, including the cost of the Administrator.

13. The Plaintiffs will seek an order for the distribution of notice of certification as follows:

(a) posting the notice on the respective websites of Class Counsel, the Defendant, and the Administrator;

(b) publishing the notice in designated newspapers;

(c) distributing the notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations.

(d) forwarding the notice to any Class member who requests it and the Chiefs of every First Nation that is eligible to opt into the class, as well as each band office;

(e) establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

(a) And by such other notice as the Court directs.

14. The Plaintiffs will ask the Court to approve opt-out and opt-in forms to be used by class members wishing to opt out of, or opt into, the class action, which will require the Class member to provide sufficient information to establish their membership in the Class.

LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS

Notice of Resolution of Common Issues

15. The Plaintiffs will ask that the Court settle the form and content for notification of the resolution of the Stage 1 and Stage 2 Common Issues ("**Resolution Notice Plan**") and the means by which Class members will file claims ("**Claim Forms**") by a fixed date with the Administrator. The Plaintiffs will also ask that the Court settle an appropriate process to determine any remaining individual issues.

Valuation of Damages

16. If the Common Issues are resolved in favour of the Plaintiffs, the Plaintiffs propose two (2) methods for assessing and distributing damages for the class members as follows:

(a) Aggregate damages that accrue to individual Class members on a *pro rata* basis or on a *pro rata* basis within a sub-group;

(b) Aggregate damages that accrue to Participating First Nations on a community basis; and

17. Following the determination of aggregate damages, including punitive damages, additional damages may be awarded in individual issues proceedings.

Assessment of Number of Claimants

18. After the deadline for submitting Claim Forms has expired, the Administrator shall calculate the total number of claimants for the purpose of any *pro rata* distribution of aggregate damages.

Global Punitive Damages Distribution

19. Should the Court award aggregate damages to the Class or a sub-group, the total amount of damages will be apportioned to the class in a manner to be determined by the Court within a fixed period of time set by the Court from the Notice of Resolution.

Funds not Distributed

20. Any monies not distributed will be distributed *cy-près* as the Court directs. The Plaintiffs propose that any residual amounts be distributed *cy-près* to community organizations that assist with water infrastructure in Impacted First Nations.

Resolution of the Individual Issues

21. Within thirty (30) days of the issuance of the judgment on the common issues, the parties will convene to settle a protocol to resolve any individual issues. If the parties cannot settle such a protocol, the Plaintiffs will move for directions from the Court within sixty (60) days.

MISCELLANEOUS REQUIREMENTS OF THE LITIGATION PLAN

Funding

22. Class Counsel has entered into an agreement with the Representative Plaintiffs with respect to legal fees and disbursements. This agreement provides that counsel will not receive payment for their work unless and until the class proceeding is successful or costs are recovered from the Defendant.

23. Class Counsel's legal fees are subject to court approval under the *Class Proceedings Act*.

Claims Administration

24. The Administrator will provide the claims administration for any settlement or judgement achieved. The Administrator will distribute notice in accordance with the Resolution Notice Plan. If a settlement is achieved and a settlement fund is provided, or if judgement results in an award in favour of Class members, the Administrator will administer payments out of the fund to claimants based on the procedures set out above, after approval and/or modification by the Court.

Class Action Website

25. From time to time, Class Counsel will post relevant pleadings and court filings, the latest documents and summaries of the latest developments, anticipated timelines, frequently asked questions and answers, and contact information for class counsel for the information of class members.

Conflict Management

26. Class Counsel and the Plaintiffs have taken appropriate measures to determine that no conflict of interest exists among the members of the Class, and no such conflict is anticipated. Should a conflict arise, McCarthy Tétrault LLP will represent one sub-group, and Olthuis Kleer Townshend LLP will represent the other. Should any conflict arise as between First Nations and their members, which is not anticipated given their commonality of interest, McCarthy Tétrault LLP will represent the members and Olthuis Kleer Townshend LLP will represent the First Nations.

Applicable Law

27. The applicable law is the *Constitution Act, 1982*, the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21, the

Indian Act, R.S.C. 1985, c, I-5, the *First Nations Land Management Act*, S.C. 1999, c. 24, *The Class Proceedings Act*, C.C.S.M. c. C130, as well as applicable regulations, the common law and the law of Manitoba.

Schedule "A"

Timetable

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Statement of Defence	Defendant	To be delivered on 60 days' notice by the Plaintiffs
Delivery of Reply, if any	Plaintiffs	To be delivered 15 days after delivery of Statement of Defence
Delivery of Certification/Summary Judgement Record	Plaintiffs	June 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Pre-trial to assess summary judgement	All parties	July 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Responding Record	Defendant	October 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Reply Record, if any	Plaintiffs	December 16, 2020 (or 45 days after delivery of Responding Record, whichever is later)
Cross-examinations	All parties	To be completed 75 days after delivery of Reply Record, if any, or 120 days after delivery of Responding Record
Refusals Motions, if any	All parties	To be completed 30 days after completion of cross-examinations
Delivery of answers to undertakings	All parties	To be completed 15 days after refusals motion

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	**By Which Party**	**Date To Be Completed By**
Delivery of Moving Factum	Plaintiffs	To be delivered 45 days after completion of answers to undertakings
Delivery of Responding Factum	Defendant	To be delivered 45 days after delivery of Moving Factum
Delivery of Reply Factum	Plaintiffs	To be delivered 15 days after delivery of Responding Factum
Hearing of Certification and possible Summary Judgement Motion	All parties	July-August 2021

Court File No.: CI 19-01-24661

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proposed Class Proceeding commenced under Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C. 130

LITIGATION PLAN

(Filed this 2nd day of July, 2020)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tel: 416-601-7831
Fax: 416-868-0673
Lawyers for the Plaintiffs

Court File No.: CI 19-01-24661

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proposed Class Proceeding commenced under Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C. 130

ORDER

(July 14, 2020)

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tel: 416-601-7831
Fax: 416-868-0673
Lawyers for the Plaintiffs

SCHEDULE D

FORM OF BAND COUNCIL ACCEPTANCE RESOLUTION

See attached.

[Name of First Nation]

Band Council Resolution

Regarding the Settlement Agreement for the
Class Action Litigation on Drinking Water Advisories on First Nations Lands

WHEREAS certain plaintiffs commenced a court action styled as *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, Court File No. T-1673-19, in the Federal Court on October 11, 2019 (the "**Federal Action**");

AND WHEREAS certain plaintiffs commenced a court action styled *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, Court File No. CI-19-01-24661, in the Manitoba Court of Queen's Bench on November 20, 2019 (the "**Manitoba Action**", and together with the Federal Action, the "**Actions**");

AND WHEREAS the Actions were certified by the respective courts as class proceedings;

AND WHEREAS the Attorney General of Canada and the plaintiffs in the Actions have negotiated a settlement agreement (the "**Settlement Agreement**") in respect of the Actions;

AND WHEREAS the Settlement Agreement provides that a First Nation that is a member of the class described in the Actions (the "**Class**") may provide the administrator appointed by the courts under the Settlement Agreement (the "**Administrator**") with notice of acceptance by that First Nation of the Settlement Agreement and thereby become entitled to certain compensation and benefits under the Settlement Agreement available to First Nation Class members;

AND WHEREAS [Name of First Nation] is a member of the Class and the **[Name of First Nation Council]** (the "**Council**") wishes to confirm and approve the acceptance of the Settlement Agreement by **[Name of First Nation]** by passing this Band Council Resolution at a properly constituted meeting called for this purpose;

BE IT HEREBY RESOLVED THAT:

1. The Council hereby directs and authorizes Chief **[Name of Chief]**, on behalf of the **[Name of First Nation]**, to approve and accept the Settlement Agreement, a copy of which was reviewed by the signatories below on behalf of the Council, and the Council hereby further directs and authorizes such signing authority to deliver an executed copy of this Band Council Resolution to the Administrator to confirm acceptance of the Settlement Agreement by **[Name of First Nation]**. The Council hereby acknowledges and confirms that no further actions are required by Council to accept the Settlement Agreement.

2. The Council hereby directs and authorizes the Chief, on behalf of the **[Name of First Nation]**, from time to time, to execute and deliver these resolutions and such further documents and instruments and do all acts and things as may be reasonably necessary

to carry out and give effect to the Settlement Agreement, including, if the Chief determines appropriate, a confirmation of the individual class members resident on a **[Name of First Nation]** reserve while a long-term drinking water advisory was in force on that reserve during the period applicable to the Settlement Agreement.

3. These resolutions may be signed by the Chief and Council members in as many counterparts as may be necessary, in original or electronic form, each of which so signed shall be deemed to be an original, and such counterparts together shall constitute one and the same resolution.

The signatories below hereby certify and warrant that a quorum of Council has signed this Band Council Resolution as evidenced by their signatures below.

DATED as of the ____ day of _____, 202__.

_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	
[insert name]	

SCHEDULE E

FORM OF BAND COUNCIL CONFIRMATION

See attached.

[Name of First Nation]

Band Council Confirmation

Regarding the Settlement Agreement for the
Class Action Litigation on Drinking Water Advisories on First Nations Lands

Reference is made to the settlement agreement (the "**Settlement Agreement**") dated September **[•]**, 2021, between the Attorney General of Canada ("**Canada**"), Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation; Chief Wayne Moonias and Former Chief Christopher Moonias on their own behalf and on behalf of all members of Neskantaga First Nation, and Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation. Capitalized terms used but not defined in this Band Council Confirmation have the meanings given to them in the Settlement Agreement.

In accordance with the Settlement Agreement, a First Nation Class Member may provide the Administrator with a declaration identifying Individual Class Members who were ordinarily resident on a Reserve of that First Nation Class Member between November 20, 1995, and June 20, 2021 while a Long-Term Drinking Water Advisory was in place on that Reserve (collectively, the "**Identified Class Members**"). Ordinarily resident means that a person lived on the Reserve more than that person lived anywhere else, or a person who was eighteen (18) years of age or younger at the applicable time and habitually lived on an affected Reserve but lived elsewhere for a portion of the year to attend an educational facility. Identified Class Members must have been ordinarily resident on the Reserve for at least one year during a period in which a Long-Term Drinking Water Advisory was in effect.

[Name of First Nation] is a First Nation Class Member. **[Name of First Nation Council]** (the "**Council**") hereby declares that attached to this Band Council Confirmation as **Appendix "A"** is a list of Identified Class Members at **[Name of First Nation]**.

DATED as of the ____ day of _____, 202__.

_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____

APPENDIX "A"

Identified Class Members at [Name of First Nation]

Name	Reserve	Period(s) Ordinarily Resident on Reserve	Last Known Address or Other Contact Information

SCHEDULE F

CLAIMS PROCESS

CLAIMS FORMS

1. Upon the appointment of the Administrator, the Parties shall provide to the Administrator a list or lists in electronic spreadsheet format (the "**List**") identifying, to the best of the Parties' knowledge:

   (a) the First Nations eligible to become First Nations Class Members should they accept the Agreement by the Acceptance Deadline;

   (b) the contact information for the band office or similar office of the First Nations in subsection (a);

   (c) the Reserve(s) affected, and the dates on which Drinking Water Advisories that lasted at least one (1) year were in effect for each First Nation in subsection (a);

   (d) whether each of the Drinking Water Advisories in subsection (c) was a Boil Water Advisory, Do Not Consume Advisory, or Do Not Use Advisory; and

   (e) whether the First Nations in subsection (a) are Remote or Non-Remote First Nations.

2. Promptly after receipt of the List, the Administrator shall send a Claims Form to each band office or similar office identified in subsection 1(b) with a request that a copy of the Claims Form be provided to members of that First Nation. The Administrator shall send the Claims Forms by email or, if no email address is provided, by regular mail if an address is provided. If an email is undelivered or undeliverable, the Administrator shall send the Claims Form by regular mail. If regular mail is undelivered or undeliverable, the Administrator shall have no further obligation to make efforts to provide a copy of the Claims Form to that First Nation.

3. Promptly after receipt of the List, the Administrator shall use all reasonable efforts to retain a community liaison from each First Nation on the List, or an appropriate tribal council, for the purposes of making all reasonable efforts to:

   (a) provide Claims Forms to members of that First Nation;

   (b) encourage eligible members of that First Nation to submit Claims Forms;

   (c) assist members of that First Nation with the completion and submission of their Claims Forms, including by referring them to the Administrator;

   (d) advise First Nation Class Members that they must give notice of Acceptance if they wish to participate in the Agreement; and

(e) advise First Nation Class Members that they can submit a Band Council Confirmation, if they wish.

4. The Administrator shall make the Claims Form available on its website and shall email or mail a Claims Forms to any person who requests one.

5. The Administrator shall include a postage paid return envelope with every Claims Form sent by mail.

6. The Administrator shall maintain a database of all Claims Forms and Band Council Confirmations it receives. If the Parties receive Claims Forms or Band Council Confirmations, they shall immediately forward them to the Administrator.

7. Upon receipt of a Claims Form or Band Council Confirmation, the Administrator shall examine the Claims Form or Band Council Confirmation, as applicable, to determine if it is complete, and if it is not complete, the Administrator shall make all reasonable efforts to contact the Claimant or First Nation Class Member, as applicable, to obtain further information to complete the Claims Form or Band Council Confirmation. However, the Administrator will have discretion to accept minor deficiencies and if the Administrator accepts a Claims Form or Band Council Confirmation with minor deficiencies, the Administrator need not contact the Claimant or First Nation Class Member for more information. Claimants and First Nation Class Members will have ninety (90) days from the date on which they are contacted to address any identified deficiencies, failing which the Administrator will provide to the Claimant or the First Nation Class Member, as applicable, in writing its refusal to accept the Claims Form or the Band Council Confirmation and the reason for its refusal. Notwithstanding the foregoing, the Administrator may accept such part of an incomplete Band Council Confirmation that provides sufficient information to make an Eligibility Decision.

8. Where a Claims Form or Band Council Confirmation contains minor omissions or errors, the Administrator shall correct such omissions or errors if the information necessary to correct the error or omission is readily available to the Administrator.

9. Each Claimant may only submit one (1) Claims Form in respect of all such Claimant's Claims, and an Estate Executor, Estate Claimant, or Personal Representative may submit only one (1) Claims Form on behalf of a particular Claimant.

ELIGIBILITY DECISIONS FOR INDIVIDUAL CLASS MEMBERS

10. Promptly on receipt of a Claims Form, the Administrator shall make an Eligibility Decision in accordance with the Agreement with reference to the Claims Form, the List, any relevant Band Council Confirmation, any other information received from the Parties, and other information the Administrator considers appropriate. Promptly on receipt of a Band Council Confirmation, the Administrator shall make Eligibility Decisions in accordance with the Agreement (including Section 7.02(2)) with respect to the Claimants identified therein, with reference to the Band Council Confirmation, any Claims Forms received in respect of the Claimants listed in the Band Council Confirmation, the List, any other information received from the Parties, and other information the Administrator considers appropriate.

11. If a Claims Form or Band Council Confirmation indicates that the Claimant was Ordinarily Resident on a Reserve that is on the List for at least one (1) year during a Long-Term Drinking Water Advisory, but the Claimant is a member of a First Nation that is not an Impacted First Nation, the Claimant is nevertheless eligible for inclusion in the Class. If a Claims Form or Band Council Confirmation indicates that the Claimant was Ordinarily Resident on a Reserve that is not on the List, and which the Administrator has not previously considered, the Administrator:

    (a) shall consult with the Settlement Implementation Committee before determining whether the Reserve should be added to the List on the basis that it was subject to a Long-Term Drinking Water Advisory during the Class Period, and if so, when the Reserve was subject to a Long-Term Drinking Water Advisory; and

    (b) may request further information or evidence before making an Eligibility Decision.

12. If the Administrator determines that that the Claimant is not an Individual Class Member, the Administrator shall promptly inform the Claimant:

    (a) of the Administrator's decision;

    (b) the reasons for the Administrator's decision that the Claimant is not an Individual Class Member; and

    (c) that the Claimant may appeal the Administrator's decision to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

INDIVIDUAL CLASS MEMBER COMPENSATION

13. If the Administrator makes an Eligibility Decision that a Claimant is an Individual Class Member in accordance with the Agreement, the Administrator shall quantify the amount payable to that Individual Class Member from the Trust Fund in accordance with Section 8.01 and Schedule G of the Agreement, the Administrator shall request such funds from the Trustee, the Trustee shall pay such funds to the Administrator, and the Administrator shall pay such funds in accordance with the Agreement.

14. When the Administrator pays compensation in accordance with Section 8.01 of the Agreement and Section 13 of this Schedule F, the Administrator shall also inform the Individual Class Member:

    (a) how the amount paid was calculated; and

    (b) that the Individual Class Member may appeal the Administrator's quantification of the amount payable to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

SPECIFIED INJURIES COMPENSATION

15. On reasonable request, Class Counsel shall assist a Claimant with their claim for Specified Injuries Compensation or their appeal from a Specified Injuries Decision at no

additional cost to the Claimant, and Class Counsel's fees shall be payable in accordance with Section 18.02 of the Agreement.

16. A Confirmed Individual Class Member is eligible for Specified Injuries Compensation if they meet the criteria in Section 8.02 of the Agreement.

17. To support their claim for Specified Injuries Compensation, a Claimant may, at their option, submit some or all of the following to the Administrator with their Claims Form:

    (a) medical records of the injury and its cause;

    (b) other records, including written records, photographs, and videos, of the injury and its cause;

    (c) a written statement; and

    (d) oral testimony.

18. For greater certainty, the process of claiming compensation for Specified Injuries is intended to be non-traumatizing and Section 17 of this Schedule F does not prevent a Claimant from establishing their eligibility for Specified Injuries Compensation on the basis of their Claims Form alone.

19. If a Claimant claims Specified Injuries Compensation but the Administrator determines that said Claimant is not entitled to Specified Injuries Compensation for the injuries claimed because the injuries are not contemplated in the Specified Injuries Compensation Grid, the Administrator shall promptly comply with Section 7.04 of the Agreement.

20. If a Claimant claims Specified Injuries Compensation but the Administrator determines that said Claimant is not entitled to Specified Injuries Compensation for the injuries claimed for any reason other than the fact that the injuries are not contemplated in the Specified Injuries Compensation Grid, the Administrator shall promptly inform said Claimant:

    (a) of the Administrator's decision;

    (b) the reasons for the Administrator's decision that the Claimant is not entitled to Specified Injuries Compensation; and

    (c) that the Claimant may appeal the Administrator's decision to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

21. If the Administrator determines that a Confirmed Individual Class Member is entitled to Specified Injuries Compensation, the Administrator shall quantify the amount payable to that Confirmed Individual Class Member from the Specified Injuries Compensation Fund in accordance with Section 8.02 of the Agreement and Schedule H.

22. Payment of Specified Injuries Compensation will be made as provided in Section 8.02 of the Agreement. The Administrator shall request such funds from the Trustee, the

Trustee shall pay such funds to the Administrator, and the Administrator shall pay such funds in accordance with the Agreement.

23. When the Administrator pays Specified Injuries Compensation to a Confirmed Individual Class Member in accordance with Section 8.02 of the Agreement and this Schedule F, the Administrator shall also inform the Confirmed Individual Class Member:

    (a) of how the amount paid was calculated; and

    (b) that the Individual Class Member may appeal the Administrator's quantification of the amount payable to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

FIRST NATIONS CLASS MEMBER DAMAGES

24. Upon receipt of an Acceptance, the Administrator shall determine whether the First Nation is eligible to be a First Nation Class Member. Inclusion on the List is conclusive proof that the First Nation is eligible to be a First Nation Class Member. If the First Nation is not on the List, the Administrator:

    (a) shall consult with the Settlement Implementation Committee before determining whether the First Nation is eligible to be a First Nation Class Member; and

    (b) may request additional information or evidence before making the determination as to whether a First Nation is eligible to be a First Nation Class Member.

25. If the Administrator determines that that a First Nation is not a First Nation Class Member under Section 24 of this Schedule F, the Administrator shall promptly inform the First Nation:

    (a) of the Administrator's decision;

    (b) of the reasons for the Administrator's decision that the First Nation is not a First Nation Class Member; and

    (c) that the First Nation may appeal the Administrator's decision to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

26. If the Administrator determines that a First Nation that has submitted an Acceptance is a First Nations Class Member, the Administrator shall pay the Base Payment and First Nation Damages in accordance with Section 8.03 of the Agreement. The Administrator shall request such funds from the Trustee, the Trustee shall pay such funds to the Administrator, and the Administrator shall pay such funds in accordance with the Agreement.

27. Whenever the Administrator pays First Nation Damages to a First Nation Class Member, the Administrator shall inform the First Nation Class Member:

    (a) of how it calculated the amount paid; and

(b) that the First Nation Class Member may appeal the Administrator's quantification of the amount payable to the Third-Party Assessor in accordance with this Claims Process and the Agreement.

APPEALS

28. When a Claimant, Individual Class Member, First Nation, or First Nation Class Member, as the case may be (an "**Appellant**"), wants to appeal a decision of the Administrator, the Appellant shall within sixty (60) days of receiving the Administrator's decision provide to the Administrator a written statement identifying the decision the Appellant wants to appeal and the reasons why the Appellant believes that the Administrator erred.

29. The Administrator shall immediately forward the materials it receives under Section 28 of this Schedule F to the Third-Party Assessor for determination.

30. When considering an appeal, the Third-Party Assessor may consult the Appellant, the Administrator, and the Settlement Implementation Committee. Without limitation, the Third-Party Assessor may request evidence from the Appellant and the Administrator.

31. The Third-Party Assessor shall adjudicate an appeal as soon as practicable.

32. Upon making a decision, the Third-Party Assessor shall promptly inform the Appellant and the Administrator:

(a) of the Third-Party Assessor's decision; and

(b) the reasons for the Third-Party Assessor's decision.

33. A decision of the Third-Party Assessor is final and not subject to appeal or review.

34. For greater certainty, there is no right of appeal to the Third-Party Assessor where an Individual Class Member claims Specified Injuries Compensation for injuries that the Administrator determines are not contemplated in the Specified Injuries Compensation Grid. Instead, Section 7.04 of the Agreement applies.

GENERAL

35. Unless otherwise specified in the Agreement or this Claims Process, the standard of proof in all cases shall be a balance of probabilities in accordance with the Agreement, and the Third-Party Assessor shall apply a standard of review of correctness in accordance with the Agreement. For greater certainty, for the Administrator or Third-Party Assessor to conclude that a Claimant or First Nation is eligible for compensation, in accordance with the Agreement and unless otherwise specified in the Agreement or this Claims Process, the Administrator or Third-Party Assessor must conclude that it is more likely than not that the Claimant or First Nation is eligible for compensation on the information available to the Administrator or Third-Party Assessor.

36. To determine whether (i) a Claimant is an Individual Class Member and eligible for compensation under the Agreement or (ii) a First Nation is a First Nation Class Member, the Administrator and Third-Party Assessor may:

(a) request more information from a Claimant, a First Nation or the Parties; and

(b) interview a Claimant or representative of a First Nation.

37. The Parties may amend this Claims Process on consent to make procedural changes, such as the extension of time, and to adopt protocols and procedures, without obtaining Court approval, so long as such amendments do not substantively affect the rights and remedies set out in the Claims Process. The Parties shall obtain the Courts' approval of substantive changes to this Claims Process.

38. The Administrator shall provide a bilingual (English and French) toll-free support line to assist Claimants, their families, their guardians, or other persons who make inquiries on behalf of Claimants.

39. After the distribution, in accordance with this Agreement, of the:

(a) Trust Fund, including any Trust Fund Surplus;

(b) Specified Injuries Compensation Fund; and

(c) First Nations Economic and Cultural Restoration Fund,

the Administrator shall apply to be discharged and shall file with the Courts a report in accordance with Section 21.02 of the Agreement, containing its best information respecting the following:

(d) the total number of Individual Class Members and First Nation Class Members;

(e) the number of Claimants who submitted a Claims Form and the number who were paid Individual Damages;

(f) the number of Claimants who applied for Specified Injuries Compensation and the number who were paid Specified Injuries Compensation;

(g) the number of First Nations Class Members who provided Acceptance of the Agreement;

(h) the amounts distributed to Class Members or on behalf of Class Members, as Individual Damages, Specified Injuries Compensation, or First Nation Damages, and a description of how the amounts were distributed;

(i) the number of Claims by First Nation and the amounts paid by First Nation; and

(j) the costs associated with the Administrator's work.

40. Any Party or the Administrator may move to have any part of the report contemplated by Section 39 of this Schedule F placed under seal.

41. Upon being discharged as Administrator, the Administrator shall retain in hard copy or electronic form all documents relating to a Claim for two (2) years, after which the Administrator shall destroy the documents.

SCHEDULE G

INDIVIDUAL DAMAGES: COMPENSATION GRID

Joint Committee to determine actual figures on the advice of an actuary or a similar advisor

	Compensation
Long-Term Drinking Water Advisory – Remote First Nation	$2,000 per year
Long-Term Drinking Water Advisory: Do Not Use Advisory – Non-Remote First Nation	$2,000 per year
Long-Term Drinking Water Advisory: Do Not Consume Advisory – Non-Remote First Nation	$1,650 per year
Long-Term Drinking Water Advisory: Boil Water Advisory – Non-Remote First Nation	$1,300 per year

SCHEDULE H

SPECIFIED INJURIES: COMPENSATION GRID

Category	Specified Injury	Exemplar Symptoms	Level 1 *Significant and prolonged disruption to health, well-being and/or daily activities that: (a) persisted for a minimum of one month; (b) impaired the Claimant's quality of life; and (c) for which the Claimant sought treatment from a health practitioner, including traditional healers, medicine-people, elders, community health leaders, shamans, or knowledge keepers (total compensation for all such injuries)*	Level 2 *Level 1 effects that: (a) persisted for a minimum of one year; (b) seriously impaired the Claimant's health and daily activities; and (c) for which the Claimant sought and received treatment from a health practitioner, including traditional healers or medicine-people (total compensation for all such injuries)*

Gastroenterological	Ingestion of bacteria (*Escherichia coli, Salmonella, Shigella, Campylobacter jejuni, Cholera, Giardia lamblia, Cryptosporidium, Cyanobacteria (blue-green algae) toxins, Total coliforms, Helicobacter pylori*) Viral infection (*rotavirus, norovirus, hepatitis A*) Ingestion of chemicals in quantities harmful to human health: *arsenic, atrazine, diquat copper, lead, fluoride, glyphosate, nitrite, nitrate, phorate, chromium, sulphate* Stomach ulcers	Stomach cramps, nausea, diarrhea, vomiting, abdominal pain, dehydration, constipation	$5,000	$20,000
Respiratory/ Breathing	Chlorine toxicity Ingestion of chemicals in quantities harmful to human health: *nitrite, nitrate*	Significant trouble breathing, painfully irritated airways or lungs (may be accompanied by irritated eyes), significant chest pain, shortness of breath, blue skin	$20,000	$50,000
Dermatological	Skin infections (*Staphylococcus sureus, Streptococcus pyogenes*) Dermal lesions	Cellulitis, boils (furuncles), dermal lesions, skin pigmentation,	$10,000	$25,000

	Chlorine toxicity	necrotizing fasciitis		
Mental Health	Major depressive disorder; persistent depressive disorder (dysthymia); panic disorder; alcohol use disorder; cannabis use disorder; tobacco use disorder; sedative, hypnotic, anxiolytic use disorder; post-traumatic stress disorder; specific phobia; adjustment disorder; generalized anxiety disorder	See Appendix "H-1"	$15,000	$30,000
Liver	Viral Infection (*hepatitis A*) Ingestion of bacteria (*cyanobacteria (blue-green algae) toxins*) Liver damage (*cysts, lesions, toxicity*) Ingestion of chemicals in quantities harmful to human health: *antimony, bromoxynil, carbon tetrachloride, copper, dicamba dichloromethane, 1,1-dichloroethylene, 2,4-dichlorophenol, diclofop-methyl, ethylbenzene, haloacetic acids (HAAs), metachlor, metribuzin, paraquat, pentachlorophenol, perfluorooctane sulfonate, perfluorooctanoic acid, picloram, vinyl chloride, benzo(a)pyrene, metachlor, trifluralin trihalomethanes (THMs)*	Discolouration of eyes and skin, swelling in legs and ankles, chronic fatigue, loss of appetite, abdominal pain, liver inflammation, liver failure	$35,000	$80,000 (if liver failure)

Neurological	Ingestion of chemicals in quantities harmful to human health: *azinphos-methyl, chlorite, dimethoate, lead, malathion, manganese, mercury, phorate, toluene*	Irritability, poor attention span, headache, insomnia, dizziness, memory loss, IQ deficits, behavioral effects in children	$20,000	$50,000
Kidney	Ingestion of chemicals in quantities harmful to human health: *antimony, barium, bromate, cadmium, copper, 2,4-dichlorophenoxy acetic acid, 2-methyl-4-chlorophenoxyacetic acid, diquat, malathion, nitrilotriacetic acid, paraquat, pentachlorophenol, picloram, trihalomethanes (THMs), uranium*	Kidney damage, kidney lesions, kidney failure	$25,000	$65,000 (if kidney failure)
Bloodstream infections, including infective endocarditis	Infections contracted from using water for injections/syringes/needles	Aching joints and muscles, chest pain, fatigue, flu-like symptoms, night sweats, shortness of breath, lower body swelling, heart murmurs	$20,000	$80,000 (if infective endocarditis)
Tumors/Cancer	Ingestion of chemicals in quantities harmful to human health	Tumors, cancer	$40,000	$100,000

Appendix H-1
Mental Health Exemplar Symptoms

• Major Depressive Disorder	A. Five (or more) of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure. Do not include symptoms that are clearly attributable to another medical condition. 1. Depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad, empty, hopeless) or observation made by others (e.g., appears tearful). (Note: In children and adolescents, can be irritable mood.) 2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation). 3. Significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. (Note: In children, consider failure to make expected weight gain.) 4. Insomnia or hypersomnia nearly every day. 5. Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down). 6. Fatigue or loss of energy nearly every day. 7. Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick). 8. Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others). 9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide. B. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. C. The episode is not attributable to the physiological effects of a substance or another medical condition.
• Persistent Depressive Disorder (Dysthymia)	This disorder represents a consolidation of DSM-IV-defined chronic major depressive disorder and dysthymic disorder. A. Depressed mood for most of the day, for more days than not, as indicated by either subjective account or observation by others, for at least 2 years. **Note:** In children and adolescents, mood can be irritable and duration must be at least 1 year. B. Presence, while depressed, of two (or more) of the following: 1. Poor appetite or overeating. 2. Insomnia or hypersomnia. 3. Low energy or fatigue.

	4. Low self-esteem. 5. Poor concentration or difficulty making decisions. 6. Feelings of hopelessness. C. During the 2-year period (1 year for children or adolescents) of the disturbance, the individual has never been without the symptoms in Criteria A and B for more than 2 months at a time. D. Criteria for a major depressive disorder may be continuously present for 2 years. E. There has never been a manic episode or a hypomanic episode, and criteria have never been met for cyclothymic disorder. F. The disturbance is not better explained by a persistent schizoaffective disorder, schizophrenia, delusional disorder, or other specified or unspecified schizophrenia spectrum and other psychotic disorder. G. The symptoms are not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition (e.g., hypothyroidism). H. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
• Panic Disorder	A. Recurrent unexpected panic attacks. A panic attack is an abrupt surge of intense fear or intense discomfort that reaches a peak within minutes, and during which time four (or more) of the following symptoms occur: **Note**: The abrupt surge can occur from a calm state or an anxious state. 1. Palpitations, pounding heart, or accelerated heart rate. 2. Sweating. 3. Trembling or shaking. 4. Sensations of shortness of breath or smothering. 5. Feelings of choking. 6. Chest pain or discomfort. 7. Nausea or abdominal distress. 8. Feeling dizzy, unsteady, light-headed, or faint. 9. Chills or heat sensations. 10. Paresthesias (numbness or tingling sensations). 11. Derealization (feelings of unreality) or depersonalization (being detached from oneself). 12. Fear of losing control or "going crazy." 13. Fear of dying. **Note**: Culture-specific symptoms (e.g., tinnitus, neck soreness, headache, uncontrollable screaming or crying) may be seen. Such symptoms should not count as one of the four required symptoms. B. At least one of the attacks has been followed by 1 month (or more) of one or both of the following: 1. Persistent concern or worry about additional panic attacks or their consequences (e.g., losing control, having a heart attack, "going crazy"). 2. A significant maladaptive change in behavior related to the attacks (e.g., behaviors designed to avoid having panic attacks, such as avoidance of exercise or unfamiliar situations).

	C. The disturbance is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition (e.g., hyperthyroidism, cardiopulmonary disorders). D. The disturbance is not better explained by another mental disorder (e.g., the panic attacks do not occur only in response to feared social situations, as in social anxiety disorder; in response to circumscribed phobic objects or situations, as in specific phobia; in response to obsessions, as in obsessive-compulsive disorder; in response to reminders of traumatic events, as in posttraumatic stress disorder; or in response to separation from attachment figures, as in separation anxiety disorder).
• Alcohol Use Disorder	A. A problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: 1. Alcohol is often taken in larger amounts or over a longer period than was intended. 2. There is a persistent desire or unsuccessful efforts to cut down or control alcohol use. 3. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects. 4. Craving, or a strong desire or urge to use alcohol. 5. Recurrent alcohol use resulting in a failure to fulfil major role obligations at work, school, or home. 6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol. 7. Important social, occupational, or recreational activities are given up or reduced because of alcohol use 8. Recurrent alcohol use in situations in which it is physically hazardous 9. Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol 10. Tolerance, as defined by either of the following: a. A need for markedly increased amounts of alcohol to achieve intoxication or desired effect. b. A markedly diminished effect with continued use of the same amount of alcohol 11. Withdrawal, as manifested by either of the following: a. The characteristic withdrawal syndrome for alcohol (refer to DSM-5 for further details). b. Alcohol (or a closely related substance, such as a benzodiazepine) is taken to relieve or avoid withdrawal symptoms.
• Cannabis Use Disorder	A. A problematic pattern of cannabis use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: 1. Cannabis is often taken in larger amounts or over a longer period than was intended.

	2. There is a persistent desire or unsuccessful efforts to cut down or control cannabis use. 3. A great deal of time is spent in activities necessary to obtain cannabis, use cannabis, or recover from its effects. 4. Craving, or a strong desire or urge to use cannabis. 5. Recurrent cannabis use resulting in a failure to fulfil major role obligations at work, school, or home. 6. Continued cannabis use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of cannabis. 7. Important social, occupational, or recreational activities are given up or reduced because of cannabis use. 8. Recurrent cannabis use in situations in which it is physically hazardous. 9. Cannabis use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by cannabis. 10. Tolerance, as defined by either of the following: a. A need for markedly increased amounts of cannabis to achieve intoxication or desired effect. b. A markedly diminished effect with continued use of the same amount of cannabis. 11. Withdrawal, as manifested by either of the following: a. The characteristic withdrawal syndrome for cannabis (refer to DSM-5 for further details). b. Cannabis (or a closely related substance) is taken to relieve or avoid withdrawal symptoms.
• Tobacco Use Disorder	A. A problematic pattern of tobacco use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: 1. Tobacco is often taken in larger amounts or over a longer period than was intended. 2. There is a persistent desire or unsuccessful efforts to cut down or control tobacco use. 3. A great deal of time is spent in activities necessary to obtain or use tobacco. 4. Craving, or a strong desire or urge to use tobacco. 5. Recurrent tobacco use resulting in a failure to fulfill major role obligations at work, school, or home. 6. Continued tobacco use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of tobacco (e.g., arguments with others about tobacco use). 7. Important social, occupational, or recreational activities are given up or reduced because of tobacco use. 8. Recurrent tobacco use in situations in which it is physically hazardous (e.g., smoking in bed). 9. Tobacco use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by tobacco. 10. Tolerance, as defined by either of the following:

	a. A need for markedly increased amounts of tobacco to achieve the desired effect. b. A markedly diminished effect with continued use of the same amount of tobacco. 11. Withdrawal, as manifested by either of the following: a. The characteristic withdrawal syndrome for tobacco (refer to Criteria A and B of the criteria set for tobacco withdrawal). b. Tobacco (or a closely related substance, such as nicotine) is taken to relieve or avoid withdrawal symptoms.
• Sedative, Hypnotic, or Anxiolytic Use Disorder	A. A problematic pattern of sedative, hypnotic, or anxiolytic use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: 1. Sedatives, hypnotics, or anxiolytics are often taken in larger amounts or over a longer period than was intended. 2. There is a persistent desire or unsuccessful efforts to cut down or control sedative, hypnotic, or anxiolytic use. 3. A great deal of time is spent in activities necessary to obtain the sedative, hypnotic, or anxiolytic; use the sedative, hypnotic, or anxiolytic; or recover from its effects. 4. Craving, or a strong desire or urge to use the sedative, hypnotic, or anxiolytic. 5. Recurrent sedative, hypnotic, or anxiolytic use resulting in a failure to fulfill major role obligations at work, school, or home (e.g. - repeated absences from work or poor work performance related to sedative, hypnotic, or anxiolytic use; sedative-, hypnotic-, or anxiolytic-related absences, suspensions, or expulsions from school; neglect of children or household). 6. Continued sedative, hypnotic, or anxiolytic use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of sedatives, hypnotics, or anxiolytics (e.g. -arguments with a spouse about consequences of intoxication; physical fights). 7. Important social, occupational, or recreational activities are given up or reduced be cause of sedative, hypnotic, or anxiolytic use. 8. Recurrent sedative, hypnotic, or anxiolytic use in situations in which it is physically hazardous (e.g. - driving an automobile or operating a machine when impaired by sedative, hypnotic, or anxiolytic use). 9. Sedative, hypnotic, or anxiolytic use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the sedative, hypnotic, or anxiolytic. 10. Tolerance, as defined by either of the following: a. A need for markedly increased amounts of the sedative, hypnotic, or anxiolytic to achieve intoxication or desired effect.

	b. A markedly diminished effect with continued use of the same amount of the sedative, hypnotic, or anxiolytic. **Note:** This criterion is not considered to be met for individuals taking sedatives, hypnotics, or anxiolytics under medical supervision. 11. Withdrawal, as manifested by either of the following: a. The characteristic withdrawal syndrome for sedatives, hypnotics, or anxiolytics (refer to Criteria A and B of the criteria set for sedative, hypnotic, or anxiolytic withdrawal). b. Sedatives, hypnotics, or anxiolytics (or a closely related substance, such as alcohol) are taken to relieve or avoid withdrawal symptoms.
• Posttraumatic Stress Disorder	**Note:** The following criteria apply to adults, adolescents, and children older than 6 years. For children 6 years and younger, see corresponding criteria below. A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: 1. Directly experiencing the traumatic event(s). 2. Witnessing, in person, the event(s) as it occurred to others. 3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental. 4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse). **Note:** Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related. B. Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred: 1. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s). **Note:** In children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed. 2. Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s). **Note:** In children, there may be frightening dreams without recognizable content. 3. Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring. (Such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings.) **Note:** In children, trauma-specific re-enactment may occur in play. 4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

	5. Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s). C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following: 1. Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s). 2. Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s). D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following: 1. Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia, and not to other factors such as head injury, alcohol, or drugs). 2. Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g., "I am bad," "No one can be trusted," "The world is completely dangerous," "My whole nervous system is permanently ruined"). 3. Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame themself or others. 4. Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame). 5. Markedly diminished interest or participation in significant activities. 6. Feelings of detachment or estrangement from others. 7. Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings). E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following: 1. Irritable behavior and angry outbursts (with little or no provocation), typically expressed as verbal or physical aggression toward people or objects. 2. Reckless or self-destructive behavior. 3. Hypervigilance. 4. Exaggerated startle response. 5. Problems with concentration. 6. Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep). F. Duration of the disturbance (Criteria B, C, D and E) is more than 1 month. G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

	H. The disturbance is not attributable to the physiological effects of a substance (e.g., medication, alcohol) or another medical condition.
• Specific Phobia	A. Marked fear or anxiety about a specific object or situation (e.g., flying, heights, animals, receiving an injection, seeing blood). **Note:** In children, the fear or anxiety may be expressed by crying, tantrums, freezing, or clinging. B. The phobic object or situation almost always provokes immediate fear or anxiety. C. The phobic object or situation is actively avoided or endured with intense fear or anxiety. D. The fear or anxiety is out of proportion to the actual danger posed by the specific object or situation and to the sociocultural context. E. The fear, anxiety, or avoidance is persistent, typically lasting for 6 months or more. F. The fear, anxiety, or avoidance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. G. The disturbance is not better explained by the symptoms of another mental disorder, including fear, anxiety, and avoidance of situations associated with panic-like symptoms or other incapacitating symptoms (as in agoraphobia); objects or situations related to obsessions (as in obsessive-compulsive disorder); reminders of traumatic events (as in posttraumatic stress disorder); separation from home or attachment figures (as in separation anxiety disorder); or social situations (as in social anxiety disorder).
• Adjustment Disorder	A. The development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s). B. These symptoms or behaviors are clinically significant, as evidenced by one or both of the following: 1. Marked distress that is out of proportion to the severity or intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation. 2. Significant impairment in social, occupational, or other important areas of functioning. C. The stress-related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation of a pre-existing mental disorder. D. The symptoms do not represent normal bereavement. E. Once the stressor (or its consequences) has terminated, the symptoms do not persist for more than an additional 6 months.
• Generalized Anxiety Disorder	A. Excessive anxiety and worry (apprehensive expectation), occurring more days than not for at least 6 months, about a number of events or activities (such as work or school performance). B. The person finds it difficult to control the worry. C. The anxiety and worry are associated with three (or more) of the following six symptoms (with at least some symptoms having been present for more days than not for the past 6 months):

	Note: Only one item is required in children. 1. Restlessness or feeling keyed up or on edge. 2. Being easily fatigued. 3. Difficulty concentrating or mind going blank. 4. Irritability. 5. Muscle tension. 6. Sleep disturbance (difficulty falling or staying asleep, or restless unsatisfying sleep). D. The anxiety, worry, or physical symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. E. The disturbance is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition (e.g., hyperthyroidism). F. The disturbance is not better explained by another mental disorder (e.g., anxiety or worry about having panic attacks in panic disorder, negative evaluation in social anxiety disorder [social phobia], contamination or other obsessions in obsessive-compulsive disorder, separation from attachment figures in separation anxiety disorder, reminders of traumatic events in posttraumatic stress disorder, gaining weight in anorexia nervosa, physical complaints in somatic symptom disorder, perceived appearance flaws in body dysmorphic disorder, having a serious illness in illness anxiety disorder, or the content of delusional beliefs in schizophrenia or delusional disorder).

SCHEDULE I

CLAIMS FORM

See attached.

[●Settlement Website URL]

DRINKING WATER CLASS ACTION CLAIMS FORM

Caution:

Filling out this Claims Form may be emotionally difficult or traumatic for some people.

If you are experiencing emotional distress or need assistance completing this Claims Form, **please contact the Hope for Wellness Help Line** toll-free at 1-855-242-3310 or connect to the online chat at hopeforwellness.ca.

Free assistance with the Claims Form is available from the Administrator. Please contact [●].

This is the Claims Form for **individuals** claiming personal compensation.

First Nations governments that want compensation for the community as a whole must give notice that they accept the Settlement and should not complete this form. Please visit [●URL] or contact [●] for more information.

DRINKING WATER CLASS ACTION CLAIMS FORM

You may be eligible for compensation if:

1. you are a member of a First Nation; and
2. for at least one year between November 20, 1995, and June 20, 2021, you ordinarily resided on First Nation lands that were subject to a drinking water advisory that lasted at least one year while the drinking water advisory was in effect.

Additionally:

1. You may claim compensation on behalf of an eligible family member who died after November 20, 2017.
2. You may be eligible even if your First Nation does not accept the Settlement.

If you meet the above criteria, please complete this Claims Form to the best of your ability.

Free assistance with the Claims Form is available from the Administrator. Please contact [•].

You must submit your Claims Form by [• Date].

INSTRUCTIONS

1. Please

    a. ensure that you complete all sections of the Claims Form that apply to you;

    b. read all questions carefully before answering; and

    c. write clearly and legibly.

2. You may submit additional documents and information with this Claims Form to support your claim. If you need assistance submitting additional documents or information—or want to make an oral statement—please contact the Administrator at [•].

3. If you need to make changes to any information in your Claims Form after you have sent it to the Administrator, please do so as soon as possible. Examples of important changes include a change of address and corrections to any information.

4. Do not send original documents to the Administrator. Clear photocopies will be accepted.

5. If your Claims Form is incomplete or does not contain all of the required information, you will be asked to provide more details. This may delay the processing of your claim. The information you provide in your Claims Form is a very important part of what will be considered when deciding whether to pay you money and if so, how much money.

6. You may submit your Claims Form

    a. online at [• URL]

    b. by mail at [• Address]

Part 1: Identifying Information Everyone must complete this part	
Information about the Claimant	
First Name:	
Middle Name(s):	
Last Name:	
Other Names:	
Date of Birth	
If Claimant has died, Date of Death	
Indian Status Card number or Beneficiary Number	
Social Insurance Number:	
Contact Information	
Street Address	
City/Town/Community	
Province/Territory	
Postal Code	
Country	
Telephone Number	
Email Address (if any)	

Part 2: Eligibility Information
Everyone must complete this part

What First Nations have you been a member of?

Use additional rows only if you have been a member of more than one First Nation.

First Nation		Dates of Membership	
First Nation		Dates of Membership	
First Nation		Dates of Membership	

When did you live on a Reserve during a Long-Term Drinking Water Advisory?

A temporary absence from your ordinary residence does not end a period of ordinary residence. Your ordinary residence changes only if you spend more time living somewhere else in a given year. If you were 18 years old or younger and ordinarily resided on a Reserve during a Long-Term Drinking Water Advisory, but were away from that Reserve for a portion of the year to attend an educational facility, you can still count that Reserve as your ordinary residence. Complete the dates below for the time that you were ordinarily resident on a Reserve during a Long-Term Drinking Water Advisory on that Reserve. Use additional rows if you were ordinarily resident on more than one Reserve that was subject to a Long-Term Drinking Water Advisory.

Reserve		Dates of Residence	
Reserve		Dates of Residence	
Reserve		Dates of Residence	
Reserve		Dates of Residence	

Part 3: Representation Information Everyone must complete this part			
Are you representing someone else? Are you making a claim on behalf of someone else as their legally authorized representative? Please mark the appropriate box.			
	Yes, I'm making a claim on behalf of someone else.		No, this is my claim.
If you are making a claim on behalf of someone else, please complete this section and attach any documents you may have that confirm your ability to represent the Claimant.			
Representative Name			
Basis of Representation			

Part 5: Declaration and Consent
Everyone must complete this part

I acknowledge and agree that:

1. the Administrator may contact me to obtain information;
2. the Administrator may provide the information I submit in this Claims Form to Canada, Class Counsel, and the Settlement Implementation Committee to evaluate my Claim;
3. Canada may provide information about me to the Administrator for the purpose of evaluating my claim.

I confirm that all the information provided in this Claims Form is true to the best of my knowledge. Where someone helped me complete this Claims Form, that person has read to me everything they wrote and included with this Claims Form.

I understand that free legal advice is available from Class Counsel at [•].

I understand that by signing this Claims Form and submitting it to the Administrator, I am consenting to the above, and to the disclosure of my personal information to be used and disclosed in accordance with the settlement.

Signature	
Name of Person Signing	
Date of Signature	

Consent to Contact (Optional)

The Administrator may try to contact you for more information. The Administrator will try to contact you using the information you provide above. If the Administrator does not reach you, is there someone else the Administrator should contact who can get in touch with you?

Contact Person's Name	
Contact Person's Contact Information (Phone, Email, Address, etc.)	

Part 6: Specified Injuries Compensation
This part is optional

Eligibility for Specified Injuries Compensation

You are eligible for additional compensation if you have suffered one of the Specified Injuries on the list below. To receive money for those injuries, you must establish that your Specified Injury caused by:

1. using treated or tap water in accordance with a Long-Term Drinking Water Advisory; or
2. by restricted access to treated or tap water caused by a Long-Term Drinking Water Advisory.

List of Specified Injuries:
[•]

You may establish your claim through this Claims Form or through additional documents or records of the Specified Injury or its cause, such as medical records. If you want to provide an oral statement about your Specific Injury and its cause, please contact the Administrator at [•].

You must complete an additional declaration with a witness at the end of this Claims Form to be eligible for Specific Injuries Compensation.

It is optional to claim Specified Injuries Compensation. You may be eligible for compensation just for living through a Long-Term Drinking Water Advisory on a Reserve. But if you do not claim Specified Injuries Compensation now, you will not have another chance.

Class Counsel can help you claim Specified Injuries Compensation. There is no charge to you. Please contact [•].

The Specified Injuries eligible for compensation are serious and the symptoms must persist for at least one month. Specified Injuries Compensation is paid in addition to Individual Damages for the ordinary hardships of living through a Long-Term Drinking Water Advisory.

Do you want to claim Specified Injuries Compensation?

Check the appropriate box.

	Yes, I want to claim Specified Injuries Compensation and will		No, I do not want to claim Specified Injuries Compensation.

	complete the rest of the Claims Form.		I will not complete the rest of this Claims Form.

Part 6: Specified Injuries Compensation This part is optional but required to claim Specified Injuries Compensation	
Instructions Please complete this form once for each Specified Injury you suffered. To support your Specified Injury Claim, you may attach any relevant documents to this Claims Form, including a further written statement. You may also tell your story to the Administrator by contacting [•].	
Specified Injury (must be on the list)	
When did you start suffering from the Specified Injury?	
When did you stop suffering from the Specified Injury?	
What symptoms did you have from the Specified Injury?	
What, if any, treatment did you seek or receive for the Specified Injury?	
What caused the Specified Injury? How do you know that it caused the Specified Injury?	
What, if any, records do you have of the Specified Injury or its cause? Relevant records include photographs and videos.	

Part 6: Specified Injuries Compensation This part is optional	
Instructions Please complete this form once for each Specified Injury you suffered. This form is a duplicate of the previous page. If you only have one Specified Injury to claim and you completed the previous page, you do not need to complete this page. To support your Specified Injury Claim, you may attach any relevant documents to this Claims Form, including a further written statement. You may also tell your story to the Administrator by contacting [•].	
Specified Injury (must be on the list)	
When did you start suffering from the Specified Injury?	
When did you stop suffering from the Specified Injury?	
What symptoms did you have from the Specified Injury?	
What, if any, treatment did you seek or receive for the Specified Injury?	
What caused the Specified Injury? How do you know that it caused the Specified Injury?	
What, if any, records do you have of the Specified Injury or its cause? Relevant records include photographs and videos.	

Part 7: Specified Injuries Sworn Declaration
You must complete this part only if applying for Specified Injuries

Instructions

You must swear this declaration before anyone of the following Guarantors:

1. the Administrator;
2. a Notary Public or Commissioner of Oaths (including Class Counsel);
3. an elected official or community leader, including a Chief or Councillor; or
4. another professional (*e.g.*, a lawyer, doctor, accountant, or police officer).

Declaration

I declare that the information I have provided is true to the best of my knowledge.

Signature	
Name of Person Signing	
Date of Signature	

Guarantor

The Guarantor needs to see the Claimant sign this page and verify the Claimant's identity. The Guarantor does not need to read this Claims Form or verify the information in it. The Guarantor must complete the rest of this section.

Signature	
Name of Guarantor	
Date	
Guarantor Title/Position	
Address	
Telephone Number	
Email Address	

SCHEDULE J

INDIGENOUS SERVICES CANADA'S LONG-TERM DRINKING WATER ADVISORY ACTION PLAN

See attached.

Long-Term Drinking Water Advisory Action Plan: Bi-Monthly Status Update

Updated: September 8, 2021

Region	# DWAs in effect	No. of households affected by # DWAs	# DWAs added since Nov. 2020	# DWAs lifted since Nov. 2020	No. of # DWAs Rescinded since November 2015	DWAs that have been in effect for ≥ 10 years	Latest DWAs that have been in effect for ≥ 10 years
ON		37			7	3	
QC		11			2	2	
MB		26			1	1	
SK		7			1	1	
AB		5			1	1	
BC		11			1	1	
YK		0			1	0	
NT		4			1	1	
NU		49			1	49	
Total		150			16	59	

Long-Term Drinking Water Advisories in Effect on Public Systems on Reserve

Number of homes and community buildings affected are estimates only.

**Target dates by which the advisory may be lifted are rough estimates only and subject to change as impacts from the pandemic evolve. In most cases, target dates are to be determined (TBD) over the course of the work in the early stage of the project. Target dates will be re-assessed as projects progress. All efforts are being made to address all remaining # DWAs as soon as possible.

Region	Area Name	System Name	First Nation (ENGLISH/FRENCH)	Date Advisory Declared in Long-Term DWA (DD/MM/YYYY)	Number of homes affected*	Number of community buildings affected*	Issue	Treatment Recommended	Current Status	Target Date**
ON	Manitoulin Lake	Wikwemikong Unceded Indian Reserve (Wikwemikong Community Centre/Youth Centre/Adult Public Water System (WTP)/Elk Bay Campsite Area Water System)	WIKWEMIKONG	20/07/2015	70	3	Chemical levels exceed Ontario guidelines	Lagooning: Phase seven upgrades, extension of lagoon network. Reservoirs: Trunk to connect to the community service	• First Nation has agreed to install in-ground chlorination at Island 24 community centre • COVID-19 restrictions limited implementation of interim measures • RFI was released by Council on Jan. 28, 2021 that has a work was divided in many elements of Island 24/ Trout Centre disposal equipment delivered in Feb 2021 • On April 27, 2021 contractor advised that they arranged to on site, at request of community, contractor mobilized to site (June), 2021 • All work completed early August 2021 • All continues contract - dispatching construction crews at winter including point treatment upgrades and water valves due at nearby Island 24 activity. Manitoga Trout and Trout Rivers Campsites have confirmed work is complete and awaiting well connection (Band Council), Manitoga coaching with environmental public health officials to confirm testing requirements at recommend 5% of services, however labour experienced may to hinder the success • Long-term solution and interim water, wastewater and servicing recommendations: currently estimated at 2 - 3 years to complete. Discussions on April / May 2021 with community leadership agreed on multi-phase approach. Project Management Team, with Wikwemikong Tribal Council on lead, working to develop approval recommendation for detailed design of water treatment plant upgrades and wastewater lagoon. Draft project documentation developed and shared with community leadership in August 2021 for review and approval • Operational supports provided to community through 10 Trained First along described by Wikwemikong Tribal Council	2021/09

ON	Neskantaga	Neskantaga Drinking Water System Project (Boil Water Advisory)	$[redacted]	$[redacted]	1	1	Groundwater well with no treatment or disinfection	Lead agency: Federation of Independent Nations of Ontario Project agency: ISR	- Boil water was declared a State of Emergency due to COVID-19 with subsequent restrictions to travel into the community - An initial meeting between ISC and Wahgoshig First Nation occurred July 20, 2020 - ISC working with the First Nation and Wahgoshig Tribal Council Water Team to design, installation and operation of a standalone water treatment system for the Drinking Station and Reclaimer - ISC issued funding submission from First Nation with scope, schedule and cost to proceed to detail, including the team approached and engineering firm engaged to begin work to obtain the treatment system for the existing groundwater source - Project Management Team has been established, funding has been received, on-site assessment occurred on June 17, 2021, revised project schedule will be developed based on findings and recommendations, during assessment issues with well pumps were identified, affecting water supply to health centre and Nurses' Residences, an interim solution was implemented, and permanent options were considered at work till 2022 - ISC informed by Wahgoshig First Nations' Council that options analysis and design of treatment system is underway, report is pending, Email that is the only way (Mail) Deadline	[redacted]
ON	Chippewas of Georgina Island	Georgina Island Public Water System (#1141) (Boil Water Advisory)	$[redacted]	$[redacted]	61	1	Distribution is chlorinated	Lead agency: Upgrades to the existing water treatment plant Project agency: MLH	- Upgrades to water treatment plant completed Dec 2019, treated water meets requirements - Certified overall responsible operator (CROP) contracted to provide operational oversight - In Sep 2020, First Nation advised that the most populated community was open for trips; a confirmation, WTP operator regular monitoring and maintenance of operational records required prior to lift recommendation - Additional funding issued in Feb 2021 for upgrades to the existing distribution system - Jan 2021, ISC discussed 10-year work from First Nation who requested an expansion of the distribution system - Feasibility study funded by First Nation's determined pipes were in the most cost-effective common and lift plant; design for water for First Nation's underload, and not to be developed until the funding is confirmed, approval documentation is under development consultant suggesting September 2021 for completion of design and construction underway, which will incorporate upgrades to existing distribution system along with extensions, reconstruction activities planned for Spring 2022 - Operational support extended through ISC funded that delivered by Regionwide Trade Council	TBD
ON	Chippewas of Rama	Rama Indian Public Water System (Boil Water Issued) (BWI)	$[redacted]	$[redacted]	248	10	System does not have treatment and distribution system professional Project agency: First Nation Band Council	- Design of well buildout work and water treatment plant complete, treatment supplier selected, and qualification for General Contractor for distribution system and water treatment plant complete - ISC and Chief had on Feb 2021 to discuss First Nation's request for project approach outside ISC level of service standards (LOS); community advised that they support partial construction to scope outside of LOS - Project approved by ISC - Tenders for Distribution system and water treatment plant closed end of August 2021; Consultant completing and analysis, and project management team scheduled to meet in September 2021 to discuss findings and options	[redacted]
ON	Deer Lake	Deer Lake Public Water System (Boil Water Advisory) (BWI)	$[redacted]	$[redacted]	518	1	Chlorination/pumping	Lead agency: To be determined through Feasibility Study Project agency: Determined stakeholders and funding	- Water is brown due to operational inconsistencies - Community Advisory Committee created through ISC Funding that identified the measurement Chlorination With Deer Lake First Nation - ISC met with Chief and Council in Sept 2020 to encourage and build relationship - A/O Hub provided trainings in sampling techniques - A/O Hub advised on May 25, 2021, that there are no technical issues in environment, their review and flow control valve completely replaced during April 30, 2021 (Unstable water modeling guidelines - Community tests evaluated until ISC, 2021 due to regular boil lifts - A/O Hub on site July 21, 2021 to address water system issues; A/O ordered parts and equipment and returned on site August 2, 2021 to complete repairs and maintain operations, as of August 25, 2021 repairs to treatment unit complete as well as new parts instrumentation, water quality operators urgent; A/O Hub remained on site with community identified from evaluations - ISC working with community to develop feasibility study for long-term needs, including for fire and residential repairs to existing system (Water Safety Advancement Approach), ISC in Dec 2020, completed a assessment completed, and off-reserve new Dec 16, 2021, report to Needs Report made known due to community expectations - ISC working with line to liaison with community the need for monitoring and to offer support	TBD

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

ON	[redacted]	[redacted]	[redacted]	[redacted]	96	3	[redacted]	[redacted]	- Water treatment plant commissioning started May 31 2020 due to COVID, re-started and completed July 2020 - In Sept 2020, environmental public health officer (EPHO) issued water recommending relocation of CTWA, in Oct 2020 Draft retrieved (subject) next Child member activity after and provided until 30 recommendation and release information - Mar 24, 2020, at request of First Nation, ISC discussed resolution of CWA, community water previous concern related to potential non-compliance in the vicinity of the treatment plant - Provision for funded project to rehabilitate old treatment unit successfully completed - ISC different congratulatory and support of resolution of CWA, in response to Notice sign by ISC in March 2021, communicated water that they will contact ISC within ready (as of September 2021), no change to status - May 26, 2021 EPHO advised two Youth ISC materials since last letter, recommendation to lift from September 2020 (second another round of training - June 7, 2021, 24/7 Technical Support requested by First Nation and approved by ISC, local operator experiencing issues - 24/7 technical number issued replacement unsafe, ISC working with CWA first to establish every plan for additional training capacity - Site family phase exercise (on 21 2021, Consultant advised that Warranty Inspection and Training Services completed August 4 to 6 water, elevated contained with fact, results showing that water quality meets all applicable requirements from plant and throughout distribution - ISC requesting protocol from EPHO on whether or not boil water support is now better ID recommendation to rescind, decision pending - Operational support provided through ISC included but declared by FNIC 3 Net Council	Yes
ON	[redacted]	[redacted]	[redacted]	[redacted]	31	4	[redacted]	[redacted]	- Due to delays, First Nation terminated contract for upgrades Dec 2019, new contractor hired - Construction completed, First Nation in operation (1 year since my filing) - Distribution system and wastewater work rejected, approved Oct 7, 2020 - On 16, 2020 intact on treatment water tested, commenced minimal on from short from pump, distribution system flushed, water sampling confirmed not traces of coliphage tested - Community evacuated, returned Dec 18, 2020, new system operational since Nov 13, 2020 - Testing Feb 12, 2020, water meets requirements, ISC funding but since our new support delivered by EPHO - Work on lift station completed, pumps replaced, service flushed, 18 metres able to pump to lagoon, Consultant recommended replacement of forcemain funding approved, replacement forcemain pipe is in community - Boil no care return in April 2021, an contractor's dispatcher dumps EPHO, on June 16, 2021 ISC received updated EPHO, all pressure established to community, contractors required to have proof of hot conditions, assessment of ragged test, and water and wastewater projects were halted due to site near requirement - Contractor for sewage forcemain replacement now on site, work is underway and expected completion in September 2021, unplanned supplier scheduled to return to site end of September 2021 to confirm system meets design specifications - Contractors to address deficiencies at water treatment plant yet to return citing issues with metering from Hydro to operations requirements - Final sign-on submitted, ISC preparing to enforce to appropriate approval authorities once any concerns are addressed	Yes
ON	[redacted]	[redacted]	[redacted]	[redacted]	101	3	[redacted]	[redacted]	- Design of plant upgrade and expansion completed, design change in Nov 2018 delayed completion - Equipment pre-purchased, construction contract awarded, treatment and expansion dropped on site in winter 2020 - First Nation closed borders in March 2020 due to COVID-19 - First Nation certified contractor in July 2020 then construction practices delayed until Spring 2021 due to community access restrictions and availability of accommodations - Accommodations, limited materials and equipment mobilized over the 2021 Winter Road - Construction kick-off meeting held May 31, 2021, Contractor indicated that foundation construction was to begin on May 24, 2021 - First Nation was in full lockdown in response to COVID-19 April / May 2021, commence scheduled to return May 28, 2021, however under extension of First Nation assessment return - Construction resumed June 28, 2021, excavation, civil piping/electrical, underslab re-routing, revised schedule submitted since substantial completion anticipated for April 28, 2022 - Contractor has already project management team of potential flu delay in the completion as a result of numerous suspension of works (COVID lockdown) has not substantially measured - Operational support provided to community through ISC funded hire temp servants by Matawa Tribal Council	2021-07

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]	[illegible]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]	[illegible]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Short-Term Drinking Water Advisories on Public Systems on Reserve (i.e. Advisories that have been in effect for 12 to 24 months)										
Region	First Nation	System Name	Date (dd-mm-yyyy)	Date Advisory Took Become a Long-Term Issue (dd-mm-yyyy)	Number of Homes Affected*	Number of community buildings Affected*	Issue	Corrective Measure(s)	Current Status	Target Date**
ON	[redacted]	[redacted]	[redacted]	[redacted]	12	4	Critical to ensure ongoing clear results and failure of disinfection equipment	[redacted]	- Adverse bacteriological test results and failure of disinfection triggered the issuance of the DWA, at the direction of Chief and Council, no further investments in interim solutions seen to be made, as the long-term solution is near completion. - Long-term solution to result in a new water treatment plant and its complete distribution upgrades a well-established and performance-tested wastewater to be completed in early September 2021 and operational completion of the connect expected in late September 2021, ECA environmental and E. Health officer. (ENGW) is aware of project status and assistance to support sampling and testing. - Operational support being provided through ON Funded fund being delivered by the AFNT Tribal Council.	[redacted]
ON	[redacted]	[redacted]	[redacted]	[redacted]	40	1	Water loss and distribution unaccounted for	[redacted]	- Challenges with current plant, experienced COVID-19 in the past 12 months, current DWA due to precautions in distribution, suspected leak - Leak detection completed, and leaks addressed. However other issues as a result of upgrade were identified as a result of new treatment equipment and systems continues to present unforeseen challenges. - First Nation considering decision to keep DWA in place until upgrades and expansion project is complete, under construction since March 2020 - Contractor estimate in June 2021 that supply main valves are to COVID-19 and different than commissioning plan. WSC is still coordinating to address wrong valve and that will be the focus to date, testing and commissioning was not expected to commence until late July 2021, commissioning plan can to be completed by contractor for consultant for review. - Contractor estimate in July 2021 of which, to potential reach up as a result of supply chain challenges due to COVID, revised schedule issued called for performance testing in begin of the end of August 2021, with all work to be completed by end of September 2021, Consultant estimated that this will be 1-2 approximately 1-2 month behind this schedule. - WC continues to monitor project and supports the community, next schedule expected to be issued in September 2021. - Operational issues exist and First Nation advised they are willing to re-evaluate plan with aim to have new operators in train in time for commissioning. - Operational support being provided through ON Funded fund being delivered by the AFNT Tribal Council.	[redacted]
ON	[redacted]	[redacted]	[redacted]	[redacted]	11	3	No plans to undo quality monitoring - operational issues	[redacted]	- Operational challenges, intermittent alum and water quality monitoring are issues for DWA. - Assessment of plant identified maintenance deficiencies (pumps, electrical, automation). Phase 1 fill the approved funding to support technical work to address these maintenance issues. - Call for proposals for a consulting engineer completed, and contract awarded, on site visit by consultant occurred during the week of March 22, 2021. Engineer's assessment report received waiting issues with some Problems maintenance. Investment support received May 2021, detailed assessment report that includes findings and recommendations of treatment system overall with 30, 100% design completed to be issued in September 2021. - Repair work was anticipated to be completed by end of August 2021, however delays have hindered progress, new target date of late September which remains current action remedies provided. - Operational support is provided by ON Funded Technician Water and Wastewater Fund delivered by (AFNTC) - Long-term solutions determined through Wastewater Study, WC working with First Nation to develop project approval documents to advance project to target dates	[redacted]

OTHER RELATED AUTHORITIES			
Region	First Nation	Project	Current Status
ON	Curve Lake First Nation	Curve Lake New Water Treatment Plant	- Curve Lake First Nation does not currently have a drinking water advisory in effect. In June 2019, two (TWAs) on the Curve Lake Band's Administration Building was lifted. - Curve Lake is serviced with groundwater drawn from roughly 500 individual wells for each home, plus the Rehabilitated Subdivision that is serviced with a communal groundwater supply system (the so-called Rehabilitated Water Supply Treatment System – serving 49 homes), this system will be demolished once the new water treatment plant is operational and the existing water distribution system for the Rehabilitated Subdivision will be incorporated into the new system. There are 288 active members currently on-reserve who are also serviced by individual wells. These wells will not be served through the new water treatment and distribution system. - Individual wells in Curve Lake are unsuitable for both domestic and public use, poor quality water, shut-boils and contamination from on-site septic systems. Previous test results show that high levels of calcium, turbidity, iron were present in numerous groundwater supplies. The Manual Assessment Strategic Business Unit, (November 2020) provided four on-site wells and noted water quality issues concerning coliforms, nitrates and nitrites, hardness and total dissolved solids. A hydrogeological report issued November 2019 listed high concentrations of iron, manganese, total dissolved solids (TDS), hardness, and chloride, as well as elevated bacterial counts (HPC) concentrations. - The Administrative Guidelines acknowledge that almost all water frequently and does not have the capacity to meet current demands. The latest Water Solutions Planning Study (WSP) Report (June 2019) (ELGR) recommended major expansion or replacement. A new water treatment and distribution system capable of confirming to Ontario drinking water regulations is needed to ensure that the First Nation is supplied with safe, potable water, for at least the next 20 years. - ISC provided funding to Curve Lake First Nation to update an existing feasibility study. The updated study recommended, and the community prefers, a surface water treatment plant with distributed filtration and extensive distribution system with loop flow. - ISC is committed to funding construction of the Curve lake water treatment system as defined in the Project Approval Request approved by Chief and Council on June 2, 2020 and ISC on June 22, 2020, subject to further ground-truthed to the design study in the First Nations maintenance living on reserve. - ISC received the First Nation's study on May 29, 2020. The design phase of this project was approved on July 13, 2020. The First Nation is working with a Project Manager and a Design Consultant to complete the design by end of March 2021.
ON	Mississaugas	Trust the Tap	- WWB has begun funded the "Trust the Tap" proposal for $240,000 in Mississaugs, which is a community Well-being Planning Plan that focuses on: community training, cultural education, building self-esteem, and developing more community-appropriate wellness strategies. The proposal arose from the need to address psychological and physical impacts of the CTWA which are compounded the ongoing trauma and intense health challenges experienced by this community. - WWB ISC's initial funding will be used mainly for community engagement and capacity support to develop the Community Well-being Plan, as well as direct mental health support for the community engagement and issues that may arise from these sessions. - The initial community engagement approved in February 2021 will be implemented at the First Nations. WWB could not to be available to support the First Nation as they advance the implementation of the project. - WWB ISC is committed to funding the implementation and delivery of the Community Wellness/Healing Plan that is developed through the community engagement process in consultation with WWB.

SCHEDULE K

COMMITMENT DISPUTE RESOLUTION PROCESS (AND APPENDIX)

See attached.

1. **Fixing Things Together: Commitment Dispute Resolution Process**

1.1. General

1.1.1. This Schedule applies to disagreements that arise between Canada and Underserviced First Nations about whether Canada is meeting its Commitment under the Agreement and about proposed plans for meeting the Commitment (collectively, "**Disagreements**").

1.1.2. Canada and the Class share the following objectives:

1.1.2.1. to cooperate with each other to ensure that the Commitment is always met;

1.1.2.2. to strive for consensus and harmony;

1.1.2.3. to agree on plans to meet the Commitment in a timely and expeditious fashion ("**Remediation Plans**");

1.1.2.4. to identify Disagreements quickly and resolve them in the most expeditious and cost-effective manner possible;

1.1.2.5. to resolve Disagreements in a non-adversarial, collaborative and informal atmosphere;

1.1.2.6. to resolve Disagreements in a manner which reflects and incorporates the legal traditions and protocols of the Underserviced First Nation;

1.1.2.7. to locate the process for resolving Disagreements within the communities of the Underserviced First Nations and conduct those processes in a way that is accessible to and respectful of those communities.

1.1.3. Except as otherwise provided, Canada and any Underserviced First Nation may agree to vary a procedural requirement contained in this Schedule, as it applies to a particular Disagreement.

1.1.4. Canada and the Class desire and expect that most Disagreements will be resolved by informal discussions without the necessity of invoking this Schedule.

1.1.5. Except as otherwise provided in this Agreement, Disagreements not resolved informally will progress, until resolved, through the following stages:

1.1.5.1. Stage One: formal, unassisted efforts to reach agreement on a Remediation Plan between Canada and the Underserviced First Nation, in collaborative negotiations in accordance with Appendix K-1;

1.1.5.2. Stage Two: structured efforts to reach agreement between or among the Canada and the Underserviced First Nation in a mediation in accordance with Appendix K-2; and

1.1.5.3. Stage Three: final adjudication in arbitral proceedings in accordance with Appendix K-3.

1.1.6. Except as otherwise provided in this Agreement, no one may refer a Disagreement to final adjudication in Stage Three without first proceeding through Stage One and Stage Two as required in this Schedule.

1.1.7. Nothing in this Schedule prevents Canada or an Underserviced First Nation from commencing arbitral proceedings on an urgent basis at any time:

1.1.7.1. to address an urgent loss of regular access to water; and/or

1.1.7.2. to obtain interlocutory or interim relief that is otherwise available pending resolution of the Disagreement under this Schedule,

and the Arbitrator shall have the power to hear such hearings on an urgent basis and grant such interlocutory or interim relief.

1.2. Stage One: Collaborative Negotiations

1.2.1. If a Disagreement is not resolved by informal discussion and an Underserviced First Nation wishes to invoke this Schedule, that Underserviced First Nation will deliver a notice to Canada, requiring the commencement of collaborative negotiations.

1.2.2. Upon receiving the notice, Canada and the Underserviced First Nation shall participate in the collaborative negotiations.

1.2.3. Collaborative negotiations must be conducted in a manner which:

1.2.3.1. is in good faith;

1.2.3.2. creates a safe and respectful space for members of the Underserviced First Nation participating;

1.2.3.3. promotes mutual understanding and transparency about the issues in the Disagreement, by, among other things, Canada providing sufficient information and sufficiently explaining those issues in a way that is accessible to members of the Underserviced First Nation;

1.2.3.4. enables and promotes the use of Indigenous languages;

1.2.3.5. is located within the community of the Underserviced First Nation and is accessible to its members;

1.2.3.6. respects the legal traditions and protocols of the Underserviced First Nation, including:

1.2.3.6.1. seating arrangements;

1.2.3.6.2. order of speaking;

1.2.3.6.3. prayers, speeches and acknowledgments;

1.2.3.6.4. exchange of gifts;

1.2.3.6.5. the wisdom of elders;

1.2.3.6.6. the importance of traditional teachings;

1.2.3.6.7. the experience of the community;

1.2.3.6.8. the community's understanding of the issues in the Disagreement; and

1.2.3.6.9. the community's protocols for decision-making.

1.2.4. Collaborative negotiations terminate in the circumstances described in Appendix K-1.

1.3. Stage Two: Mediation

1.3.1. Within fifteen (15) days of termination of collaborative negotiations that have not resolved the Disagreement, an Underserviced First Nation may require the commencement of a facilitated process by delivering a notice describing the Disagreement and including any Remediation Plans from Canada and the Underserviced First Nation.

1.3.2. Within thirty (30) days after delivery of a notice, the Canada and the Underserviced First Nation engaged in the Disagreement (the "**Participating Parties**") will use mediation to attempt to resolve the Disagreement.

1.3.3. The Parties shall establish a Roster of Mediators available to facilitate negotiations who have knowledge of:

1.3.3.1. The conditions of life on First Nations reserves; and

1.3.3.2. First Nations languages, customs and legal traditions.

1.3.4. The mediator and the Participating Parties must conduct the facilitated process in a manner which:

1.3.4.1. creates a safe and respectful space for members of the Underserviced First Nation participating;

1.3.4.2. promotes mutual understanding and transparency about the issues in the Disagreement, by, among other things, Canada providing sufficient information and sufficiently explaining those issues in a way that is accessible to members of the Underserviced First Nation;

1.3.4.3. enables and promotes the use of Indigenous languages throughout the process;

1.3.4.4. is located within the community of the Underserviced First Nation and is accessible to its members;

1.3.4.5. respects the legal traditions and protocols of the Underserviced First Nation, including:

1.3.4.5.1. seating arrangements;

1.3.4.5.2. order of speaking;

1.3.4.5.3. prayers, speeches and acknowledgments;

1.3.4.5.4. exchange of gifts;

1.3.4.5.5. the wisdom of elders;

1.3.4.5.6. the importance of traditional teachings;

1.3.4.5.7. the experience of the community;

1.3.4.5.8. the community's understanding of the issues in the Disagreement;

1.3.4.5.9. the community's protocols for decision-making.

1.3.5. The Underserviced First Nation may designate a representative knowledge keeper or elder to provide guidance to the mediator on legal traditions and protocols.

1.3.6. The Underserviced First Nation may develop guidelines outlining its legal traditions and protocols for use by the mediator and the Parties.

1.3.7. The Participating Parties may or may not request a report from the mediator.

1.3.8. A mediation terminates in the circumstances described in Appendix K-2.

1.4. Stage Three: Adjudication – Arbitration

1.4.1. After the later of termination of collaborative negotiations, or of a required facilitated process, the Disagreement will, on the delivery of a notice to arbitrate in accordance with Appendix K-3, be referred to and finally resolved by arbitration in accordance with that Appendix.

1.4.2. Accompanying the notice to arbitrate shall be:

1.4.2.1. any Remediation Plans prepared by the Participating Parties;

1.4.2.2. any neutral evaluation report;

1.4.2.3. any mediator's report that the Parties have agreed may be provided to the Arbitrator.

1.4.3. The Parties shall establish a Roster of Arbitrators available to hear arbitration of Disagreements.

1.4.4. Arbitrators on the Roster of Arbitrators shall have knowledge of:

1.4.4.1. The conditions of life on First Nations reserves; and

1.4.4.2. First Nations languages, customs and legal traditions.

1.4.5. The Arbitrator shall consider the Remediation Plans proposed and the reasonableness of Canada's efforts to ensure regular access as defined in the Commitment. Relevant factors include:

1.4.5.1. the views of the Underserviced First Nation, including:

1.4.5.1.1. the physical, social and cultural importance of water;

1.4.5.1.2. the legal traditions of the Underserviced First Nation as they relate to water use, protection and access;

1.4.5.1.3. the historic and ongoing effects of lack of access to water within the Underserviced First Nation;

1.4.5.1.4. the history of Canada's efforts with respect to ensuring regular access to water;

1.4.5.1.5. the urgency of the Underserviced First Nation's water needs.

1.4.5.2. any federal requirements or provincial standards and protocols relating to water;

1.4.5.3. whether monitoring and testing are performed on the water system; and

1.4.5.4. the physical location of the home, including proximity to centralized water systems and remoteness.

1.4.6. The Arbitrator shall conduct the arbitration proceedings in a manner which:

1.4.6.1. creates a safe and respectful space for members of the Underserviced First Nation participating;

1.4.6.2. promotes mutual understanding and transparency about the issues in the Disagreement;

1.4.6.3. enables and promotes the use of Indigenous languages throughout the process;

1.4.6.4. is located within the community of the Underserviced First Nation and is accessible to its members;

1.4.6.5. respects the legal traditions and protocols of the Underserviced First Nation, including:

1.4.6.5.1. seating arrangements;

1.4.6.5.2. order of speaking;

1.4.6.5.3. prayers, speeches and acknowledgments;

1.4.6.5.4. exchange of gifts;

1.4.6.5.5. the admissibility and relevance of evidence, including:

1.4.6.5.5.1. the wisdom of elders;

1.4.6.5.5.2. traditional teachings;

1.4.6.5.5.3. the experience of the community;

1.4.6.5.5.4. the community's understanding of the issues in the Disagreement; and

1.4.6.5.5.5. the community's protocols for decision-making.

1.4.7. The Underserviced First Nation may recommend a representative knowledge keeper or elder, who may, at the discretion of the Arbitrator, sit with the Arbitrator to provide guidance on legal traditions and protocols.

1.4.8. The Underserviced First Nation may develop guidelines outlining its legal traditions and protocols for use by the Arbitrator and the Parties.

1.4.9. After reviewing the Remediation Plans proposed and hearing from the Participating Parties, the Arbitrator shall make an arbitral award as follows:

1.4.9.1. ordering the Underserviced First Nation's Remediation Plan if it is reasonable in all the circumstances;

1.4.9.2. ordering Canada's Remediation Plan if it is reasonable and the Underserviced First Nation's Remediation Plan is not reasonable; or

1.4.9.3. remitting the matter back to the Participating Parties with directions in the event that neither Remediation Plan is reasonable.

1.4.10. An Arbitral Award, as defined in Appendix K-3, is final and binding on all Participating Parties whether or not a Participating Party has participated in the arbitration.

1.4.11. The Parties shall maintain a public registry of arbitral decisions for use by Canada, Underserviced First Nations, and Arbitrators.

Dispute Resolution Procedures

GENERAL

(1) If, in the circumstances set out in Section 9.07 of the Agreement, an Underserviced First Nation wishes to invoke the dispute resolution process set out in this Schedule in respect of an applicable dispute (each a "**Disagreement**"), the Underserviced First Nation may give Canada a Negotiation Notice, and the Parties shall resolve the Disagreement using the procedure set out in this Schedule.

(2) The **"Schedule"** means this Schedule K: Dispute Resolution.

APPENDIX K-1
Collaborative Negotiations

GENERAL

(3) Collaborative negotiations commence on the date of delivery of a written notice by an Underserviced First Nation requiring the commencement of collaborative negotiations (a "**Negotiation Notice**").

NOTICE

(4) A Negotiation Notice will include the following:

(a) the names of the Participating Parties

(b) a summary of the particulars of the Disagreement;

(c) a description of the efforts made to date to resolve the Disagreement;

(d) the names of the individuals involved in those efforts; and

(e) any other information that will help the Participating Parties.

REPRESENTATION

(5) A Participating Party may attend collaborative negotiations with or without legal counsel or other advisors.

(6) At the commencement of the first negotiation meeting, each Participating Party will advise the other Participating Parties of any limitations on the authority of its representatives.

NEGOTIATION PROCESS

(7) The Participating Parties will convene their first negotiation meeting in collaborative negotiations within twenty-one (21) days after the commencement of the collaborative negotiations.

(8) Before the first scheduled negotiation meeting, the Participating Parties will attempt to agree on any procedural issues that will facilitate the collaborative negotiations.

(9) The Participating Parties will make a serious attempt to resolve the Disagreement by:

(a) identifying underlying interests;

(b) isolating points of agreement and disagreement;

(c) exploring alternative solutions;

(d) considering compromises or accommodations; and

(e) taking any other measures that will assist in resolution of the Disagreement.

(10) No transcript or recording will be kept of collaborative negotiations, but this does not prevent an individual from keeping notes of the negotiations.

CONFIDENTIALITY

(11) In order to assist in the resolution of a Disagreement, collaborative negotiations will not be open to the public, but this paragraph does not prevent leadership of the Underserviced First Nation and their representatives from attending.

(12) The Participating Parties, and all persons, will keep confidential:

(a) all oral and written information disclosed in the collaborative negotiations; and

(b) the fact that the information has been disclosed.

(13) The collaborative negotiations will be without prejudice to the rights of the Participating Parties, and nothing disclosed in the collaborative negotiations may be used outside of the collaborative negotiations.

RIGHT TO WITHDRAW

(14) A Participating Party may withdraw from collaborative negotiations at any time.

TERMINATION OF COLLABORATIVE NEGOTIATIONS

(15) Collaborative negotiations are terminated when any of the following occurs:

(a) the expiration of sixty (60) days;

(b) a Participating Party withdraws from the collaborative negotiations under paragraph (14);

(c) the Participating Parties agree in writing to terminate the collaborative negotiations; or

(d) the Participating Parties sign a written agreement resolving the Disagreement.

COSTS

(16) Canada shall pay the reasonable costs of collaborative negotiations conducted under this Appendix in accordance with Section 9.08 of the Agreement.

APPENDIX K-2
Mediation

GENERAL

(17) A mediation may commence at any time after the conclusion of collaborative negotiations, in accordance with Appendix K-1, when an Underserviced First Nation delivers written notice requiring the commencement of mediation (a "**Mediation Notice**").

(18) A mediation begins on the date the Participating Parties directly engaged in the Disagreement have agreed in writing to commence mediation in accordance with 1.3.2 of the Schedule.

NOTICE

(19) A Mediation Notice will include the following:

(a) the names of the Participating Parties

(b) a summary of the particulars of the Disagreement;

(c) a description of the efforts made to date to resolve the Disagreement;

(d) the names of the individuals involved in those efforts; and

(e) any other information that will help the Participating Parties.

APPOINTMENT OF MEDIATOR

(20) A mediation will be conducted by one mediator selected by the Underserved First Nation from the Roster of Mediators established in accordance with the Schedule.

(21) Subject to any limitations agreed to by the Participating Parties, a mediator may employ reasonable and necessary administrative or other support services.

REQUIREMENT TO WITHDRAW

(22) At any time a Participating Party may give the mediator and the other Participating Parties a written notice, with or without reasons, requiring the mediator to withdraw from the mediation on the grounds that the Participating Party has justifiable doubts as to the mediator's independence or impartiality.

(23) On receipt of a written notice in accordance with paragraph (22), the mediator will immediately withdraw from the mediation.

END OF APPOINTMENT

(24) A mediator's appointment terminates if:

(a) the mediator is required to withdraw in accordance with paragraph (23);

(b) the mediator withdraws from office for any reason; or

(c) the Participating Parties agree to the termination.

(25) If a mediator's appointment terminates, a replacement mediator will be appointed in accordance with paragraph (20).

REPRESENTATION

(26) A Participating Party may attend a mediation with or without legal counsel or other advisor.

(27) If a mediator is a lawyer, the mediator will not act as legal counsel for any Participating Party.

(28) At the commencement of the first meeting of a mediation, each Participating Party will advise the mediator and the other Participating Parties of any limitations on the authority of its representatives.

CONDUCT OF MEDIATION

(29) The Participating Parties will:

(a) make a serious attempt to resolve the Disagreement by:

(i) identifying underlying interests;

(ii) isolating points of agreement and disagreement;

(iii) exploring alternative solutions; and

(iv) considering compromises or accommodations; and

(b) cooperate fully with the mediator and give prompt attention to, and respond to, all communications from the mediator.

(30) A mediator shall conduct a mediation with reference to Indigenous legal traditions and protocols, as set out in the Schedule, and may otherwise take any steps

the mediator considers necessary and appropriate to assist the Participating Parties to resolve the Disagreement in a fair, efficient and cost-effective manner.

(31) Within seven (7) days of appointment of a mediator, each Participating Party may deliver a written summary to the mediator of the relevant facts, the issues in the Disagreement, and its viewpoint in respect of them and the mediator will deliver copies of the summaries to each Participating Party at the end of the seven-day period.

(32) A mediator may conduct a mediation in joint meetings or private caucus convened at locations the mediator designates after consulting the Participating Parties.

(33) Disclosures made by any Participating Party to a mediator in private caucus will not be disclosed by the mediator to any other Participating Party without the consent of the disclosing Participating Party.

(34) No transcript or recording will be kept of a mediation meeting but this does not prevent a person from keeping notes of the negotiations.

CONFIDENTIALITY

(35) In order to assist in the resolution of a Disagreement, mediations will not be open to the public, but this paragraph does not prevent leadership of the Underserviced First Nation and their representatives from attending.

(36) The Parties, and all persons, will keep confidential:

(a) all oral and written information disclosed in the mediation; and

(b) the fact that this information has been disclosed.

(37) The Participating Parties will not rely on or introduce as evidence in any proceeding, whether or not that proceeding relates to the subject matter of the mediation, any oral or written information disclosed in or arising from the mediation, including:

(a) any documents of other Participating Parties produced in the course of the mediation that are not otherwise produced or producible in that proceeding;

(b) any views expressed, or suggestions, or proposals made in respect of a possible settlement of the Disagreement;

(c) any admissions made by any Participating Party in the course of the mediation, unless otherwise stipulated by the admitting Participating Party;

(d) any recommendations for settlement made by the mediator; and

(e) the fact that any Participating Party has indicated a willingness to make or accept a proposal or recommendation for settlement.

(38) A mediator, or anyone retained or employed by the mediator, is not compellable in any proceeding to give evidence about any oral and written information acquired or opinion formed by that person as a result of the mediation, and all

Participating Parties will oppose any effort to have that person or that information subpoenaed.

(39) A mediator, or anyone retained or employed by the mediator, is disqualified as a consultant or expert in any proceeding relating to the Disagreement, including any proceeding that involves persons not a Participating Party to the mediation.

REFERRAL OF ISSUES TO OTHER PROCESSES

(40) During a mediation the Participating Parties may agree to refer particular issues in the Disagreement to independent fact-finders, expert panels or other processes for opinions or findings that may assist them in the resolution of the Disagreement, and in that event, the Participating Parties will specify:

(a) the terms of reference for the process;

(b) the time within which the process will be concluded; and

(c) how the costs of the process are to be allocated to the Participating Parties.

(41) The time specified for concluding a mediation will be extended for fifteen (15) days following receipt of the findings or opinions rendered in a process described in paragraph (40).

RIGHT TO WITHDRAW

(42) A Participating Party may withdraw from a mediation at any time by giving notice of its intent to the mediator.

(43) Before a withdrawal is effective, the withdrawing Participating Party will:

(a) speak with the mediator;

(b) disclose its reasons for withdrawing; and

(c) give the mediator the opportunity to discuss the consequences of withdrawal.

TERMINATION OF MEDIATION

(44) A mediation is terminated when any of the following occurs:

(a) subject to paragraph (41), the expiration of sixty (60) days after the appointment of the last mediator appointed to assist the Parties in resolving the Disagreement, or any longer period agreed by the Participating Parties;

(b) the Participating Parties have agreed in writing to terminate the mediation or not to appoint a replacement mediator in accordance with paragraph (25);

(c) a Participating Party withdraws from the mediation in accordance with paragraph (42); or

(d) the Participating Parties sign a written agreement resolving the Disagreement.

MEDIATOR RECOMMENDATION

(45) If a mediation is terminated without an agreement between the Participating Parties, they may jointly request that the mediator give a written non-binding recommendation for settlement, but the mediator may decline the request without reasons.

(46) Within fifteen (15) days after delivery of a mediator's recommendation in accordance with paragraph (45), the Participating Parties will meet with the mediator to attempt to resolve the Disagreement.

COSTS

(47) Subject to paragraph (40), Canada shall pay for the reasonable costs of mediations conducted under this Appendix in accordance with Section 9.08 of the Agreement.

APPENDIX K-3
Arbitration

DEFINITIONS

(48) In this Appendix:

(a) "**Court**" means the superior court of the province where the Reserve of the Underserviced First Nation underlying the Disagreement is located;

(b) "**Applicant**" means the Participating Party that delivered the notice of arbitration;

(c) "**Arbitral Award**" means any decision of the Arbitrator on the substance of the Disagreement submitted to it, and includes:

(i) an interim award; and

(ii) an award of interest;

(d) "**Arbitral Agreement**" includes

(i) the requirement to refer to arbitration Disagreements in accordance with this Schedule; and

(ii) an agreement of the Participating Parties to arbitrate a Disagreement;

(e) "**Arbitrator**" means a single arbitrator appointed in accordance with this Appendix;

(f) "**Respondent**" means a Participating Party other than the Applicant;

(49) A reference in this Appendix, other than in paragraph (96) or (118)(a), to a claim, applies to a counterclaim, and a reference in this Appendix to a defence, applies to a defence to a counterclaim.

(50) Notwithstanding any other provision in the Schedule, the Participating Parties may not vary paragraphs (63) or (108) of this Appendix.

COMMUNICATIONS

(51) Except in respect of administrative details, the Participating Parties will not communicate with the Arbitrator:

(a) orally, except in the presence of all other Participating Parties; or

(b) in writing, without immediately sending a copy of that communication to all other Participating Parties.

EXTENT OF JUDICIAL INTERVENTION

(52) In matters governed by this Appendix:

(a) no court will intervene except as provided in this Appendix or the Schedule; and

(b) no arbitral proceeding of an Arbitrator, or an order, ruling or Arbitral Award made by an Arbitrator will be appealed, questioned, reviewed, or restrained by a proceeding under any law except to the extent provided in this Appendix.

(c) the Participating Parties, to the greatest extent permitted by law, waive any right to appeal, question, review, or restrain arbitral proceeding of an Arbitrator, or an order, ruling or Arbitral Award made by an Arbitrator.

COMMENCEMENT OF ARBITRAL PROCEEDINGS

(53) The arbitral proceedings in respect of a Disagreement commences on delivery of the notice of arbitration by the Applicant to the Respondents ("**Arbitration Notice**").

NOTICE OF ARBITRATION

(54) An Arbitration Notice will be in writing and contain the following information:

(a) a statement of the subject matter or issues of the Disagreement;

(b) a requirement that the Disagreement be referred to arbitration;

(c) the remedy sought; and

(d) any preferred qualifications of the arbitrators.

(55) An Arbitration Notice may contain the names of any proposed arbitrators, including the information specified in paragraph (58).

ARBITRATOR

(56) In each arbitration, there will be one arbitrator.

APPOINTMENT OF ARBITRATORS

(57) The Participating Parties will make good faith efforts to agree on the Arbitrator from the Roster of Arbitrators. If the Participating Parties fail to agree on the Arbitrator within fifteen (15) days after the commencement of the arbitration, the Participating Parties will ask the Courts or any one of them to appoint an arbitrator form the Roster of Arbitrators.

(58) In appointing an Arbitrator, the Courts will have due regard to:

(a) any qualifications required of the Arbitrator as set out in the Arbitration Notice or as otherwise agreed in writing by the Participating Parties; and

(b) any other considerations that are likely to secure the appointment of an independent and impartial Arbitrator.

TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATOR

(59) The mandate of an Arbitrator terminates:

(a) if the Arbitrator withdraws from office for any reason; or

(b) by, or pursuant to, agreement of the Participating Parties.

(60) If the mandate of an Arbitrator terminates, a replacement arbitrator will be appointed in accordance with paragraph (57).

INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL

(61) Unless otherwise agreed by the Participating Parties, the Arbitrator may, at the request of a Participating Party, order a Participating Party to take any interim measure of protection as the Arbitrator may consider necessary in respect of the subject matter of the Disagreement.

EQUAL TREATMENT OF PARTIES

(62) The Participating Parties will be treated with equality and each Participating Party will be given a full opportunity to present its case.

DETERMINATION OF RULES OF PROCEDURE

(63) Subject to the Schedule and this Appendix, the Participating Parties may agree on the procedure to be followed by the Arbitrator in conducting the proceedings.

(64) Failing any agreement in accordance with paragraph (63), the Arbitrator, subject to the Schedule and this Appendix, may conduct the arbitration in the manner they consider appropriate with due regard to the Indigenous legal traditions and protocols of the Underserviced First Nation.

(65) The Arbitrator is not required to apply the legal rules of evidence, and may determine the admissibility, relevance, materiality and weight of any evidence. In accordance with the Schedule, the Arbitrator shall have due regard to the Indigenous legal traditions and protocols of the Underserviced First Nation in determining the presentation and admission of evidence.

(66) Subject only to the Schedule and the Indigenous laws and protocols of the Underserviced First Nation, the Arbitrator will make all reasonable efforts to conduct the arbitral proceedings in the most efficient, expeditious and cost effective manner as is appropriate in all the circumstances of the case.

(67) The Arbitrator may extend or abridge a period of time:

(a) set in this Appendix, except the period specified in paragraph (109); or

(b) established by the Arbitrator.

PRE-HEARING MEETING

(68) Within ten (10) days after the Arbitrator is appointed, the Arbitrator will convene a pre-hearing meeting of the Participating Parties to reach agreement and to make any necessary orders on

(a) any procedural issues arising in accordance with this Appendix;

(b) the procedure and community protocols to be followed in the arbitration;

(c) any elders or knowledge keepers who will sit with and advise the Arbitrator on community protocol and Indigenous law;

(d) the time periods for taking steps in the arbitration;

(e) the scheduling of hearings or meetings, if any;

(f) any preliminary applications or objections; and

(g) any other matter which will assist the arbitration to proceed in an efficient and expeditious manner.

(69) The Arbitrator will prepare and distribute promptly to the Participating Parties a written record of all the business transacted, and decisions and orders made, at the pre-hearing meeting.

(70) The pre-hearing meeting may be conducted by conference or videoconference call.

PLACE OF ARBITRATION

(71) As far as practicable the place of the arbitration shall be on or near the reserve of the Underserviced First Nation.

(72) An Arbitrator may

(a) with the consent of the Participating Parties, may meet at any other place it considers, for hearing witnesses, experts or the Participating Parties; and

(b) attend any place for inspection of documents, goods or other personal property, or for viewing physical locations.

LANGUAGE

(73) As far as practicable the conduct of the arbitration will promote the use of the Indigenous language of the Underserviced First Nation.

(74) Canada shall bear the costs of translation of oral presentations and proceedings, and of such documents as the Arbitrator may direct in the circumstances of a particular Disagreement.

STATEMENTS OF CLAIM AND DEFENCE

(75) Within twenty-one (21) days after the Arbitrator is appointed, the Underserviced First Nation, as Applicant will deliver its Remediation Plan and a written statement to Canada, the Respondent, stating the facts supporting its claim or position, the points at issue and the relief or remedy sought.

(76) Within fifteen (15) days after receipt of the Applicant's statement, the Respondent will deliver a written statement to all the Participating Parties stating its defence or position in respect of those particulars.

(77) Each Participating Party will attach to its statement a list of documents:

(a) upon which the Participating Party intends to rely; and

(b) which describes each document by kind, date, author, addressee and subject matter.

(78) The Participating Parties may amend or supplement their statements, including the list of documents, unless the Arbitrator considers it inappropriate to allow the amendment, supplement or additional pleadings having regard to:

(a) the delay in making it; and

(b) any prejudice suffered by the other Participating Parties.

(79) The Participating Parties will deliver copies of all amended, supplemented or new documents delivered in accordance with paragraph (78) to all the Participating Parties.

DISCLOSURE

(80) The Arbitrator may order a Participating Party to produce, within a specified time, any documents that:

(a) have not been listed in accordance with paragraph (77);

(b) the Participating Party has in its care, custody or control; and

(c) the Arbitrator considers to be relevant.

(81) Each Participating Party will allow the other Participating Parties the necessary access at reasonable times to inspect and take copies of all documents that the Participating Party has listed in accordance with paragraph (77), or that the Arbitrator has ordered to be produced in accordance with paragraph (80).

(82) The Participating Parties will prepare and send to the Arbitrator an agreed statement of facts within the time specified by the Arbitrator, failing which the Parties will identify their differences and ask the arbitrator to decide the facts.

(83) Not later than twenty-one (21) days before a hearing commences, each Participating Party will give the other Participating Party:

(a) the name and address of any witness and a written summary or statement of the witness's evidence; and

(b) in the case of an expert witness, a written statement or report prepared by the expert witness.

(84) Not later than fifteen (15) days before a hearing commences, each Participating Party will give to the other Participating Party and the Arbitrator an assembly of all documents to be introduced at the hearing.

HEARINGS AND WRITTEN PROCEEDINGS

(85) Unless the Participating Parties have agreed that no hearings will be held, the Arbitrator will convene a hearing if so requested by a Participating Party.

(86) The Arbitrator will give the Participating Parties sufficient advance notice of any hearing and of any meeting of the Arbitrator for the purpose of inspection of documents, goods or other property or viewing any physical location.

(87) All statements, documents or other information supplied to, or applications made to, the Arbitrator by one Participating Party will be communicated to the other Participating Parties, and any expert report, evidentiary document or case law on which the Arbitrator may rely in making its decision will be communicated to the Participating Parties.

(88) Unless ordered by the Arbitrator, all hearings and meetings in arbitral proceedings, other than the Arbitrator's meetings, are open to the public.

(89) The Arbitrator will schedule hearings to be held on consecutive days until completion.

(90) All oral evidence will be taken in the presence of the Arbitrator and all the Participating Parties unless a Participating Party is absent by default or has waived the right to be present.

(91) The Arbitrator may order any individual to be examined by the Arbitrator under oath or on affirmation in relation to the Disagreement and to produce before the Arbitrator all relevant documents within the individual's care, custody or control.

(92) The document assemblies delivered in accordance with paragraph (84) will be deemed to have been entered into evidence at the hearing without further proof and without being read out at the hearing, but a Participating Party may challenge the admissibility of any document so introduced.

(93) If the Arbitrator considers it just and reasonable to do so, the Arbitrator may permit a document that was not previously listed in accordance with paragraph (77), or produced in accordance with paragraph (80) or (84), to be introduced at the hearing.

(94) If the Arbitrator permits the evidence of a witness to be presented as a written statement, the other Participating Party may require that witness to be made available for cross examination at the hearing.

(95) The Arbitrator may order a witness to appear and give evidence, and, in that event, the Participating Parties may cross examine that witness and call evidence in rebuttal.

DEFAULT OF A PARTY

(96) If, without explanation, the Applicant fails to communicate its statement of claim in accordance with paragraph (75), the Arbitrator may terminate the proceedings. If, without explanation, a Respondent fails to communicate its statement of defence in accordance with paragraph (76), the Arbitrator will continue the proceedings without treating that failure in itself as an admission of the Applicant's allegations.

(97) If, without showing sufficient cause, a Participating Party fails to appear at the hearing or to produce documentary evidence, the Arbitrator may continue the proceedings and make the Arbitral Award on the evidence before it.

(98) Before terminating the proceedings contemplated by paragraph (96), the Arbitrator will give all Parties written notice providing an opportunity to provide an explanation and to file a statement of claim in respect of the Disagreement within a specified period of time.

(99) For greater clarity, termination under paragraph (96) is without prejudice to the Applicant's ability to initiate new arbitration proceedings, without first returning to Stage 1 and 2 processes.

EXPERT APPOINTED BY ARBITRAL TRIBUNAL

(100) After consulting the Participating Parties, the Arbitrator may:

(a) appoint one or more experts to report to it on specific issues to be determined by the Arbitrator; and

(b) for that purpose, require a Participating Party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other personal property or land for inspection or viewing.

(101) The Arbitrator will give a copy of the expert's report to the Participating Parties who will have an opportunity to reply to it.

(102) If a Participating Party so requests, or if the Arbitrator considers it necessary, the expert will, after delivery of a written or oral report, participate in a hearing where the Participating Parties will have the opportunity to cross-examine the expert and to call any evidence in rebuttal.

(103) The expert will, on the request of a Participating Party:

(a) make available to that Participating Party for examination all documents, goods or other property in the expert's possession, and provided to the expert in order to prepare a report; and

(b) provide that Participating Party with a list of all documents, goods or other personal property or land not in the expert's possession but which were provided to or given access to the expert, and a description of the location of those documents, goods or other personal property or lands.

LAW APPLICABLE TO SUBSTANCE OF DISPUTE

(104) An Arbitrator will decide the Disagreement in accordance with the law, including Indigenous law, and the Schedule.

(105) If the Participating Parties have expressly authorized it to do so, an Arbitrator may decide the Disagreement based upon equitable considerations.

(106) In all cases, an Arbitrator will make its decisions in accordance with the spirit and intent of the Agreement.

SETTLEMENT

(107) If, during arbitral proceedings, the Participating Parties settle the Disagreement, the Arbitrator will terminate the proceedings and, if requested by those Participating Parties, will record the settlement in the form of an Arbitral Award on agreed terms.

(108) An Arbitral Award on agreed terms:

(a) will be made in accordance with paragraphs (110) to (112);

(b) will state that it is an Arbitral Award; and

(c) has the same status and effect as any other Arbitral Award on the substance of the Disagreement.

FORM AND CONTENT OF ARBITRAL AWARD

(109) An Arbitrator will make its final Arbitral Award as soon as possible and, in any event, not later than sixty (60) days after:

(a) the hearings have been closed; or

(b) the final submission has been made, whichever is the later date.

(110) An Arbitral Award will be made in writing, and be signed by the Arbitrator.

(111) An Arbitral Award will state the reasons upon which it is based, unless:

(a) the Participating Parties have agreed that no reasons are to be given; or

(b) the award is an Arbitral Award on agreed terms contemplated by paragraphs (107) and(108).

(112) A signed copy of an Arbitral Award will be delivered to all the Participating Parties and the Joint Committee by the Arbitrator.

(113) At any time during the arbitral proceedings, an Arbitrator may make an interim Arbitral Award on any matter with respect to which it may make a final Arbitral Award.

(114) An Arbitrator may award interest.

(115) Unless an Arbitrator orders otherwise, Canada shall pay for the costs of an arbitration under this Appendix in accordance with Section 9.08 of the Agreement.

TERMINATION OF PROCEEDINGS

(116) An Arbitrator will close any hearings if:

(a) the Participating Parties advise they have no further evidence to give or submissions to make; or

(b) the Arbitrator considers further hearings to be unnecessary or inappropriate.

(117) A final Arbitral Award, or an order of the Arbitrator in accordance with paragraph (118), terminates arbitral proceedings.

(118) An Arbitrator will issue an order for the termination of the arbitral proceedings if:

(a) the Applicant withdraws its claim, unless the Respondent objects to the order and the Arbitrator recognizes a legitimate interest in obtaining a final settlement of the Disagreement;

(b) the Participating Parties agree on the termination of the proceedings; or

(c) the Arbitrator finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(119) Subject to paragraphs (120) to (125), the mandate of an Arbitrator terminates with the termination of the arbitral proceedings.

CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD

(120) Within thirty (30) days after receipt of an Arbitral Award:

(a) a Participating Party may request the Arbitrator to correct in the Arbitral Award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and

(b) a Participating Party may, if agreed by all the Participating Parties, request the Arbitrator to give an interpretation of a specific point or part of the Arbitral Award.

(121) If an Arbitrator considers a request made in accordance with paragraph (120) to be justified, it will make the correction or give the interpretation within thirty (30) days after receipt of the request and the interpretation will form part of the Arbitral Award.

(122) An Arbitrator, on its own initiative, may correct any error of the type referred to in sub-paragraph (120)(a) within thirty (30) days after the date of the Arbitral Award.

(123) A Participating Party may request, within thirty (30) days after receipt of an Arbitral Award, the Arbitrator to make an additional Arbitral Award respecting claims presented in the arbitral proceedings but omitted from the Arbitral Award.

(124) If the Arbitrator considers a request made in accordance with paragraph (123) to be justified, it will make an additional Arbitral Award within thirty (30) days.

(125) Paragraphs (110) to (112), and paragraphs (114) to (115), apply to a correction or interpretation of an Arbitral Award made in accordance with paragraph (121) or(122), or to an additional Arbitral Award made in accordance with paragraph (124).

NO APPEAL

(126) An Arbitral Award shall be final and binding on the Participating Parties and not subject to any appeal or review.

RECOGNITION AND ENFORCEMENT

(127) An Arbitral Award will be recognized as binding and, upon application to the Court, will be recognized and enforced.

(128) Unless the Court orders otherwise, the Participating Party relying on an Arbitral Award or applying for its enforcement will supply the duly authenticated original Arbitral Award or a duly certified copy of it.

SCHEDULE L

NOTICE PLAN

I. OVERVIEW

Objective:

To provide clear, concise, plain-language information to the greatest practicable number of Class Members and their family members regarding:

a. the Settlement Agreement and their rights to receive compensation under it; and

b. the Claims Process and timeline.

Class Members:

The Class Consists of the following:

- Individual Class Members, consisting of an estimated 142,300 individuals who are members of the Class and have not Opted Out of the Actions.

- First Nation Class Members, consisting of First Nations that are members of the Class and provide the Administrator with notice of Acceptance. There are up to a total of 258 Impacted First Nations that could deliver notices of Acceptance and become First Nation Class Members.

Known Factors:

Known factors considered in designing this Notice Plan include:

1. The Reserves subject to Long-Term Drinking Water Advisories during the Class Period include Reserves in remote areas, posing additional communication challenges (for example, delays or limitations in delivery of mailed notice materials).

2. Education levels of Class Members vary widely, from members who have not completed high school to members with graduate-level university education.

3. Class Members speak a variety of languages, including English, French, and a number of Indigenous languages.

4. Impacted First Nations are geographically dispersed across Canada's provinces, with particular concentration in Ontario, British Columbia, and Manitoba.

5. 2016 census data indicates that approximately two thirds of First Nation people do not reside on Reserves.[1] Class Members who lived on impacted Reserves during the Class

[1] Aboriginal Identity (9), Residence by Aboriginal Geography (10), Registered or Treaty Indian Status (3), Age (20) and Sex (3) for the Population in Private Households of Canada, Provinces and Territories, 2016 Census - 25% Sample Data (table), Statistics Canada, 2016 Census- of Population, Statistics Canada Catalogue no. 98-400-X2016154. Ottawa. Released October 25, 2017.

Period may no longer reside on the Reserve with which their Claim is associated or in the same province or territory. Some Class Members may reside outside of Canada.

Strategies:

1. CA2 will give the "**Settlement Notice**" using the same notice plan that it used to give Certification Notice, as particularized further below. The form of the Settlement Notice will be substantially as set out in Schedule M, with such reasonable modifications as CA2 may suggest, and as approved by the Courts. CA2 will disseminate the Settlement Notice in a manner that is substantially similar to the way in which it disseminated the notice of certification of the Actions.

2. The Administrator will give the "**Settlement Approval Notice**" substantially in the form set out in Schedule N, with such reasonable amendments as the Administrator may suggest, and as approved by the Courts. The Settlement Approval Notice will advise Individual Class Members of the Claims Deadline and First Nation Class Members of the need to accept the settlement agreement. The Settlement Approval Notice will be disseminated by the following methods, as particularized further below:

    a. Direct mailed notice to Class member First Nations;

    b. A national press release;

    c. Live in-person and virtual community meetings for interested First Nation Class Members;

    d. Creation of an informational website providing access to copies of the Settlement Agreement, Claims Form, FAQs, and other informational resources, to be referenced in all notice materials and advertisements;

    e. Establishment of a national toll-free support line for Class Members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class Members to call for further information and support with Claims, to be cited in all notice materials and advertisements.

    f. Publication in newspapers and First Nation publications across the country

    g. Placement of 30- and 60-second television advertisements on APTN;

    h. Placement of 30- and 60-second radio advertisements on leading First Nation radio stations in all relevant regions;

    i. Social media/online advertisements to run on popular platforms, including Facebook, Twitter, and YouTube;

    j. Translation of the notice into French, and all reasonable efforts to translate notice into Indigenous languages, as requested by Class Members; and

    k. Toll-free support line to assist members in making Claims.

3. The Administrator will give a "**Reminder Notice**" eight months after first publication of Settlement Approval Notice, using the same notice plan. The Reminder Notice will be in a form to be agreed by the Parties, acting reasonably, on the advice of the Administrator, and approved by the Courts.

4. The Administrator will give a "**Late Claims Notice**" in the event that late claims are permitted. The Late Claims Notice, if any, will use the same notice plan as the Settlement Approval Notice and the Reminder Notice, modified as the Administrator advises and the Courts approve to target those First Nations where participation has fallen below expectations.

5. Canada will be responsible for the cost of giving notice in accordance with this Notice Plan.

II. SETTLEMENT NOTICE PLAN

Websites

Class Counsel, the Defendant, and CA2 shall post on their respective websites the Short Form Notice set out in Schedule M and the Long Form Notice set out in Schedule M, and the French language translations of these documents, as agreed upon by the parties;

Print Media Advertising

CA2 shall publish the Short Form Notice set out in Schedule M, in the following publications in ¼ of a page size in the weekend edition of each newspaper, if possible: Globe and Mail; National Post; Winnipeg Free Press; Vancouver Sun; Edmonton Sun; Calgary Herald; Saskatoon Star Phoenix; Regina Leader Post; Thunder Bay Chronicle-Journal; Toronto Star; Ottawa Citizen; Montreal Gazette; Montreal La Presse (digital edition); Halifax Chronicle-Herald; Moncton Times and Transcript; First Nations Drum.

Direct Mailed Notices

CA2 shall forward the Short Form Notice set out in Schedule M and Long Form Notice set out in Schedule M to the Assembly of First Nations and the Chiefs of every Impacted First Nation identified in accordance with, except for Excluded Persons;

CA2 shall CA2 shall forward the Short Form Notice set out in Schedule M and Long Form Notice set out in Schedule M to the band office or similar office of every Impacted First Nation, except for Excluded Persons, together with a request that they be posted in a prominent place.

Toll-Free Support Line

CA2 shall establish a national toll-free support line, to provide assistance to Class Members, their family, their guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

III. SETTLEMENT APPROVAL NOTICE PLAN

Direct Mailed Notices

Print notices to be mailed by regular postal mail to each of the following:

- The band office or similar office of all Impacted First Nations, requesting that the notices be posted in prominent locations, with sufficient copies of notice materials to distribute to community residents;
- The Chief of each Impacted First Nation;
- Friendship Centres associated with Impacted First Nations;
- Tribal council or similar for each Impacted First Nation;
- Head office and regional offices of the Assembly of First Nations;
- To the extent that their addresses are known, all Individual Class Members who are identified to the Administrator by a First Nation in a Band Council Confirmation or otherwise; and
- Any person who requests a copy of the Settlement Approval Notices,

Where mailed to a community hub, mailer to be accompanied by request to post the notice in a prominent location.

Print Media Advertising

Print notices in Court-approved short form to run twice, 60 days apart, on the best circulation day, in 1/4 page size and placed to maximize visibility and readership, in each of the following publications, or such reasonable substitutions as the Administrator may advise:

Publication	Geographical Scope
Globe & Mail	National
National Post	National
Vancouver Sun	British Columbia
Vancouver Province	British Columbia
Calgary Sun	Alberta
Calgary Herald	Alberta
Edmonton Journal	Alberta
Edmonton Sun	Alberta

Saskatoon Star Phoenix	Saskatchewan
Winnipeg Free Press	Manitoba
Winnipeg Sun	Manitoba
Regina Leader Post	Manitoba
Thunder Bay Chronicle-Journal	Northwestern Ontario
Toronto Star	Ontario
Ottawa Citizen	Southeastern Ontario
Montreal Gazette	Québec
Montreal La Presse (digital edition)	Québec
Halifax Chronicle-Herald	Nova Scotia and Atlantic Canada
Moncton Times and Transcript	New Brunswick and Atlantic Canada
First Nations Drum	National
NationTalk	National
Turtle Island News	National
Windspeaker	National
BC Raven's Eye	British Columbia
Alberta Sweetgrass	Alberta
Saskatchewan Sage	Saskatchewan
Ontario Birchbark	Ontario

Radio and Television Advertisements and Public Service Announcements

Radio advertisements providing content substantially similar to the Court-approved Short Form Notice in Schedule N, to be run on the following radio stations serving areas in which Impacted First Nations are situated, with ads to be run at times of high listenership (e.g., morning and afternoon drive times):

Station	Language	Approximate Duration	Number of Broadcasts per Week	Total Number of Spots
CBC	English	0:60	1	52
Radio-Canada	French	0:60	1	52
CKUR-FM 106.3 (Terrace, BC)	English	0:30	2	52
CFNR Network (BC)	English	0:30	2	52
CJWE-FM 88.1 FM (Calgary)	English	0:30	2	52
CIWE-FM 89.3 FM (Edmonton)	English	0:30	2	52
ELMNT Radio 106.5 (Toronto)	English	0:60	2	52
ELMNT Radio 95.7 FM (Ottawa)	English	0:60	2	52
Administrator to identify additional targeted radio stations	[•]	[•]	[•]	[•]

Television advertisements providing content substantially similar to the Court-approved Short Form Notice in Schedule N, to be run on the following national networks focused on First Nations audiences and local television stations serving regions in which Impacted First Nations are located, at times of high viewership (e.g., evening news time, prime time, or CBC News Indigenous):

Station	Language	Approximate Duration	Number of Broadcasts per Week	Total Number of Spots
APTN	English	0:60	2	104
CBC News Indigenous	English/French	0:30	2	104
Administrator to identify additional	[•]	[•]	[•]	[•]

targeted television stations				

Websites

- Administrator to create informational website providing access to copies of the Settlement Agreement, Claims Form, FAQs, and other informational resources. Website to be referenced in all notice materials and advertisements.
- Notice materials to be posted on websites of Class Counsel, Canada, and the Administrator.

Social Media Advertising

- Targeted online advertisements, including short videos, to run on popular social media platforms, including Facebook, Instagram, Twitter, Google Ads, TikTok, YouTube.
- Impressions to be geo-targeted to Class Members and persons searching for information about drinking water class actions.
- Minimum 3.5 million impressions, to be allocated as advised by the Administrator.

Community Meetings

- Administrator to host in-person and online community meetings, both independently, and in collaboration with First Nation Class Members.
- Administrator to offer a meeting to any First Nation Class Member that requests it.
- Meetings to provide details of Settlement Agreement and Claims Process and provide time for attendee Q&A.
- Printed notice materials and Claims Forms to be made available at all in-person community meetings.

Press Release

- Administrator will issue a national press release by Canadian Newswire (CNW) to press outlets across Canada announcing settlement approval, if granted, to attract unpaid news coverage.
- The press release will include the toll-free number and website information.

Toll-Free Support Line

The Administrator shall establish a national toll-free support line, to provide assistance to Class members, their families, their representatives, and other who make inquiries about the Agreement, or who request assistance in making Claims.

SCHEDULE M

NOTICE OF SETTLEMENT APPROVAL HEARING (LONG AND SHORT FORMS)

See attached.

Short Form Notice of Settlement

Affected by Drinking Water Advisories on a Reserve?

A proposed settlement may affect you. Please read this notice carefully.
Pour lire cet avis en français: [•Settlement Website URL]

The Court of Queen's Bench of Manitoba and the Federal Court of Canada approved this notice. This is not a solicitation from a lawyer.

First Nations and their members affected by drinking water advisories since November 20, 1995 sued Canada for compensation in two class actions. The representative plaintiff First Nations and their members and Canada have reached a proposed settlement.

If approved by the courts, the proposed settlement would compensate eligible First Nations and their members. Eligible individuals may receive a payment for the years they ordinarily resided on First Nations Lands during a long-term drinking water advisory. It is expected that the per-year amount will vary from approximately $1,300 to $2,000 for eligible years. Additional amounts may be available to eligible individuals who suffered certain specified injuries as a result of using treated or tap water in accordance with a long-term drinking water advisory, or by restricted access to treated or tap water caused by a long-term drinking water advisory.

Each eligible First Nation that accepts the settlement will receive $500,000 plus half the amount paid to eligible individuals who ordinarily resided on that First Nation's reserve during a long-term drinking water advisory. Additionally, Canada will commit to make reasonable efforts to help ensure that eligible individuals have regular access to safe drinking water in their homes, and Canada will spend at least $6 billion on water and wastewater infrastructure on reserves.

If the settlement is approved by the courts, individuals and First Nations will give up their right to sue Canada for failing to provide safe drinking water on their reserves. Subject to court approval, the lawyers will be paid by Canada from a separately negotiated fund and not the money available for compensation.

The courts must approve the proposed settlement before there is any money or any other benefit available.

If you are eligible for compensation, your legal rights will be affected even if you do nothing.

You have three options:

1. **Object in writing:** Write to the courts if you do not like the proposed settlement or the lawyers' fees and do not want them approved. If the settlement is not approved, no one will get any benefits under the settlement.

2. **Object in person:** Ask to speak in court about why you do not like the proposed settlement or the lawyers' fees on [•date] by [•videoconference]. If the settlement is not approved, no one will get any benefits.

3. **Do Nothing:** Give up any right you have to object to the proposed settlement.

If you want to object or go to a hearing, you must act by [•date].

If you are a resident of the following First Nations: Oneida of the Thames; Deer Lake; Mitaanjigaming First Nation; North Caribou Lake; and Ministikwan Lake Cree Nation you my be able to exclude yourself from these class actions by writing to the Settlement Administrator by [●date].

To learn more about your options and determine if you or your First Nation is included, please visit: [●Settlement Website URL] or call [●Administrator phone number]

Additional Information for First Nations:

Eligible First Nations will not receive compensation unless they accept the proposed settlement by [●date]. First Nations who do not accept the proposed settlement by [●date] are not eligible for any benefits under the settlement agreement.

For more information about how to a First Nation can accept the settlement agreement, please visit [●Settlement Website URL] or call [●Administrator phone number].

Long Form Notice of Settlement

Affected by Drinking Water Advisories on First Nations Lands?

A proposed settlement may affect you. Please read this notice carefully.
Pour lire cet avis en français: [•Settlement Website URL]

The Court of Queen's Bench of Manitoba and the Federal Court of Canada approved this notice. This is not a solicitation from a lawyer.

First Nations and their members affected by drinking water advisories since November 20, 1995 sued Canada for compensation in two class actions. The representative plaintiff First Nations and their members and Canada have reached a proposed settlement.

If approved the courts, the proposed settlement would compensate eligible First Nations and their members. Eligible individuals may receive a payment for the years they ordinarily resided on First Nations Lands during a long-term drinking water advisory. It is expected that the per-year amount will vary from approximately $1,300 to $2,000 for eligible years. Additional amounts may be available to eligible individuals who suffered certain specified injuries as a result of using treated or tap water in accordance with a long-term drinking water advisory, or by restricted access to treated or tap water caused by a long-term drinking water advisory.

Each eligible First Nation that accepts the settlement will receive $500,000 plus half the amount paid to eligible individuals who ordinarily resided on that First Nation's reserve during a long-term drinking water advisory. Additionally, Canada will commit to make reasonable efforts to help ensure that eligible individuals have regular access to safe drinking water in their homes, and Canada will spend at least $6 billion on water and wastewater infrastructure on reserves.

If the settlement is approved by the courts, individuals and First Nations will give up their right to sue Canada for failing to provide safe drinking water on their reserves. Subject to court approval, the lawyers will be paid by Canada from a separately negotiated fund and not the money available for compensation.

The courts must approve the proposed settlement before there is any money or any other benefit available.

If you are eligible for compensation, your legal rights will be affected even if you do nothing.

You have three options:

1. **Object in writing:** Write to the courts if you do not like the proposed settlement or the lawyers' fees and do not want them approved. If the settlement is not approved, no one will get any benefits under the settlement.

2. **Object in person:** Ask to speak in court about why you do not like the proposed settlement or the lawyers' fees on [•date] by [•videoconference]. If the settlement is not approved, no one will get any benefits.

3. **Do Nothing:** Give up any right you have to object to the proposed settlement.

If you want to object or go to a hearing, you must act by [•date].

If you are a resident of the following First Nations: Oneida of the Thames; Deer Lake; Mitaanjigaming First Nation; North Caribou Lake; and Ministikwan Lake Cree Nation you can exclude yourself from these class actions by writing to the Settlement Administrator by [•date].

Additional Information for First Nations:

Eligible First Nations will not receive compensation unless they accept the proposed settlement by [•date]. First Nations who do not accept the propose settlement by [•date] are not eligible for any benefits under the settlement agreement.

This notice explains your rights and options and how to exercise them.

BASIC INFORMATION

WHY DID I GET NOTICE OF THIS PROPOSED SETTLEMENT?

The Court of Queen's Bench of Manitoba and the Federal Court of Canada approved this notice to let you know about the proposed settlement and your options before the courts decide whether to approve the settlement. Notice was provided to First Nations and their members who may be affected by the proposed settlement.

WHAT IS A CLASS ACTION?

In a class action, one or more people called "**Plaintiffs**" or "**Representative Plaintiffs**" sue on behalf of people who have similar claims. All of those people are called a "Class" or "Class Members". The courts resolve the issues for everyone affected.

The Representative Plaintiffs in the Court of Queen's Bench of Manitoba are Tataskweyak Cree Nation and Chief Doreen Spence.

The Representative Plaintiffs in the Federal Court of Canada are (i) Curve Lake First Nation and Chief Emily Whetung and (ii) Neskantaga First Nation, Chief Wayne Moonias and Former Chief Christopher Moonias.

Canada is the defendant in both class actions. Canada is represented by the Attorney General of Canada.

WHAT ARE DRINKING WATER ADVISORIES?

Drinking water advisories mean that something is unsafe about drinking water. Drinking water advisories include boil water advisories, do not consume advisories, and do not use advisories.

WHAT ARE THE CLASS ACTIONS ABOUT?

The representative plaintiffs allege that Canada failed to address long-term drinking water advisories on First Nations reserves across Canada. The key allegation is that Canada breached its obligations to First Nations and their members by failing to ensure that reserve communities have safe water.

WHY IS THERE A PROPOSED SETTLEMENT?

The Representative Plaintiffs and Canada have agreed to a proposed settlement. By agreeing to a proposed settlement, the parties avoid the costs and uncertainties of a trial and delays in obtaining judgment and Class members receive the benefits described in this notice (if the courts approve the proposed settlement).

The Representative Plaintiffs and their lawyers believe that the proposed settlement is in the best interests of all Class Members.

WHO IS INCLUDED IN THE PROPOSED SETTLEMENT?

WHICH INDIVIDUALS ARE INCLUDED?

Individuals are included in the Class if:

1. they were alive on November 20, 2017;

2. they are members of a band, as defined in the *Indian Act*, or aboriginal peoples of Canada, other than the Inuit or Métis aboriginal peoples of Canada, who are parties to a modern treaty (a "**First Nation**"), the disposition of whose lands is subject to that Act, the *First Nations Land Management Act*, or a modern treaty ("**First Nations Lands**"); and

3. for at least one year between November 20, 1995, and June 30, 2021, they ordinarily resided on First Nations Lands that were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year between November 20, 1995, and June 30, 2021 ("**Impacted First Nations**") while such a drinking water advisory of at least one year was in effect.

Individuals who are included are eligible for compensation even if their First Nation, or the First Nation on whose First Nation Lands they resided, does not accept the settlement.

WHO SHOULD INDIVIDUALS WITH QUESTIONS CONTACT?

The Settlement Administrator at [•Administrator email] or [•Administrator phone].

WHICH FIRST NATIONS ARE INCLUDED?

Impacted First Nations are eligible for compensation only if they accept the proposed settlement. Every Impacted First Nation that wants to participate must approve the settlement in a band council acceptance resolution and provide a copy of that resolution to the Settlement Administrator at [•Administrator email] or [•Administrator mailing address].

First Nations must accept the proposed settlement by [•date for Acceptance Deadline] to participate. The Settlement Administrator can provide you with the form of band council acceptance resolution that is required to accept the proposed settlement.

WHO SHOULD FIRST NATIONS WITH QUESTIONS CONTACT?

The Settlement Administrator at [•Administrator email] or [•Administrator phone].

WHAT ARE THE BENEFITS OF THE SETTLEMENT?

WHAT COMPENSATION WILL BE PAID UNDER THE PROPOSED SETTLEMENT IF THE COURTS APPROVE IT?

Individuals may receive a payment for each year they ordinarily resided on First Nations Lands while under a drinking water advisory. The per-year amount is expected to vary from $1,300 to $2,000 depending on the type of advisory and the remoteness of the First Nation Lands. These amounts are subject to limitation periods: individuals who reached the age of 18 before November 20, 2013, are eligible for compensation only back to November 20, 2013, unless they were incapable of commencing a proceeding in respect of their claim before November 20, 2013, because of their physical, mental or psychological condition.

Individuals with specific injuries may be eligible for additional compensation.

Impacted First Nations who accept the proposed settlement will receive $500,000 plus 50% of the amounts paid to individuals for drinking water advisories on their reserves.

For more details, please consult the proposed settlement available here: [●URL].

WHAT ARE THE OTHER BENEFITS FOR FIRST NATIONS AND THEIR MEMBERS IN THE PROPOSED SETTLEMENT?

1. Canada has agreed to make all reasonable efforts to support the removal of long-term drinking water advisories that affect the Class.

2. Canada has agreed to make all reasonable efforts to ensure that class members living on reserves have regular access to drinking water in their homes. Canada will spend at least $6 billion by March 31, 2030 to implement that commitment by funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on reserves.

3. Canada has agreed to an alternative dispute resolution framework to decide what additional measures are reasonably required to help individuals get regular access to safe drinking water in their homes.

4. Canada has agreed to make all reasonable efforts to repeal the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21 by March 31, 2022 and replace it with legislation that improves drinking water on First Nations reserves.

5. Canada has agreed to provide $20 million to create the First Nations Advisory Committee on Safe Drinking Water.

6. Canada has agreed to make available $9 million to fund First Nations governance initiatives and by-law developments.

For more details, please consult the proposed settlement available here: [●URL].

WHEN WILL INDIVIDUALS AND FIRST NATIONS RECEIVE COMPENSATION?

Nothing will be paid unless the courts approve the proposed settlement. Payment of the base payment to First Nations will be made within 90 days of the settlement approval order becoming

final. The remaining payments to individuals and First Nations will begin to be paid one year after the settlement approval order becomes final.

HOW WILL INDIVIDUALS AND FIRST NATIONS RECEIVE COMPENSATION?

Individuals and First Nations eligible for compensation must submit their claims to the Settlement Administrator to receive payment. No claims forms will be available until the courts approve the proposed settlement.

HOW WILL THE LAWYERS BE PAID?

The lawyers who represent the plaintiffs will ask the courts to agree that Canada can pay them from a separately-negotiated fund that will not be deducted from the money available to pay individuals or First Nations. The amount of the fund is $53 million for fees and disbursements, inclusive of taxes, plus $5 million for ongoing legal services.

The lawyers will not be paid until the courts decide that the fees requested are fair and reasonable. The courts will decide how much the lawyers should be paid.

WHAT AM I GIVING UP IN THE PROPOSED SETTLEMENT?

If the courts approve the settlement, you will give up your right to sue Canada for the claims resolved by the proposed settlement. That means you will not be able to sue Canada for damages incurred before June 20, 2021 that arise from Canada's failure to provide safe drinking water on your reserve.

First Nations who do not accept the proposed settlement are not bound by it (though their Members will be).

CAN I REMOVE MYSELF FROM THE PROPOSED SETTLEMENT?

Individuals cannot remove themselves from the settlement without court approval. Class counsel will not help individuals opt out. Individuals who want to opt out should consult a different lawyer.

However, if you are a resident of the following First Nations: Oneida of the Thames; Deer Lake; Mitaanjigaming First Nation; North Caribou Lake; and Ministikwan Lake Cree Nation you may be able to exclude yourself from these class actions by writing to the Settlement Administrator by [•date].

First Nations do not need to agree to the proposed settlement. If a First Nation does not accept the proposed settlement, the proposed settlement will not affect that First Nation.

WHO REPRESENTS ME?

WHO ARE THE LAWYERS REPRESENTING ME?

The Representative Plaintiffs and the Class are represented by McCarthy Tétrault LLP and Olthuis Kleer Townsend LLP ("**Class Counsel**"). You may contact class counsel at [• contact address].

DO I HAVE TO PAY CLASS COUNSEL?

No. Class counsel will ask the courts to approve their fees.

WHAT IF I WANT MY OWN LAWYER?

If you want to hire your own lawyer, you may do so at your own expense.

HOW DO I OBJECT TO THE PROPOSED SETTLEMENT?

HOW DO I TELL THE COURTS I DO NOT LIKE THE PROPOSED SETTLEMENT?

If you do not like some part of the proposed settlement, including the lawyers' fees, you may object. The courts will consider your views. To object, your must submit an objection form that includes the following:

1. your name, address, phone number, and email address;
2. a statement saying you object to the proposed settlement;
3. the reasons you object to the proposed settlement;
4. the First Nation you are a member of and the reserve on which you ordinarily reside; and
5. your signature.

You must mail or email your objection by [•date] to [•Administrator email address] or [•Administrator mailing address].

WHEN AND WHERE WILL THE COURTS DECIDE WHETHER TO APPROVE THE PROPOSED SETTLEMENT?

The courts will hold a joint hearing on [•date] at [•time]. You may attend by [•videoconference or teleconference].

DO I HAVE TO ATTEND COURT TO OBJECT?

No. If you send an objection you do not have to talk about it in court. The courts will consider objections received in time even if you do not attend the hearing. You or your lawyer may attend by [•videoconference or teleconference] at your own expense.

MAY I SPEAK AT THE HEARING?

You may ask the courts for permission to speak at the approval hearings. To do so, you must file a notice of objection and indicate you wish to speak.

WHAT IF I DO NOTHING?

Individuals who are eligible for the proposed settlement who do nothing will be bound by the settlement if the courts approve it. Those individuals will be eligible for compensation but will give up their right to object to the settlement.

First Nations who are eligible for the proposed settlement who do nothing will not be bound by the proposed settlement if the courts approve it. Those First Nations will not be eligible for compensation and will give up their right to object to the settlement.

If the settlement is approved, individuals, together with First Nations that accept the settlement, will give up their right to sue Canada for failing to provide safe drinking water on their reserves.

HOW DO FIRST NATIONS ACCEPT THE PROPOSED SETTLEMENT?

HOW DO FIRST NATIONS ACCEPT THE PROPOSED SETTLEMENT?

First Nations who are eligible for the proposed settlement must approve it in a Band Council Acceptance Resolution and provide a copy to the Settlement Administrator by [•date].

More information—including a draft Band Council Acceptance Resolution is available here: [•URL].

You may also consult Class Counsel at [• contact address].

WHO DO FIRST NATIONS CONTACT TO JOIN THE PROPOSED SETTLEMENT?

First Nations with questions should ask Class Counsel at [• contact address].

First Nations who have a Band Council Acceptance Resolution should provide a copy to the Settlement Administrator by [•date] at [•Administrator email address] or [•Administrator mailing address].

WHAT IF I NEED MORE INFORMATION?

WHO DO I CONTACT FOR MORE INFORMATION?

You may contact the Settlement Administrator at [•Administrator email address] or [•phone number].

You may also contact Class Counsel at [• contact address].

SCHEDULE N
NOTICE OF SETTLEMENT APPROVAL
(LONG AND SHORT FORMS)

See attached.

Short Form Notice of Settlement Approval

Settlement of First Nation Drinking Water Advisory Class Actions

You may be eligible for compensation. Please read this notice carefully.
Pour lire cet avis en français: [•Settlement Website URL]

The courts have approved a settlement between Canada and certain First Nations and their members who were subjected to long-term drinking water advisories from 1995 to 2021.

Who is included?

Individuals are included in the Class if:

1. they were alive on November 20, 2017;

2. they are members of a band, as defined in the *Indian Act*, or aboriginal peoples of Canada, other than the Inuit or Métis aboriginal peoples of Canada, who are parties to a modern treaty (a "**First Nation**"), the disposition of whose lands is subject to that Act, the *First Nations Land Management Act*, or a modern treaty ("**First Nations Lands**"); and

3. for at least one year between November 20, 1995, and June 30, 2021, they ordinarily resided on First Nations Lands that were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year between November 20, 1995, and June 30, 2021 ("**Impacted First Nations**") while such a drinking water advisory of at least one year was in effect.

Individuals who are included are eligible for compensation even if their First Nation, or the First Nation on whose First Nation Lands they resided, does not accept the settlement.

Impacted First Nations are included if they accept the settlement by [•date]. Impacted First Nations who do not accept the settlement by then will not be compensated.

What does the settlement provide?

Individuals will receive a payment for each year they ordinarily resided on First Nations Lands while under a drinking water advisory. The per-year amount is expected to vary from $1,300 to $2,000 for eligible years, depending on the type of advisory and the remoteness of the First Nation Lands. These amounts are subject to limitation periods. Individuals with specific injuries may be eligible for additional compensation.

Impacted First Nations who accept the proposed settlement will receive $500,000 plus 50% of the amounts paid to individuals for drinking water advisories on their reserves.

Canada must also take other steps to lift long-term drinking water advisories and help individuals get regular access to safe drinking water in their homes. Canada will spend at least $6 billion on water and wastewater infrastructure on reserves. There is an alternative dispute resolution process available where individuals are unhappy with Canada's efforts.

How do I claim money?

Individuals must submit a claims form, or their band council can submit a resolution, confirming that they were ordinarily resident on that First Nation's First Nations Lands during a long-term drinking water advisory. First Nations must accept the settlement and inform the Settlement Administrator. To view and submit claims forms please visit [●URL].

For more information, please visit [●Settlement Website URL] or call [●Administrator phone number].

Long Form Notice of Settlement Approval

Settlement of First Nation Drinking Water Advisory Class Actions

You may be eligible for compensation. Please read this notice carefully.
Pour lire cet avis en français: [•Settlement Website URL]

The courts have approved a settlement between Canada and certain First Nations and their members who were subjected to long-term drinking water advisories from 1995 to 2021.

First Nations and their members affected by drinking water advisories since November 20, 1995 sued Canada for compensation in two class actions. The Court of Queen's Bench of Manitoba and the Federal Court of Canada approved a settlement in the class actions. The settlement compensates eligible First Nations and their members.

This notice explains who is eligible for compensation and how to claim it. Individuals who do not claim compensation by [•date] and First Nations who do not accept the settlement by [•date] will not be compensated.

BASIC INFORMATION

WHY DID I GET NOTICE OF THE SETTLEMENT?

The Court of Queen's Bench of Manitoba and the Federal Court of Canada approved the settlement on [•date]. They also approved this notice to let you know about the settlement and how to claim compensation.

WHO IS INCLUDED IN THE PROPOSED SETTLEMENT?

WHICH INDIVIDUALS ARE INCLUDED?

Individuals are included in the Class if:

1. they were alive on November 20, 2017;

2. they are members of a band, as defined in the *Indian Act*, or aboriginal peoples of Canada, other than the Inuit or Métis aboriginal peoples of Canada, who are parties to a modern treaty (a "**First Nation**"), the disposition of whose lands is subject to that Act, the *First Nations Land Management Act* or a modern treaty ("**First Nations Lands**"); and

3. for at least one year between November 20, 1995, and June 30, 2021, they ordinarily resided on First Nations Lands that were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year between November 20, 1995, and June 30, 2021 ("**Impacted First Nations**") while such a drinking water advisory of at least one year was in effect.

Individuals who are included are eligible for compensation even if their First Nation, or the First Nation on whose First Nation Lands they resided, does not accept the settlement.

WHO SHOULD INDIVIDUALS WITH QUESTIONS CONTACT?

The Settlement Administrator at [●Administrator email] or [●Administrator phone].

WHICH FIRST NATIONS ARE INCLUDED?

Impacted First Nations are eligible for compensation only if they accept the proposed settlement. Every Impacted First Nation that wants to participate must accept the settlement in a Band Council Acceptance Resolution and provide a copy of that resolution to the Settlement Administrator at [●Administrator email] or [●Administrator mailing address].

Impacted First Nations must accept the proposed settlement by [●date] to participate. The Settlement Administrator can provide you with the form of Band Council Acceptance Resolution that is required to accept the proposed settlement.

WHO SHOULD FIRST NATIONS WITH QUESTIONS CONTACT?

Class Counsel at [● contact address].

HOW DO I GET COMPENSATION?

WHAT CAN CLASS MEMBERS GET?

Individuals may receive a payment for each year they ordinarily resided on First Nations Lands while under a long-term drinking water advisory. It is expected that the amount will vary from approximately $1,300 to $2,000 for each eligible year, depending on the type of advisory and the remoteness of the First Nation Lands. These amounts are subject to limitation periods: individuals who reached the age of 18 before November 20, 2013, are only eligible for compensation going back to November 20, 2013, unless they were incapable of commencing a proceeding in respect of their claim before November 20, 2013, because of their physical, mental or psychological condition.

Individuals with specific injuries may be eligible for additional compensation.

Impacted First Nations who accept the proposed settlement will receive $500,000 plus 50% of the amounts paid to individuals for drinking water advisories on their reserves.

For more details, please consult the proposed settlement available here: [●URL].

WHAT ARE THE OTHER BENEFITS FOR FIRST NATIONS AND THEIR MEMBERS IN THE PROPOSED SETTLEMENT?

1. Canada has agreed to make all reasonable efforts to support the removal of long-term drinking water advisories that affect the Class.

2. Canada has agreed to make all reasonable efforts to ensure that class members living on reserves have regular access to drinking water in their homes. Canada will spend at least $6 billion by March 31, 2030 to implement that commitment by funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on reserves.

3. Canada has agreed to an alternative dispute resolution framework to decide what additional measures are reasonably required to help individuals get regular access to safe drinking water in their homes.

4. Canada has agreed to make all reasonable efforts to repeal the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21 by March 31, 2022 and replace it with legislation that improves drinking water on First Nations reserves.

5. Canada has agreed to provide $20 million to create the First Nations Advisory Committee on Safe Drinking Water.

6. Canada has agreed to make available $9 million to fund First Nations governance initiatives and by-law developments.

For more details, please consult the proposed settlement available here: [•URL].

WHEN WILL INDIVIDUALS AND FIRST NATIONS RECEIVE COMPENSATION?

Individuals can submit claims forms until [• date]. After the claims period ends, the Settlement Administrator will pay valid claims for compensation.

First Nations will be paid the $500,000 base payment within 90 days of their acceptance or the Courts' approval of the settlement agreement, whichever comes first. Every six months, each First Nation will receive an installment of 50% of the amounts paid to eligible individuals who ordinarily resided on that First Nation's reserve during a long-term drinking water advisory.

HOW WILL INDIVIDUALS AND FIRST NATIONS RECEIVE COMPENSATION?

Individuals must submit a claims form, or their band council can submit a resolution, confirming that they were ordinarily resident on that First Nation's First Nations Lands during a long-term drinking water advisory.

First Nations must accept the settlement and inform the Settlement Administrator. To view and submit claims forms please visit [•URL].

Individuals can receive compensation even if their First Nation, or the First Nation on whose First Nation Lands they resided, does not accept the settlement agreement.

Claims forms are available here [•URL] and may be submitted to the Settlement Administrator at [•Administrator email] or [•Administrator mailing address].

DO I NEED MY OWN LAWYER TO MAKE A CLAIM?

No. Class Counsel represent you. You may contact class counsel at [• contact address].

HOW WILL THE LAWYERS BE PAID?

Canada, rather than class members, will pay the Class Counsel's fees for prosecuting the class actions and continuing to assist individuals and First Nations. The courts have approved the lawyers' fees and you do not have to pay any money to make a claim.

WHAT AM I GIVING UP IN THE PROPOSED SETTLEMENT?

Class members are giving up their right to sue Canada for the claims resolved by the proposed settlement. That means you will not be able to sue Canada for damages incurred before June 20, 2021 that were caused by Canada's failure to provide safe drinking water on your reserve.

First Nations that do not accept the proposed settlement will not be not bound by it, although their members' individual claims will be covered by the settlement.

CAN I REMOVE MYSELF FROM THE PROPOSED SETTLEMENT?

Individuals generally cannot remove themselves from the settlement without court approval. Class Counsel are not able to help individuals opt out. Individuals who want to seek leave of the Courts to opt out should consult a different lawyer.

First Nations do not need to agree to the settlement. If a First Nation does not accept the settlement, the settlement will not resolve the collective or communal claims of that First Nation.

You are not required to submit a claim but if you do not opt out and do not submit a claim, and a band does not provide the Settlement Administrator with confirmation of your residence, you will not receive compensation and you will still give up your right to sue Canada.

WHO REPRESENTS ME?

WHO ARE THE LAWYERS REPRESENTING ME?

The Representative Plaintiffs and the Class are represented by McCarthy Tétrault LLP and Olthuis Kleer Townsend LLP ("**Class Counsel**"). You may contact Class Counsel at [●contact address].

DO I HAVE TO PAY CLASS COUNSEL?

No. The courts approved Class Counsel's fees.

WHAT IF I WANT MY OWN LAWYER?

If you want to hire your own lawyer, you may do so at your own expense.

HOW DO FIRST NATIONS ACCEPT THE SETTLEMENT?

First Nations who are eligible for the settlement must accept it in a Band Council Acceptance Resolution and provide a copy to the Settlement Administrator by [●date].

More information—including a draft Band Council Acceptance Resolution is available here: [●URL].

You may also direct questions to Class Counsel at [● contact address].

WHO DO FIRST NATIONS CONTACT TO ACCEPT THE SETTLEMENT?

First Nations with questions should contact Class Counsel at [● contact address].

First Nations who have a Band Council Acceptance Resolution accepting the settlement agreement should provide a copy to the Settlement Administrator by [•date] at [•Administrator email address] or [•Administrator mailing address].

WHO DO I CONTACT FOR MORE INFORMATION?

You may contact the Settlement Administrator at [•Administrator email address] or [•phone number].

You may also contact Class Counsel at [• contact address].

SCHEDULE O

FORM OF FEDERAL COURT APPROVAL ORDER AND MANITOBA COURT APPROVAL ORDER

See attached.

FEDERAL COURT

Date: [•]

Docket: T-1673-19

Ottawa, Ontario, [•date]

Present: The Honourable Mr. Justice Favel

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

(Class Proceeding commenced under Part 5.1 of the *Federal Courts Rules*, SOR/98/106)

THIS MOTION made by the Plaintiffs for judgment approving the settlement of this action in accordance with the terms of the Settlement Agreement entered into on [•date] was heard on [•date] at [•location]

UPON READING the Motion Record of the parties and the facta of the parties;

AND UPON HEARING the motion made by the Plaintiffs for an order approving the terms of the Settlement Agreement dated [•date] and attached to this Order as **Schedule "A"** (the "**Settlement Agreement**") including the oral submissions of counsel for the Plaintiffs and the Defendant as well as the oral submissions of Class Member supporters and Class Member objectors or in the case of the latter, counsel designated by such objectors to make oral submissions on their behalf;

THIS COURT ORDERS that:

1. For the purposes of this Order, the definitions in the Settlement Agreement apply to and are incorporated into this Order.

2. The Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs and the Class.

3. The Settlement Agreement (including all of its Schedules) is expressly incorporated by reference into this Order and has the full force and effect of an order of this Court.

4. The Settlement Agreement shall be and hereby is approved and shall be implemented in accordance with this Order and such further orders of this Court.

5. Notice of settlement approval shall be given in accordance with the Notice Plan attached to this Order as **Schedule "B"** which will constitute adequate notice, and which is the best practicable notice that can be given in the circumstances.

6. The persons listed in **Schedule "C"** have Opted Out and shall have no further participation in this action.

7. First Nation Class Members and Individual Class Members who have not Opted Out are bound by the releases in s. 10.03(1) of the Settlement Agreement and this Court declares that:

> Except as set forth in the Settlement Agreement, and in consideration for Canada's obligations and liabilities under the Settlement Agreement, each Individual Class Member or their Estate Executor, Estate Claimant, or Personal Representative on behalf of such Individual Class Member or their estate and each First Nation Class Member (hereinafter collectively the "**Releasors**") has fully, finally and forever released Canada and its servants, agents, officers and employees, predecessors, successors, and assigns (hereinafter collectively the "**Releasees**"), from any and all actions, causes of action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasors had, now have or may in the future have against the Releasees in respect of or arising from Canada's failure to provide, or fund the provision of, safe drinking water on the Reserve or Reserves of such First Nation Class Member, or on which such Individual Class Member was Ordinarily Resident

during a Long-Term Drinking Water Advisory, in each case prior to the conclusion of the Class Period.

8. This Order and the Settlement Agreement, including the releases referred to in paragraph 7 above are binding on all Individual Class Members who have not Opted Out, including those persons who are under a disability.

9. This Order and Settlement Agreement, including the releases referred to in paragraph 7 above are binding on all First Nation Class Members who have provided notice of Acceptance.

10. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all Individual Class Members who have not Opted Out, all First Nations Class Members that have provided notice of Acceptance, and the Defendant for the purpose of implementing the Settlement Agreement.

11. Save as set out above, this action is discontinued against the Defendant without costs and with prejudice.

12. This court may issue such further and ancillary orders, from time to time, as are necessary to implement the Settlement Agreement and this Order.

[•date]

The Honourable Justice Favel

Court File No. T-1673-19

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Patrick Williams LSBC#510862
pwilliams@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Alana Robert LSO#79761P
alrobert@mccarthy.ca

Tel: 416-601-7831
Fax: 416-868-0673

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8th Floor
Toronto ON M5H 3E5

Harry S. LaForme LSO#19338D
hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S
khille@oktlaw.com
Jaclyn McNamara LSO# 66694B
jmcnamara@oktlaw.com

Tel: 416-981-9330
Fax: 416-981-9350

Lawyers for the Plaintiffs

Court File No.: CI-19-01-24661

THE QUEEN'S BENCH

Winnipeg Centre

THE HONOURABLE	)		[•]	, THE	[•]
	)				
CHIEF JUSTICE JOYAL	)	DAY OF	[•]	,	[•]
	)				

B E T W E E N :

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK REE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under *The Class Proceedings Act*, CCSM. c. C. 130

ORDER

THIS MOTION, made by the Plaintiffs for made by the Plaintiffs for judgment approving the settlement of this action in accordance with the terms of the Settlement Agreement entered into on [•date] was heard on [•date], at [•location] attached to this Order as **Schedule "A"** (the "**Settlement Agreement**").

ON READING the Motion Record of the parties and the facta of the parties and on hearing the submissions of counsel for the Plaintiffs and the Defendant as well as the oral submissions of class member supports and class member objects or in the case of the latter, counsel designated by such objectors to make oral submissions on their behalf;

AND UPON HEARING the oral submissions of counsel for the Plaintiffs and the Defendant as well as the oral submissions of Class Member supporters and Class Member objectors or in the case of the latter, counsel designated by such objectors to make oral submissions on their behalf;

THIS COURT ORDERS that:

1. For the purposes of this Order, the definitions in the Settlement Agreement apply to and are incorporated into this Order.

2. The Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs and the Class.

3. The Settlement Agreement (including all of its Schedules) is expressly incorporated by reference into this Order and has the full force and effect of an order of this Court.

4. The Settlement Agreement shall be and hereby is approved and shall be implemented in accordance with this Order and such further orders of this Court.

5. Notice of settlement approval shall be given in accordance with the Notice Plan attached to this Order as **Schedule "B"** which will constitute adequate notice, and which is the best practicable notice that can be given in the circumstances.

6. The persons listed in **Schedule "C"** have Opted Out and shall have no further participation in this action.

7. First Nation Class Members and Individual Class Members who have not Opted Out are bound by the releases in s. 10.03(1) of the Settlement Agreement and this Court declares that:

> Except as set forth in the Settlement Agreement, and in consideration for Canada's obligations and liabilities under the Settlement Agreement, each Individual Class Member or their Estate Executor, Estate Claimant, or Personal Representative on behalf of such Individual Class Member or their estate and each First Nation Class Member (hereinafter collectively the "**Releasors**") has fully, finally and forever released Canada and its servants, agents, officers and employees, predecessors, successors, and assigns (hereinafter collectively the "**Releasees**"), from any and all actions, causes of action, claims, and demands of every nature or kind available, whether or not known or anticipated, which the Releasors had, now have or may in the future have against the Releasees in respect of or arising from Canada's failure to provide, or fund the provision of, safe drinking water on the Reserve or Reserves of such First Nation Class Member, or on which such Individual

Class Member was Ordinarily Resident during a Long-Term Drinking Water Advisory, in each case prior to the conclusion of the Class Period.

8. This Order and the Settlement Agreement, including the releases referred to in paragraph 7 above are binding on all Individual Class Members who have not Opted Out, including those persons who are under a disability.

9. This Order and Settlement Agreement, including the releases referred to in paragraph 7 above are binding on all First Nation Class Members who have provided notice of Acceptance.

10. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all Individual Class Members who have not Opted Out, all First Nations Class Members that have provided notice of Acceptance, and the Defendant for the purpose of implementing the Settlement Agreement.

11. Save as set out above, this action is discontinued against the Defendant without costs and with prejudice.

12. This court may issue such further and ancillary orders, from time to time, as are necessary to implement the Settlement Agreement and this Order.

[•date]

The Honourable Chief Justice Joyal

Court File No. CI-19-01-24661

MANITOBA COURT OF QUEEN'S BENCH

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under *The Class Proceedings Act*, CCSM. c. C. 130

ORDER

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Patrick Williams LSBC#510862
pwilliams@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Alana Robert LSO#79761P
alrobert@mccarthy.ca
Tel: 416-601-7831
Fax: 416-868-0673

Olthuis Kleer Townshend LLP
8th Floor, 250 University Avenue
Toronto ON M5H 3E5
Harry LaForme LSO# 19338D
hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S
khille@oktlaw.com
Jaclyn McNamara LSO# 66694B
jmcnamara@oktlaw.com
Tel: 416-981-9330

Fax: 416-981-9350

Lawyers for the Plaintiffs

SCHEDULE P

FORM OF BAND COUNCIL ACCEPTANCE RESOLUTION APPROVING PRIVATE WATER SYSTEMS ON RESERVE

See attached.

[Name of First Nation]

Band Council Resolution

Approving Private Water Systems on Reserve

WHEREAS certain plaintiffs commenced a lawsuit styled as Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Wayne Moonias and Former Chief Christopher Moonias on their own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada, Court File No. T-1673-19, in the Federal Court on October 11, 2019 (the "**Federal Action**");

AND WHEREAS certain plaintiffs commenced a court action styled Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada, Court File No. CI-19-01-24661, in the Manitoba Court of Queen's Bench on November 20, 2019 (the "**Manitoba Action**", and together with the Federal Action, the "**Actions**");

AND WHEREAS the Actions were certified by the respective courts as class proceedings;

AND WHEREAS the Attorney General of Canada and the plaintiffs in the Actions have negotiated a settlement agreement (the "**Settlement Agreement**") in respect of the Actions;

AND WHEREAS the Settlement Agreement provides that Canada shall make all reasonable efforts to ensure that Individual Class Members (as defined in the Settlement Agreement) living on Reserves (as defined in the Settlement Agreement have regular access to drinking water in their homes, whether from a public water system or a private water system approved by a Band Council resolution including on-site systems, that meets the stricter of the federal requirements or provincial standards governing residential water quality (the "**Commitment**");

AND WHEREAS [Name of First Nation Council] (the "**Council**") wishes to approve the private water systems listed below for the purposes of the Commitment by passing this Band Council Resolution;

AND WHEREAS this Band Council Resolution is not an acknowledgment that the Council is responsible in any way for the private water systems listed below;

BE IT HEREBY RESOLVED THAT:

1. For the purposes of the Commitment only, and without hereby confirming or accepting responsibility, the Council hereby approves the following water systems:

    a. **[Identify or describe private water systems, including wells]**

2. The Council hereby delares that the approval set out in Paragraph 1, above, may be revoked by the Council at any time.
3. The Council hereby declares that the approval set out in Paragraph 1, above, may be supplemented by the Council at any time to incorporate additional water systems.
4. These resolutions may be signed by the Chief and Council members in as many counterparts as may be necessary, in original or electronic form, each of which so signed

shall be deemed to be an original, and such counterparts together shall constitute one and the same resolution.

The signatories below hereby certify and warrant that a quorum of Council has signed this Band Council Resolution as evidenced by their signatures below.

DATED as of the ____ day of _____, 202__.

_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	_____
[insert name]	**[insert name]**
_____	
[insert name]	

SCHEDULE Q

ELIGIBLE CLASS MEMBER ADDRESS SEARCH PLAN

1. If the Administrator receives a Band Council Confirmation or a Claims Form that does not provide a legible mailing address for an Individual Class Member, or an Individual Class Member has not deposited a cheque or claimed a payment made in accordance with the Agreement within one hundred and eighty (180) days of such cheque or payment being issued, such Individual Class Member will be a "**Missing Eligible Class Member**", and the date of becoming a Missing Eligible Class Member will be the "**Search Commencement Date**".

2. For each Missing Eligible Class Member, the Administrator will conduct or cause to be conducted all of the following searches in order to find the Missing Eligible Class Member's current contact information:

(a) Canadian national change of address database;

(b) reverse phone number lookup;

(c) Canada 411;

(d) consult any contact information for such Missing Eligible Class Member in a Band Council Confirmation, if any, and make a written or telephonic request for such Missing Eligible Class Member's contact information from the band office of the First Nation where such Missing Eligible Class Member ordinarily resides or last resided, if any; and

(e) make a written or telephonic request for such Missing Eligible Class Member's contact information from the band office of the First Nation of which such Missing Eligible Class Member is a member, if different than paragraph 2(d), above.

3. The searches identified in paragraph 2, above, will be conducted within forty-five (45) days of the Search Commencement Date.

4. If the Administrator locates more than one new mailing address for a Missing Eligible Class Member, the Administrator will make reasonable inquiries to determine which address is correct.

5. If the Administrator locates a new mailing address for a Missing Eligible Class Member, the Administrator will issue and mail a new cheque or other form of payment to the Missing Eligible Class Member for any amount payable in accordance with this Agreement, which cheque or payment will be stale dated within ninety (90) days of issuance. If a cheque or other form of payment had been previously issued to the Missing Eligible Class Member but not deposited or claimed, the Administrator will cancel or rescind such prior payment prior to issuance of the new cheque or other payment.

6. If the Administrator does not locate a new mailing address for a Missing Eligible Class Member, but such Missing Eligible Class Member's Claims Form indicates that they are currently resident on a Reserve, the Administrator will issue and mail to such Missing Eligible Class Member, care of the band office or similar place on such Reserve, a new cheque or other form of payment for any amount payable in accordance with this Agreement, which cheque or payment will be stale dated within ninety (90) days of issuance. If a cheque or other form of

payment had been previously issued to the Missing Eligible Class Member but not deposited or claimed, the Administrator shall cancel or rescind such prior payment prior to issuance of the new cheque or other payment.

8. If the Administrator remains unable to locate a Missing Eligible Class Member despite complying with this Eligible Class Member Search Plan, and any cheque or payment to such Missing Eligible Class Member has become stale dated, the Administrator shall wait for a period of one hundred and eighty (180) days (the conclusion of which is the "**Search Cancellation Date)**". If the Administrator is still unable to locate the Missing Eligible Class Member on the Search Cancellation Date, the Missing Eligible Class Member's Claim will be fully and finally extinguished and discharged, the Administrator shall have no obligation to make any payment to such Missing Eligible Class Member, and the Administrator, Canada, counsel for Canada, Class Counsel, the Joint Committee and its members, the Settlement Implementation Committee and its Members, the Trustee, and the FNAC will be released from any liability.

Manitoba Court of Queen's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

FIRST ADDENDUM TO THE SETTLEMENT AGREEMENT

THE QUEEN'S BENCH, Winnipeg Centre

BETWEEN:

TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE, on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under *The Class Proceedings Act*, CCSM. c. C. 130

- and -

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Class Proceeding commenced under Part 5.1 of the *Federal Court Rules*, SOR/98-106

FIRST ADDENDUM TO THE SETTLEMENT AGREEMENT

This addendum (the "**Addendum**") is made as of October 8, 2021.

WHEREAS:

A. Tataskweyak Cree Nation and Chief Doreen Spence, on their own behalf and on behalf of all Individual Class Members (together, the "**Manitoba Action Plaintiffs**"), Curve Lake First Nation and Chief Emily Whetung, on their own behalf and on behalf of all Individual Class Members(together, the "**Curve Lake First Nation Plaintiffs**"), Neskantaga First Nation and Chief Wayne Moonias and Former Chief Christopher Moonias, each on his own behalf and on behalf of all Individual Class Members (together, the "**Neskantaga First Nation Plaintiffs**", and collectively with the Curve Lake First Nation Plaintiffs, the "**Federal Action Plaintiffs**") and Her Majesty the Queen in Right of Canada (all of the foregoing, collectively, the "**Parties**") entered into a settlement agreement dated September 15, 2021 (the "**Settlement Agreement**"); and

B. The Parties wish to amend the Settlement Agreement to clarify the availability of Specified Injuries Compensation;

NOW THEREFORE the Parties agree to amend the Settlement Agreement as follows:

1. Capitalized terms used but not defined herein shall have the meanings set out in the Settlement Agreement.

2. Section 8.02(2) of the Settlement Agreement is hereby amended to add the words "Specified Injuries Compensation shall only be paid if the Individual Class Member experienced a Specified Injury or the continuing symptoms of an earlier Specified Injury, as set out in Schedule H, during a year for which Individual Damages would be payable to the Individual Class Member in accordance with the Individual Damages Formula in Section 8.01(2) if it were an Advisory Year (but which, for greater certainty, is not required to have been an Advisory Year)." at the end of the paragraph, as follows:

> Confirmed Individual Class Members will be entitled to compensation for Specified Injuries in the amount set out in Schedule H (the "**Specified Injuries Compensation**"), provided that the Claimant establishes that the injury was caused by using treated or tap water in accordance with a Long-Term Drinking Water Advisory, or by restricted access to treated or tap water caused by a Long-Term Drinking Water Advisory, in accordance with the Claims Process and Schedule H. Specified Injuries Compensation shall only be paid if the Individual Class Member experienced a Specified Injury or the continuing symptoms of an earlier Specified Injury, as set out in Schedule H, during a year for which Individual Damages would be payable to the Individual Class Member in accordance with the Individual Damages Formula in Section 8.01(2) if it were an Advisory Year (but which, for greater certainty, is not required to have been an Advisory Year).

3. Sections 1.12, 1.13, 1.14, 1.15, 2.01 and 2.02 of the Settlement Agreement are incorporated by reference herein and shall apply to this Addendum.

4. Section 16.12(1) of the Settlement Agreement is hereby amended to replace the words "section 81(g.3) of the Income Tax Act" with "section 81(1)(g.3) of the Income Tax Act".

5. The Parties, by their counsel, agree that this Addendum shall be incorporated into the Settlement Agreement.

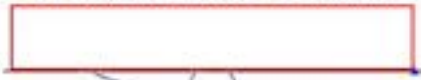
IN WITNESS WHEREOF the undersigned have executed this Addendum on behalf of the Parties as of the date first written above.

FOR THE MANITOBA ACTION PLAINTIFFS
AND THE FEDERAL ACTION PLAINTIFFS

By: 

Michael Rosenberg
Partner, McCarthy Tétrault LLP
Counsel for the Manitoba Action Plaintiffs
and the Federal Action Plaintiffs

FOR HER MAJESTY
THE QUEEN IN THE RIGHT OF CANADA

By: 

Scott Farlinger
Senior Counsel, Department of Justice
Counsel for the Defendant

APPENDIX 2

FRENCH VERSION OF PROPOSED SETTLEMENT AGREEMENT

N° de dossier de la Cour du Banc de la Reine du Manitoba : CI-19-01-24661

N° de dossier de la Cour fédérale : T-1673-19

ENTENTE DE RÈGLEMENT

BANC DE LA REINE, Winnipeg-Centre

ENTRE

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE, pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK,

demandeurs,

– et –

PROCUREUR GÉNÉRAL DU CANADA,

défendeur.

Recours collectif introduit en vertu de la *Loi sur les recours collectifs*, C.P.L.M. ch. C130

– et –

COUR FÉDÉRALE

ENTRE

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE CURVE LAKE et PREMIÈRE NATION DE NESKANTAGA et CHEF CHRISTOPHER MOONIAS, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE NESKANTAGA,

demandeurs,

– et –

PROCUREUR GÉNÉRAL DU CANADA,

défendeur.

Recours collectif introduit en vertu de la partie 5.1 des *Règles des Cours fédérales*, DORS/98-106

ENTENTE DE RÈGLEMENT

LA PRÉSENTE ENTENTE intervient le 15 septembre 2021

ENTRE

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE, pour son propre compte et pour le compte de toutes les PERSONNES MEMBRES DU GROUPE (au sens des présentes),

(collectivement, les « **demandeurs de l'action au Manitoba** »),

ET

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG, pour son propre compte et pour le compte de toutes les PERSONNES MEMBRES DU GROUPE (au sens des présentes),

(collectivement, les « **demandeurs de la Première Nation de Curve Lake** »),

ET

PREMIÈRE NATION DE NESKANTAGA et CHEF WAYNE MOONIAS et ANCIEN CHEF CHRISTOPHER MOONIAS, chacun pour son propre compte et pour le compte de toutes les PERSONNES MEMBRES DU GROUPE (au sens des présentes),

(collectivement, les « **demandeurs de la Première Nation de Neskantaga** » et collectivement avec les demandeurs de la Première Nation de Curve Lake, les « **demandeurs de l'action devant la Cour fédérale** »),

ET

SA MAJESTÉ LA REINE DU CHEF DU CANADA,

(le « **Canada** »).

ATTENDU QUE :

A. Le 11 octobre 2019, les demandeurs de l'action devant la Cour fédérale ont introduit l'action intitulée *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation c. Attorney General of Canada*, portant le numéro de dossier T-1673-19 devant la Cour fédérale (l'« **action devant la Cour fédérale** »);

B. Le 20 novembre 2019, les demandeurs de l'action au Manitoba ont introduit l'action intitulée *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation c. Attorney General of Canada*, portant le numéro de dossier CI-19-01-24661 devant la Cour du Banc de la Reine du Manitoba (l'« **action au Manitoba** » et, collectivement avec l'action devant la Cour fédérale, les « **actions** »);

C. Le 14 juillet 2020, la Cour du Banc de la Reine du Manitoba a attesté l'action au Manitoba à titre de recours collectif et le 8 octobre 2020, la Cour fédérale a autorisé l'action devant la Cour fédérale à titre de recours collectif;

D. Le « **groupe** » de chacune des actions est ainsi défini :

a) toutes les personnes, sauf les personnes exclues :

(i) qui sont membres d'une Première Nation;

(ii) qui n'étaient pas décédées avant le 20 novembre 2017; et

(iii) qui au cours de la période visée ont résidé habituellement pendant au moins un an dans une Première Nation touchée alors visée par un avis concernant la qualité de l'eau potable à long terme; et

b) la Nation des Cris de Tataskweyak, la Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation qui donne un avis d'acceptation conformément aux conditions de la présente entente;

E. L'avis d'autorisation des actions a été donné en la forme approuvée par les tribunaux et de la manière ordonnée par les tribunaux. Les personnes membres du groupe ont eu la possibilité de s'exclure du groupe pendant une période de cent vingt (120) jours après la première publication de l'avis d'autorisation (la « **période d'exclusion** »);

F. La période d'exclusion a expiré le 29 mars 2021. Aucune personne membre du groupe ne s'est exclue des actions;

G. Le groupe a subi d'énormes préjudices en étant privé d'eau potable salubre et les personnes et collectivités touchées en ont gravement souffert;

H. Le Canada reconnaît les préjudices dont ont souffert les membres du groupe et souhaite aider les membres du groupe à assurer un accès à une source fiable d'eau potable salubre;

I. Les avocats du groupe et le Canada ont conclu une entente de principe intervenue le 20 juin 2021, qui énonce en principe les conditions auxquelles le Canada est disposé à régler les actions et auxquelles les avocats du groupe recommanderaient aux demandeurs de l'action au Manitoba et aux demandeurs de l'action devant la Cour fédérale (collectivement, les « **représentants demandeurs** »);

J. Le chef Wayne Moonias a succédé à Christopher Moonias en tant que chef de la Première Nation de Neskantaga et demandera à la Cour fédérale l'autorisation de le remplacer en tant que représentant;

K. Les représentants demandeurs et le Canada ont conclu une entente de principe intervenue le 29 juillet 2021, qui énonce les principales conditions de leur entente de règlement des actions et qui constitue le fondement de la présente entente;

L. Dans le cadre de la rédaction de la présente entente, les parties :

a) ont l'intention d'en faire un règlement juste, global et durable des réclamations relatives à la privation d'eau potable salubre des membres du groupe et aux préjudices connexes dont ils ont souffert;

b) souhaitent la mise en œuvre de mesures concrètes pour empêcher que les membres du groupe ne souffrent de nouveau de ces préjudices;

c) reconnaissent l'importance de fournir aux Premières Nations des fonds pour des projets liés à l'approvisionnement en eau et au traitement des eaux usées, au développement économique et aux activités culturelles, et respectent l'autonomie des Premières Nations quant à l'utilisation de ces fonds;

d) souhaitent promouvoir la guérison, l'éducation, la commémoration et la réconciliation; et

e) ont l'intention d'inclure les Premières Nations signataires d'un traité moderne, selon le cas, mais reconnaissent le caractère unique de chaque Première Nation signataire d'un traité moderne, de ses terres, de ses peuples et de ses relations avec le Canada, et conviennent par conséquent que les modalités précises de la participation d'une Première Nation signataire d'un traité moderne seront élaborées en consultation avec les parties et la Première Nation signataire d'un traité moderne visée.

PAR CONSÉQUENT, en contrepartie des ententes, des accords et des engagements réciproques énoncés dans les présentes, les parties conviennent de ce qui suit :

ARTICLE 1 – INTERPRÉTATION

1.01 **Définitions**

Les définitions ci-dessous s'appliquent à la présente entente.

« **acceptation** » L'acceptation de la présente entente par une Première Nation membre du groupe :

a) par voie d'une résolution d'acceptation du conseil de bande qui est remise à l'administrateur; ou

b) par ailleurs conformément aux ordonnances d'approbation du règlement.

« **action au Manitoba** » L'action au Manitoba au sens du préambule.

« **action devant la Cour fédérale** » L'action devant la Cour fédérale au sens du préambule.

« **actions** » Les actions au sens du préambule, et « **action** » l'une ou l'autre d'entre elles.

« **administrateur** » L'administrateur nommé par les tribunaux, et ses successeurs le cas échéant nommés conformément aux dispositions de l'article 3.01.

« **année de l'avis** » L'année de l'avis au sens du paragraphe 8.01(1).

« **auditeur** » L'auditeur nommé par les tribunaux, et ses successeurs le cas échéant nommés conformément aux dispositions de l'article 17.01.

« **audition de l'approbation du règlement** » Une audition conjointe des tribunaux en vue de de statuer sur une demande d'approbation de la présente entente et des honoraires des avocats du groupe.

« **avis concernant la qualité de l'eau potable** » Un avis d'ébullition de l'eau, un avis de ne pas boire, un avis de non-utilisation, ou un avis analogue concernant l'utilisation de l'eau potable.

« **avis concernant la qualité de l'eau potable à long terme** » Un avis concernant la qualité de l'eau potable pour une réserve ou une partie d'une réserve qui a duré au moins un (1) an.

« **avis d'ébullition de l'eau** » Un avis émis par un organisme émetteur d'avis visant à avertir le public de faire bouillir l'eau du robinet avant de la boire ou d'en faire usage à d'autres fins, notamment la cuisson, l'alimentation des animaux domestiques, le brossage des dents et des activités analogues, et de ne pas utiliser l'eau du robinet pour donner un bain aux personnes ayant besoin d'aide, comme les bébés, les jeunes enfants et les personnes âgées, et de les laver plutôt à la débarbouillette pour éviter qu'elles avalent de l'eau, ou un avis analogue.

« **avis de ne pas boire** » Un avis émis par un organisme émetteur d'avis visant à avertir le public de ne pas utiliser l'eau du robinet pour la cuisson, les boissons, l'alimentation des animaux domestiques, le brossage des dents et/ou des activités analogues, et de ne pas utiliser l'eau du robinet pour donner un bain aux personnes ayant besoin d'aide, comme les bébés, les jeunes enfants et les personnes âgées, et de les laver plutôt à la débarbouillette pour éviter qu'elles avalent de l'eau, ou un avis analogue.

« **avis de non-utilisation** » Un avis émis par un organisme émetteur d'avis visant à avertir le public de ne pas utiliser l'eau du robinet, quelle qu'en soit la raison, ou un avis analogue.

« **avocats du groupe** » Collectivement, McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP.

« **banque canadienne de l'annexe I** » Une banque à charte canadienne visée à l'annexe I de la *Loi sur les banques*, L.C. (1991), ch. 46.

« **bénéficiaires de quittance** » Les bénéficiaires de quittance au sens du paragraphe 10.03(1).

« **Canada** » Le Canada au sens du préambule.

« **comité consultatif des Premières Nations sur l'eau potable salubre** » ou « **CCPNEPS** » Le comité consultatif des Premières Nations sur l'eau potable salubre au sens du paragraphe 9.04(1).

« **comité de mise en œuvre du règlement** » ou « **comité de mise en œuvre du règlement et ses membres** » Le comité créé conformément à l'article 14.01 et les personnes qui y sont nommées membres, soit deux (2) représentants du comité mixte, deux (2) représentants du Canada et deux (2) représentants du CCPNEPS.

« **comité mixte** » Un comité de trois (3) personnes nommées par les tribunaux conformément à l'article 15.01 et composé d'un (1) représentant des avocats du groupe de Olthuis Kleer

Townshend LLP et de deux (2) représentants des avocats du groupe de McCarthy Tétrault S.E.N.C.R.L., s.r.l.

« **compte d'indemnisation pour préjudices déterminés** » Le compte d'indemnisation pour préjudices déterminés au sens du paragraphe 5.01(1).

« **compte du Fonds de relance** » Le compte du Fonds de relance au sens du paragraphe 6.01(1).

« **compte en fiducie** » Le compte en fiducie au sens du paragraphe 4.01(1).

« **confirmation du conseil de bande** » Une déclaration facultative d'une Première Nation membre du groupe qui identifie des personnes membres du groupe et qui indique les dates au cours de la période visée où ces personnes résidaient habituellement dans une réserve d'une Première Nation membre du groupe alors visée par un avis concernant la qualité de l'eau potable à long terme en vigueur, essentiellement selon le modèle reproduit en ANNEXE E, ou un autre modèle que le Canada et les avocats du groupe jugent acceptable, et qui est remise à l'administrateur.

« **date de mise en œuvre** » La dernière des éventualités suivantes à survenir : a) le jour qui suit le dernier jour où un membre du groupe peut interjeter appel ou demander l'autorisation d'interjeter appel des ordonnances d'approbation du règlement; b) la date à laquelle le dernier de tous les appels des ordonnances d'approbation du règlement est définitivement tranché.

« **date limite pour l'acceptation** » La date qui tombe deux cent soixante-dix (270) jours après la date de mise en œuvre ou toute autre date dont les parties peuvent convenir.

« **date limite pour les réclamations** » La date qui tombe un (1) an après la date de mise en œuvre ou toute autre date dont les parties conviennent et que les tribunaux approuvent, et tout renvoi à la date limite pour les réclamations comprend tout report de celle-ci.

« **décision quant à l'admissibilité** » La décision quant à l'admissibilité au sens du paragraphe 7.02(1).

« **décision relative aux préjudices déterminés** » La décision relative aux préjudices déterminés au sens du paragraphe 7.02(1).

« **déclaration de représentation successorale** » La déclaration de représentation successorale au sens du paragraphe 13.02(1).

« **demandeur d'indemnité** » Soit a) une personne qui fait une réclamation en remplissant et en soumettant un formulaire de réclamation à l'administrateur, ou pour le compte de laquelle une réclamation est faite par l'exécuteur testamentaire, le demandeur d'indemnité successoral ou le représentant personnel du membre du groupe, soit b) une personne identifiée comme une personne membre du groupe dans une confirmation du conseil de bande.

« **demandeur d'indemnité successoral** » Un demandeur d'indemnité successoral au sens du paragraphe 13.02(1).

« **demandeurs de l'action au Manitoba** » Les demandeurs de l'action au Manitoba au sens du préambule.

« **demandeurs de l'action devant la Cour fédérale** » Les demandeurs de l'action devant la Cour fédérale au sens du préambule.

« **demandeurs de la Première Nation de Curve Lake** » Les demandeurs de la Première Nation de Curve Lake au sens du préambule.

« **demandeurs de la Première Nation de Neskantaga** » Les demandeurs de la Première Nation de Neskantaga au sens du préambule.

« **dépenses dans le cadre de l'engagement** » Les dépenses dans le cadre de l'engagement au sens du paragraphe 9.02(2).

« **dernière date limite pour les réclamations** » La dernière date limite pour les réclamations au sens du paragraphe 13.02(1).

« **différend** » Un différend au sens du paragraphe 19.01(1).

« **dommages-intérêts de Première Nation** » Les dommages-intérêts de Première Nation au sens de l'alinéa b).

« **dommages-intérêts individuels** » Les dommages-intérêts individuels au sens du paragraphe 8.01(2).

« **donneurs de quittance** » Les donneurs de quittance au sens du paragraphe 10.03(1).

« **eau de source** » L'eau non traitée provenant de sources d'eau de surface comme des lacs, des étangs ou des rivières.

« **engagement** » Un engagement au sens du paragraphe 9.02(1).

« **entente de principe** » L'entente de principe intervenue le 29 juillet 2021, jointe aux présentes en ANNEXE A.

« **entente** » La présente entente de règlement, y compris ses annexes.

« **excédent du Fonds en fiducie** » Un excédent du Fonds en fiducie au sens du paragraphe 4.03(1).

« **exclusion** » Soit a) la remise par une personne membre du groupe à CA2 Inc., en sa qualité d'administrateur pour l'avis d'autorisation et l'avis de règlement, d'un coupon d'exclusion ou d'une demande écrite d'exclusion des actions au cours de la période d'exclusion; soit b) après la période d'exclusion, l'obtention par une personne membre du groupe d'une autorisation des tribunaux de s'exclure des actions; soit c) une exclusion tardive, ayant dans chaque cas pour effet d'exclure une personnes membre du groupe des actions, et le verbe « **s'exclure** » a un sens correspondant.

« **exclusion tardive** » Le droit de s'exclure conformément à l'article 12.02.

« **exécuteur testamentaire** » L'exécuteur, l'administrateur, le fiduciaire ou le liquidateur de la succession d'une personne membre du groupe décédée.

« **fiduciaire** » Le fiduciaire nommé par les tribunaux aux fins de la présente entente.

« **Fiducie pour de l'eau potable salubre** » La Fiducie pour de l'eau potable salubre au sens de l'article 16.01.

« **Fonds** » Un Fonds au sens de l'alinéa 16.02a).

« **fonds d'indemnisation pour préjudices déterminés** » Le fonds d'indemnisation pour préjudices déterminés au sens du paragraphe 5.01(2).

« **fonds détenus en fiducie à l'égard de frais continus** » Les fonds détenus en fiducie à l'égard de frais continus au sens du paragraphe 18.02(1).

« **Fonds en fiducie** » Le Fonds en fiducie au sens du paragraphe 4.01(2).

« **Fonds pour la gouvernance de l'eau** » Le Fonds pour la gouvernance de l'eau au sens du paragraphe 9.05(1).

« **Fonds pour la relance économique et culturelle des Premières Nations** » Le Fonds pour la relance économique et culturelle des Premières Nations au sens du paragraphe 6.01(2).

« **formulaire de réclamation** » Une déclaration écrite simplifiée à l'égard d'une réclamation par une personne membre du groupe, selon le modèle reproduit en ANNEXE I, ou tout autre modèle que l'administrateur peut recommander et dont les parties conviennent, sans pièces justificatives, sauf celles dont les parties conviennent.

« **formule de calcul des dommages-intérêts individuels** » La formule de calcul des dommages-intérêts individuels au sens du paragraphe 8.01(2).

« **frais continus** » Les frais continus au sens du paragraphe 18.02(1).

« **grille d'indemnisation pour préjudices déterminés** » La grille d'indemnisation pour préjudices déterminés jointe aux présentes en **Error! Reference source not found.** ou toute autre grille d'indemnisation des préjudices déterminés que les tribunaux peuvent approuver.

« **groupe** » Le groupe au sens du préambule.

« **indemnité de base** » L'indemnité de base au sens de l'alinéa 8.03(1)a).

« **indemnité pour préjudices déterminés** » L'indemnité pour préjudices déterminés au sens du paragraphe 8.02(2).

« **jour ouvrable** » Un jour sauf un samedi, un dimanche ou un jour férié en vertu de la législation de la province ou du territoire dans lequel la personne qui doit prendre des mesures aux termes de la présente entente réside habituellement ou un jour férié en vertu de législation fédérale du Canada applicable dans cette province ou dans ce territoire.

« **Loi constitutionnelle de 1982** » La *Loi constitutionnelle de 1982*, annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, ch. 11.

« **Loi de l'impôt sur le revenu** » La *Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.).

« **loi remplaçante** » La loi remplaçante au sens de l'alinéa 9.03(1)b).

« **Loi sur la gestion des finances publiques** » La *Loi sur la gestion des finances publiques*, L.R.C. (1985), ch. F-11.

« **Loi sur la gestion des terres des premières nations** » La *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24.

« **Loi sur les Indiens** » La *Loi sur les Indiens*, L.R.C. (1985), ch. I-5.

« **LSEPPN** » La LSEPPN au sens de l'alinéa 9.03(1)a).

« **Manuel de la classification des bandes** » Le Manuel de la classification des bandes de 2005 publié par la Direction générale de la gestion de l'information de la Direction de la gestion de l'information ministérielle, Affaires indiennes et du Nord Canada.

« **membre** » Une membre au sens du paragraphe 14.01(1).

« **membre du groupe** » Une personne membre du groupe ou une Première Nation membre du groupe, selon le cas, et « **membres du groupe** » tous les membres du groupe, collectivement.

« **membre du groupe admissible disparu** » Un membre du groupe admissible disparu au sens de l'ANNEXE Q.

« **montant total de l'indemnité pour préjudices déterminés** » Le montant total de l'indemnité pour préjudices déterminés au sens du paragraphe 8.02(4).

« **ordonnance d'attestation du Manitoba** » L'ordonnance de la Cour du Banc de la Reine du Manitoba datée du 14 juillet 2020, attestant l'action du Manitoba à titre de recours collectif, dont une copie est jointe en ANNEXE C.

« **ordonnance d'autorisation de la Cour fédérale** » L'ordonnance d'autorisation de la Cour fédérale datée du 8 octobre 2020, autorisant l'action devant la Cour fédérale à titre de recours collectif, dont une copie est jointe en ANNEXE B.

« **ordonnances d'approbation du règlement** » Les ordonnances des tribunaux approuvant la présente entente, essentiellement selon le modèle reproduit en ANNEXE O.

« **organisme émetteur d'avis**» Un gouvernement ou un organisme fédéral, provincial, territorial, régional, municipal ou d'une Première Nation, un chef, un conseil de bande, une autorité sanitaire ou un organisme exécutif, judiciaire, réglementaire ou administratif ou un organisme analogue ou un organisme délégataire, dans chaque cas qui émet des avis concernant la qualité de l'eau potable.

« **parties** » Se dit a) avant la date de mise en œuvre, des demandeurs de l'action au Manitoba et des demandeurs de l'action devant la Cour fédérale, pour le compte du groupe, et du Canada; et b) après la date de mise en œuvre, des membres du groupe, représentés par le comité mixte, et du Canada.

« **période d'exclusion** » La période d'exclusion au sens du préambule et qui a expiré le 29 mars 2021.

« **période de réclamation tardive** » La période de réclamation tardive au sens de l'alinéa 4.03(3)c).

« **période visée** » La période allant du 20 novembre 1995 au 20 juin 2021, inclusivement.

« **personne exclue** » Un membre de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang et de la Bande d'Okanagan, et Michael Darryl Isnardy.

« **personne frappée d'incapacité** » Soit a) un mineur au sens de la législation de sa province ou de son territoire de résidence; soit b) une personne qui n'est pas en mesure de gérer ses affaires ou de prendre des décisions raisonnables à l'égard de ses affaires en raison de son incapacité mentale et pour laquelle un représentant personnel a été nommé en vertu de la législation provinciale ou fédérale applicable;

« **personne membre du groupe** » Une personne physique qui est membre du groupe et qui ne s'est pas exclue des actions, et « **personnes membres du groupe** » l'ensemble de ces personnes, collectivement.

« **personne membre du groupe confirmée** » Une personne membre du groupe confirmée au sens du paragraphe 7.02(5).

« **personne membre du groupe décédée** » Une personne membre du groupe décédée au sens du paragraphe 13.01(1).

« **plan d'action** » Le plan d'action de Services aux Autochtones Canada visant à lever tous les avis concernant la qualité de l'eau potable à long terme, qui décrit en détail les mesures correctives que le Canada doit prendre pour mettre fin aux avis concernant la qualité de l'eau potable à long terme, joint en ANNEXE J, en sa version le cas échéant modifiée compte tenu de l'ajout de nouveaux engagements ou de la réalisation d'engagements existants.

« **plan de mesures correctrices** » Un plan de mesures correctrices au sens du paragraphe 9.06(4).

« **plan de notification** » Le plan de notification, essentiellement selon le modèle reproduit en ANNEXE L, ou que l'administrateur peut recommander et dont les parties conviennent.

« **plan de recherche d'adresse de membres du groupe admissibles** » Le plan de recherche d'adresse de membres du groupe admissibles joint aux présentes en ANNEXE Q.

« **préambule** » Le préambule de la présente entente.

« **préjudices déterminés** » Les préjudices déterminés au sens du paragraphe 8.02(1).

« **Première Nation** » Une bande, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, dont l'aliénation des terres est régie par cette loi ou de la *Loi sur la gestion des terres des premières nations*, ou une Première Nation signataire d'un traité moderne.

« **Première Nation éloignée** » Une réserve qui est classée dans la zone 3 ou dans la zone 4 au sens du Manuel de la classification des bandes, c'est-à-dire une réserve réputée soit « isolée », soit « isolée et nécessitant un accès spécial », respectivement, ou si une réserve

n'est pas classée dans le Manuel de la classification des bandes, i) elle est située à plus de 350 kilomètres d'un centre de service relié par une route d'accès à l'année longue; ou ii) elle n'a pas de route d'accès ouverte reliée à l'année longue à un centre de service.

« **Première Nation insuffisamment desservie** » Une Première Nation insuffisamment desservie au sens du paragraphe 9.06(1).

« **Première Nation membre du groupe** » Une Première Nation touchée qui remet à l'administrateur un avis d'acceptation conformément à la présente entente.

« **Première Nation non éloignée** » Une réserve qui n'est pas une Première Nation éloignée.

« **Premières Nations signataires d'un traité moderne** » Les peuples autochtones du Canada, sauf les peuples autochtones inuit ou métis du Canada, signataires d'un traité moderne.

« **Premières Nations touchées** » Les Premières Nations dont les terres des Premières Nations ont été visées par un avis concernant la qualité de l'eau potable qui a duré au moins un an entre le 20 novembre 1995 et le 20 juin 2021.

« **procédure de règlement des différends relatifs à l'engagement** » La procédure de règlement des différends relatifs à l'engagement au sens de l'article 9.07.

« **procédure de règlement des réclamations** » La procédure décrite dans la présente entente, y compris dans l'ANNEXE F et dans les formulaires connexes, ou toute autre procédure que l'administrateur peut recommander et dont les parties conviennent, aux fins de l'établissement de la composition du groupe, de la soumission des réclamations et de l'évaluation, de l'établissement et du paiement de l'indemnité aux membres du groupe.

« **réclamation** » Une réclamation d'indemnisation soumise a) par une personne membre du groupe, ou par un exécuteur testamentaire, un demandeur d'indemnité successoral ou un représentant personnel pour le compte d'une personne membre du groupe ou de sa succession, moyennant la remise d'un formulaire de réclamation à l'administrateur conformément à la présente entente, ou b) par un conseil de bande pour le compte d'une personne membre du groupe, moyennant l'identification de cette personne membre du groupe dans une confirmation du conseil de bande.

« **représentants demandeurs** » Les représentants demandeurs au sens du préambule.

« **représentant personnel** » La personne nommée en vertu de la législation provinciale ou fédérale applicable pour gérer les affaires ou prendre des décisions raisonnables à l'égard des affaires d'une personne frappée d'incapacité et comprend un administrateur de biens.

« **réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations** » Les réseaux d'approvisionnement en eau et de traitement des eaux usées dans des réserves.

« **réserve** » Une parcelle distincte de terres des Premières Nations que Sa Majesté la Reine du chef du Canada a réservé à l'usage et au profit d'une ou de plusieurs Premières Nations, ou une parcelle de terre distincte analogue visée par un traité moderne.

« **résident habituel** » Un résident habituel au sens du paragraphe 8.01(1) et l'expression « **résider habituellement** » a un sens correspondant.

« **résolution d'acceptation du conseil de bande** » Une résolution du conseil de bande d'une Première Nation membre du groupe confirmant l'acceptation, essentiellement selon le modèle reproduit en ANNEXE D, ou un autre modèle que le Canada et les avocats du groupe jugent acceptable.

« **terres des Premières Nations** » Les terres d'une Première Nation, dont l'aliénation est régie par la *Loi sur les Indiens* ou la *Loi sur la gestion des terres des premières nations*, ou un traité moderne.

« **tiers évaluateur** » Une ou plusieurs personnes nommées par les tribunaux pour s'acquitter des fonctions de tiers évaluateur décrites dans la présente entente et dans la procédure de règlement des réclamations et leurs successeurs le cas échéant nommés conformément aux dispositions de l'article 3.03.

« **traité moderne** » Un accord sur des revendications territoriales au sens de l'article 35 de la *Loi constitutionnelle de 1982*, conclu après le 1er janvier 1973, inclusivement.

« **tribunaux** » Collectivement, la Cour fédérale et la Cour du Banc de la Reine du Manitoba.

1.02 **Titres**

La division de la présente entente en articles et en paragraphes et l'utilisation de titres ne visent qu'à en faciliter la consultation et ne sauraient influer sur son interprétation.

1.03 **Sens large**

Dans la présente entente, le singulier s'entend du pluriel et inversement, le masculin s'entend du féminin et inversement, et le terme « personnes » s'entend, également des Premières Nations. Le terme « y compris » s'entend au sens de « y compris, sans que soit limitée la portée générale de ce qui précède ». Tout renvoi à un ministère ou à un poste du gouvernement s'entend également de tout ministère ou poste du gouvernement remplaçant.

1.04 **Interprétation**

Les parties reconnaissent qu'elles ont examiné les conditions de la présente entente et ont participé à leur établissement et conviennent qu'il n'existe aucune règle d'interprétation par inférence selon laquelle toute ambiguïté dans la présente entente doit être interprétée en faveur d'une partie en particulier.

1.05 **Législation citée**

À moins que l'objet ou le contexte ne s'y oppose ou sauf disposition contraire, dans la présente entente, un renvoi à une législation et à son règlement d'application renvoie à cette législation et à son règlement d'application en leur version alors en vigueur et non pas en leur version le cas échéant modifiée, remise en vigueur ou remplacée.

1.06 **Date prévue d'une mesure à prendre**

Si une mesure doit être prise aux termes des présentes un jour ou au plus tard un jour qui n'est pas un jour ouvrable, cette mesure peut être prise le jour ouvrable suivant.

1.07 **Monnaie**

Dans la présente entente, le numéraire est exprimé en monnaie légale du Canada.

1.08 **Indemnisation inclusive**

Les montants payables aux membres du groupe aux termes de la présente entente comprennent les intérêts avant jugement ou après jugement.

1.09 **Annexes**

Les annexes suivantes de la présente entente sont intégrées dans la présente entente et en font partie intégrante :

ANNEXE A	Entente de principe
ANNEXE B	Ordonnance d'autorisation de la Cour fédérale
ANNEXE C	Ordonnance d'attestation du Manitoba
ANNEXE D	Modèle de résolution d'acceptation du conseil de bande
ANNEXE E	Modèle de confirmation du conseil de bande
ANNEXE F	Procédure de règlement des réclamations
ANNEXE G	Grille d'indemnisation des préjudices individuels
Error! Reference source not found.	Grille d'indemnisation des préjudices déterminés
ANNEXE I	Formulaire de réclamations
ANNEXE J	Plan d'action de Services aux Autochtones Canada visant à lever tous les avis concernant la qualité de l'eau potable à long terme
ANNEXE K	Procédure de règlement des différends relatifs à l'engagement (et appendices)
ANNEXE L	Plan de notification
ANNEXE M	Avis d'audition de l'approbation du règlement (formulaires détaillé et simplifié)
ANNEXE N	Avis d'approbation de l'entente de règlement (formulaires détaillé et simplifié)

ANNEXE O Modèle de l'ordonnance d'autorisation de la Cour fédérale et de l'ordonnance d'attestation du Manitoba

ANNEXE P Modèle de résolution d'acceptation du conseil de bande approuvant des réseaux d'approvisionnement en eau privés dans la réserve

ANNEXE Q Plan de recherche d'adresse de membres du groupe admissibles

1.10 **Aucun effet sur les traités ou les accords existants**

Aucune disposition de la présente entente n'annule ni ne remplace un traité entre le Canada et un ou plusieurs membres du groupe, ou un accord existant entre le Canada et un ou plusieurs membres du groupe à l'égard des réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations, des avis concernant la qualité de l'eau potable à long terme ou de questions analogues, à l'exception de l'entente de principe, que la présente entente remplace.

1.11 **Aucune dérogation aux droits constitutionnels**

La présente entente doit être interprétée comme une entente confirmant les droits des peuples autochtones reconnus et affirmés par l'article 35 de la *Loi constitutionnelle de 1982*, et non pas comme une entente les abrogeant ou y dérogeant.

1.12 **Avantage de l'entente**

La présente entente lie les parties, et dans le cas du Canada et des Premières Nations membres du groupe, leurs successeurs respectifs et, dans le cas des personnes membres du groupe, leurs successions, héritiers, exécuteurs testamentaires, demandeurs d'indemnité successoraux et représentants personnels, et elle est faite à leur avantage.

1.13 **Droit applicable**

La présente entente est régie par la législation du Canada et par la législation du Manitoba, selon le cas, ou encore, au choix d'un membre, par la législation du Canada et par la législation de la province ou du territoire où le membre réside habituellement, selon le cas.

1.14 **Exemplaires**

La présente entente peut être signée par voie électronique et en plusieurs exemplaires, dont chacun est réputé être un original et dont l'ensemble est réputé constituer une seule et même entente.

1.15 **Langues officielles**

Comme il est indiqué dans la version anglaise de la présente entente, les avocats du groupe préparent la présente traduction française aux fins d'audition de l'approbation du règlement. Après le prononcé des ordonnances d'approbation du règlement, la présente version française a le même poids et la même force exécutoire que la version anglaise.

1.16 **Rôle de supervision continue des tribunaux**

Par dérogation à toute autre disposition contraire de la présente entente, les tribunaux restent compétents quant à la supervision de la mise en œuvre de la présente entente conformément à ses conditions, y compris, notamment l'adoption de protocoles et d'énoncés de procédure, et les parties reconnaissent la compétence des tribunaux à cette fin. Les tribunaux peuvent donner les directives ou rendre les ordonnances nécessaires pour l'application du présent article.

ARTICLE 2 – DATE DE PRISE D'EFFET DE L'ENTENTE

2.01 **Date à laquelle l'entente prend effet et devient exécutoire**

À la date de mise en œuvre, la présente entente devient exécutoire pour toutes les personnes membres du groupe. La présente entente devient exécutoire pour toutes les Premières Nations membres du groupe a) à la date de son acceptation par les Premières Nations ou, si elle est postérieure b) à la date de mise en œuvre. Si une Première Nation membre du groupe ne donne pas un avis d'acceptation au plus tard à la date limite pour l'acceptation, la présente entente n'est pas exécutoire pour la Première Nation membre du groupe et la Première Nation membre du groupe n'a droit à aucun avantage aux termes des présentes, à moins que les tribunaux n'en décident autrement.

2.02 **Prise d'effet au moment de l'approbation**

Sous réserve de l'article 2.03, aucune des dispositions de la présente entente ne prend effet tant que les tribunaux n'ont pas approuvé la présente entente.

2.03 **Frais de justice dissociés**

Les honoraires des avocats du groupe dans le cadre des actions ont été négociés séparément de la présente entente et demeurent assujettis à l'approbation des tribunaux. Le refus des tribunaux d'approuver les honoraires des avocats du groupe n'a aucune incidence sur la mise en œuvre de la présente entente. Dans l'éventualité où les tribunaux refusent d'approuver les honoraires des avocats du groupe prévus à l'article 18.01, a) les autres dispositions de la présente entente demeurent pleinement en vigueur et ne sont aucunement modifiées ou invalidées, et b) l'article 18.01 est modifié compte tenu des honoraires des avocats du groupe approuvés par les tribunaux et par ailleurs de l'intention originale des parties.

ARTICLE 3 – ADMINISTRATION

3.01 **Nomination de l'administrateur**

Sur la recommandation des parties, les tribunaux nomment un administrateur chargé d'administrer la procédure de règlement des réclamations et investi des pouvoirs, des droits, des attributions et des responsabilités énoncés à l'article 3.02 et des autres pouvoirs, droits, attributions et responsabilités déterminés par le comité mixte et approuvés par les tribunaux. Sur la recommandation des parties, ou de leur propre chef, les tribunaux peuvent à tout moment remplacer l'administrateur.

3.02 **Attributions de l'administrateur**

L'administrateur est notamment investi des attributions et des responsabilités suivantes :

a) élaborer, mettre en place et mettre en œuvre des systèmes, des formulaires, de l'information, des lignes directrices et des procédures pour le traitement des réclamations et prendre des décisions concernant les réclamations conformément à la présente entente;

b) élaborer, mettre en place et mettre en œuvre des systèmes et des procédures de paiement des indemnités conformément à la présente entente;

c) recevoir des fonds de la Fiducie pour de l'eau potable salubre et du fiduciaire pour effectuer des paiements aux membres du groupe conformément à la présente entente;

d) fournir le personnel en nombre raisonnable requis pour l'exercice de ses fonctions aux termes de la présente entente, et former et diriger ce personnel;

e) conserver des liaisons avec les collectivités des Premières Nations touchées et des liaisons avec les conseils tribaux afin de faciliter la mise en œuvre du plan de notification et de la procédure de règlement des réclamations;

f) tenir ou veiller à ce que soient tenus des comptes exacts de ses activités et de son administration et établir les états financiers, rapports et dossiers exigés par les tribunaux;

g) rendre compte chaque mois au comité de mise en œuvre du règlement de ce qui suit :

(i) les réclamations reçues et ayant fait l'objet d'une décision;

(ii) les réclamations réputées non admissibles et les raisons de cette décision; et

(iii) les appels des décisions de l'administrateur et les résultats de ces appels;

h) répondre aux demandes de renseignements concernant les réclamations et les formulaires de réclamation;

i) examiner les formulaires de réclamation et les confirmations du conseil de bande et déterminer, sous réserve du paragraphe 7.02(2) dans le cas d'une confirmation du conseil de bande :

(i) l'adhésion au groupe d'un demandeur d'indemnité;

(ii) les dates auxquelles et les endroits où le demandeur d'indemnité était un résident habituel;

(iii) le droit d'un demandeur d'indemnité à des dommages-intérêts individuels, le cas échéant; et

(iv) le droit d'un demandeur d'indemnité à une indemnisation pour préjudices déterminés, le cas échéant;

j) examiner les acceptations et déterminer si une Première Nation qui soumet une acceptation est admissible à titre de Première Nation membre du groupe et le droit de chaque Première Nation membre du groupe à des dommages-intérêts de Première Nation, le cas échéant;

k) donner avis des décisions prises conformément à la présente entente;

l) communiquer avec les demandeurs d'indemnité soit en anglais soit en français, au choix du demandeur d'indemnité, et si un demandeur d'indemnité exprime le désir de communiquer dans une autre langue que l'anglais ou le français, faire de son mieux pour l'accommoder; et

m) exercer les autres attributions et responsabilités que les tribunaux ou les parties peuvent de temps à autre demander.

3.03 **Nomination du tiers évaluateur**

Sur la recommandation des parties, les tribunaux nomment un ou plusieurs tiers évaluateurs. Sur la recommandation des parties, ou de leur propre chef, les tribunaux peuvent remplacer un tiers évaluateur à tout moment. Le tiers évaluateur exerce les fonctions de tiers évaluateur énoncées dans la présente entente.

3.04 **Responsabilité des frais**

Le Canada paie :

a) les frais de remise d'un avis conformément au plan de notification et de tout autre avis ordonné par les tribunaux;

b) les frais et débours raisonnables de l'administrateur, du tiers évaluateur, du fiduciaire, de l'auditeur et du comité de mise en œuvre du règlement (sauf les membres du comité mixte), jusqu'à concurrence de cinquante millions de dollars au total (50 000 000 $), et par la suite, l'administrateur paie ces frais sur le Fonds en fiducie sous réserve de l'approbation des tribunaux;

c) les frais du comité consultatif des Premières Nations sur l'eau potable salubre, conformément à l'article 9.04;

d) les frais du Fonds pour la gouvernance de l'eau conformément à l'article 9.05;

e) les frais des conseils techniques relatifs à l'engagement conformément au paragraphe 9.06(3); et

f) les frais de la procédure de règlement des différends relatifs à l'engagement conformément à l'article 9.08.

ARTICLE 4 – FONDS EN FIDUCIE

4.01 **Création du Fonds en fiducie**

(1) Dans les meilleurs délais après sa nomination et après l'établissement de la Fiducie pour de l'eau potable salubre conformément à l'article 16.01, le fiduciaire ouvre un compte en fiducie portant intérêt auprès d'une banque canadienne de l'annexe I aux fins du Fonds en fiducie (le « **compte en fiducie** »).

(2) Au plus tard soixante (60) jours après la date de mise en œuvre, et conformément aux conditions de l'Article 16 , le Canada fait une contribution à la Fiducie pour de l'eau potable salubre en versant un milliard quatre cent trente-huit millions de dollars (1 438 000 000 $) dans le compte en fiducie, ce paiement constituant un fonds distinct (le « **Fonds en fiducie** ») dans la Fiducie pour de l'eau potable salubre.

4.02 **Distribution du Fonds en fiducie**

Le fiduciaire autorise l'administrateur à distribuer et l'administrateur distribue le Fonds en fiducie au bénéfice des membres du groupe conformément à la présente entente, y compris, notamment aux fins du paiement des dommages-intérêts individuels conformément à l'alinéa 8.01(2)a).

4.03 **Excédent du Fonds en fiducie**

(1) Sur l'avis d'un actuaire ou d'un conseiller analogue, le comité mixte peut à tout moment décider qu'il est plus probable qu'improbable qu'il y ait des fonds non affectés ou excédentaires dans le Fonds en fiducie (un « **excédent du Fonds en fiducie** »).

(2) Le comité mixte propose une distribution de tout excédent du Fonds en fiducie pour le bénéfice direct ou indirect des membres du groupe conformément au présent article 4.03.

(3) Une distribution d'un excédent du Fonds en fiducie comprend notamment des distributions à une ou plusieurs des fins suivantes, par ordre de priorité décroissant, et aux autres fins que le comité mixte peut déterminer en consultation avec le CCPNEPS :

a) transférer jusqu'à quatre cents millions de dollars (400 000 000 $) au Fonds pour la relance économique et culturelle des Premières Nations, au besoin;

b) payer une indemnité pour préjudices déterminés si le fonds d'indemnisation pour préjudices déterminés est insuffisant pour payer le montant total de l'indemnité pour préjudices déterminés;

c) payer les dommages-intérêts individuels ou les dommages-intérêts de Première Nation aux demandeurs d'indemnité qui ont déposé des réclamations valables pendant une période déterminée après la date limite pour les réclamations, s'il y a lieu (une « **période de réclamation tardive** »), à l'appréciation du comité mixte;

d) payer les dommages-intérêts individuels ou les dommages-intérêts de Première Nation, à l'appréciation du comité mixte; et

e) financer des programmes visant à promouvoir l'éducation, les pratiques traditionnelles ou spirituelles, l'enseignement ou la guérison eu égard aux avis concernant la qualité de l'eau potable à long terme, à l'appréciation du comité mixte.

(4) Le comité mixte propose toute distribution de l'excédent du Fonds en fiducie et saisit les tribunaux des demandes d'approbation de la distribution proposée de l'excédent du Fonds en fiducie.

(5) L'affectation d'un excédent du Fonds en fiducie doit être approuvée par les deux tribunaux et prend effet

a) le lendemain du dernier jour où un membre du groupe peut interjeter appel ou demander l'autorisation d'interjeter appel de l'une ou l'autre des ordonnances d'approbation à l'égard de cette affectation, ou, si elle est postérieure,

b) à la date à laquelle le dernier des appels de l'une ou l'autre des ordonnances d'approbation à l'égard de cette affectation est définitivement tranché.

(6) Il est entendu qu'en aucun cas un montant provenant du Fonds en fiducie, y compris un excédent du Fonds en fiducie, n'est restitué au Canada, et que le Canada n'est pas un bénéficiaire admissible de tout excédent du Fonds en fiducie.

ARTICLE 5 – FONDS D'INDEMNISATION POUR PRÉJUDICES DÉTERMINÉS

5.01 **Établissement du Fonds d'indemnisation pour préjudices déterminés**

(1) Dans les meilleurs délais après sa nomination et après l'établissement de la Fiducie pour de l'eau potable salubre conformément à l'article 16.01, le fiduciaire ouvre un compte en fiducie portant intérêt auprès d'une banque canadienne de l'annexe I aux fins du Fonds d'indemnisation pour préjudices déterminés (le « **compte d'indemnisation pour préjudices déterminés** »).

(2) Au plus tard soixante (60) jours après la date de mise en œuvre, et conformément aux modalités de l'articleArticle 16 , le Canada fait une contribution à la Fiducie pour de l'eau potable salubre en versant cinquante millions de dollars (50 000 000 $) dans le compte d'indemnisation pour préjudices déterminés, ce paiement constituant un fonds distinct (le « **Fonds d'indemnisation pour préjudices déterminés** » dans la Fiducie pour de l'eau potable salubre.

5.02 **Distribution du Fonds d'indemnisation pour préjudices déterminés**

(1) Le fiduciaire autorise l'administrateur à payer et l'administrateur paie l'indemnité pour préjudices déterminés sur le Fonds d'indemnisation pour préjudices déterminés, conformément à l'article 8.02.

(2) Si, après la dernière date limite pour les réclamations et le paiement de l'indemnité pour préjudices déterminés comme il est prévu à l'article 8.02, il reste des fonds dans le Fonds d'indemnisation pour préjudices déterminés, le fiduciaire transfère ces fonds restants au Fonds en fiducie.

(3) Il est entendu qu'en aucun cas un montant provenant du Fonds d'indemnisation pour préjudices déterminés n'est restitué au Canada, et que le Canada n'est pas un bénéficiaire admissible des fonds provenant du Fonds d'indemnisation pour préjudices déterminés.

ARTICLE 6 – FONDS POUR LA RELANCE ÉCONOMIQUE ET CULTURELLE DES PREMIÈRES NATIONS

6.01 Création du Fonds pour la relance économique et culturelle des Premières Nations

(1) Dans les meilleurs délais après sa nomination et après l'établissement de la Fiducie pour de l'eau potable salubre conformément à l'article 16.01, le fiduciaire ouvre un compte en fiducie portant intérêt auprès d'une banque canadienne de l'annexe I aux fins du Fonds pour la relance économique et culturelle des Premières Nations (le « **compte du Fonds de relance** »).

(2) Au plus tard soixante (60) jours après la date de mise en œuvre, et conformément aux modalités de l'Article 16 , le Canada fait une contribution à la Fiducie pour de l'eau potable salubre en versant quatre cents millions de dollars (400 000 000 $) dans le compte du Fonds de relance, ce paiement constituant un fonds distinct (le « **Fonds pour la relance économique et culturelle des Premières Nations** ») dans la Fiducie pour de l'eau potable salubre.

(3) Le Fonds pour la relance économique et culturelle des Premières Nations a pour but de fournir aux Premières Nations membres du groupe des fonds pour financer des projets liés à l'approvisionnement en eau et au traitement des eaux usées, au développement économique et aux activités culturelles. Les parties respectent l'autonomie des Premières Nations quant à l'utilisation des fonds distribués provenant du compte du Fonds de relance.

6.02 Distribution du Fonds pour la relance économique et culturelle des Premières Nations

(1) Le fiduciaire autorise l'administrateur à payer et l'administrateur paie les dommages-intérêts de Première Nation sur le Fonds pour la relance économique et culturelle des Premières Nations, conformément au paragraphe 8.03(1).

(2) Si, après la dernière date limite pour les réclamations et le paiement des dommages-intérêts de Première Nation comme il est prévu au paragraphe 8.03(1), il reste des fonds dans le Fonds pour la relance économique et culturelle des Premières Nations, le fiduciaire transfère ces fonds restants au Fonds en fiducie.

(3) Il est entendu qu'en aucun cas un montant provenant du Fonds pour la relance économique et culturelle des Premières Nations n'est restitué au Canada, et que le Canada n'est pas un bénéficiaire admissible des fonds provenant du Fonds pour la relance économique et culturelle des Premières Nations.

ARTICLE 7 – PROCÉDURE DE RÈGLEMENT DES RÉCLAMATIONS

7.01 **Principes régissant l'administration des réclamations**

(1) La procédure de règlement des réclamations est censée être rapide, économique, conviviale, adaptée aux différences culturelles et non traumatisante, compte tenu des traumatismes subis. L'administrateur détermine et met en œuvre les délais de service pour la procédure de règlement des réclamations au plus tard soixante (60) jours après la date de mise en œuvre.

(2) Sauf preuve raisonnable contraire, l'administrateur, le tiers évaluateur et le comité de mise en œuvre du règlement et ses membres supposent qu'un demandeur d'indemnité agit honnêtement et de bonne foi à l'égard d'une réclamation.

(3) Dans l'examen d'un formulaire de réclamation ou d'une confirmation du conseil de bande, l'administrateur, le tiers évaluateur et le comité de mise en œuvre du règlement et ses membres tirent toutes les conclusions raisonnables et favorables qu'ils peuvent tirer en faveur du demandeur d'indemnité.

7.02 **Décisions quant à l'admissibilité et décisions quant aux préjudices déterminés**

(1) L'administrateur examine chaque formulaire de réclamation, confirmation du conseil de bande et/ou tout autre renseignement qu'il juge pertinent pour établir, sous réserve du paragraphe 7.02(2) dans le cas d'une confirmation du conseil de bande, pour chaque demandeur d'indemnité si ce dernier est ou non une personne membre du groupe et la période pendant laquelle il a résidé habituellement dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme (une « **décision quant à l'admissibilité** ») et, s'il y lieu, la validité d'une réclamation d'indemnité pour préjudices déterminés (une « **décision quant aux préjudices déterminés** »). Il est entendu que l'administrateur peut communiquer à un demandeur d'indemnité une décision quant à l'admissibilité ou une décision quant aux préjudices déterminés avant que l'administrateur n'ait calculé l'indemnité pour préjudices individuels ou l'indemnité pour préjudices déterminés, le cas échéant, à laquelle le demandeur d'indemnité peut avoir droit.

(2) Une confirmation du conseil de bande est facultative. Dans les cas où elle est fournie, et sauf preuve contraire, une confirmation du conseil de bande constitue une preuve suffisante que les personnes membres du groupe qui y sont identifiées résidaient habituellement dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme aux fins d'une décision quant à l'admissibilité et est suffisante pour faire une demande d'indemnité pour préjudices individuels pour le compte de ces personnes membres du groupe sans que ces personnes membres du groupe ne soient tenues de soumettre des formulaires de réclamation. Par dérogation à ce qui précède, une personne membre du groupe identifiée dans une confirmation du conseil de bande, ou un exécuteur testamentaire, un demandeur d'indemnité successoral ou un représentant personnel pour son compte, a le droit de soumettre un formulaire de réclamation, et une confirmation du conseil de bande n'est pas censée remplacer un formulaire de réclamation soumis par une personne membre du groupe ou pour son compte, que cette personne membre du groupe soit ou non identifiée dans une confirmation du conseil de bande. En cas de conflit entre une confirmation du conseil de bande et un formulaire de réclamation, le formulaire de réclamation prévaut. Tout demandeur d'indemnité qui souhaite présenter une demande d'indemnité pour préjudices déterminés est tenu de soumettre un formulaire de réclamation à l'égard de ses préjudices déterminés.

(3) L'administrateur donne à chaque demandeur d'indemnité un avis énonçant les résultats de sa décision quant à l'admissibilité et, s'il y a lieu, de sa décision quant aux préjudices déterminés. Si l'administrateur établit que le demandeur d'indemnité est une personne membre du groupe, la décision quant à l'admissibilité précise la période pendant laquelle il résidait habituellement dans une réserve applicable alors visée par un avis concernant la qualité de l'eau potable à long terme, le type d'avis concernant la qualité de l'eau potable applicable et s'il s'agit d'une réserve située dans une Première Nation éloignée.

(4) L'administrateur communique au demandeur d'indemnité ses motifs écrits dans les cas suivants :

a) une décision quant à l'admissibilité selon laquelle un demandeur d'indemnité n'est pas une personne membre du groupe, ou le demandeur d'indemnité n'a pas résidé habituellement dans une réserve applicable pendant toute la période indiquée dans le formulaire de réclamation du demandeur d'indemnité; ou

b) une décision quant aux préjudices déterminés selon laquelle un demandeur d'indemnité n'est pas admissible à l'indemnité pour préjudices déterminés réclamée dans le formulaire de réclamation du demandeur d'indemnité.

(5) Seul un demandeur d'indemnité dont une décision quant à l'admissibilité (y compris, pour plus de certitude, identifié comme une personne membre du groupe dans une confirmation du conseil de bande) confirme qu'il est une personne membre du groupe (une « **personne membre du groupe confirmée** ») peut avoir droit à une indemnité en vertu de l'article 8.01 et, le cas échéant, de l'article 8.02.

(6) Le demandeur d'indemnité dispose d'un délai de soixante (60) jours pour interjeter appel devant le tiers évaluateur conformément à la procédure de règlement des réclamations après avoir reçu :

a) une décision quant à l'admissibilité selon laquelle un demandeur d'indemnité n'est pas une personne membre du groupe ou le demandeur d'indemnité n'a pas résidé habituellement dans une réserve applicable pendant toute la période indiquée dans le formulaire de réclamation du demandeur d'indemnité ou une confirmation du conseil de bande; ou

b) une décision quant aux préjudices déterminés selon laquelle un demandeur d'indemnité n'est pas admissible à l'indemnité pour préjudices déterminés réclamée dans le formulaire de réclamation du demandeur d'indemnité.

(7) La décision du tiers évaluateur dans un appel interjeté en vertu du paragraphe 7.02(6) est définitive et n'est pas susceptible d'appel ou de révision.

(8) Les avocats du groupe aident les demandeurs d'indemnité ou leurs représentants qui en font raisonnablement la demande à soumettre des demandes d'indemnité pour préjudices déterminés ou à interjeter appel d'une décision quant aux préjudices déterminés sans frais pour le Canada ou le demandeur d'indemnité, si ce n'est, pour plus de certitude, des honoraires des avocats du groupe négociés séparément ou approuvés par les tribunaux et payables conformément à l'article 18.02.

7.03 **Décisions quant aux dommages-intérêts de Première Nation**

Dans les trente (30) jours qui suivent la réception par une Première Nation membre du groupe de la décision de l'administrateur quant à son admissibilité à une indemnité de base ou quant au calcul par l'administrateur de ses dommages-intérêts de Première Nation conformément à la procédure de règlement des réclamations, la Première Nation membre du groupe peut interjeter appel devant le tiers évaluateur de cette décision conformément à la procédure de règlement des réclamations. La décision du tiers évaluateur dans un tel appel est définitive et n'est pas susceptible d'appel ou de révision.

7.04 **Renvois au comité de mise en œuvre du règlement**

(1) L'administrateur renvoie un formulaire de réclamation au comité de mise en œuvre du règlement lorsque les préjudices qui y sont décrits ne sont pas prévus dans la grille d'indemnisation pour préjudices déterminés et que le comité de mise en œuvre du règlement n'a pas déjà refusé d'accorder l'indemnité pour préjudices déterminés dans des circonstances essentiellement analogues.

(2) La décision du comité de mise en œuvre du règlement à l'égard d'un formulaire de réclamation qui lui est renvoyé en vertu du présent article 7.04 est définitive et n'est pas susceptible d'appel ou de révision.

7.05 **Caractère définitif des décisions**

Sous réserve de ce qui est énoncé dans le présent Article 7 et dans la procédure de règlement des réclamations, toutes les décisions de l'administrateur sont définitives et lient un demandeur d'indemnité et ne sont pas susceptibles d'appel ou de révision.

ARTICLE 8 – INDEMNISATION RÉTROSPECTIVE

8.01 **Dommages-intérêts individuels**

(1) Lorsqu'il détermine où résidait habituellement un demandeur d'indemnité aux fins de la présente entente, l'administrateur tient compte de chaque année au cours de la période visée où une réserve était visée par un avis concernant la qualité de l'eau potable à long terme, depuis la date de l'imposition de l'avis (individuellement, une « **année de l'avis** »), et où un demandeur d'indemnité a été un « **résident habituel** » dans une réserve touchée, aux fins de la présente entente, si :

a) le demandeur d'indemnité a vécu dans la réserve touchée pendant une plus grande partie d'une année de l'avis (ou, après la première année de l'avis, la partie applicable de l'année de l'avis subséquente où un avis concernant la qualité de l'eau potable à long terme était en vigueur si l'avis concernant la qualité de l'eau potable à long terme a été levé avant la fin de l'année de l'avis) qu'il n'a vécu ailleurs; et

b) par dérogation à ce qui précède, dans le cas d'un demandeur d'indemnité âgé de dix-huit (18) ans ou moins au moment applicable, le demandeur d'indemnité vivait habituellement dans une réserve touchée, mais a vécu ailleurs pendant une partie de l'année de l'avis pour fréquenter un établissement d'enseignement.

(2) L'administrateur calcule les dommages-intérêts pour chaque personnes membre du groupe confirmée (les « **dommages-intérêts individuels** ») selon la formule suivante (la « **formule de calcul des dommages-intérêts individuels** ») :

a) dans le cas d'une personne membre du groupe confirmée qui n'avait pas encore atteint l'âge de dix-huit (18) ans le 20 novembre 2013 :

(i) pour chaque année de l'avis; et

(ii) après la première année de l'avis, pour chaque partie d'une année de l'avis conformément au paragraphe 8.01(4);

au cours de la période visée pendant laquelle la personne membre du groupe confirmée était un résident habituel dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme en vigueur;

b) dans le cas d'une personne membre du groupe confirmée qui avait atteint l'âge de dix-huit (18) ans avant le 20 novembre 2013, mais qui était incapable en raison de son état physique, mental ou psychologique d'introduire une instance à l'égard de sa réclamation :

(i) pour chaque année de l'avis (et, après la première année de l'avis, pour chaque partie d'une année de l'avis conformément au paragraphe 8.01(4)) antérieure au 20 novembre 2019, dans laquelle la personne membre du groupe confirmée avait atteint l'âge de dix-huit (18) ans et avait été en mesure d'introduire une instance à l'égard de cette année de l'avis (ou d'une partie de celle-ci) pour une période cumulative de moins de six (6) années en date du 20 novembre 2019; et

(ii) pour chaque année de l'avis (et, après la première année de l'avis, pour chaque partie d'une année de l'avis conformément au paragraphe 8.01(4)) postérieure au 20 novembre 2019,

au cours de la période visée pendant laquelle la personne membre du groupe confirmée était un résident habituel dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme en vigueur; ou

c) dans le cas d'une personne membre du groupe confirmée qui avait atteint l'âge de dix-huit (18) ans avant le 20 novembre 2013, sauf une personne visée à l'alinéa 8.01(2)b) :

(i) pour chaque année de l'avis; et

(ii) après la première année de l'avis, pour chaque partie d'une année de l'avis conformément au paragraphe 8.01(4),

entre le 20 novembre 2013 et la fin de la période visée au cours de laquelle la personne membre du groupe confirmée était un

résident habituel dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme en vigueur.

(3) Le comité mixte, agissant sur l'avis d'un actuaire ou d'un conseiller analogue, détermine les taux auxquels les dommages-intérêts individuels sont payés. Sous réserve a) de la disponibilité de fonds suffisants dans le Fonds en fiducie et b) de la disponibilité de fonds suffisants dans le Fonds pour la relance économique et culturelle des Premières Nations pour payer des dommages-intérêts de Première Nation d'un montant égal à cinquante pour cent (50 %) des dommages-intérêts individuels, les dommages-intérêts individuels sont payés aux taux indiqués à l'ANNEXE G, ou à des taux se rapprochant de ceux que permettent les fonds dans le Fonds en fiducie et dans le Fonds pour la relance économique et culturelle des Premières Nations.

(4) Les dommages-intérêts individuels pour toute année de l'avis partielle postérieure à la première année de l'avis sont calculés pour chaque personne membre du groupe confirmée en multipliant :

a) les dommages-intérêts individuels auxquels aurait eu droit la personne membre du groupe confirmée pour une année de l'avis complète, calculés conformément au paragraphe 8.01(2); par

b) une fraction, dont le numérateur est le nombre de jours de l'année de l'avis partielle applicable après la première année de l'avis au cours de laquelle un avis concernant la qualité de l'eau potable à long terme était encore en vigueur dans une réserve où la personne membre du groupe confirmée était un résident habituel, et dont le dénominateur est trois cent soixante-cinq (365).

(5) Sauf disposition contraire dans la présente entente, dans les cent vingt (120) jours qui suivent la date limite pour les réclamations, l'administrateur paie les dommages-intérêts individuels conformément à la présente entente. L'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à la présente entente.

8.02 **Indemnité pour préjudices déterminés**

(1) En plus des dommages-intérêts individuels, une personne membre du groupe peut indiquer dans son formulaire de réclamation qu'elle demande des dommages-intérêts pour un ou plusieurs problèmes de santé indiqués à l'**Error! Reference source not found.** qui ont été causés par une utilisation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme dans une réserve dans laquelle la personne membre du groupe était un résident habituel, ou par un accès restreint à de l'eau traitée ou à de l'eau du robinet en raison d'un avis concernant la qualité de l'eau potable à long terme dans une réserve dans laquelle la personne membre du groupe était un résident habituel (les « **préjudices déterminés** »). Il est entendu que les problèmes de santé causés par une utilisation de l'eau d'une manière qui est contraire à un avis concernant la qualité de l'eau potable à long terme ou par une utilisation d'eau de source ne constituent pas des préjudices déterminés.

(2) Les personnes membres du groupe confirmées ont droit à une indemnité pour préjudices déterminés d'un montant indiqué à l'**Error! Reference source not found.** (l'« **indemnité pour préjudices déterminés** »), pour peu que le demandeur d'indemnité

établisse que le préjudice a été causé par une utilisation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme, ou par un accès restreint à de l'eau traitée ou de l'eau du robinet en raison d'un avis concernant la qualité de l'eau potable à long terme, conformément à la procédure de règlement des réclamations et à l'**Error! Reference source not found.**.

(3) À moins que le comité de mise en œuvre du règlement ne l'ordonne autrement, les personnes membres du groupe confirmées doivent établir un préjudice déterminé de la manière prévue dans l'**Error! Reference source not found.** et dans la procédure de règlement des réclamations. Chaque montant indiqué à l'**Error! Reference source not found.** n'est versé qu'une seule fois à un demandeur d'indemnité en particulier, même s'il a subi plusieurs préjudices déterminés de même nature ou type.

(4) Dans les cent vingt (120) jours qui suivent la date limite pour les réclamations, l'administrateur détermine s'il y a suffisamment de fonds dans le Fonds d'indemnisation pour préjudices déterminés pour payer la totalité de l'indemnité pour préjudices déterminés pour chaque réclamation valide et établie d'une indemnité pour préjudices déterminés (le « **montant total de l'indemnité pour préjudices déterminés** ») établie conformément à la procédure de règlement des réclamations, et :

a) s'il y a suffisamment de fonds dans le Fonds d'indemnisation pour préjudices déterminés pour payer le montant total de l'indemnité pour préjudices déterminés, l'administrateur paie l'indemnité pour préjudices déterminés conformément à la présente entente; ou

b) s'il n'y a pas suffisamment de fonds dans le Fonds d'indemnisation pour préjudices déterminés pour payer le montant total de l'indemnité pour préjudices déterminés, l'administrateur paie à chaque personne membre du groupe confirmée, conformément à la présente entente, sa quote-part du Fonds d'indemnisation pour préjudices déterminés proportionnelle à l'indemnité pour préjudices déterminés à laquelle la personne membre du groupe confirmée aurait droit si le montant total de l'indemnité pour préjudices déterminés était égal au Fonds d'indemnisation pour préjudices déterminés; et

c) dans l'un ou l'autre cas, l'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à la présente entente.

8.03 **Dommages-intérêts de Première Nation membre du groupe**

(1) L'administrateur calcule les dommages-intérêts de Première Nation membre du groupe selon les indemnités suivantes auxquelles a droit chaque Première Nation membre du groupe :

a) une indemnité de base de cinq cent mille dollars (500 000 $) (l'« **indemnité de base** »); et

b) une indemnité d'un montant correspondant à 50 pour cent (50 %) des dommages-intérêts individuels payés aux personnes membres du groupe confirmées qui résidaient habituellement dans la réserve ou les réserves de la Première Nation membre du groupe alors visées par un avis concernant la

qualité de l'eau potable à long terme (les « **dommages-intérêts de Première Nation** »).

(2) L'administrateur paie l'indemnité de base à chaque Première Nation membre du groupe sur le Fonds pour la relance économique et culturelle des Premières Nations dans les quatre-vingt-dix (90) jours qui suivent a) la date de mise en œuvre ou, si elle postérieure, b) la date à laquelle la Première Nation membre du groupe remet un avis d'acceptation écrit aux avocats du groupe. L'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à la présente entente.

(3) Tous les six (6) mois après le paiement de l'indemnité de base conformément au paragraphe 8.03(2), l'administrateur paie à chaque Première Nation membre du groupe sur le Fonds pour la relance économique et culturelle des Premières Nations, sans double emploi, les dommages-intérêts de Première Nation alors accumulés, mais impayés payables à la Première Nation membre du groupe. L'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à la présente entente.

ARTICLE 9 – MESURES DE REDRESSEMENT POTENTIELLES

9.01 **Plan d'action pour les Premières Nations membres du groupe**

(1) Le Canada déploie tous les efforts raisonnables pour contribuer à l'élimination des avis concernant la qualité de l'eau potable à long terme qui touchent les membres du groupe, notamment en prenant les mesures décrites dans le plan d'action dans les délais de projet qui y sont prévus.

(2) Le Canada met à jour régulièrement, et au moins chaque trimestre, le plan d'action compte tenu des progrès réalisés par rapport au plan d'action.

(3) Le plan d'action est modifié pour tenir compte des engagements supplémentaires pris par le Canada, y compris les engagements prévus dans les plans de mesures correctrices.

(4) Dans les trente (30) jours ouvrables qui suivent une mise à jour ou une modification du plan d'action, le Canada remet au comité mixte une copie du plan d'action mis à jour ou modifié.

(5) Il est entendu qu'aucune disposition de la présente entente ne limite le Canada qu'aux mesures à prendre énoncées dans le plan d'action ni n'empêche le Canada de prendre des mesures additionnelles qui ne sont pas prévues dans le plan d'action au bénéfice des membres du groupe.

9.02 **Engagement à prendre d'autres mesures**

(1) En plus des mesures énoncées dans le plan d'action, le Canada déploie tous les efforts raisonnables pour veiller à ce que les personnes membres du groupe qui vivent dans des réserves aient un accès à une source fiable d'eau potable dans leurs foyers, que ce soit à partir d'un réseau d'approvisionnement en eau public ou d'un réseau d'approvisionnement en eau privé approuvé par voie d'une résolution du conseil de bande conforme essentiellement selon le modèle reproduit en ANNEXE P, ou une autre modèle que le Canada et les avocats du

groupe jugent acceptable, y compris, notamment des réseaux sur place, qui respectent les exigences fédérales ou les normes provinciales les plus rigoureuses en matière de qualité de l'eau à domicile (l'« **engagement** »). Il est entendu que :

a) l'« accès à une source fiable d'eau potable » doit être de nature et en quantité suffisantes pour permettre toute utilisation habituelle et nécessaire de l'eau dans un foyer canadien semblable, y compris, notamment, l'eau potable, le bain et l'hygiène personnelle, la préparation et le lavage des aliments, l'assainissement et la lessive;

b) l'engagement se limite aux efforts raisonnables du Canada, y compris, notamment le financement des coûts réels, la formation, la planification et l'assistance technique;

c) si, malgré tous les efforts raisonnables déployés par le Canada, l'accès à une source fiable d'eau potable ne peut être assuré, le Canada n'est pas tenu de garantir l'accès à une source fiable d'eau potable dans le foyer d'une personne membre du groupe; et

d) les facteurs qui peuvent être pris en compte pour déterminer le caractère raisonnable des efforts déployés comprennent, notamment :

(i) les opinions de la Première Nation visée;

(ii) les exigences fédérales ou les normes et protocoles provinciaux en matière de qualité de l'eau;

(iii) la surveillance et les essais effectués ou non à l'égard du réseau d'approvisionnement en eau; et

(iv) l'emplacement physique du foyer, y compris la proximité des réseaux d'approvisionnement en eau centralisés et l'éloignement.

(2) Le Canada dépensera au moins six milliards de dollars (6 000 000 000 $) entre le 20 juin 2021 et le 31 mars 2030 pour respecter l'engagement, à raison d'au moins quatre cents millions de dollars (400 000 000 $) par exercice se terminant le 31 mars, en finançant les coûts réels de la construction, de l'amélioration, de l'exploitation et de l'entretien de l'infrastructure d'approvisionnement en eau dans les réserves pour les Premières Nations (les « **dépenses dans le cadre de l'engagement** »).

(3) Le Canada remet au comité mixte un état annuel de toutes les dépenses dans le cadre de l'engagement effectivement engagées au cours de chaque exercice jusqu'au 31 mars 2030, lequel état doit être fourni au plus tard quatre-vingt-dix (90) jours après la fin de l'exercice visé.

(4) Le Canada fournit sans délai à toute Première Nation membre du groupe qui en fait la demande un état des dépenses dans le cadre de l'engagement à l'égard des réserves de la Première Nation membre du groupe.

9.03 **Abrogation et remplacement de la *Loi sur la salubrité de l'eau potable des Premières Nations***

(1) Le Canada déploie tous les efforts raisonnables :

a) pour déposer une loi abrogeant la *Loi sur la salubrité de l'eau potable des Premières Nations*, L.C. 2013, ch. 21 (la « **LSEPPN** ») au plus tard le 31 mars 2022;

b) pour élaborer et déposer une loi remplaçant la LESPPN (la « **loi remplaçante** »), en consultation avec les Premières Nations; et

c) pour déposer la loi remplaçante au plus tard le 31 décembre 2022.

(2) La loi remplaçante vise les objectifs suivants :

a) assurer la viabilité des réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations, en fonction des prémisses suivantes :

(i) définir des normes minimales de qualité de l'eau pour les réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations, compte tenu des normes qui s'appliquent directement aux collectivités des Premières Nations; et

(ii) définir des normes minimales de capacité pour l'approvisionnement en eau des collectivités des Premières Nations, quant au volume par personne membre de la collectivité;

b) élaborer une approche transparente pour la construction, l'amélioration et la prestation de services d'approvisionnement en eau potable et de traitement des eaux usées pour les Premières Nations;

c) confirmer le financement adéquat et durable des réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations; et

d) appuyer la prise en charge volontaire de l'infrastructure d'approvisionnement en eau et de traitement des eaux usées par les Premières Nations.

(3) Malgré l'engagement du Canada de déposer la loi remplaçante, le Canada appuie l'élaboration d'initiatives en matière de gouvernance des Premières Nations, comme il est décrit à l'article 9.05, ci-après.

9.04 **Comité consultatif des Premières Nations sur l'eau potable salubre**

(1) Le Canada fournit vingt millions de dollars (20 000 000 $) de financement jusqu'à l'exercice se terminant le 31 mars 2026, pour la création du comité consultatif des Premières Nations sur l'eau potable salubre (le « **CCPNEPS** »).

(2) La composition du CCPNEPS est représentative de la diversité des collectivités, des langues, des genres, des territoires, des compétences, des connaissances et de

l'expérience de la précarité de l'approvisionnement en eau des Premières Nations membres du groupe au Canada.

(3) Les membres du CCPNEPS sont nommés d'un commun accord entre les parties, sur la recommandation du comité mixte, et à défaut d'un accord, les membres sont nommés par les tribunaux. Les parties peuvent convenir de destituer un membre du CCPNEPS, et cette destitution prend effet dès son approbation par les tribunaux.

(4) Le CCPNEPS est investi des fonctions principales suivantes :

a) travailler avec les Premières Nations membres du groupe à assurer une supervision et un encadrement et à faire des recommandations à Services aux Autochtones Canada propres à favoriser l'élaboration et la mise en œuvre d'initiatives stratégiques prospectives, notamment :

(i) l'élaboration de la stratégie à long terme pour l'approvisionnement en eau et le traitement des eaux usées de Services aux Autochtones Canada dans les réserves des Premières Nations membres du groupe; et

(ii) l'élaboration de la loi remplaçante;

b) fournir à Services aux Autochtones Canada des conseils et des perspectives stratégiques propres à favoriser la viabilité à long terme pour de l'eau potable salubre dans les collectivités des Premières Nations; et

c) appuyer l'établissement des besoins et des priorités du financement pour l'approvisionnement en eau et le traitement des eaux usées dans les collectivités des Premières Nations.

(5) Les parties établissent conjointement le mandat du CCPNEPS.

9.05 **Initiatives en matière de gouvernance des Premières Nations**

(1) Le Canada fournit neuf millions de dollars (9 000 000 $) de financement aux Premières Nations pour qu'elles élaborent leurs propres règlements et initiatives en matière de gouvernance jusqu'à l'exercice se terminant le 31 mars 2026 (le « **Fonds pour la gouvernance de l'eau** »). Services aux Autochtones Canada administre le Fonds pour la gouvernance de l'eau conformément à son mandat.

(2) La capitalisation du Fonds pour la gouvernance de l'eau s'effectue jusqu'à l'exercice se terminant le 31 mars 2026, que la loi remplaçante soit ou non adoptée, notamment dans les délais prévus.

(3) Le Fonds pour la gouvernance de l'eau aide les Premières Nations membres du groupe qui souhaitent élaborer leurs propres initiatives en matière de gouvernance de l'eau, notamment au moyen de financement pour :

a) la recherche :

b) l'obtention de conseils techniques;

c) la rédaction de règlements; et

d) la mise en œuvre de projets pilotes dans les réserves.

(4) Les parties établissent conjointement le mandat du Fonds pour la gouvernance de l'eau.

9.06 **Accord sur les mesures requises**

(1) Si une Première Nation établit que l'engagement n'est pas ou n'est plus respecté dans sa ou ses réserves ou si une Première Nation établit que le Canada ne se conforme pas à un plan de mesures correctrices (chacune de ces Premières Nations, une « **Première Nation insuffisamment desservie** »), elle en donne un avis écrit au Canada, adressé au sous-ministre des Services aux Autochtones Canada, décrivant la manière dont l'engagement n'est pas ou n'est plus respecté ou dont le Canada ne se conforme pas à un plan de mesures correctrices.

(2) Le Canada consulte sans délai chaque Première Nation insuffisamment desservie afin de respecter l'engagement dans les meilleurs délais.

(3) Le Canada paie les frais raisonnables qu'une Première Nation insuffisamment desservie doit engager pour obtenir des conseils techniques afin de déterminer quelles mesures sont nécessaires pour respecter l'engagement dans la ou les réserves de la Première Nation insuffisamment desservie.

(4) Le Canada déploie tous les efforts raisonnables pour parvenir à un accord avec la Première Nation insuffisamment desservie précisant les mesures qui sont nécessaires pour respecter l'engagement (un « **plan de mesures correctrices** »).

(5) Le Canada et la Première Nation insuffisamment desservie se conforment au plan de mesures correctrices.

9.07 **Règlement des différends concernant les mesures requises**

Si le Canada ne se conforme pas à un plan de mesures correctrices en vigueur ou si le Canada et une Première Nation insuffisamment desservie ne peuvent convenir d'un plan de mesures correctrices dans les trois (3) mois qui suivent la remise de l'avis de la Première Nation insuffisamment desservie prévu à l'article 9.06 ou dans tout autre délai dont les parties peuvent convenir, la Première Nation insuffisamment desservie peut recourir à la procédure de règlement des différends décrite à l'ANNEXE K (la « **procédure de règlement des différends relatifs à l'engagement** »), auquel cas le Canada et la Première Nation insuffisamment desservie soumettent le plan de mesures correctrices alors en vigueur ou leur projet de plan de mesures correctrices respectif à la procédure de règlement des différends relatifs à l'engagement.

9.08 **Frais de la procédure de règlement des différends relatifs à l'engagement**

(1) Le Canada paie cinquante pour cent (50 %) des frais et débours raisonnables de la participation d'une Première Nation membre du groupe insuffisamment desservie à la procédure de règlement des différends relatifs à l'engagement, y compris les honoraires et débours juridiques raisonnables, étant entendu que le Canada paie cent pour cent (100 %) des frais raisonnables d'une convocation à quelque négociation, médiation et arbitrage collaboratifs

conformément à la procédure de règlement des différends relatifs à l'engagement, ainsi que les honoraires et les débours raisonnables du médiateur et de l'arbitre nommé conformément à la procédure de règlement des différends relatifs à l'engagement; et

(2) Il est entendu que les frais et débours dont il est question au paragraphe 9.08(1) sont distincts et en sus des frais et débours payables aux avocats du groupe et au comité mixte en vertu de l'Article 18 .

ARTICLE 10 – EFFET DE L'ENTENTE

10.01 **Aucune disposition quant aux préjudices continus**

La présente entente ne prévoit aucune disposition quant aux préjudices dont les membres du groupe pourraient en raison d'avis concernant la qualité de l'eau potable à long terme qui commencent ou qui sont maintenus après le 20 juin 2021, et les membres du groupe ne peuvent pas réclamer une indemnité à l'égard de ces préjudices.

10.02 **Responsabilité du Canada**

Les parties conviennent expressément qu'une fois que le Canada a respecté les conditions de la présente entente, le Canada n'a aucune autre responsabilité envers les membres du groupe à l'égard des préjudices dont ils ont souffert avant le 20 juin 2021 en raison de l'omission du Canada d'assurer ou de financer l'approvisionnement en eau potable salubre dans la ou les réserves alors visées par un avis concernant la qualité de l'eau potable à long de ces Premières Nations membres du groupe, ou dans lesquelles ces personnes membres du groupe étaient des résidents habituels.

10.03 **Quittances**

(1) Les ordonnances d'approbation du règlement rendues par les tribunaux stipulent que, sauf comme il est prévu aux articles 10.01 et 10.04, et en contrepartie des obligations et des responsabilités du Canada qui lui incombent en vertu de la présente entente, chaque personne membre du groupe ou son exécuteur testamentaire, demandeur d'indemnité successoral ou représentant personnel pour le compte de la personne membre du groupe ou de sa succession, et chaque Première Nation membre du groupe (collectivement ci-après, les « **donneurs de quittance** ») dégage entièrement et définitivement le Canada et ses fonctionnaires, mandataires, dirigeants et employés, prédécesseurs, successeurs et ayants cause (collectivement ci-après, les « **bénéficiaires de quittance** »), de quelque action, cause d'action, réclamation et demande de quelque nature ou type, qu'elle soit ou non connue ou prévue, que les donneurs de quittance avaient, ont aujourd'hui ou pourraient avoir à l'avenir contre les bénéficiaires de quittance à l'égard ou en raison de l'omission du Canada d'assurer ou de financer l'approvisionnement en eau potable salubre dans la ou les réserves alors visées par un avis concernant la qualité de l'eau potable à long de ces Premières Nations membres du groupe, ou dans lesquelles ces personnes membres du groupe étaient des résidents habituels, dans chaque cas avant la fin de la période visée.

(2) Les donneurs de quittance sont réputés convenir que s'ils font une réclamation ou une demande ou introduisent une action ou une instance contre d'autres personnes qui donne lieu à une réclamation contre les bénéficiaires de quittance pour une contribution, une indemnité ou une autre réparation, que ce soit en vertu d'une loi, de la common law ou du droit civil du Québec, à l'égard de réclamations visées par la quittance prévue au

paragraphe 10.03(1), ci-dessus, les donneurs de quittance limitent expressément leurs réclamations de manière à exclure toute partie de responsabilité du Canada.

(3) Après une décision définitive relative à une réclamation faite en vertu de la procédure de règlement des réclamations et conformément à ses modalités, les donneurs de quittance sont également réputés dégager libérer entièrement et définitivement :

a) les parties, les avocats du groupe, les avocats du Canada, le comité de mise en œuvre du règlement et ses membres, le CCPNEPS et ses membres, le comité mixte et ses membres, l'administrateur et le tiers évaluateur à l'égard de quelque réclamation qui a découlé, qui découle ou qui pourrait découler de l'application de la procédure de règlement des réclamations, y compris, notamment quelque réclamation quant au calcul des dommages-intérêts individuels, de l'indemnité pour préjudices déterminés et des dommages de Première Nation, au caractère suffisant de l'indemnité reçue et à la répartition et à la distribution de l'excédent du Fonds en fiducie;

b) tout conseil de bande qui a soumis une confirmation du conseil de bande à l'égard de quelque réclamation qui a découlé, qui découle ou qui pourrait découler de la confirmation du conseil de bande, y compris, notamment quelque réclamation quant à l'exhaustivité ou à l'exactitude de celle-ci; et

c) tout conseil de bande qui adopte une résolution du conseil de bande approuvant des réseaux d'approvisionnement en eau privés, essentiellement selon le modèle reproduit en ANNEXE P ou un autre modèle que le Canada et les avocats du groupe jugent acceptable à l'égard de quelque réclamation qui a découlé, qui découle ou qui pourrait découler de la résolution du conseil de bande approuvant des réseaux d'approvisionnement en eau privés, y compris, notamment quelque réclamation quant à l'exhaustivité ou à l'exactitude de celle-ci, et l'adoption d'une résolution du conseil de bande ou l'omission d'adopter une résolution du conseil de bande approuvant des réseaux d'approvisionnement en eau privés ne saurait avoir pour effet de rendre une Première Nation ou son conseil de bande responsable ou imputable à l'égard des réseaux d'approvisionnement en eau qui y sont décrits.

(4) Les parties, les avocats du groupe, les avocats du Canada, le comité de mise en œuvre du règlement et ses membres, le CCPNEPS et ses membres, le comité mixte et ses membres, l'administrateur et le tiers évaluateur n'ont aucune responsabilité envers un membre du groupe admissible disparu à l'égard de quelque réclamation qui a découlé, qui découle ou qui pourrait découler du paiement ou du non-paiement d'un montant conformément à la présente entente, lorsque l'administrateur s'est conformé au plan de recherche d'adresse de membres du groupe admissibles prévu à l'ANNEXE Q.

(5) Il est entendu :

a) qu'une personne membre du groupe vivante qui ne soumet pas un formulaire de réclamation valide à l'administrateur, ou pour le compte de laquelle une réclamation valide n'est pas faite au moyen d'une confirmation du conseil de bande, ou, dans le cas d'une personne membre du groupe qui est une personne frappée d'incapacité, pour le compte de laquelle son représentant personnel n'a pas soumis de formulaire de réclamation valide; et

b) qu'une personne membre du groupe décédée qui n'a pas soumis un formulaire de réclamation valide avant son décès, ou dont l'exécuteur testamentaire ou le demandeur d'indemnité successoral ne soumet pas un formulaire de réclamation valide pour le compte de la personne membre du groupe décédée, avec les autres renseignements requis par la présente entente,

dans chaque cas, au plus tard à la dernière date limite pour les réclamations, n'a pas droit à des dommages-intérêts individuels ni à une indemnité pour préjudices déterminés en vertu de la présente entente, et l'administrateur rejette toute réclamation soumise après la dernière date limite pour les réclamations. Chaque personne membre du groupe continue d'être liée par la quittance prévue dans le présent article 10.03, même si elle ne soumet pas un formulaire de réclamation valide au plus tard à la dernière date limite pour les réclamations.

(6) Il est entendu que toute Première Nation touchée qui ne donne pas un avis d'acceptation au plus tard à la date limite pour l'acceptation perd tout droit à quelque avantage en vertu de la présente entente, y compris, notamment les dommages-intérêts de Première Nation, et l'administrateur rejette tout avis d'acceptation soumis après la date limite pour l'acceptation.

10.04 **Recours permanents**

(1) Les parties reconnaissent et conviennent que, par dérogation à l'article 10.03 ou à toute autre disposition contraire de la présente entente, les membres du groupe n'abandonnent pas et conservent expressément leurs réclamations ou causes d'action en cas de violation de la présente entente par le Canada.

(2) Les Parties reconnaissent et conviennent qu'il y aurait préjudice irréparable pour lequel des dommages-intérêts ne constitueraient pas une réparation appropriée en droit si le Canada devait manquer à ses obligations qui lui incombent en vertu de l'article 3.04, de l'Article 4 , de l'Article 5 , de l'Article 6 ou de l'Article 9 . Il est donc convenu que, sous réserve de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. (1985), ch. C-50, les parties ont le droit de recourir à une mesure injonctive et à une autre mesure de redressement équitable pour prévenir toute violation réelle ou imminente de la présente entente, et pour faire respecter les conditions de la présente entente, sans qu'il ne soit nécessaire d'obtenir ou de déposer un cautionnement dans le cadre de l'obtention d'une telle mesure injonctive ou autre mesure de redressement équitable, en plus des autres dommages-intérêts et mesures de redressement dont les parties peuvent bénéficier en droit ou en équité.

10.05 **Impôt sur le revenu canadien et avantages sociaux**

(1) Le Canada fait de son mieux pour veiller à ce que la réception d'un paiement conformément à la présente entente ne porte pas atteinte au droit d'un membre du groupe à des prestations sociales ou à des prestations d'assistance sociale fédérales, et aucun pareil paiement ne saurait être considéré comme un revenu imposable au sens de la *Loi de l'impôt sur le revenu*.

(2) Le Canada fait de son mieux pour obtenir une entente avec les gouvernements provinciaux et territoriaux aux termes de laquelle la réception d'un paiement conformément à la présente entente ne porte pas atteinte au montant, à la nature ou à la durée des prestations sociales ou des prestations d'assistance sociale offertes ou payables à un membre du groupe.

ARTICLE 11 – MISE EN ŒUVRE DE LA PRÉSENTE ENTENTE

11.01 **Ordonnances d'approbation du règlement**

(1) Les parties conviennent de solliciter les ordonnances d'approbation du règlement aux tribunaux essentiellement selon le modèle reproduit en ANNEXE O.

(2) Les parties consentent à l'inscription des ordonnances d'approbation du règlement.

(3) Les parties prennent toutes les mesures raisonnables pour coopérer en vue de saisir les tribunaux d'une demande d'ordonnances d'approbation de règlement.

(4) Les parties planifient l'audition de l'approbation du règlement dans les meilleurs délais compte tenu des exigences du plan de notification et de la disponibilité des tribunaux.

11.02 **Plan de notification**

(1) Les parties conviennent de saisir conjointement les tribunaux d'une demande d'approbation du plan de notification comme moyen permettant aux membres du groupe de recevoir les avis de règlement et les avis d'approbation du règlement, et les avis d'exclusion tardive, selon le cas.

(2) Le Canada convient de financer la mise en œuvre du plan de notification et de tout avis ultérieur ordonné par les tribunaux.

ARTICLE 12 – EXCLUSION

12.01 **Exclusion**

Aucune personne membre du groupe ne peut s'exclure des actions sans l'autorisation des tribunaux, et chaque personne membre du groupe est liée par la présente entente si elle est approuvée par les tribunaux.

12.02 **Exclusion tardive**

Par dérogation à l'article 12.01, les personnes membres du groupe qui résident habituellement dans la Première Nation de Mitaanjigamiing, la North Caribou Lake, la Nation crie de Ministikwan Lake, la Nation des Oneidas de la Thames et la Bande de Deer Lake ont le droit de s'exclure des actions moyennant la remise à l'administrateur d'un avis écrit dans les quarante-cinq (45) jours qui suivent la date de la première publication de l'avis de règlement. Les Premières Nations visées dans le présent article 12.02 ont reçu un premier avis concernant la qualité de l'eau potable à long terme après le commencement de la période d'exclusion. Sauf en ce qui a trait à l'exclusion tardive prévue dans le présent article 12.02, les personnes membres du groupe n'ont pas le droit de s'exclure aux termes de la présente entente et ne peuvent s'exclure des actions qu'avec l'autorisation des tribunaux conformément à l'article 12.01**Error! Reference source not found.**.

12.03 **Exclusion automatique pour les réclamations individuelles**

Toute personne membre du groupe qui n'abandonne pas, avant l'expiration du délai pour s'exclure des actions, quelque instance qui soulève des questions de droit ou de fait qui sont communes aux actions, est réputée s'être exclue des actions.

ARTICLE 13 – PAIEMENTS AUX PERSONNES MEMBRES DU GROUPE DÉCÉDÉES ET FRAPPÉES D'INCAPACITÉ

13.01 **Indemnisation d'une personne décédée; octroi d'une autorisation ou d'un pouvoir analogue**

(1) Si une personne membre du groupe est décédée ou décède après le 20 novembre 2017, inclusivement (cette personne membre du groupe, une « **personne membre du groupe décédée** »), et :

a) que la personne membre du groupe décédée a été identifiée dans une confirmation du conseil de bande;

b) que la personne membre du groupe décédée, ou son représentant personnel, a soumis un formulaire de réclamation à l'administrateur avant son décès; ou

c) que l'exécuteur testamentaire de la personne membre du groupe décédée a soumis un formulaire de réclamation à l'administrateur après le décès de cette dernière,

et que l'exécuteur testamentaire de la personne membre du groupe décédée a soumis à l'administrateur la preuve exigée par le paragraphe 13.01(2), l'administrateur paie à l'exécuteur testamentaire de la personne membre du groupe décédée l'indemnité à laquelle la personne membre du groupe décédée avait droit aux termes de la procédure de règlement des réclamations, ce paiement étant payable à « la succession » de la personne membre du groupe décédée.

(2) Au soutien d'une réclamation soumise conformément au paragraphe 13.01(1), l'exécuteur testamentaire de la personne membre du groupe décédée soumet à l'administrateur, dans chaque cas, selon le modèle que l'administrateur juge acceptable :

a) un formulaire de réclamation (si un formulaire de réclamation n'a pas été soumis par la personne membre du groupe décédée, ou son représentant personnel, avant son décès et que la personne membre du groupe décédée n'a pas été identifiée dans une confirmation du conseil de bande);

b) la preuve et la date du décès de la personne membre du groupe décédée;

c) la preuve de l'autorisation légale du représentant de recevoir l'indemnité pour le compte de la succession de la personne membre du groupe décédée, ainsi établie :

(i) si la réclamation est fondée sur un testament ou un autre titre testamentaire ou une succession ab intestat, une copie de l'acte d'homologation ou des lettres d'homologation ou d'un autre

document de même nature ou des lettres d'administration ou d'un autre document de même nature, étant censés être délivrés par un tribunal ou une autorité au Canada; ou

(ii) si la réclamation est fondée sur un testament notarié au Québec, une copie certifiée conforme du testament.

13.02 **Indemnisation d'une personne décédée; sans octroi d'une autorisation ou d'un pouvoir analogue**

(1) Si un formulaire de réclamation a été soumis à l'administrateur par une personne membre du groupe décédée, ou par son représentant personnel, avant son décès, ou par son exécuteur testamentaire ou un autre représentant de la personne membre du groupe décédée (un « **demandeur d'indemnité successoral** »), après son décès, mais que la succession de la personne membre du groupe décédée n'a pas soumis à l'administrateur tous les éléments de la preuve requise aux termes du paragraphe 13.01(2), l'exécuteur testamentaire ou le demandeur d'indemnité successoral doit soumettre à l'administrateur la preuve requise aux termes de l'alinéa a) et de l'alinéa b), ainsi qu'une preuve de l'autorisation ou du pouvoir d'agir de l'exécuteur testamentaire ou du demandeur d'indemnité successoral de la personne membre du groupe décédée conformément au paragraphe 13.02(3) (collectivement, une « **déclaration de représentation successorale** »), au plus tard à la date limite pour les réclamations ou, si elle est postérieure, à l'expiration de la période de réclamation tardive (la « **dernière date limite pour les réclamations** ») et par ailleurs conformément à la présente entente, et :

a) si une seule déclaration de représentation successorale a été soumise à l'égard de la personne membre du groupe décédée au plus tard à la dernière date limite pour les réclamations, l'administrateur paie l'indemnité à laquelle la personne membre du groupe décédée a droit à l'exécuteur testamentaire ou au demandeur d'indemnité successoral indiqué dans la déclaration de représentation successorale pour le compte de la succession; ou

b) si plus d'une déclaration de représentation successorale a été soumise à l'égard de la personne membre du groupe décédée au plus tard à la dernière date limite pour les réclamations, l'administrateur :

(i) si les exécuteurs testamentaires ou les demandeurs d'indemnité successoraux indiqués dans toutes les déclarations de représentation successorale soumettent à l'administrateur une convention signée ordonnant le paiement de l'indemnité à laquelle la personne membre du groupe décédée a droit et donnent une quittance que l'administrateur juge acceptable quant à la forme, paie l'indemnité à la succession conformément à cette convention; ou

(ii) si les exécuteurs testamentaires ou les demandeurs d'indemnité successoraux indiqués dans toutes les déclarations de représentation successorale ne soumettent pas à l'administrateur une convention conformément au sous-alinéa 13.02(1)b)(i), demande à l'un des exécuteurs testamentaires ou des demandeurs d'indemnité successoraux de soumettre à l'administrateur la preuve requise aux termes de

l'alinéa 13.01(2)c) et paie à cette personne pour le compte de la succession l'indemnité à laquelle a droit la personne membre du groupe décédée, étant entendu que si personne ne soumet à l'administrateur la preuve requise aux termes de l'alinéa 13.01(2)c) dans les deux (2) ans qui suivent la dernière date limite pour les réclamations, la réclamation pour le compte de la personne membre du groupe décédée et de sa succession s'éteint, l'administrateur n'a plus aucune autre obligation de faire quelque paiement à la personne membre du groupe décédée ou à sa succession et toutes les réclamations de ou pour le compte de la personne membre du groupe décédée et de sa succession sont réputées avoir fait l'objet d'une quittance conformément à l'article 10.03.

(2) Si un formulaire de réclamation est soumis à l'administrateur par une personne membre du groupe décédée, ou pour son compte, mais qu'aucune déclaration de représentation successorale n'est soumise à l'administrateur à l'égard de la personne membre du groupe décédée conformément au paragraphe 13.01(1) dans les quatre-vingt-dix (90) jours qui suivent la réception du formulaire de réclamation, l'administrateur déploie des efforts raisonnables pour envoyer un avis à la dernière adresse connue de la personne membre du groupe décédée ou à l'exécuteur testamentaire ou au demandeur d'indemnité successoral de la personne membre du groupe décédée, selon le cas, demandant la soumission d'une déclaration de représentation successorale. Si personne ne soumet à l'administrateur une déclaration de représentation successorale à l'égard de la personne membre du groupe décédée dans les deux (2) ans qui suivent la dernière date limite pour les réclamations, la réclamation pour le compte de la personne membre du groupe décédée et de sa succession s'éteint, l'administrateur n'a plus aucune autre obligation de faire quelque paiement à la personne membre du groupe décédée ou à sa succession et toutes les réclamations de ou pour le compte de la personne membre du groupe décédée et de sa succession sont réputées avoir fait l'objet d'une quittance conformément à l'article 10.03.

(3) Au soutien d'une déclaration de représentation successorale soumise en vertu du paragraphe 13.02(1), l'exécuteur testamentaire ou le demandeur d'indemnité successoral de la personne membre du groupe décédée, selon le cas, soumet à l'administrateur la preuve suivante qu'il représente la succession de la personne membre du groupe décédée, dans chaque cas, selon le modèle que l'administrateur juge acceptable :

a) si la personne membre du groupe décédée avait un testament :

(i) une copie du testament nommant l'exécuteur testamentaire ou le demandeur d'indemnité successoral, selon le cas, pour représenter la succession de la personne membre du groupe décédée; et

(ii) une attestation ou une déclaration signée par l'exécuteur testamentaire ou le demandeur d'indemnité successoral, et par une autre personne qui connaissait personnellement la personne membre du groupe décédée, confirmant qu'ils croient que le testament est valide, n'ont pas connaissance que le testament a été révoquée, n'ont pas connaissance de quelque testament ultérieur de la personne membre du groupe décédée, et n'ont pas

connaissance de quelque exécuteur, administrateur, fiduciaire ou liquidateur nommé par un tribunal; ou

b) si la personne membre du groupe décédée n'avait pas de testament :

(i) une attestation ou une déclaration signée par l'exécuteur testamentaire ou le demandeur d'indemnité successoral, et par une autre personne qui connaissait personnellement la personne membre du groupe décédée, confirmant qu'ils n'ont pas connaissance de quelque testament de la personne membre du groupe décédée et n'ont pas connaissance de quelque exécuteur, administrateur, fiduciaire ou liquidateur nommé par un tribunal;

(ii) une preuve de la relation entre l'exécuteur testamentaire ou le demandeur d'indemnité successoral, selon le cas, et la personne membre du groupe décédée, selon le modèle que l'administrateur juge raisonnablement acceptable;

(iii) une attestation ou une déclaration signée par l'exécuteur testamentaire ou le demandeur d'indemnité successoral, et par une autre personne qui connaissait personnellement la personne membre du groupe décédée :

A. confirmant qu'ils n'ont pas connaissance de quelque héritier ayant priorité de rang de la personne membre du groupe décédée conformément au paragraphe 13.02(4); et

B. soit :

(I) confirmant qu'ils n'ont pas connaissance de quelque héritier de rang égal de la personne membre du groupe décédée conformément au paragraphe 13.02(4), ou

(II) s'il existe un héritier de rang égal de la personne membre du groupe décédée conformément au paragraphe 13.02(4), énumérant les personnes ayant un rang égal; et

(iv) s'il existe des héritiers de la personne membre du groupe décédée qui ont un rang égal par rapport à l'exécuteur testamentaire ou au demandeur d'indemnité successoral conformément au paragraphe 13.02(4), le consentement signé de toutes ces personnes quant au pouvoir de l'exécuteur testamentaire ou du demandeur d'indemnité successoral, selon le cas, d'agir pour la succession de la personne membre du groupe décédée.

(4) Pour l'application de l'alinéa b), la priorité de rang des héritiers est établie conformément aux dispositions de la *Loi sur les Indiens* quant à la distribution des biens ab intestat, et cette priorité de rang des héritiers de la plus élevée à la plus basse s'établit comme suit :

a) l'époux ou conjoint de fait survivant;

b) les enfants;

c) les petits-enfants;

d) les parents;

e) les frères et sœurs; et

f) les enfants des frères et sœurs.

Les termes et expressions utilisés dans le présent paragraphe 13.02(4), mais qui ne sont pas définis dans la présente entente s'entendent au sens qui leur est attribué dans la *Loi sur les Indiens*.

13.03 **Personne frappée d'incapacité**

Si une personne membre du groupe qui a soumis un formulaire de réclamation à l'administrateur avant la date limite pour les réclamations, ou qui a été identifiée dans une confirmation du conseil de bande, est ou devient une personne frappée d'incapacité avant la réception de son indemnité, et que l'administrateur est avisé que cette personne membre du groupe est une personne frappée d'incapacité avant le paiement de son indemnité, l'administrateur paie au représentant personnel de la personne membre du groupe l'indemnité à laquelle elle aurait eu droit aux termes de la procédure de règlement des réclamations, et si l'administrateur n'en est pas ainsi avisé, l'administrateur paie l'indemnité payable à la personne membre du groupe. Si une personne membre du groupe est ou devient une personne frappée d'incapacité avant de soumettre un formulaire de réclamation à l'administrateur, le représentant personnel de la personne membre du groupe peut soumettre un formulaire de réclamation pour le compte de la personne membre du groupe avant la date limite pour les réclamations et l'indemnité à laquelle la personne membre du groupe aurait eu droit aux termes de la procédure de règlement des réclamations est payée au représentant personnel de la personne membre du groupe.

13.04 **Clause de dégagement de responsabilité du Canada, de l'administrateur, des avocats du groupe, du comité mixte, du tiers évaluateur, du comité de mise en œuvre du règlement et du CCPNEPS**

Le Canada et ses avocats, l'administrateur, les avocats du groupe, le comité mixte et ses membres, le tiers évaluateur, le comité de mise en œuvre du règlement et ses membres et le CCPNEPS sont tenus indemnes et à couvert quant à l'ensemble des réclamations, des demandes reconventionnelles, des poursuites, des actions, des causes d'action, des demandes, des dommages, des pénalités, des préjudices, des compensation, des jugements, des dettes, des frais (y compris les honoraires et frais d'avocats) ou des autres responsabilités de quelque nature que ce soit en raison ou par suite d'un paiement ou d'un non-paiement à un à une personne membre du groupe décédée ou à une personne frappée d'incapacité ou pour son compte, ou à un exécuteur testamentaire, à un demandeur d'indemnité successoral, à la succession ou à un représentant personnel aux termes de la présente entente, et la présente entente constitue un moyen de défense péremptoire.

ARTICLE 14 – COMITÉ DE MISE EN ŒUVRE DU RÈGLEMENT

14.01 **Comité de mise en œuvre du règlement**

(1) Les tribunaux instituent un comité de mise en œuvre du règlement composé de deux (2) membres du comité mixte, de deux (2) représentants du Canada et de deux (2) membres du CCPNEPS, chacun d'eux étant appelé aux présentes un « **membre** » pour l'application de la présente entente. Un des membres du comité mixte est nommé président du comité de mise en œuvre du règlement.

(2) Le comité de mise en œuvre du règlement s'efforce de parvenir à un consensus. Si un consensus n'est pas possible, le comité de mise en œuvre du règlement prend ses décisions à la majorité des voix. En cas de partage des voix, le président a voix prépondérante.

(3) Les tribunaux ou les parties, d'un commun accord, peuvent remplacer un membre du comité de mise en œuvre du règlement, pour peu que la composition du comité de mise en œuvre du règlement demeure conforme à celle prévue au paragraphe 14.01(1) ci-dessus.

(4) Le comité de mise en œuvre du règlement est un organe de surveillance institué en vertu de la présente entente et investi des responsabilités suivantes :

a) surveiller le travail de l'administrateur et la procédure de règlement des réclamations;

b) recevoir et examiner les rapports de l'administrateur, y compris, notamment les rapports sur les frais d'administration;

c) donner à l'administrateur ou au tiers évaluateur les directives qui peuvent alors être nécessaires conformément au mandat du comité de mise en œuvre du règlement;

d) recevoir et accepter ou rejeter les demandes de report de la date limite pour les réclamations, étant entendu qu'un report nécessite une ordonnance des tribunaux;

e) proposer à l'approbation des tribunaux les protocoles qui peuvent être nécessaires à la mise en œuvre de la présente entente;

f) examiner les formulaires de réclamation dont il est saisi par l'administrateur; et

g) traiter toute autre question soumise au comité de mise en œuvre du règlement par les tribunaux ou l'un d'eux.

(5) Il est entendu que le comité de mise en œuvre du règlement n'a pas compétence pour examiner les appels, les demandes ou les recours analogues d'un demandeur d'indemnité ou d'une personne membre du groupe. Aucune personne membre du groupe ni aucune autre personne ne peut solliciter des mesures de redressement de quelque nature auprès du comité de mise en œuvre du règlement et le comité de mise en œuvre du règlement ne peut être saisi de toute pareille demande ou procédure analogue.

14.02 **Décisions définitives et exécutoires**

Les décisions du comité de mise en œuvre du règlement seront définitives et exécutoires et ne sont pas susceptibles d'appel ou de révision.

14.03 **Frais du comité de mise en œuvre du règlement**

Conformément au paragraphe b), le Canada assume les frais de participation au comité de mise en œuvre du règlement des membres qui ne sont pas aussi membres du comité mixte. Les frais des membres du comité mixte sont payés conformément au paragraphe 15.01(8). Le Canada paie les débours raisonnables que tous les membres engagent pour participer au comité de mise en œuvre du règlement.

ARTICLE 15 – COMITÉ MIXTE

15.01 **Comité mixte**

(1) Les tribunaux instituent un comité mixte qui est composé de trois (3) membres recommandés par les avocats du groupe et qui est investi des pouvoirs, des droits, des attributions et des responsabilités nécessaires à l'exécution des obligations qui lui incombent aux termes de la présente entente. Le comité mixte est composé d'un (1) représentant des avocats du groupe de Olthuis Kleer Townshend LLP et de deux (2) représentants des avocats du groupe de McCarthy Tétrault S.E.N.C.R.L., s.r.l.

(2) Sous réserve du paragraphe 15.01, sur la recommandation du comité mixte, ou de leur propre chef, les tribunaux peuvent remplacer un membre du comité mixte dans l'intérêt véritable du groupe.

(3) Le comité mixte s'efforce raisonnablement de parvenir à un consensus. Si un consensus n'est pas possible, le comité mixte prend ses décisions à la majorité des voix.

(4) Le comité mixte représente les membres du groupe et agira dans l'intérêt véritable de l'ensemble des membres du groupe dans l'exercice de ses fonctions prévues dans la présente entente.

(5) Le comité mixte consulte le CCPNEPS et les membres du groupe, ou un sous-ensemble d'entre eux, conformément à la présente entente ou comme le comité mixte le juge approprié.

(6) Le comité mixte peut présenter les requêtes ou répondre aux requêtes ou engager les procédures qu'il juge nécessaires pour faire valoir les intérêts des membres du groupe.

(7) Le comité mixte peut répartir ses travaux entre ses membres et leurs cabinets d'avocats ou retenir les services d'autres conseillers juridiques, auquel cas les honoraires et débours de ces autres conseillers juridiques, ainsi que les taxes applicables, sont à la charge du comité mixte.

(8) Les frais et débours raisonnables du comité mixte sont payés conformément à l'article 18.02, sauf s'il n'y a pas suffisamment de fonds détenus en fiducie à l'égard des frais

continus, auquel cas l'administrateur paie les frais et débours raisonnables du comité mixte et les débours sur Fonds en fiducie avec l'approbation des tribunaux.

(9) Si un membre du comité mixte estime que la majorité du comité mixte a pris une décision qui n'est pas dans l'intérêt véritable du groupe, le membre peut soumettre la décision à un arbitrage confidentiel et exécutoire pour déterminer, selon la prépondérance des probabilités, si la décision de la majorité n'est pas dans l'intérêt véritable du groupe. L'arbitre rend sa décision rapidement et sommairement et sans droit d'appel. Si les membres du comité mixte ne parviennent pas à s'entendre sur un arbitre, ils peuvent demander aux tribunaux d'en nommer un. Les frais de l'arbitrage sont à la charge du comité mixte.

(10) Le comité mixte se réunit tous les trimestres ou plus fréquemment au besoin.

ARTICLE 16 – FIDUCIAIRE ET FIDUCIE

16.01 **Fiducie**

Au plus tard trente (30) jours après la nomination du fiduciaire par les tribunaux, le Canada établit une seule fiducie (la « **Fiducie pour de l'eau potable salubre** ») d'un capital de dix dollars (10 $), que le fiduciaire détient conformément aux conditions de la présente entente.

16.02 **Fiduciaire**

Sur la recommandation du comité mixte, les tribunaux nomment le fiduciaire de la Fiducie pour de l'eau potable salubre, investi des pouvoirs, des droits, des attributions et des responsabilités que les tribunaux ordonnent. Sans que soit limitée la portée générale de ce qui précède, le fiduciaire est notamment investi des attributions et des responsabilités suivantes :

a) détenir le Fonds en fiducie, le Fonds d'indemnisation pour préjudices déterminés et le Fonds pour la relance économique et culturelle des Premières Nations (chacun, un « **Fonds** ») dans la Fiducie pour de l'eau potable salubre;

b) si le fiduciaire juge qu'il est dans l'intérêt véritable des membres du groupe d'investir les fonds de chaque Fonds (ou de l'un d'eux) en vue d'atteindre un taux de rendement maximal sans risque de perte important, eu égard à la capacité de la Fiducie pour de l'eau potable salubre et de chaque Fonds de respecter ses obligations financières;

c) payer à l'administrateur et à toute autre personne visée à l'article 3.04 et au paragraphe 15.01(8) sur la Fiducie pour de l'eau potable salubre au besoin, les montants alors nécessaires pour donner effet à quelque disposition de la présente entente, y compris le paiement des dommages-intérêts individuels, de l'indemnité pour préjudices déterminés et des dommages-intérêts de Première Nation;

d) retenir les services de professionnels pour l'aider dans l'exercice de ses attributions;

e) faire preuve du même degré de soin, de diligence et de compétence dont ferait preuve une personne raisonnablement prudente dans des circonstances comparables;

f) tenir les livres, registres et comptes nécessaires ou appropriés pour documenter l'actif détenu dans la Fiducie pour de l'eau potable salubre et dans chaque Fonds, ainsi que chaque opération de la Fiducie pour de l'eau potable salubre et de chaque Fonds;

g) prendre toutes les mesures raisonnables requises aux termes de la *Loi de l'impôt sur le revenu*, comme le prévoit la présente entente;

h) faire rapport à l'administrateur et au Canada et au comité mixte, trimestriellement, sur l'actif détenu dans la Fiducie pour de l'eau potable salubre et dans chaque Fonds à la fin de chaque trimestre, ou de façon intermédiaire, si une demande lui en est faite; et

i) prendre les autres mesures qui sont accessoires à ce qui précède et exercer tous les pouvoirs qui sont nécessaires ou utiles à l'exercice des activités de la Fiducie pour de l'eau potable salubre ou à l'application des dispositions de la présente entente.

16.03 **Frais des fiduciaires**

Le Canada paie les honoraires, débours et autres frais du fiduciaire conformément à l'alinéa b).

16.04 **Nature de la Fiducie pour de l'eau potable salubre**

La Fiducie pour de l'eau potable salubre est établie aux fins suivantes :

a) acquérir les fonds applicables payables par le Canada;

b) détenir le Fonds en fiducie, le Fonds d'indemnisation pour préjudices déterminés et le Fonds pour la relance économique et culturelle des Premières Nations, en tant que fonds distincts dans la Fiducie pour de l'eau potable salubre;

c) effectuer les décaissements nécessaires;

d) investir des fonds dans des placements dans l'intérêt véritable des membres du groupe, comme le prévoit la présente entente; et

e) prendre les autres mesures qui sont accessoires à ce qui précède et exercer tous les pouvoirs qui sont nécessaires ou utiles à l'application des dispositions de la présente entente.

16.05 **Droits légaux**

La propriété légale de l'actif de la Fiducie pour de l'eau potable salubre, y compris chaque Fonds, et le droit d'exercer les activités de la Fiducie pour de l'eau potable salubre, y compris les activités relatives à chaque Fonds, sont, sous réserve des restrictions et des autres conditions énoncées dans les présentes, dévolus exclusivement au fiduciaire, et les membres du groupe et autres bénéficiaires de la Fiducie pour de l'eau potable salubre n'ont pas le droit d'exiger ou d'imposer un partage, une division ou une distribution de quelque élément d'actif de la Fiducie pour de l'eau potable salubre, sauf dans le cadre d'une action visant à faire respecter

les dispositions de la présente entente. Aucun membre du groupe ni aucun autre bénéficiaire de la Fiducie pour de l'eau potable salubre n'a ni n'est réputé avoir un droit de propriété sur l'actif de la Fiducie pour de l'eau potable salubre.

16.06 **Dossiers**

Le fiduciaire tient les livres, registres et comptes nécessaires ou appropriés pour documenter l'actif de la Fiducie pour de l'eau potable salubre et chaque opération de la Fiducie pour de l'eau potable salubre. Sans que soit limitée la portée générale de ce qui précède, le fiduciaire tient, à son bureau principal, des registres de toutes les opérations de la Fiducie pour de l'eau potable salubre et une liste des éléments d'actif détenus en fiducie, y compris chaque Fonds, et un registre du solde du compte de chaque Fonds de temps à autre.

16.07 **Rapports trimestriels**

Le fiduciaire remet à l'administrateur, au Canada et au comité mixte, dans les trente (30) jours qui suivent la fin de chaque trimestre civil, un rapport trimestriel indiquant les éléments d'actif détenus à la fin de ce trimestre dans la Fiducie pour de l'eau potable salubre et dans chaque Fonds (y compris la durée, le taux d'intérêt ou le rendement et la date d'échéance de ceux-ci) et un relevé du solde du compte de la Fiducie pour de l'eau potable salubre au cours de ce trimestre.

16.08 **Rapports annuels**

L'auditeur remet à l'administrateur, au fiduciaire, au Canada, au comité mixte et aux tribunaux, dans les soixante (60) jours qui suivent la fin de chaque anniversaire de la date de capitalisation de la Fiducie pour de l'eau potable salubre, laquelle date est la fin de l'exercice de la Fiducie pour de l'eau potable salubre :

a) les états financiers audités de la Fiducie pour de l'eau potable salubre, segmentés pour chaque Fonds, pour le dernier exercice terminé, avec le rapport de l'auditeur s'y rapportant; et

b) un rapport présentant un sommaire des éléments d'actif détenus en fiducie à la fin de l'exercice pour chaque Fonds et les décaissements effectués par la Fiducie pour de l'eau potable salubre au cours de l'exercice précédent.

16.09 **Mode de paiement**

Le fiduciaire a le pouvoir discrétionnaire exclusif de déterminer si une somme payée ou payable sur la Fiducie pour de l'eau potable salubre est payée ou payable sur le revenu de la Fiducie pour de l'eau potable salubre ou sur le capital de la Fiducie pour de l'eau potable salubre.

16.10 **Ajouts de capital**

Tout revenu de la Fiducie pour de l'eau potable salubre qui n'a pas été versé au cours d'un exercice s'ajoute à son capital à la fin de cet exercice.

16.11 **Choix fiscaux**

Pour chaque année d'imposition de la Fiducie pour de l'eau potable salubre, le fiduciaire produit les choix et désignations qu'il peut produire en vertu de la *Loi de l'impôt sur le revenu* et des dispositions équivalentes de la législation en matière d'impôt sur le revenu d'une province ou d'un territoire et prend toutes les autres mesures raisonnables de façon à ce que ni la Fiducie pour de l'eau potable salubre ni aucune autre personne ne soient assujetties à l'impôt sur le revenu de la Fiducie pour de l'eau potable salubre, y compris, notamment le choix en vertu du paragraphe 104(13.1) de la *Loi de l'impôt sur le revenu* et des dispositions équivalentes de la législation en matière d'impôt sur le revenu d'une province ou d'un territoire pour chaque année d'imposition de la Fiducie pour de l'eau potable salubre et le montant à préciser dans le cadre de ce choix correspond au maximum autorisé en vertu de la *Loi de l'impôt sur le revenu* ou de la législation en matière d'impôt sur le revenu d'une province ou d'un territoire, selon le cas.

16.12 **Impôt sur le revenu canadien**

(1) Le Canada fait de son mieux pour exonérer de l'impôt fédéral tout revenu gagné par la Fiducie pour de l'eau potable salubre, et le Canada tient compte des mesures qu'il a prises dans des circonstances analogues pour les conventions de règlements de recours collectifs visés à l'alinéa 81g.3) de la *Loi de l'impôt sur le revenu*.

(2) Les parties conviennent que les paiements aux membres du groupe sont de la nature de dommages-intérêts pour préjudice personnel et ne constituent pas un revenu imposable et le Canada fait de son mieux pour obtenir une décision anticipée en matière d'impôt en ce sens, ou à défaut une interprétation technique ayant le même effet, dans l'un ou l'autre cas auprès de la Direction des décisions en impôt de l'Agence du revenu du Canada.

16.13 **Conseillers en placement**

Sur demande du fiduciaire, le comité mixte peut demander aux tribunaux de nommer des conseillers en placement pour donner au fiduciaire des conseils sur le placement des fonds détenus dans chaque Fonds de la Fiducie pour de l'eau potable salubre. Le fiduciaire paie les honoraires et frais raisonnables de tous les conseillers en placement sur le Fonds applicable de la Fiducie pour de l'eau potable salubre.

ARTICLE 17 – AUDITEUR

17.01 **Nomination de l'auditeur**

Sur la recommandation du comité mixte, les tribunaux nomment l'auditeur investi des pouvoirs, des droits, des attributions et des responsabilités que les tribunaux ordonnent. Sur la recommandation des parties, ou de leur propre chef, les tribunaux peuvent remplacer l'auditeur en tout temps. Sans que soit limitée la portée générale de ce qui précède, l'auditeur est notamment investi des attributions et des responsabilités suivantes :

a) vérifier annuellement les comptes de la Fiducie pour de l'eau potable salubre conformément aux normes d'audit généralement reconnues;

b) fournir les rapports prévus à l'article 16.08; et

c) déposer les états financiers de la Fiducie pour de l'eau potable salubre, avec le rapport de l'auditeur s'y rapportant auprès des tribunaux et en remettre un exemplaire au Canada, au comité mixte, à l'administrateur et au fiduciaire dans les soixante (60) jours qui suivent la fin de chaque exercice de la Fiducie pour de l'eau potable salubre.

17.02 **Paiement de l'auditeur**

Le Canada paie les honoraires, débours et autres frais raisonnables de l'auditeur conformément à l'alinéa 3.04b).

ARTICLE 18 – FRAIS JURIDIQUES

18.01 **Honoraires et frais des avocats du groupe**

Sous réserve de l'approbation des tribunaux et dans les soixante (60) jours qui suivent la date de mise en œuvre, le Canada paie aux avocats du groupe la somme de cinquante-trois millions de dollars (53 000 000 $), taxes applicables en sus, au titre de leurs honoraires et frais juridiques dans le cadre de la poursuite des actions jusqu'à la date de l'audition de l'approbation du règlement, et des conseils aux membres du groupe concernant l'entente et l'acceptation.

18.02 **Frais continus**

(1) Sous réserve de l'approbation des tribunaux, dans les soixante (60) jours qui suivent la date de mise en œuvre, le Canada paie aux avocats du groupe la somme additionnelle de cinq millions de dollars (5 000 000 $), taxes applicables en sus, en fiducie (les « **fonds détenus en fiducie à l'égard des frais continus** ») au titre de leurs honoraires et frais pour des services devant être rendus par les avocats du groupe et le comité mixte conformément à la présente entente, y compris la mise en œuvre et l'administration de la présente entente, pour une période de quatre (4) ans après l'audition de l'approbation du règlement (les « **frais continus** »).

(2) Les avocats du groupe tiennent des registres appropriés et demandent l'approbation des tribunaux pour le paiement des frais continus sur les fonds détenus en fiducie à l'égard des frais continus.

(3) Les avocats du groupe déclarent semestriellement au Canada et aux tribunaux le solde des fonds détenus en fiducie à l'égard des frais continus.

(4) Les avocats du groupe demandent aux tribunaux d'ordonner le paiement des fonds détenus en fiducie à l'égard des frais continus qui demeurent en fiducie quatre (4) ans après l'audition de l'approbation du règlement.

18.03 **Services juridiques continus**

(1) Les avocats du groupe se partagent le travail de la prestation de services juridiques continus aux membres du groupe entre eux, ou par ailleurs selon les directives du comité mixte.

(2) Dans la mesure où les honoraires et frais des avocats du groupe, et les taxes applicables, sont payés conformément au paragraphe 18.01 ou au paragraphe 18.02, les

avocats du groupe s'abstiennent de facturer aux membres du groupe quelque montant additionnel pour les services juridiques rendus conformément à la présente entente.

(3) Après la date de mise en œuvre, la responsabilité de représenter les intérêts de du groupe dans son ensemble (à l'exclusion de l'aide apporter à un ou plusieurs membres du groupe en particulier qui leur est raisonnablement demandée) passe des avocats du groupe au comité mixte, et les avocats du groupe n'ont aucune autre obligation à cet égard.

(4) Il est entendu que le comité mixte et ses membres, ainsi que les avocats nommés par le comité mixte, reçoivent leurs honoraires, frais et taxes applicables conformément au paragraphe 15.01(8).

(5) Ni les avocats du groupe ni le comité mixte n'ont la responsabilité de représenter les Premières Nations membres du groupe dans le cadre de la procédure de règlement des différends relatifs à l'engagement, à moins que leurs services ne soient retenus séparément à cette fin, auquel cas ils peuvent représenter des Premières Nations membres du groupe dans le cadre de la procédure de règlement des différends relatifs à l'engagement, étant entendu que leurs honoraires et frais ne sont dans ce cas pas payés conformément à l'article 18.01 ou à l'article 18.02.

18.04 **Choix d'un autre avocat**

Aucune disposition de la présente entente n'empêche un membre du groupe de retenir à ses frais les services d'un autre avocat que les avocats du groupe, étant entendu, toutefois, que cet autre avocat n'a droit à aucun paiement en vertu du présent Article 18 . Cet autre avocat n'a en outre pas le droit de recevoir quelque paiement de quelque nature de la part d'un membre du groupe relativement à la présente entente, que ce soit directement ou indirectement, à moins que le paiement ne soit approuvé par les tribunaux.

ARTICLE 19 – PROCÉDURE GÉNÉRALE DE RÈGLEMENT DES DIFFÉRENDS

19.01 **Renvoi initial au tiers évaluateur**

(1) Sous réserve de l'article 19.03, en cas de différend quant à un droit ou à une obligation aux termes de la présente entente, sauf un différend concernant la procédure de règlement des réclamations ou un différend visé à l'article 9.07 (chacun de ces différends sauf un différend concernant la procédure de règlement des réclamations ou un différend visé à l'article 9.07, un « **différend** »), les parties déploient de bonne foi des efforts raisonnables pour régler le différend dans les trente (30) jours.

(2) Si un différend ne peut être résolu dans les trente (30) jours, le Canada, le comité mixte ou un membre du groupe peut le renvoyer au tiers évaluateur

(3) Le tiers évaluateur tranche le différend dont il est ainsi saisi sommairement et fournit les motifs de sa décision par écrit.

19.02 **Renvoi devant les tribunaux**

(1) Le Canada et le comité mixte peuvent interjeter appel d'une décision rendue par application du paragraphe 19.01(3) devant les tribunaux, et les tribunaux révisent la décision du tiers évaluateur selon une norme de décision raisonnable.

(2) Une décision des tribunaux peut être portée en appel conformément aux règles de chaque tribunal.

19.03 **Exclusion des décisions relatives à la procédure de règlement des réclamations et des plans de mesures correctrices**

Il est entendu que l'Article 19 ne s'applique pas aux différends concernant la procédure de règlement des réclamations, y compris, notamment l'admissibilité au groupe et l'indemnité payable à un membre du groupe, ni à l'égard d'un plan de mesures correctrices, y compris, notamment son contenu ou la conformité du Canada, et que ces différends sont réglés conformément à la présente entente.

ARTICLE 20 – RÉSILIATION ET AUTRES CONDITIONS

20.01 **Résiliation de l'entente**

(1) Sauf comme il prévu au paragraphe 20.01(2), la présente entente demeure pleinement en vigueur jusqu'à ce que toutes les obligations qui y sont prévues soient honorées.

(2) Par dérogation à toute autre disposition contraire de la présente entente :

a) l'engagement demeure en vigueur et continue de s'appliquer après à la résiliation de la présente entente, de même que l'article 9.06, l'article 9.07 et l'article 9.08 et la procédure de règlement des différends relatifs à l'engagement; et

b) l'article 10.02 et l'article 10.03 demeurent en vigueur après la résiliation de la présente entente; et

c) l'Article 21 demeure en vigueur après la résiliation de la présente entente.

20.02 **Modifications**

Sauf disposition expresse contraire dans la présente entente, des modifications ne peuvent être apportées à la présente entente qu'avec l'accord écrit des parties, et si les tribunaux ont rendu les ordonnances d'approbation du règlement, toute modification apportée à la présente entente ne prend effet qu'après avoir été approuvée par les tribunaux.

20.03 **Aucune cession**

(1) Sauf disposition expresse contraire dans la présente entente, aucune somme payable aux termes de la présente entente ne peut faire l'objet d'une cession et toute pareille cession est nulle et sans effet.

(2) Sauf ordonnance contraire d'un tribunal compétent et sous réserve du paragraphe 20.03(3) et de l'article 18.04, tout paiement auquel un demandeur d'indemnité a droit est versé au demandeur d'indemnité conformément aux directives que le demandeur d'indemnité donne à l'administrateur.

(3) Les paiements à l'égard d'une personne membre du groupe décédée ou d'une personne frappée d'incapacité seront versés conformément à l'Article 13 .

ARTICLE 21 – CONFIDENTIALITÉ

21.01 **Confidentialité**

À moins que les parties n'en conviennent autrement, l'information donnée, créée ou obtenue dans le cadre de la mise en œuvre de la présente entente est gardée confidentielle et ne saurait être utilisée à une autre fin que celle de la présente entente.

21.02 **Destruction de l'information et des dossiers des membres du groupe**

Deux (2) ans après avoir effectué le paiement des dommages-intérêts individuels, de l'indemnité pour préjudices déterminés et des dommages-intérêts de Première Nation, l'administrateur détruit l'ensemble de l'information et des documents de tous les membres du groupe qu'il détient, à moins qu'un membre du groupe ou son exécuteur testamentaire ou demandeur d'indemnité successoral ne demande expressément la restitution de l'information le concernant dans le délai de deux (2) ans. Dès réception d'une demande en ce sens, l'administrateur transmet l'information concernant le membre du groupe de la manière qui lui est indiquée. Avant de détruire quelque information ou document conformément au présent article, l'administrateur prépare une analyse statistique anonymisée du groupe conformément à l'article 39 de la procédure de règlement des réclamations.

21.03 **Confidentialité des négociations**

À moins que les parties n'en conviennent autrement, l'engagement de confidentialité quant aux discussions et à toutes les communications, écrites ou verbales, dans le cadre et à l'égard des négociations menant à l'entente de principe et à la présente entente demeure en vigueur.

ARTICLE 22 – COOPÉRATION

22.01 **Coopération quant à l'approbation et à la mise en œuvre du règlement**

Dès la signature de la présente entente, les représentants demandeurs dans les actions, les avocats du groupe et le Canada font de leur mieux pour obtenir l'approbation de la présente entente par les tribunaux et pour favoriser et faciliter la participation des membres du groupe à tous les aspects de la présente entente. Si la présente entente n'est pas approuvée par les tribunaux, les parties négocient de bonne foi pour remédier aux lacunes indiquées par les tribunaux.

22.02 **Annonces publiques**

Dès le prononcé des ordonnances d'approbation du règlement, les parties publient une déclaration publique conjointe annonçant le règlement selon un modèle dont les parties doivent convenir et, au moment convenu d'un commun accord, font des annonces publiques en faveur de la présente entente. À la demande raisonnable de l'une d'entre elles, les parties continuent de se prononcer publiquement en faveur de la présente entente.

[Le reste de cette page est laissé en blanc intentionnellement. Suivent les pages de signature.]

EN FOI DE QUOI, les parties ont signé la présente entente le 15 septembre 2021.

POUR LES DEMANDEURS NATION DES CRIS DE TATASKWEYAK ET CHEFFE DOREEN SPENCE

Par : _____
Doreen Spence
Cheffe

POUR LES DEMANDEURS PREMIÈRE NATION DE CURVE LAKE ET CHEFFE EMILY WHETUNG

Par : _____
Emily Whetung
Cheffe

POUR LES DEMANDEURS PREMIÈRE NATION DE NESKANTAGA, CHEF WAYNE MOONIAS et ANCIEN CHEF CHRISTOPHER MOONIAS

Par : _____
Wayne Moonias
Chef

Par : _____
Christophe Moonias
Ancien chef

POUR LE DÉFENDEUR SA MAJESTÉ LA REINE DU CHEF DU CANADA

Par : _____
Christiane Fox
Sous-ministre des Services aux Autochtones
Canada

POUR LES AVOCATS DU GROUPE

Par : _____
Michael Rosenberg
Associé, McCarthy Tétrault S.E.N.C.R.L., s.r.l.

Par : _____
Harry LaForme
Avocat principal, Olthuis Kleer Townshend LLP

ANNEXE A

ENTENTE DE PRINCIPE

Voir ci-joint.

[Traduction]

N° de dossier de la Cour du Banc de la Reine du Manitoba : CI-19-01-24661

N° de dossier de la Cour fédérale : T-1673-19

LE BANC DE LA REINE

Winnipeg Centre

ENTRE :

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK

demandeurs

–et–

PROCUREUR GÉNÉRAL DU CANADA

défendeur

Recours collectif introduit
en vertu de la *Loi sur les recours collectifs*, CPLM. ch. C. 130

–et–

COUR FÉDÉRALE

ENTRE :

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE CURVE LAKE et PREMIÈRE NATION DE NESKANTAGA et CHEF CHRISTOPHER MOONIAS pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE NESKANTAGA

demandeurs

–et–

PROCUREUR GÉNÉRAL DU CANADA

défendeur

Recours collectif introduit en vertu de
la partie 5.1 des *Règles des Cours fédérale*, DORS/98-106

ENTENTE DE PRINCIPE (l'« ENTENTE »)

ATTENDU QUE les demandeurs ont introduit l'action intitulée *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, nº dossier de la Cour 1-1673-19 devant la Cour fédérale le 11 octobre 2019 (l' « **action de Curve Lake** ») et l'action intitulée *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, nº de dossier de la Cour CI 19-01-24661 devant la Cour du Banc de la Reine du Manitoba le 20 novembre 2019 (l'« **action de Tataskweyak** » et, collectivement avec l'action de Curve Lake, les « **actions** »);

ET ATTENDU QUE la Cour du Banc de la Reine du Manitoba a attesté l'action de Tataskweyak à titre de recours collectif le 14 juillet 2020 et que la Cour fédérale a autorisé l'action de Curve Lake à titre de recours collectif le 8 octobre 2020;

ET ATTENDU QUE le « **groupe** » dans les actions est défini comme suit :

a) Toutes les personnes qui :

i) sont membres d'une bande, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, ch. 1-5 (« **Première Nation** »), dont l'aliénation des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations ont fait l'objet d'un avis concernant la qualité de l'eau potable (soit un avis d'ébullition de l'eau, un avis de non-consommation ou de non-utilisation ou un avis similaire) qui a duré au moins un an du 20 novembre 1995 au 20 juin 2021 (« **Premières Nations touchées** »);

ii) n'étaient pas décédées avant le 20 novembre 2017; et

iii) ont résidé habituellement dans une Première Nation touchée alors qu'elle était visée par un avis concernant la qualité de l'eau potable d'une durée d'au moins un an; et

b) la Nation des Cris de Tataskweyak, la Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation qui choisit de se joindre à la présente action à titre de représentant;

Les « **personnes exclues** » sont des membres de la Tsuu T'ina Nation, de la Sucker Creek First Nation, de la Ermineskin Cree Nation, de la Tribu des Blood et de la Okanagan Indian Band, et Michael Darryl Isnardy.

ET ATTENDU QUE le groupe a subi d'énormes préjudices en étant privé d'eau potable salubre et que les personnes et les collectivités touchées en ont gravement souffert;

ET ATTENDU QUE le groupe a demandé un jugement sommaire sur la première question commune concernant l'existence et la portée de l'obligation du Canada de fournir de l'eau potable salubre aux membres du groupe;

ET ATTENDU QU'aucune personne membre du groupe ne s'est retirée des actions et que quelques cent vingt-deux (122) Premières Nations membres du groupe se sont jointes aux actions;

ET ATTENDU QUE le défendeur (« **Canada** ») reconnaît les difficultés auxquelles sont confrontés les membres du groupe et souhaite les aider à obtenir un accès courant à de l'eau potable salubre;

ET ATTENDU QUE le Canada est disposé à régler les actions aux conditions énoncées ci-après, sous réserve de la négociation d'une entente de règlement définitive (l'« **entente de règlement** »);

ET ATTENDU QUE la cheffe Doreen Spence, la Nation des Cris de Tataskweyak, la cheffe Emily Whetung, la Première Nation de Curve Lake, l'ancien chef Christopher Moonias et la Première Nation de Neskantaga (collectivement, les « **représentants demandeurs** ») sont disposés à régler les actions selon les modalités énoncées ci-après, sous réserve que ces dernières soient intégrées dans l'entente de règlement, et recommandent aux Premières Nations membres du groupe d'accepter ces modalités;

PAR CONSÉQUENT, le Canada et les demandeurs négocient de bonne foi et déploient tous les efforts raisonnables pour signer l'entente de règlement au plus tard le 27 août 2021, sous réserve de l'accord des parties à une prolongation.

ARTICLE 1 GÉNÉRALITÉS

1.01 **Définitions**

(1) **Acceptation** : L'indication de l'acceptation de l'entente de règlement par une Première Nation membre du groupe sous une forme dont les parties peuvent convenir et avant une date dont les parties peuvent convenir.

(2) **Plan d'action** : Le plan d'action de Services aux Autochtones Canada visant à lever tous les avis concernant la qualité de l'eau potable à long terme, qui décrit en détail les mesures correctives que le Canada doit prendre pour mettre fin aux avis concernant la qualité de l'eau potable à long terme, joint en **annexe A**.

(3) **Administrateur** : Un administrateur de réclamations dûment qualifié choisi d'un commun accord par les parties, ou à défaut, par les tribunaux, pour s'acquitter des obligations énoncées dans l'entente.

(4) **Confirmation du conseil de bande** : Une déclaration d'une Première Nation membre du groupe identifiant les personnes membres du groupe qui résident habituellement dans sa réserve et les dates auxquelles ces personnes membres du groupe ont résidé habituellement dans sa réserve alors qu'un avis concernant la qualité de l'eau potable à long terme était en vigueur.

(5) **Indemnité de base** : Cinq cent mille dollars (500 000 $).

(6) **Canada** : Le défendeur.

(7) **Avocats du groupe** : McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP.

(8) **Date limite pour les réclamations** : Deux (2) ans après la résolution des appels ou toute autre date convenue par les parties.

(9) **Formulaire de réclamation** : Une déclaration écrite simplifiée que les personnes membres du groupe doivent remplir et soumettre à l'administrateur, sans pièces justificatives, sauf comme les parties peuvent en convenir.

(10) **Groupe** :

a) Toutes les personnes qui :

i) sont membres d'une bande, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, ch. 1-5 (« **Première Nation** »), dont l'aliénation des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations ont fait l'objet d'un avis concernant la qualité de l'eau potable (qu'il s'agisse d'un avis d'ébullition de l'eau, d'un avis de non-consommation ou de non-utilisation ou d'un avis similaire) qui a duré au moins un an du 20 novembre 1995 jusqu'à aujourd'hui (« **Premières Nations touchées** »)

ii) n'étaient pas décédées avant le 20 novembre 2017; et

iii) ont résidé habituellement dans une Première Nation touchée alors qu'elle était visée par un avis concernant la qualité de l'eau potable d'une durée d'au moins un an; et

b) la Nation des Cris de Tataskweyak, la Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation qui choisit de se joindre à cette action à titre de représentant.

(11) **Période visée** : Du 20 novembre 1995 au 20 juin 2021.

(12) **Engagement** : Un engagement au sens de l'alinéa 3.02(1).

(13) **Procédure de règlement des différends relatifs à l'engagement** : Une procédure de règlement des différends relatifs à l'engagement au sens de l'article 3.07.

(14) **Dépenses dans le cadre de l'engagement** : Les dépenses dans le cadre de l'engagement au sens de l'alinéa 3.02(1)d)iv).

(15) **Tribunaux** : La Cour du Banc de la Reine du Manitoba et la Cour fédérale.

(16) **Action de Curve Lake** : L'action portant l'intitulé *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada*, n° de dossier de la Cour 1-1679 introduite devant la Cour fédérale le 11 octobre 2019.

(17) **Décision quant à l'admissibilité** : Une décision quant à l'admissibilité au sens du paragraphe 1.05(1).

(18) **Fonds excédentaires** : S'entend au sens du paragraphe 1.04(4).

(19) **Première Nation** : Une bande, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, ch. 1-5, dont l'aliénation des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24.

(20) **Première Nation membre du groupe** : Une Première Nation qui satisfait à la définition de statut de membre du groupe et qui fournit un avis d'acceptation aux avocats du groupe.

(21) **Dommages-intérêts de Première Nation** : Les dommages-intérêts de Première Nation au sens de l'article 2.04.

(22) **Formule de calcul des dommages-intérêts de Première Nation** : La formule de calcul des dommages-intérêts de Première Nation au sens de l'article 2.04.

(23) **Comité consultatif des Premières Nations sur l'eau potable salubre ou CCPNEPS** : Le Comité consultatif des Premières Nations sur l'eau potable salubre ou le CCPNEPS au sens de l'article 3.03(3).

(24) **Fonds pour la relance économique et culturelle des Premières Nations** : Le Fonds pour la relance économique et culturelle des Premières Nations au sens de l'article 1.04.

(25) **Transfert de fonds** : Sommes transférées des fonds en fiducie au Fonds pour la relance économique et culturelle des Premières Nations.

(26) **Terres des Premières Nations** : Les terres assujetties à la *Loi sur les Indiens*, L.R.C. 1985, ch. 1-5 ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24.

(27) **Personnes membres du groupe** : Les personnes physiques qui sont membres du groupe et qui n'ont pas choisi de s'exclure des actions.

(28) **Dommages-intérêts individuels** : Les dommages-intérêts individuels au sens de l'alinéa 2.01(2).

(29) **Formule de calcul des dommages-intérêts individuels** : La Formule de calcul des dommages-intérêts individuels au sens de l'article 2.01.

(30) **Avis concernant la qualité de l'eau potable à long terme** : Un avis concernant la qualité de l'eau potable pour une réserve ou une partie d'une réserve qui dure plus d'un (1) an.

(31) **Parties** : Les demandeurs, au nom du groupe, et le Canada, chacun d'entre eux étant une « **partie** ».

(32) **Demandeurs** : Doreen Spence, Nation des Cris de Tataskweyak, Emily Whetung, Première Nation de Curve Lake, Christopher Moonias et Première Nation de Neskantaga.

(33) **Accord de réparation** : Un accord de réparation au sens de l'alinéa 3.06(2).

(34) **Première Nation éloignée** : Chaque réserve qui est classée dans la zone 3 ou dans la zone 4 par Affaires autochtones et du Nord Canada dans le Manuel de classification des bandes de 2005 publié par la Direction générale de la gestion de l'information ministérielle, c'est-à-dire les réserves réputées être, soit « éloignées » (*Remote*), soit « isolées et nécessitant un accès spécial » (*Isolated and require Special Access*).

(35) **Loi remplaçante** : La loi remplaçante au sens de l'alinéa 3.03(2).

(36) **Réserve** : Les terres dont l'aliénation est assujettie à la *Loi sur les Indiens*, L.R.C. 1985, ch. 1-5 ou la *Loi sur la gestion des terres des premières nations*, L.C. 1999, ch. 24.

(37) **Compte du Fonds de relance** : Le compte du Fonds de relance au sens de l'article 1.04(2).

(38) **Entente de règlement** : Une entente de règlement définitive et juridiquement contraignante devant être signée par le défendeur et les demandeurs au plus tard le 27 août 2021, ou à

toute autre date dont les parties peuvent convenir, qui comprend les modalités de l'entente, sauf si les parties en conviennent autrement.

(39) **Préjudices déterminés** : Les préjudices déterminés au sens de l'alinéa 2.03(1).

(40) **Indemnité pour préjudices déterminés** : L'indemnité pour préjudices déterminés au sens de l'alinéa 2.03(2).

(41) **Compte d'indemnisation pour préjudices déterminés** : Le compte d'indemnisation pour préjudices déterminés au sens du paragraphe 2.03(3).

(42) **Fonds d'indemnisation pour préjudices déterminés** : Le Fonds d'indemnisation pour préjudices déterminés au sens du paragraphe 2.03(4).

(43) **Décision relative aux préjudices déterminés** : Une décision relative aux préjudices déterminés au sens de l'alinéa 2.03(5)b).

(44) **Excédent** : L'excédent au sens du paragraphe 1.03(3).

(45) **Action de Tataskweyak** : L'action intitulée *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada*, n° de dossier de la Cour CI 19-01-24661 de la Cour du Banc de la Reine du Manitoba introduite le 20 novembre 2019.

(46) **Compte en fiducie** : Le compte en fiducie au sens du paragraphe 1.03(1).

(47) **Fonds en fiducie** : Le Fonds en fiducie au sens de l'alinéa 1.03(2).

(48) **Première Nation insuffisamment desservie** : Une Première Nation insuffisamment desservie au sens du paragraphe 3.06(1).

(49) **Fonds pour la gouvernance de l'eau** : Le Fonds pour la gouvernance de l'eau au sens du paragraphe **Error! Reference source not found.**

1.02 **Administration**

(1) Les parties conviennent du choix de l'administrateur. Si les parties ne parviennent pas à une entente, toute partie peut présenter une requête pour obtenir des directives devant les tribunaux.

(2) L'administrateur est nommé par les tribunaux.

(3) Le Canada est seul responsable du paiement des honoraires et débours raisonnables de l'administrateur, y compris les taxes applicables.

1.03 **Fonds en fiducie**

(1) Dès que possible après sa nomination, l'administrateur doit établir un compte en fiducie portant intérêt à une Banque canadienne de l'annexe I (le « **compte en fiducie** »).

(2) Le Canada réglera le fonds en fiducie en versant un milliard quatre cent trente-huit millions de dollars (1 438 000 000 $) dans le compte en fiducie dans les soixante (60) jours suivant la

date à laquelle les ordonnances approuvant l'entente de règlement deviennent définitives, compte tenu des appels.

(3) Si les avocats du groupe, de l'avis d'un actuaire expert, déterminent qu'il y a des fonds non affectés dans le fonds en fiducie (l' « **excédent** »), ces fonds sont distribués au profit direct ou indirect du groupe.

(4) Les avocats du groupe, suivant les conseils des membres du groupe ou d'un comité représentatif de ceux-ci, proposeront une répartition de l'excédent, qui pourra comprendre ce qui suit :

i) le transfert d'un maximum de quatre cents millions de dollars (400 000 000 $) au Fonds pour la relance économique et culturelle des Premières Nations;

ii) l'augmentation des dommages-intérêts individuels ou des dommages-intérêts de Première Nation;

iii) des dommages-intérêts individuels ou des dommages-intérêts de Première Nation pour les demandeurs en retard qui ont présenté des réclamations valides après la date limite pour les réclamations;

iv) l'indemnisation pour préjudices déterminés si le Fonds d'indemnisation pour préjudices déterminés était insuffisant pour verser l'indemnité pour préjudices déterminés pour toutes les réclamations valides; ou

v) de la programmation visant à promouvoir l'éducation, les pratiques culturelles ou spirituelles, l'étude ou la guérison relative aux avis concernant la qualité de l'eau potable à long terme.

b) Les avocats du groupe présentent des requêtes pour obtenir des directives devant les tribunaux en vue de l'approbation de la distribution proposée de l'excédent.

(5) Il est entendu qu'il n'y aura pas de réversion au Canada des fonds en fiducie et que le Canada ne sera pas un bénéficiaire admissible de l'excédent.

1.04 **Fonds pour la relance économique et culturelle des Premières Nations**

(1) Les parties reconnaissent l'importance de fournir aux Premières Nations des fonds pour des projets liés à l'eau et aux eaux usées, au développement économique et aux activités culturelles. Les parties respectent l'autonomie des Premières Nations quant à l'utilisation des fonds.

(2) Dès que possible après sa nomination, l'administrateur doit établir un compte en fiducie portant intérêt à une Banque canadienne de l'annexe I (le « **compte du Fonds de relance** »).

(3) Le Canada finance le **Fonds pour la relance économique et culturelle des Premières Nations** en versant quatre cents millions de dollars (400 000 000 $) dans le compte du Fonds de relance dans les soixante (60) jours suivant la date à laquelle les ordonnances approuvant l'entente de règlement deviennent définitives, compte tenu des appels.

(4) Si des fonds demeurent dans le compte du Fonds de relance après l'expiration de la date limite pour les réclamations et que l'administrateur a payé tous les dommages-intérêts de Première Nation (les « **fonds excédentaires** »), ces fonds sont distribués au profit direct ou indirect du groupe.

(5) Les avocats du groupe, suivant les conseils des membres du groupe, proposeront une répartition des fonds excédentaires, qui pourra comprendre ce qui suit :

i) l'augmentation des dommages-intérêts individuels ou des dommages-intérêts de Première Nation;

ii) des dommages-intérêts individuels ou des dommages-intérêts de Première Nation pour les demandeurs en retard qui ont présenté des réclamations valides après la date limite pour les réclamations;

iii) l'indemnité pour préjudices déterminés si le Fonds d'indemnisation pour préjudices déterminés était insuffisant pour verser l'indemnité pour préjudices déterminés pour toutes les réclamations valides; ou

iv) de la programmation visant à promouvoir l'éducation, les pratiques culturelles ou spirituelles, l'étude ou la guérison relative aux avis concernant la qualité de l'eau potable à long terme.

b) Les avocats du groupe présentent des requêtes pour obtenir des directives devant les tribunaux en vue de l'approbation de la distribution proposée des fonds excédentaires.

(6) Il n'y aura pas de réversion au Canada du Fonds pour la relance économique et culturelle des Premières Nations et le Canada ne sera pas un bénéficiaire admissible des fonds excédentaires.

1.05 **Admissibilité**

(1) L'administrateur doit examiner chaque formulaire de réclamation, confirmation du conseil de bande ou tout autre renseignement qu'il juge pertinent pour identifier les membres admissibles du groupe (la « **décision quant à l'admissibilité** »). L'administrateur doit donner des motifs écrits lorsqu'il établit qu'un demandeur n'est pas un membre du groupe.

(2) Dans les trente (30) jours suivant la réception d'une décision quant à l'admissibilité refusant l'adhésion au groupe, le demandeur et toute partie peuvent interjeter appel de la décision d'admissibilité.

(3) La procédure d'appel à l'égard d'une décision quant à l'admissibilité est décidée par les parties.

ARTICLE 2 INDEMNISATION RÉTROSPECTIVE

2.01 **Calcul des dommages-intérêts des personnes membres du groupe**

(1) L'administrateur calculera les dommages-intérêts des personnes membres du groupe conformément à l'information présentée dans un formulaire de réclamation valide, une confirmation du conseil de bande ou tout autre renseignement qu'il juge pertinent, conformément à la formule énoncée ci-après (la « **formule de calcul des dommages-intérêts individuels** »).

(2) Les personnes membres du groupe recevront des dommages-intérêts (les « **dommages-intérêts individuels** ») :

a) Si la personne membre du groupe n'avait pas encore atteint l'âge de 18 ans le 20 novembre 2013, pour chaque année, au cours de la période visée, durant laquelle elle résidait habituellement dans une réserve pendant qu'un avis concernant la qualité de l'eau potable à long terme était en vigueur; ou

b) Si la personne membre du groupe avait atteint l'âge de 18 ans avant le 20 novembre 2013, pour chaque année du 20 novembre 2013 jusqu'à la fin de la période visée, durant laquelle elle résidait habituellement dans une réserve alors qu'un avis concernant la qualité de l'eau potable à long terme était en vigueur.

(3) Les dommages-intérêts individuels seront payés environ aux taux suivants, les taux réels devant être déterminés par les avocats du groupe sur avis d'un actuaire expert :

a) Mille trois cents dollars (1 300 $) par année pour un avis d'ébullition de l'eau qui vise une Première Nation qui n'est pas une Première Nation éloignée;

b) Mille six cent cinquante (1 650 $) par année pour un avis de non-consommation qui vise une Première Nation qui n'est pas une Première Nation éloignée;

c) Deux mille dollars (2 000 $) par année pour un avis de non-utilisation qui vise une Première Nation qui n'est pas une Première Nation éloignée; et

d) Deux mille dollars (2 000 $) par année pour tout avis concernant la qualité de l'eau potable d'une Première Nation éloignée.

(4) Les dommages-intérêts individuels seront payés au prorata de toute partie d'une année pour laquelle ils sont exigibles.

2.02 **Paiement des dommages-intérêts individuels des membres du groupe**

(1) Dans un délai raisonnable que les parties doivent fixer en consultation avec l'administrateur, l'administrateur doit verser à chaque personne membre du groupe les dommages-intérêts individuels des fonds en fiducie conformément à la formule de calcul des dommages-intérêts individuels.

2.03 **Fonds d'indemnisation pour préjudices déterminés**

(1) En plus des dommages-intérêts individuels, les personnes membres du groupe peuvent indiquer sur leur formulaire de réclamation qu'ils réclament des dommages-intérêts pour des conditions médicales précises qui ont été causées par un avis concernant la qualité de l'eau potable à long terme dans une réserve où elles résidaient habituellement (les « **préjudices déterminés** »). Il est entendu que le demandeur doit établir que le préjudice a été causé par l'utilisation d'eau, autre que l'eau de source, conformément à un avis concernant la qualité de l'eau potable à long terme ou par le manque d'eau propre pendant un avis concernant la qualité de l'eau potable à long terme.

(2) Les parties déterminent la liste des préjudices déterminés, ainsi que l'indemnité pour chaque préjudice déterminé (l'« **indemnité pour préjudices déterminés** »).

(3) L'administrateur doit établir un compte en fiducie portant intérêt à une Banque canadienne de l'annexe I (le « **compte d'indemnisation pour préjudices déterminés** »).

(4) Le Canada réglera le **Fonds d'indemnisation pour préjudices déterminés** en versant cinquante millions de dollars (50 000 000 $) dans le compte d'indemnisation pour préjudices déterminés dans les soixante (60) jours suivant la date à laquelle les ordonnances approuvant l'entente de règlement deviennent définitives, compte tenu des appels.

(5) Les parties conviennent de ce qui suit :

a) Les moyens de prouver un préjudice déterminé d'une manière non conflictuelle et culturellement sensible de manière à ne pas traumatiser de nouveau les demandeurs;

b) Un délai approprié pour que l'administrateur détermine la validité d'une demande d'indemnisation pour des préjudices déterminés (une « **décision relative aux préjudices déterminés** »); et

c) Un mécanisme d'appel et un calendrier appropriés;

(6) Les avocats du groupe aident les personnes membres du groupe ou leurs représentants, sur demande, à présenter une demande d'indemnisation pour préjudices déterminés ou à faire appel d'une décision relative aux préjudices déterminés sans frais pour le Canada ou la personne membre du groupe.

(7) Dans les quatre-vingt-dix (90) jours suivant la date limite pour les réclamations, l'administrateur doit déterminer s'il y a suffisamment de fonds dans le Fonds d'indemnisation pour préjudices déterminés pour payer l'indemnité pour chaque réclamation valide.

a) S'il y a suffisamment de fonds dans le Fonds d'indemnisation pour préjudices déterminés, l'administrateur doit verser à chaque membre du groupe l'indemnité pour préjudices déterminés; ou

b) En cas d'insuffisance de fonds dans le Fonds d'indemnisation pour préjudices déterminés, l'administrateur verse aux personnes membres du groupe leur quote-part du Fonds d'indemnisation pour préjudices déterminés, proportionnelle à l'indemnisation pour les préjudices déterminés qui leur seraient dus.

(8) Il n'y a pas de réversion au Canada du Fonds d'indemnisation pour préjudices déterminés.

(9) Si des fonds restent dans le Fonds d'indemnisation pour préjudices déterminés après avoir payé toutes les demandes d'indemnisation pour les dommages déterminés, l'administrateur les verse au fonds en fiducie.

2.04 **Calcul des dommages-intérêts de Première Nation membre du groupe**

(1) L'administrateur calcule les dommages-intérêts de Première Nation membre du groupe selon la formule indiquée ci-après (la « **formule de calcul des dommages-intérêts de Première Nation** »).

(2) Chaque Première Nation membre du groupe recevra une indemnité de base de cinq cent mille dollars (500 000 $) (l'« **indemnité de base** »).

(3) En plus de l'indemnité de base, les Premières Nations recevront un montant correspondant à cinquante pour cent (50 %) des dommages-intérêts individuels payés aux personnes

membres du groupe à l'égard des avis concernant la qualité de l'eau potable dans les réserves ou réserves des Premières Nations membre du groupe (les « **dommages-intérêts de Première Nation** »).

2.05 **Paiement des dommages-intérêts des Premières Nations membres du groupe**

(1) L'administrateur paie l'indemnité de base et les dommages-intérêts de Première Nation provenant du Fonds pour la relance économique et culturelle des Premières Nations.

(2) L'administrateur paie l'indemnité de base à chaque Première Nation membre du groupe dans les quatre-vingt-dix (90) jours suivant l'approbation de l'entente de règlement par les tribunaux, y compris tous les appels, et à une Première Nation membre du groupe qui donne un avis d'acceptation aux avocats du groupe.

(3) Tous les six (6) mois après que l'indemnité de base a été versée conformément au paragraphe 2.05(2), l'administrateur paie à la Première Nation membre du groupe les dommages-intérêts de Première Nation qui ont été accumulés à ce jour.

2.06 **Aucune disposition relative aux préjudices continus**

(1) L'entente ne prévoit pas que des dommages-intérêts seront accordés aux membres du groupe à l'égard des avis concernant la qualité de l'eau potable à long terme qui commencent ou se poursuivent après le 20 juin 2021, et les membres du groupe ne renoncent pas à quelque réclamation à l'égard de ces dommages-intérêts futurs.

2.07 **Responsabilité du Canada**

(1) Les parties conviennent expressément qu'au moment de faire les paiements prévus dans l'entente de règlement, la responsabilité du Canada envers les personnes membres du groupe et les Premières Nations membres du groupe qui ont accepté l'entente de règlement pour les préjudices jusqu'au 20 juin 2021, en raison du défaut du Canada de fournir de l'eau potable propre, est terminée.

(2) Les parties devront convenir d'un libellé de renonciation spécifique pour l'entente de règlement.

ARTICLE 3 RÉPARATION PROSPECTIVE

3.01 **Plan d'action pour les Premières Nations membres du groupe devant être mis en œuvre**

(1) Le Canada déploie tous les efforts raisonnables pour appuyer l'élimination des avis concernant la qualité de l'eau potable à long terme qui concernent les membres du groupe, y compris en prenant les mesures énoncées dans le plan d'action, dans les délais prévus dans le projet.

(2) Le plan d'action peut être modifié avec le consentement des parties, en plus d'être mis à jour régulièrement par le Canada au fur et à mesure que des progrès sont réalisés.

(3) Aucune disposition de l'entente n'empêche le Canada de prendre des mesures supplémentaires au profit des membres du groupe, mesures qui ne sont pas prévues dans le plan d'action.

3.02 **Engagement à prendre des mesures supplémentaires**

(1) En plus du plan d'action, le défendeur doit faire tous les efforts raisonnables pour veiller à ce que les personnes membres du groupe qui vivent sur les réserves aient régulièrement accès à l'eau

potable à leur domicile, que ce soit à partir d'un réseau d'eau public ou privé approuvé par une résolution du conseil de bande, y compris les systèmes sur place, qui respecte les exigences les plus strictes entre les exigences fédérales ou les normes provinciales régissant la qualité de l'eau résidentielle (l'« **engagement** »). Il est entendu :

a) qu'un accès courant doit permettre toutes les utilisations habituelles et nécessaires de l'eau dans une maison canadienne située dans un endroit similaire, y compris, notamment, l'eau potable, pour se laver et pour l'hygiène personnelle, pour la préparation d'aliments et pour laver la vaisselle, pour l'assainissement et pour la blanchisserie;

b) que l'engagement se limite aux efforts raisonnables du Canada, y compris la fourniture réelle de financement au titre des coûts, de formation, de planification et d'assistance technique;

c) que si, malgré les efforts raisonnables du Canada, un accès courant ne peut être obtenu, le Canada n'est pas tenu de garantir un accès courant au domicile d'une personne membre du groupe; et

d) que les facteurs qui peuvent être pris en compte dans la détermination des efforts raisonnables comprennent, notamment :

i) les points de vue de la Première Nation;

ii) les exigences fédérales ou les normes et protocoles provinciaux relatifs à l'eau;

iii) si de la surveillance et des essais sont effectués sur le réseau d'alimentation en eau; et

iv) l'emplacement physique du domicile, y compris la proximité des réseaux d'alimentation en eau centralisés et l'éloignement.

(2) Le Canada doit dépenser au moins six milliards de dollars (6 000 000 000 $) jusqu'en 2030, comme le prévoit le Budget principal des dépenses de Services aux Autochtones Canada, au taux d'au moins quatre cents millions de dollars (400 000 000 $) par année, pour respecter l'engagement en finançant le coût réel de la construction, de la mise à niveau, de l'exploitation, de l'aménagement et de l'entretien de l'infrastructure de l'eau dans les réserves pour les Premières Nations (les « **dépenses dans le cadre de l'engagement** »).

a) Le Canada doit remettre aux avocats du groupe un état annuel de toutes les dépenses dans le cadre de l'engagement jusqu'en 2030.

b) Sur demande, le Canada remet à toute Première Nation membre du groupe un état des dépenses dans le cadre de l'engagement qu'il a reçu.

3.03 **Abrogation et remplacement de la Loi sur la salubrité de l'eau potable des Premières Nations**

(1) Le Canada fera tous les efforts raisonnables pour déposer une loi abrogeant la *Loi sur la salubrité de l'eau potable des Premières Nations*, L.C. 2013, ch. 21 (la « ***LSEPPN*** ») au plus tard le 31 mars 2022.

(2) Le Canada fera tous les efforts raisonnables pour élaborer et déposer une loi remplaçant la LSEPPN (la « **loi remplaçante** »), en consultation avec les Premières Nations, et pour déposer cette loi au plus tard le 31 décembre 2022.

(3) La loi remplaçante vise les objectifs suivants :

a) Assurer la viabilité des réseaux d'approvisionnement en eau des Premières Nations, en fonction des prémisses suivantes :

i) Définir des normes minimales de qualité de l'eau pour les réseaux d'approvisionnement en eau des Premières Nations, compte tenu des normes qui s'appliquent directement aux collectivités des Premières Nations; et

ii) Définir des normes minimales de capacité pour l'approvisionnement en eau des collectivités des Premières Nations, quant au volume par personne membre de la collectivité;

b) Élaborer une approche transparente pour la construction, l'amélioration et la prestation de services d'approvisionnement en eau potable et de traitement des eaux usées pour les Premières Nations;

c) Confirmer le financement adéquat et durable des réseaux d'approvisionnement en eau et de traitement des eaux usées des Premières Nations; et

d) Appuyer la prise en charge volontaire de l'infrastructure d'approvisionnement en eau et de traitement des eaux usées par les Premières Nations.

(4) Indépendamment de son engagement de déposer la loi remplaçante, le Canada appuie l'élaboration d'initiatives en matière de gouvernance des Premières Nations, comme il est décrit à l'article 3.04, ci-après.

3.04 **Comité consultatif des Premières Nations**

(1) Le Canada fournit vingt millions de dollars (20 000 000 $) de financement jusqu'à l'exercice 2025/2026, pour la création du comité consultatif des Premières Nations sur l'eau potable salubre (le « **CCPNEPS** »).

(2) La composition du CCPNEPS est représentative de la diversité des collectivités, des langues, des genres, des territoires, des compétences, des connaissances et de l'expérience de la précarité de l'approvisionnement en eau des Premières Nations membres du groupe au Canada.

(3) Le CCPNEPS est investi des fonctions principales suivantes :

a) Travailler avec les Premières Nations membres du groupe à assurer une supervision et un encadrement et à faire des recommandations à Services aux Autochtones Canada propres à favoriser l'élaboration et la mise en œuvre d'initiatives stratégiques prospectives, y compris notamment :

i) L'élaboration de la stratégie à long terme pour l'approvisionnement en eau et le traitement des eaux usées de Services aux Autochtones Canada dans les réserves des Premières Nations membres du groupe; et

ii) L'élaboration de la loi remplaçante;

b) Fournir à Services aux Autochtones Canada des conseils et des perspectives stratégiques propres à favoriser la viabilité à long terme pour de l'eau potable salubre dans les collectivités des Premières Nations; et

c) Appuyer l'établissement des besoins et des priorités du financement pour l'approvisionnement en eau et le traitement des eaux usées dans les collectivités des Premières Nations.

(4) Les parties établissent conjointement le mandat du CCPNEPS.

3.05 **Initiatives en matière de gouvernance des Premières Nations**

(1) Le Canada fournit neuf millions de dollars (9 000 000 $) de financement aux Premières Nations pour qu'elles élaborent leurs propres règlements et initiatives en matière de gouvernance jusqu'à l'exercice 2025/2026 (le « **Fonds pour la gouvernance de l'eau** »).

(2) La capitalisation du Fonds pour la gouvernance de l'eau s'effectue jusqu'à la période indiquée, que la loi remplaçante soit ou non adoptée, notamment dans les délais prévus.

(3) Le Fonds pour la gouvernance de l'eau aide les Premières Nations membres du groupe qui souhaitent élaborer leurs propres initiatives en matière de gouvernance de l'eau, notamment pour la recherche, l'obtention de conseils techniques, la rédaction de règlements et la mise en œuvre de projets pilotes dans les communautés des Premières Nations.

(4) Les parties établissent conjointement le mandat du Fonds pour la gouvernance de l'eau.

3.06 **Accord sur les mesures requises**

(1) Le Canada doit consulter sans délai chaque Première Nation membre du groupe qui l'avise que l'engagement n'est pas respecté ou qu'il cesse d'être respecté (chacune étant une « **Première Nation insuffisamment desservie** ») en vue de respecter l'engagement.

(2) Le Canada doit déployer tous les efforts raisonnables pour parvenir à un accord avec la Première Nation insuffisamment desservie précisant les mesures qui sont nécessaires pour respecter l'engagement (un « **accord de réparation** »).

(3) Le Canada et la Première Nation insuffisamment desservie doivent se conforment à l'accord de réparation.

3.07 **Règlement des différends concernant les mesures requises**

(1) Si le Canada ne parvient pas à un accord de réparation avec une Première Nation insuffisamment desservie après six (6) mois, le Canada et la Première Nation insuffisamment desservie soumettent chacun leur projet d'accord de réparation à un processus de règlement des différends (la « **procédure de règlement des différends relatifs à l'engagement** »).

(2) La procédure de règlement des différends relatifs à l'engagement sera élaborée conjointement par les parties et intégrera les pratiques de règlement des différends autochtones.

[Cet espace a été volontairement laissé en blanc]

LES PARTIES CONVIENNENT DES MODALITÉS CI-DESSUS et elles négocieront de bonne foi et feront tous les efforts raisonnables pour signer l'entente de règlement au plus tard le 27 août 2021, ou à toute autre date dont les parties peuvent convenir.

Nation des Cris de Tataskweyak

(signé) Doreen Spence
Cheffe Doreen Spence pour son propre compte et pour le compte de la Nation des Cris de Tataskeweyak
Date : Le 21 juillet 2021

Première Nation de Curve Lake

(signé) Emily Whetung
Cheffe Emily Whetung pour son propre compte et pour le compte de la Première Nation de Curve Lake
Date : Le 19 juillet 2021

Première Nation de Neskantaga

(signé) Wayne Moonias
Chef Wayne ~~Christopher~~ Moonias pour son propre compte et pour le compte de la Première Nation de Neskantaga
Date : Le 27 juillet 2021

Procureur général du Canada

(signé)
Catharine Moore/Scott Farlinger
Avocat du procureur général du Canada
Date : Le 29 juillet 2021

ANNEXE « A »

Plan d'action relatif aux avis concernant la qualité de l'eau potable à long terme : rapport d'étape aux deux semaines

Mise à jour : 25 juin 2021

Progression relativement aux AQEP à long terme depuis novembre 2015							
Région	AQEP LT en vigueur	Nbre de collectivités touchées par les AQEP LT	AQEP LT ajoutés depuis nov. 2015	AQEP LT levés depuis nov. 2015	Nbre d'AQEP LT émis/levés depuis novembre 2015	AQEP en vigueur depuis 2 à 10 mois	AQEP levés en vigueur depuis 2 à 10 mois
ATL	[illegible]	4	[illegible]	1	4	1	1
SO	[illegible]	2	[illegible]	1	2	0	1
GRE	[illegible]	69	[illegible]	10	3	3	10
NIP	[illegible]	1	[illegible]	10	1	1	10
SUD	[illegible]	4	[illegible]	17	2	2	17
NOR	[illegible]	2	[illegible]	2	2	0	10
C.-B.	[illegible]	2	[illegible]	10	2	1	10
TNO	[illegible]	4	[illegible]	10	2	0	0
Total	[illegible]	88	[illegible]	101	3	8	100

Mentions

[illegible] LT et autres éléments à considérer

AQEP LT susceptible de devenir un avis à long terme

AQEP levé depuis le dernier rapport

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des districts										
"Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant avis définitif dans les rapports. "Les nouvelles dates cibles sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates cibles seront normalisées au fur et à mesure de l'avancement des projets.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date cible**
ON	Beardmi Lake	Beardmi Lake Community Centre Public Centre Semi-Public Public System (n° 17219) Ne pas tenir Hors dépôt Avec Eau	01/02/2008	01/02/2007	0	1	Les travaux d'urgence sont maintenus aux recommandations de l'Ontario.	Long terme : Mise à niveau [illegible] de la station, prolongement du réseau de canalisations. Court terme : Camion à la citerne du centre communautaire	- La Première Nation a accepté une version provisoire modifiée d'une citerne au centre communautaire) projet approuvé - Des exercices ont lieu à mise au secours de la solution provisoire. - Les représentants de SAC ont été informés par le conseil le 18 janvier 2021 que la nouvelle citerne avait été installée à l'entrée, la propriété de la citerne au centre provisoire a été donnée. l'équipement est mis en service 2021. Fin mars 2021, l'entrepreneur a été informé que le model des travaux de plomberie était terminée, l'entrepreneur recommandait un réservoir de 2 700 litres, plutôt que trois réservoirs de 1 100 litres (les petits réservoirs seront utilisés comme remplacement pour les citernes remplies par camion). Depuis les gestion du projet (PGP), est d'accord. Avril 2021 : nouveau réservoir sur place. à la demande de la collectivité, l'entrepreneur a retardé la installation au 12 mai 2021. l'entrepreneur est arrivé sur les lieux le 6 juin 2021. les travaux sur le système d'eau étaient commencer le jeudi au 10 juin 2021. l'entrepreneur a fait savoir qu'il faudrait 7 à 14 jours pour terminer les travaux. Les représentants régionaux continuent les activités de sensibilisation, en respectant les autres priorités de la collectivité, y compris la santé publique pendant la pandémie. La solution à long terme, un projet intégré dont les coûts sont évalués à plus de 30 MB, dont certains des recommandations relatives à l'eau, aux eaux usées et aux services publics, on publie actuellement qu'il faudra de trois à quatre ans pour réaliser le projet (son financé, des discussions en cours mai 2021 avec la direction de la collectivité on permis de convenir d'une approche en plusieurs phases. "Etat", avec le conseil tribal de Windigo à la tête, travaille à l'élaboration de documents d'approbation pour la conception détaillée de la mise/modern de la station de traitement d'eau et de l'étang d'épuration, dans l'objectif d'entamer les activités de conception en 2021-2022. Soutien opérationnel fourni à la collectivité par le conseil tribal de Windigo, avec le soutien financier de SAC.	07/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date clos**
ON	Beardy's Lake	Beardy's Lake Nursing Station Water Private Water AGEP depuis février 2020	28/02/2020	28/02/2021	4	1	Puits n'ayant seulement subi un traitement à désinfection	**Court terme** : Installation d'un système de traitement pour l'immédiat **Court terme** : s.o.	Beardy's Lake a déclaré l'état d'urgence en raison de la COVID-19 avec restrictions subséquentes sur les déplacements dans la collectivité Une entente rencontre entre SAC et le Conseil tribal de Windigo a eu lieu le 28 juillet 2020. Windigo a confirmé avec la collectivité pour élaborer une proposition relative à l'évaluation du puits, la conception d'un système de traitement approprié et une maintenance/surveillance continue SAC collabore avec la Première Nation et la pile concernés à l'idée du conseil tribal de Windigo pour la conception, l'installation et l'exploitation d'un système de traitement des eaux souterrain pour le puits de puits intérieur de la résidence SAC a reçu une demande de financement de la Première Nation qui donne un aperçu de ce puits, du calendrier et du coût du projet proposé. Le financement a été approuvé et le conseil de la Première Nation de Windigo a informé des représentants de SAC que les services d'une firme d'ingénierie avaient été retenus pour commencer les travaux en vue de définir le système de traitement de la source d'eau souterraine souhaité, le calendrier du projet est à venir L'AGEP a été constitutive de financement a été accordé. Windigo a envoyé un courriel au chef le 12 avril pour confirmer l'approbation du financement du projet, le 5 mai 2021, SAC a été informé que la collectivité avait donné à l'ingénieur-conseil l'autorisation de procéder. L'expert-conseil collabore avec l'ENAT pour planifier les dispositions afin de se rendre dans la collectivité et réaliser l'évaluation du site. Une évaluation sur place doit prévue le 17 juin 2021, le nouveau calendrier du projet sera alors établi. L'opérateur local de la STE a effectué un examen pour l'analyse de qualité de l'eau brute. Celle continue liée à la coordination et à la communication	08/2021
ON	Chippewas of Rama	Cape Croker Public Water System AGEP depuis janvier 2019	21/01/2019	21/01/2020	282	20	Le réseau satisfait aux exigences minimales de traitement	**Long terme** : Nouvelle station de traitement en prolongement du réseau de distribution **Court terme** : Option non privilégiée par la Première Nation	**Long terme** - conception dans une proportion de 99 % pour les travaux de distribution, conception dans une proportion de 99 %, pour les travaux de traitement estimés en juillet 2021 a été reçue par SAC et est à l'étude. Ils incluent des services de traitement sélectionné. Évaluation terminée de la préqualification de l'entrepreneur générale pour le réseau de distribution, préqualification en cours pour l'entrepreneur général du Conseil tribal de Windigo. La Première Nation a demandé une plus grande portée du projet pour que le réseau de distribution et le débit pour les services d'incendie desservent les ménages sur les réseaux de service (WSS), de SAC et l'approbation du financement, discussions avec la Première Nation pour une portée en conformité avec les WSS de SAC. SAC a rencontré le collectivité en janvier 2021 une visite exécutée non prévues du (3) (99 à 61 kB) La conception dans une proportion de 99 % pour les travaux de distribution soumise à SAC le 29 mars 2021 a été examinée et des commentaires ont été émis Rencontre entre SAC et le chef en février 2021 pour discuter de la demande de la Première Nation d'approuver le nouveau (...) à 7 de 60 000 et de financer tous les éléments du projet au delà des WSS, le collectivité a indiqué qu'il a pas terminé subséquemment qu'elle était favorable à ce partage partiel des coûts pour les éléments en dehors des WSS, le collectivité a indiqué qu'elle pouvait fournir une contribution de 700 000 $. Réponses apportées à la demande de changement en fonction de l'examen national de l'entité 1 et devis AGEP révisé de l'ingénieur-conseil, informations transmises à la collectivité et approuvée, soumis par des représentants régionaux pour approbation et examen, le projet doit être présenté en juin 2021 **Solution provisoire** : station contenaire/unité mécanique, la Première Nation a volontairement mis en pas poursuivre cette option, mais l'a ensuite acceptée, la Première Nation a fourni à SAC la correspondance officielle le 27 août 2020 confirmant sa demande de retenues à la solution provisoire pour compenser le financement au projet à long terme.	11/2021
ON	Deer Lake	Deer Lake Public Water System AGEP depuis octobre 2019	15/10/2019	15/10/2020	220	6	Échantillonnage inchangé	**Court terme** : Il détermine du risque d'une étude de faisabilité **Court terme** : Amélioration des activités et de la surveillance	AGEP en vigueur en raison d'incidences opérationnelles, les opérateurs devront poursuivre à "AGEP des échantillons bactériologiques pendant quatre semaines à-dire de chaque des échantillonnages combinés pour analyse en laboratoire. La collectivité reçoit du matériel opérationnel fourni par le conseil tribal de Keewaytinook Okimakanak (KO), axés, le soutien financier de SAC. Les trois responsables de SAC ont rencontré le chef et le conseil en septembre 2020 pour encourager une amélioration des activités La pile a offert une formation aux opérateurs sur les techniques d'échantillonnage, la pile a fait part d'une amélioration du contrôle de la qualité d'eau et des autres fonctions opérationnelles en janvier 2021, en février 2021, le contrôle de la qualité d'eau (...) a pas été effectué à la fréquence requise Le 12 mai 2021, le pilier de KO a informé les responsables de SAC qu'il y a plus de problèmes techniques à court terme, le statut filtrant et la valve de (arrêt/le du débit) ont été remplacés avec succès, les tests effectués le 28 avril 2021 indiquaient que l'eau de la station était conforme aux recommandations applicables. l'échantillonnage/test doit être fait chaque semaine pour vérifier le conformité, problèmes opérationnels récurrents	À déterminer

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réservoir

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront révisées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu ou devra être LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation actuelle	Date clos**
									SAC travaille avec la collectivité pour faire progresser l'étude de faisabilité pour des besoins à long terme, le financement des faits saillants et les répercussions immédiates au système suivant remplacement des filtres) ont été approuvés par SAC en décembre 2020, approximativement consacrées pour l'étude de faisabilité finale. Évaluation des propositions terminée et rapport soumis (mois en avril 2021. Réunion de remontée du 20 avril. Ébauche prévue du document d'information/rapport sur les besoins en juillet 2021 Les responsables régionaux de SAC collaborent avec le plus pour discuter avec le collectivité du besoin de surveillance et pour offrir du soutien	
ON	Première Nation Attawapiskat	Attawapiskat Public Water System (#17132) AWP depuis août 2021	21/08/2021	21/08/2022	287	12	La province de traitement et le réseau de distribution ne sont pas l'objet de recommandations.	Mise en service, Fonctionnement et modernisation de la station de traitement d'eau existante Travail terminé - 4.1	Fonctionnement, modernisation et mise en service terminée Inspection de l'INSPP en octobre 2019, des déficiences opérationnelles ont été corrigées La Première Nation a demandé un financement pour d'autres travaux à la STE et pour remplacer le système d'eaux usées avant de avoir l'AUEP. le financement a été approuvé en octobre 2020 des travaux restent en suspens en raison des problèmes survenus le mauvais approvisionnement Inspection se déroulera le 19 novembre 2020, certaines parties des travaux sur les eaux usées ont été achevées avant janvier 2021, des restrictions en raison de la COVID-19 ont entravé des travaux. l'entrepreneur a fait savoir que le calendrier des travaux sur les dernières sources (électriques de eaux usées). travaux de génie civil mineurs) sera établi le semaine du 14 juin 2021 L'échantillonnage indique que le couvercle immédiat de quatre résultats d'analyse des THM et AHA en 2020-2021 est inférieure à la concentration maximale acceptable L'INSPP de Wabasca a indiqué le 7 mai 2021 que des échantillons récupérés et la déclaration des problèmes opérationnels restent nécessaires avant la publication d'une recommandation Le problème du fonctionnement inopportun et intermittent a été résolu(e) en janvier 2020, et Première Nation) voulait exploiter le système pendant un an avant de faire la levée demande de l'équivalent (inadéquat) de n'entretien à 100 %. la collectivité n'a pas transmis les conclusions sur les coûts d'exploitation et d'entretien. correspondance entre SAC et le chef en janvier et décembre 2020 Réunion le 26 mars 2021. la collectivité est ouverte à la vente de travailleurs externes. rencontrer régulièrement de l'INSPP. réunion le 10 mai 2021 pour discuter des problèmes d'eaux usées. des sous le retrait de l'AUEP LT. la Première Nation élabore une demande de financement afin d'entreprendre une évaluation Jason Meshequenous chargé du nettoyage du système d'eaux usées. le nettoyage/pompage doit achevé le 23 avril. SAC n'a reçu aucune mise à jour de l'AN La correspondance entre le chef et SAC indique l'intérêt pour le démolition de l'APEU LT une fois un plan mis en place pour corriger les lacunes en matière d'exploitation et de construction En raison des problèmes touchant le réseau d'égout, le EER est fermée par intermittence afin de contrôler le débit d'eaux usées. la collectivité a demandé un approvisionnement et un remboursement pour l'eau embouteillée. SAC a approuvé le financement de l'eau embouteillée pour 2021-2022 Soutien opérationnel fourni par le conseil tribal de Wabasca, avec le soutien financier de SAC.	A déterminer
ON	Marten Falls	Marten Falls Public Water System (#17134) AUEP depuis juillet 2020	19/07/2020	19/07/2020	91	4	La système de traitement produit de l'eau qui ne respecte pas les recommandations.	Mise en service, fonctionnement du système de traitement et le station secondaire et modernisation des installations Travail terminé - 1.1	La construction a été achevée en mars 2019, la résidence locale de mise en service a été achevée avec succès en juin 2019 Fin du nivelage de réseau de distribution en juillet 2019 Le rapport d'évaluation du MEPP (juillet 2019) a révélé des déficiences opérationnelles, les problèmes on été réglés en novembre 2019. L'échantillonnage répond aux exigences, mais l'INSPP de Wabasca ne recommande pas encore la levée de l'avis L'INSPP a indiqué que quatre séries d'échantillons consécutifs pour l'analyse des THM et des AHA (avril, octobre et décembre 2020 et février 2021) ne révèlent rien des limites réglementaires applicables (tels au sinon de la concentration maximale acceptable recommandée par Immédiat) Inspection de garantie terminée, au 29 mars 2021. toutes les leçons de la STE ont été corrigées comme suivi des corrigées. rapport d'achèvement présenté le 10 mars 2021 Lettre du chef en janvier 2021 décrivant les préoccupations de la collectivité quant à l'exploitation et l'entretien, le fonctionnement en l'opposition en matière de gestion d'actifs à vérifié Réunion le 22 avril 2021 pendant laquelle le chef a fait part de la lettre du 4 avril 2021 et visite au ministre pour obtenir des engagements relatifs à un un financement d'exploitation et d'entretien à 100 % lorsqu'un des derniers mettez. à un système de gestion des actifs. c) la préparation de Wabasca pour un fonctionnement en bon temps par une	A déterminer

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu ou AGEP (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date clos**
									Dans la correspondance de l'AGEP de Mateus datée du 5 mars 2021, la Première Nation a été avisée que l'AGEP demeurerait en vigueur jusqu'à ce que deux échantillons d'eau bactériologiques consécutifs soient prélevés à 24 heures d'intervalle pour se conformer aux exigences applicables. Actuellement, il n'a pas été fait et est plus susceptible de se faire sous un bon règlement des préoccupations du chef et du conseil à l'égard du fonctionnement inopportun et d'entretien, de l'approche de gestion des actifs et du fonctionnement. Source : questionnaire fourni par le conseil tribal de Mateus, par l'intermédiaire du plan de l'eau potable et des eaux usées, financé par SAC.	
ON	Wahnapaegamang Ten Second Systems (ESA) (n° 1180) ; AGEP depuis juin 2019	Wahnapaegamang Ten Second Systems (ESA) (n° 1180) ; AGEP depuis juin 2019	10/06/2019	10/06/2020	30	2	Le système de traitement va satisfaire aux nos exigences d'EQ/ODS. Problèmes d'exploitation et d'entretien.	Leurs devoirs : Nécessité d'aider de traitement d'eau Leurs devoirs : Amélioration de systèmes de traitement.	Procédente – Nouveau système clos en novembre 2020 L'ANDP a indiqué que quatre semaines d'échantillonnage étaient nécessaires pour confirmer la sécurité. l'opérateur responsable général (OPG) soutient les opérateurs, des défis opérationnels persistent Échantillonnage par l'ANDP le 05 janvier 2021 ; résultats défavorables remis à la bande en manquantes le 2 février 2021 (OPATTC à participé activement) Février 2021 : le COVID a retardé le soudeur qui allait du pôle, défis opérationnels toujours présents Le chef a informé le personnel en cours 2021 de l'importance d'une surveillance générique. l'OPATTC a indiqué au conseil de consulter directement avec des opérateurs locaux Soudeur opérationnel offert par l'OPATTC, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées avec le soutien financier de SAC. l'OPG de retour sur le site la semaine du 26 avril 2021 pour une période de deux semaines. Le 6 mai 2021, l'OPG a confirmé que les essais effectuaient une conformité pour le manganèse. l'OPG a organisé une amélioration des pratiques de surveillance de l'eau avant la distribution à l'intérieur de trois séries d'analyses bactériologiques. le 17 mai 2021, l'OPG a communiqué de très bons résultats par suite de modifications mineures du système de traitement. l'OPG prévoit retourner sur le site le 7 juin 2021 Le 28 mai 2021, l'ANDP a indiqué que, avec une surveillance, les doublets des essais avaient été reçus pendant trois semaines Le 1er juin 2021, l'OPG a signalé que les échantillons bactériologiques reçus n'avaient pas été prélevés Le phase de conception de la modernisation a long terme de la STE est terminée, le C.A.T. est passé de 3,75 MB à 9 MB, la Première Nation a reçu l'approbation du financement pour la phase de construction. l'appel d'offres concurrentiel a pris fin, toutes les soumissions dépassaient le budget approuvé pour le projet. SAC a approuvé un financement pour doubler ce montant (1 A.T. de 11,2 MB) Phase de construction en cours, dadaïdad prévue en novembre 2021, la construction respectera la calendrier	27/2021
ON	Première Nation des Wesmesiagas de Grupeg Island	Grupeg Community Water System 1 (Public Water System n° 15985) ; AGEP depuis octobre 2008	22/12/2008	22/10/2009	6	0	Les systèmes de traitement ne satisfont pas aux exigences d'EQ/ODS	Leurs devoirs : Nécessité d'aider de traitement, réchauffage eau et et niveau de distribution Leurs devoirs : s.o.	Construction des nouveau puits et à une station de traitement, stockage accru, modernisation de la station de pompage en réseau, de distribution terminale, des travaux connexes d'aménagement paysager en 9 points environ, devant être réalisés et complets au printemps 2021 Les services d'un ANDP ont été retenus et les entrepreneurs en cours en service potentiel aux exigences contractuelles Demande exigeante pour le contrat remis à la STE eau et le réseau de distribution est en cours. Il reste plusieurs travaux, aménagement paysager, etc., on un plan d'action est en cour d'élaboration par l'entrepreneur pour les corriger, période de garantie expirée le 22 mai 2021 La Première Nation croge que 55 maisons environnent actuellement par des puits privés seront raccordées au nouveau réseau suite à visite de face, comprend des travaux à l'intérieur des maisons, le COVID a occasionné des retards Rencontre entre le chef et le conseil en décembre 2020, a indiqué que le contrat pour le raccordement aux services publics de deux bâtiments publics et de deux bâtiments semi-publics, en plus de 55 maisons aussi été prévue. travaux devaient être terminés d'ici le 31 mars 2021, le chef a demandé au SAC un soutien financier pour le contrat de construction d'environ 750 000 $, SAC a approuvé le financement supplémentaire Retards dans la construction attribuables aux restrictions de la COVID. le chef et le conseil ont déplacé les travaux au 1er février 2021 par souci de sécurité à l'égard des travaux à l'intérieur des maisons. reunion du 15 déf au 24 février 2021 pour confirmer le calendrier de démarrage et les paramètres de santé et de sécurité. le 15 des travaux n'était pas prévue avant juillet 2021 Les travaux de construction ont commencé, l'entrepreneur a effectué des forages directionnels sur environ propriétés dans la collectivité et le chargé des raccordements de service n'est pas prêt de visites	28/2021
ON	Première Nation des Wesmesiagas de Grupeg Island	Grupeg Health Centre Semi-Public Water System n° 17337) ; AGEP depuis octobre 2008	22/12/2008	22/10/2009	0	1				28/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date clos*
									Le 23 août 2021, le chef et le conseil ont informé l'entrepreneur qu'en raison des restrictions provinciales liées à la COVID, aucun travail ne pourrait être effectué dans les maisons jusqu'à ce que le confinement soit levé. En raison d'engagements contractuels antérieurs, le retour de l'entrepreneur sur le site n'aura pas lieu avant août 2021. Soutien opérationnel fourni par le conseil tribal d'Experience3, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées, financé par SAC.	
ON	Wikwemikong	Wikwemikong Public Water System AQEP depuis mai 2020	15/05/2020	15/05/2021	68	5	Arrêt nécessaire pour parfaire les travaux de construction afin de mettre le réseau d'installation	Avant décembre Modernisation des procédés de traitement et de désinfection, amélioration d'accessibilité du bâtiment, mise à niveau des systèmes mécaniques et électriques Projet terminé - ++	AQEP en vigueur pour permettre les travaux de modernisation, y compris le remplacement du module filtrant AQEP levé en vigueur en vertu des avis opérationnels touchant une durée de traitement, problèmes de réseau de distribution résolus La modernisation de la station et des procédés de traitement se poursuit, le module filtrant a été remplacé en août (couche biologique s'est formée sur le nouveau filtre à sable en). Le 27 janvier 2021, décision de l'EQP : l'entrepreneur est informé d'autres défauts. L'équipement de traitement est retenu à la frontière (Canada–É.-U.), en attente d'une autorisation d'entrer au Canada. Le 23 février 2021, l'entrepreneur a tenté un démarrage, cependant, plusieurs composants requièrent d'autres réparations. L'entrepreneur s'attèlera avec des mesures pour circuler aux équipements et prévoit entreprendre les procédures de démarrage le 23 mars 2021. L'expert conseil a été averti que les activités de démarrage se sont limitées infructueusement, puisque le système SCADA n'avait pas été programmé ni configuré par le sous-traitant. Le démarrage était prévu le 26 avril 2021, cependant, d'autres problèmes avec les systèmes (VI) ont été détectés et les pièces manquantes n'étaient pas encore rendues sur place. Tentative de démarrage manquée le 6 mai 2021, les analyseurs ne fonctionnaient pas comme le fondent les usines, une injection le 11 mai 2021 a aussi échoué. Depuis la semaine du 17 mai 2021, répétitives, les essais de performance ont échoué parce que le système à membrane ne répondent pas aux exigences pour la filtre membranaire. Les travaux sont en cours pour régler les problèmes liés à la performance. Le 10 juin 2021, l'EQP a indiqué que l'entrepreneur poursuivrait le travail pour corriger les problèmes touchant l'usinage, aucun calendrier n'a été fourni pour l'achèvement des travaux et le démarrage. L'essai de performance doit être refait, une session de l'EQP est prévue la semaine du 14 juin 2021. Soutien opérationnel offert à la collectivité par le conseil tribal de Par-Te-Nou-Ding, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées, financé par SAC.	À déterminer — en attendant un projet n'est pas encore établi
ON	Richards de la baie de Quinte	Ak-Mkq Semi- Public Water System (n° 17220) AQEP depuis juin 2048	06/06/2048	06/06/2048	44	0	L'approvisionnement est en eau souterraine risque d'être contaminé.	Modernisation de la station de traitement (mise en Décembre), prolongement de la conduite principale en eau (phase 2), prolongement de la conduite principale (phase 3). Projet terminé - ++	La Première Nation considère tous les systèmes touchés comme un seul système La modernisation de la station de traitement satisfait aux exigences de l'entente de service municipale (ESTM) - Achèvement de la phase 2 du prolongement de la conduite d'eau principale et du château d'eau, mise en service en cheese le 13 novembre 2020, travaux terminés. Appel d'offres pour la phase 3 de la construction (début en septembre 2020, une soumission reçue dépassant le budget approuvé d'environ $ 8M), la Première Nation et l'EQP ont envisagé une réduction de la portée et retarde la construction au printemps 2021, des négociations en vertu des coûts d'environ 1 M$. En octobre 2020, les Mohawks de la baie de Quinte ont fait savoir que des retards avaient une incidence sur le projet de rétablissement du pont Shanks, du MTO et demandé que le projet soit suivant afin d'obtenir l'approbation du financement de SAC pour la phase 2 au lieu de l'appel d'offres. SAC a approuvé la pleine portée et les coûts du projet, contrat attribué, construction en cours. Les travaux satisfaisant aux exigences nécessaires pour lever les cinq avis touchant le collectivité La Première Nation est préoccupée par les puits privés près du lac Ontario qui ne sont pas reliés par le phase 3 ou le projet d'infrastructure Canada, les représentants de SAC travaillent de concert avec la collectivité pour trouver des solutions. La Première Nation est préoccupée par la contamination du sol (solution) découverte sur le route de la construction. Terrapresseur doit installer une conduite d'eau principale avec une gaine en plastique installée autour de la conduite en présence de contamination. Semaine du 24 mai 2021, l'EQP a indiqué que le forage allégé nous le contre pour rapporter le réseau de distribution avait entraîné en raison de conditions imprévues au sol. L'exigent conseil a examiné les options, y compris la possibilité de forer plus en profondeur pour en savoir plus sur la viabilité, une nouvelle conception de la conduite pourrait être nécessaire, possibilité de retard Expert conseil/entrepreneur préoccupé sur l'état de la conduite d'eau principale de Johnson's Lane, le plan de projet prévoit de remplir à la conduite d'eau existante en tenant compte de dépendance d'épuisé, rapport de différence supérieur et, compte tenu	09/2021
ON	Richards de la baie de Quinte	MBG Aiguil Public Water System (n° 17247) AQEP depuis octobre 2002	17/10/2002	17/10/2004	10	0	Désinfection insuffisante			09/2021
ON	Richards de la baie de Quinte	MBG Bayview Estate Association Public Water System (n° 17228) AQEP depuis juin 2008	06/06/2008	06/06/2008	6	0	L'approvisionnement est en eau souterraine risque d'être contaminé.			09/2021
ON	Richards de la baie de Quinte	MBG Clifford Mariaville Wellington Public Water Supply (n° 17226) AQEP depuis janvier 2012	20/01/2012	20/07/2012	Inconnu	Inconnu	La bactérie E. coli et les coliformes totaux sont présents. Le système de traitement n'est pas conforme.			09/2021
ON	Richards de la baie de Quinte	MBG Trailer Park Public Water System (n° 17231) AQEP depuis juin 2008	06/06/2008	06/06/2008	6	0	L'approvisionnement est en eau souterraine risque d'être contaminé.			09/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront réévaluées au fur et à mesure de l'avancement des projets.

Région	Province Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date cible*
									de l'état de la station principale, un remplacement pourrait être nécessaire. Les options sont évaluées et l'OIGP cherche à calculer les coûts supplémentaires pour le projet. Le 10 juin 2021, l'évaluation des options se poursuit.	
ON	Muskrat Dam Lake	Muskrat Dam Public Water System (n° 2000) AGEP depuis Juillet 2021	[redacted]	[redacted]	68	0	La capacité de filtration est inadéquate et la capacité de la station est insuffisante.	Mise à niveau recommandée des systèmes de filtration et de désinfection Travaux terminés - 0 $	Le fonctionnement des systèmes de filtration et de désinfection est surveillé 24 heures sur 24 par un opérateur de salle de commande. Le système a été interrompu en mars 2020 en raison de la COVID, mais a redémarré en juillet 2020. En septembre 2020, l'AGEP a reçu une lettre du chef et du conseil recommandant la désactivation de l'AGEP. En octobre 2020, le chef a indiqué son appui à la résolution de l'AGEP. Le 7 octobre, un nouveau chef et un nouveau conseil ont été élus, après la réunion avec le chef adjoint le 5 novembre. L'AGEP a été informé du nouveau chef et du nouveau conseil la résolution de l'AGEP. Le 19 décembre 2020, à la demande de la Première Nation, SAC a discuté de la résolution de l'AGEP. Le chef a indiqué qu'aux termes du mandat précédent (2017-2021), il existait une nouvelle STE (et un nouvel emplacement) en raison du risque de contamination d'une nouvelle rivière. Le chef a demandé à SAC de revoir de faire pression pour une révision de l'AGEP. SAC a déjà financé un projet d'assainissement des eaux usées/eaux. Une correspondance a été envoyée par SAC (Affaires aux Métallières et Nord appui à la résolution de l'AGEP). SAC a discuté un suivi en mars 2021, la collectivité a indiqué qu'elle communiquera avec le fournisseur lorsque elle sera prête. Le 26 mai 2021, l'AGEP a informé SAC que des travaux des eaux usées des recommandations de l'AGEP n'ont pas été reçus depuis l'automne 2020, la recommandation de l'AGEP de tenir lieu à compter de septembre 2020 (loge une autre série d'essais pour confirmer que l'eau respecte les recommandations). Le 7 juin 2021, un soutien technique en tour temps a été demandé par le chef. L'opérateur local ayant été aux prises avec des problèmes qui nécessitaient un outil, l'opérateur avait travaillé avec le fournisseur de l'attirant pour ajuster le processus afin de tenir compte des fluctuations de la qualité de l'eau brute, des progrès ont été réalisés, la production de l'eau a été relancée, apprécient, à la demande de la Première Nation, SAC a approuvé le soutien sur place. Un plomb de garantie expiré le 27 juillet 2021 et SAC a demandé à l'expert-conseil de fournir les dates d'inspection. Soutien opérationnel fourni par le conseil tribal d'Oshki, avec le soutien financier de SAC.	0 (Maintenue)
ON	Neskantaga	Neskantaga Public Water System (n° 7127); AGEP depuis Mars 1995	[redacted]	[redacted]	78	0	La capacité de traitement est inadéquate pour les recommandations à levée en cours continuelle.	Usine de traitement de l'eau - Mise à niveau en cours de réalisation actuelle. Travaux terminés - 0 $	En raison de retards, la Première Nation a mis fin à un contrat de mise à niveau en février 2019 un nouvel entrepreneur a été engagé. Conjointement, entendre, la Première Nation soumettre le système permettrait on en avant que l'AGEP ne soit levé, demande de financement d'exploitation et de maintenance à 100 % lettre reçue en février 2020 décrivant les demandes. Des travaux pour le réseau de distribution et les eaux usées sont nécessaires, approbation obtenue le 7 octobre 2020 (lacune de 4 047 000 $, 2 à 7 mois à 16 438 742 $). Le 15 octobre 2020, des inspecteurs ont été observées sur l'eau du réservoir et la colonie à la présence d'huile nombreux (non évaluer) convenant de la pompe, de tirages de distribution à été purgé. les eaux différentes par la suite on confirmé l'absence d'huiles et de graisses. La collectivité a été évacuée pour mettre le 25 décembre 2020, de nouveaux niveaux ont en fonction depuis le 15 novembre 2020. Une boîte est été effectuée le 15 décembre 2020. Très respecte les exigences financement de SAC et soutien sur place à temps plein de l'AGE. Les travaux de pourchasse pour régler les problèmes liés aux eaux usées, un nouveau camion de pompage permet de gérer procurement les débit d'eaux usées. les travaux du poste de refoulement achevés, les pompes ont été remplacées, les submergés, porte de débordement et mesure de pompe sur contrôle vers le bassin. Issues contact à recommandé de remplacer le syndicat de refoulement, financement approuvé, les arrêtés municipaux ont déposer l'entretien de l'usager convoité et le budget approuvé de 1 347 856, la région réponse la note supplémentaire, l'entrepreneur a été embauché, le fonds de syndicat de refoulement de remplacement a été mis à la collectivité. Installation devait commencer à la fin de mai et être achevée à la fin de septembre 2021. La Première Nation doit en confirmement, tous les entrepreneurs sont partis. Il n'exception d'HOM, en date du 11 juin 2021, le confinement est maintenu, et aucun travail n'est entrepris pour régler le problème des eaux usées ou au fonctionnement de la STE. le 8 juin 2021, la Première Nation a indiqué qu'une décision sur la levée des restrictions devrait être prise le 11 juin 2021 au plus tard.	0 (Maintenue)

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les nombres dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu (ou AGEP LT) (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation actuelle	Date cible**
									Un dysfonctionnement du système de traitement des eaux usées a été signalé. Selon l'article 20 (1 à 7 ; de 10 à 20) du règlement du SAC, les représentants du SAC se prévalent d'ouvertures pour exercer les compétences conférées par les dispositions [illegible]	
ON	Wikwemikong	Wikwemikong Public Water System (7 ??-08) AGEP depuis Nov/Dec 2019	[illegible]	[illegible]	191	3	Le réseau est inadéquat et ne respecte pas les recommandations fondamentales de la capacité requise	Long terme : Mise à niveau ou agrandissement de la station actuelle, ou réseau de distribution Autres options : Option non privilégiée par la Première Nation	Long terme : Planification de la mise à niveau et de l'agrandissement de la station terminée, une modification apportée à la conception en novembre 2019 en vue d'accroître l'achèvement. Équipement installé à l'avance : contrat de construction attribué. Matériaux et équipement achetés au site à l'hiver 2020. La Première Nation a fermé en mars 2020 en raison de la COVID-19 La construction n'est pas commencée. la Première Nation a donné la priorité à un projet de rénovée au détriment ces d'urgence L'analyse des options a été effectuée par l'expert-conseil pour faire progresser la construction du projet d'agrandissement en cas de 2020, la Première Nation a fourni de la correspondance en juillet 2020 pour avoir l'entrepreneur que la construction a été retardé jusqu au printemps 2021 en raison des restrictions à cause de la collectivité SAC a envoyé une lettre en décembre 2020 pour accuser réception de la décision de la Première Nation de retarder d'un an le projet d'agrandissement en raison de la COVID-19 et de la disponibilité de l'entrepreneur Des matériaux et de l'équipement rendus à l'entrepreneur ont été livrés au moyen de la route d'hiver 2021 Réunion du GLAP le 20 avril 2021 l'entrepreneur prendrait au plutôt juste au 2 mai pour la préparation du camp, la construction devait commencer le 10 mai 2021 au lieu du 20 mai 2021 La réunion de lancement des travaux de construction a eu lieu le 6 mai 2021, l'entrepreneur a confirmé que la construction des bretelles commencerait le 14 mai. La Première Nation allait en confinement complet en raison de la COVID-19 et des deux décès dans la collectivité, l'entrepreneur était censé revenir le 25 mai 2021, mais la Première Nation lui a demandé de reporter son retour L'AGP s'est réuni le 7 juin 2021, la Première Nation a accepté le protocole de la COVID-19 révisé de l'entrepreneur général et a approuvé le report des travaux de construction. l'entrepreneur a confirmé la mobilisation du site, prévu vers le 10 juin 2021, le calendrier révisé du projet suivra Prochaine. La solution provisoire plus élaboré (unité de traitement pour membrane pour remplacer le traitement existant) n'a pas été acceptée par la Première Nation Autres questionnaire fourni à la collectivité par le conseil tribal de Manitowaning, avec le soutien financier de SAC	[illegible]
ON	North Caribou Lake	North Caribou Lake Public Water System AGEP depuis mars 2020	[illegible]	[illegible]	264	7	Le système ne peut plus répondre à la demande en raison de l'état des exigences relatives au traitement	Autre mesure : Équipement de la station actuelle, ou remplacement du système de traitement Autres options : À déterminer	Une étude de faisabilité a été menée auprès des membres à long terme en matière d'eau potable et d'eaux usées, mais aucune solution provisoire n'a été proposée. le principal problème à l'état à la capacité. l'âge de l'équipement ne l'disponibilité de de réparer rendent ce problème difficile à régler La Première Nation a terminé de réparer et réparer les fuites du réseau de distribution, en qui comprend l'appuyé de réparations de précédent récemment visant à réduire la consommation. la collectivité a réparé trois secteurs du réseau de distribution. le remplacée de fuites effectuée par la suite n'a révélé aucun autre problème. la station de traitement de l'eau fonctionne en tout temps afin de répondre à la demande. grâce aux nouveaux appareils au réseau de distribution par la collectivité. l'approvisionnement n'a pas à être interrompu pour permettre aux réservoirs de se remplir. La Première Nation avait aussi l'un engagé à mettre en œuvre une solution à long terme non financée pour l'eau potable et les eaux usées avant que soit envisagée une solution provisoire pour le district de traitement de l'eau. Des travaux sont en cours pour faire progresser l'élaboration d'une solution à long terme, pour l'eau potable en fonction des recommandations de l'étude de faisabilité. le feu vert a été officiellement en attente. la recommandation du projet a été transmise à la Première Nation pour examen et approbation. Des solutions provisoires ont été menées. et la location d'un ou de plusieurs systèmes de traitement communautaire est recommandée. l'accompagnement des capacités d'entreposagement à titre de solution provisoire est jugé techniquement et financièrement impossible. Réunion tenue le 14 mai 2021, la Première Nation s'est accordée sur l'examen de la demande d'approbation de projet (DAP) pour la modernisation de la STE. la solution provisoire est considérée comme un projet distinct, la Première Nation n'a pas confirmé son plan à avec l'avis à une solution provisoire était fixé en janvier – commentaires finales sur l'examen de la DAP par la Première Nation depuis le 28 mai 2021, soumis. Suivi par la Première Nation et SAC en cours discutés du MPP en vu mandat de l'experti conseil en principes partagés avec la Première Nation et sur des prochaines étapes Les documents d'approbation de la solution provisoire sont en cours d'élaboration	À déterminer – en collaboration du projet n'est pas encore établi

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la province évaluent. Les dates citées seront mises à jour et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date clos*
ON	Saint Saint Lake	North Saint Lake Public Water System (n° 1124) AGEP depuis avril 2019	05/04/2019	05/04/2020	39	5	Turbo dans le réseau de distribution d'eau, le station de traitement ne l'eau présente des problèmes de déficience et de rejet de Problèmes d'exploitant et d'entretien	Long terme Entretien et réparation de la station et du réseau de distribution, prolongements à l'exploitation COMPLÉTÉE - 0 $	Les exploitants locaux sont effectués à engager. la Première Nation à engagé un opérateur non qualifié. La pôle a augmenté la fréquence de ses visites et de ses soudes à distance Le réseau de distribution à subi des réparations supplémentaires des pompes à haute pression ont été remplacées et un compteur de transfert a été installé pour le système d'alimentation de secours depuis. Une nouvelles pompes à haute pression ont été installées en octobre 2020. L'installation du commutateur de transfert pour le système d'alimentation de secours ou des pompes à incendie a été terminée en raison du manque de disponibilité de l'entrepreneur (maladie de la COVID). L'entrepreneur a été notifiée. mais des pièces supplémentaires étaient nécessaires. Les travaux concernant la commande de deux sodes de contrôle du niveau et d'un système de protection contre les incendies pour l'école de la collectivité. le pôle NTC a indiqué que l'automatisation de ces pompes à haute pression et de surveillance progressivement a été effectuée. le mauge du réseau de distribution a été installé. En février 2021, il n'y avait aucun accès à la collectivité en raison de la COVID. Le 10 avril 2021, la collectivité n'avait il a pas été évalué. le 28 avril 2021. la collectivité a indiqué qu'elle achèvait une étude de faisabilité sur une solution à long terme visitant à la fin de cet sdéc. SAC a obtenu une exemption de financement pour la compte de la collectivité et l'a partagée lors fors d'octobre et d'approbation à 2 mai 2021. la réunion prévue pour le 19 mai 2021 a été reportée au 21 mai. SAC a été informé par le pôle NTC que des travaux relatifs au commutateur de transfert et à la génératrice de secours ont été achevés la semaine du 10 mai 2021. des générateurs d'essai ont été reçus et devaient être installés la semaine du 31 mai 2021. le mauge du réseau de distribution est prévu pour la semaine du 21 mai 2021. SAC n'a pas obtenu de mise à jour. Les postes de relèvement des eaux usées sont fonctionnels grâce au travail d'opérateurs formés et à la télésurveillance du pôle. Le pôle NTC a indiqué qu'il n'a pas pu confirmer que la station est surveillée des essais n'ont pas lieu. le pôle NTC confirme que la collectivité n'est et le conseil auprès aux compagnies opérationnels à régler.	4 septembre
ON	Northwest Angle No. 33	East Pump House Plant Public Water System (partie du Angle Inlet Public Water System) (n° 1126) AGEP depuis avril 2011	11/04/2011	11/04/2016	17	2	Station de pompage sol-désinfection insuffisante	Long terme Nouvelle station de traitement des eaux communale à Angle Inlet COMPLÉTÉE - 0 $	Des solutions provisoires permettent à toute de l'eau soit été envoyages, mais ne de sont pas autres possibles ou économiques. La conception de l'appel d'offres pour la nouvelle usine sont terminés. l'équipement a été achevé à l'usine et livré sur le site. La collectivité a été fermée en mars 2020 et la construction, interrompue, en raison de la COVID-19. une réouverture limitée en mai a permis la poursuite des travaux. Les travaux de construction de la STE se poursuivent. les retards dus à la COVID-19 ont entraîné une hausse de coûts de 1,2 M$. En mars 2021, l'entrepreneur a indiqué qu'il était sur la bonne voie pour l'achèvement au juillet 2021. Alors étaient que l'immeuble n'était pas encore livrés. les représentants régionaux de SAC ont indiqué qu'il y avait un risque élevé que les travaux ne soient pas terminés conformément au calendrier. Le 12 avril 2021, l'entrepreneur a livré un calendrier révisé repoussant l'achèvement substantiel des travaux à octobre 2021. pour justifier ce report. il a évoqué le défaut de certains sous-traitants (affectés au retard) d'effectuer leurs travaux. ainsi que d'autres problèmes non attribuables à la Première Nation ou à la COVID. l'entrepreneur a été informé des conditions contractuelles qui prévoient des coûts de l'opérateur continue de la gestion de projet et de l'administration de la Première Nation. l'entrepreneur a indiqué qu'il n'envisage de couvrir des travaux à l'excédent de provisoire. Lors d'une réunion de l'EGP, le 28 avril, l'entrepreneur a signalé l'introduction d'un nouveau coordonnateur de la sécurité du chantier et d'un nouveau superviseur du chantier. l'administrateur du comité a rapporté une amélioration de la productivité et de l'organisation sur le terrain. À la demande de SAC, l'EGP a convoqué d'urgence des sessions intrimestrielle pour aborder la gestion des problèmes. les travaux étaient supposant manquaient. la réunion de l'EGP a eu lieu le 10 juin 2021 et le projet a été déclaré conforme au calendrier révisé. Soutien substantiel fourni par le conseil tribal MWC, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées Nishnik par SAC. la collectivité collabore avec le pôle pour fonder l'opérateur principal afin au l'univers de l'accumulation de catégorie 2 à celle de catégorie 3. et pour que deux autres candidats obtiennent le certificat d'opérateur en formation.	11/2021
ON	Northwest Angle No. 22	West Pump House Plant Public Water System (partie du Angle Inlet Public Water System) (n° 1124) AGEP depuis février 2016	12/02/2016	12/02/2017	Inconnu	Inconnu	Station de pompage dotée de turbidimètres non fonctionnels et d'alarmes non avertissantes			11/2021
ON	Northwest Angle No. 33	East Backbeach Pump House Public Water System (n° 1124) AGEP depuis avril 2011	11/04/2011	11/04/2016	3	1	Ne satisfait pas aux recommandations minimales de distribution			11/2021
ON	Sandy Narrows et Sauguen	Sauguen Health Clinic Non-Public Water System	26/04/2019	2019-04-26	0	1	Les niveaux de turbidité sont	Long terme Installation d'unités de traitement au	Formation en travail physique pour la réparation et la réhabilitation de puits artésien, grâce au FFI en mars 2019. Actuellement, attente une conservation technologique	01/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

**Les échéances dates cibles sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates cibles seront révisées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation actuelle	Date cible**
		AQEP depuis avril 2016					applicable aux recommandations	point distribué au lieu d'eau potable Avis levé	• Suite aux évaluation de novembre 2019, l'expert-conseil a recommandé l'installation d'un nouveau puits et de nouvelles unités de traitement pour chaque bâtiment touché : conception détaillée achevée en janvier 2021 • Forage de nouveaux puits pour les bâtiments communautaires en octobre 2020; travaux de pompe et de plomberie terminés Les tests indiquent une eau brute de bonne qualité avec de légers dépassements de l'objectif esthétique (goût au manganèse) Devis demandés aux entrepreneurs le 19 février 2021; visite obligatoire, équipement et calculs en commande. "entrepreneur x indiqué pour l'intention de certains matériaux à des remplac. des problèmes de chaîne d'approvisionnement ont eu du respect des échéances des travaux. travaux d'essai en cours (maintien par un ingénieur conseil) depuis le 5 QUÉ le semaine du 5 avril 2021. "entrepreneur x indiqué qu'il faut quatre semaines pour terminer les travaux Le 13 mai 2021, l'entrepreneur a livré par eau les matériaux, les fournisseurs ont avisé que le fondant était arrivé pour le fin de mai L'entrepreneur a indiqué qu'il attendait l'arrivée de matériaux importants, dont des désinfectants, depuis Halifax en grande d'autres composantes, notamment une pompe, sont sur départ de plus d'un mois, et le fournisseur ne donne aucune de renseignements sur leur livraison L'entrepreneur a confirmé la mobilisation sur le site prévue pour le 14 juin pour l'installation du système de vente de sable. On prévoit qu'il faudra une semaine pour terminer l'installation, les commandes de certaines pièces d'équipement (diverses de contact au chlore) nécessaires pour achever les systèmes de traitement ou point d'entrée de l'école et du bureau, sont en souffrance et, dans le meilleur des cas, on prévoit qu'ils seront disponibles de la mi-juin à la fin juin. Il faudra procéder à une analyse d'impact complète, ainsi qu'à d'autres essais pour démontrer l'AQEP (JJ La Première Nation est participante par les puits distinctement et a demandé du financement dans le cadre du volet Infrastructure verte/Island partie du Programme d'infrastructure. Investir dans le Canada administré par le ministre d'Indien- et Première Nation- a demandé une notification de SAC pour approuver le projet s'il est approuvé. Bouton opérationnel fourni et la collectivité par l'OPERATEC, avec le soutien financier de SAC	6/7/2021
ON	Ontario Nation of Saugeen	Saugeen School Semi-Public Water System AQEP depuis avril 2016	27/04/2016	27/04/2016	4	1	Le système fi - Les eaux collectées dans le puits	Avis levé		6/7/2021
ON	Chiefs of the Thames	Chiefs of the Thames Public Water System (1 ^{er} ??/??) AQEP depuis septembre 2016	26/09/2016	06/09/2020	546	24	Le système de traitement ne satisfait plus aux exigences d'EXEDE.	Avis levé - fi traitement au moyen d'une étude de faisabilité Système provisoire à envisager	Le fournisseur de traitement de l'étude de faisabilité a mené en septembre 2020. des options provisoires n'ont pas pu être conçues et construites avant mars 2021 + une augmentation des coûts du projet. le BIE approuvée afin que soit établie la viabilité à long terme de la source d'eau souterraine actuellement utilisée. les résultats indiquent que la qualité d'eau souterraine est inacceptable pour être approuvée à la station actuelle. une solution provisoire pourrait ne pas être techniquement ou financièrement possible L'expert-conseil a soumis aux recherches de solutions provisoires. les options possibles comprennent la location d'un système à membranes mobiles, mais on se préoccupe de la capacité de traitement des eaux usées de supporter une interruption ainsi que des déshumidificateurs électriques et mécaniques devront être approuvés à la station actuelle. une solution provisoire pourrait ne pas être techniquement ou financièrement possible L'EQP a tenu une réunion le 3 février 2021 pour discuter de l'analyse des options. l'expert-conseil a indiqué que le seul prélèvement du Weeks municipal devrait s'effectuer des que possible à titre de solution provisoire. la Première Nation a exprimé son accord à un raccordement municipal. il existe deux options de raccordement municipal, dont l'une pourrait répondre aux besoins de certains logements dans d'autres collectivités des Premières Nations à proximité. le raccordement à d'autres collectivités n'a pas été examiné à fond L'expert-conseil a présenté des options au chef et au conseil en février 2021 afin de déterminer la préférence pour deux options de connexion. il a invité l'OMNI pour une solution provisoire. les détails de la discussion et les résultats n'ont pas été communiqués à SAC Lors de consultations avec les représentants de projets de la collectivité, SAC a été informé que le chef et le conseil fournissent une révision conjointe une ESTM. la Première Nation examine l'étude du faisabilité finale, partagée le 28 mai 2021 avec SAC l'examen technique est en cours et les commentaires devraient être émis d'ici le 18 juin 2021 SAC travaille à la planification d'une réunion pour faire progresser le projet de sorte qu'il soit	À déterminer – La collectivité du projet n'est pas encore établi

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réservoir

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront révisées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation actuelle	Date clos**
ON	Eagle Lake	Eagle Lake Public Water System AGEP depuis octobre 2018	15/10/2018	15/10/2018	160	3	La cause de la station de traitement de l'eau fait l'objet de la garantie de l'usine.	Actuellement: Approvisionnement de la station actuelle Avant février: Installation des nouvelles unités de traitement dans la station actuelle des eaux potables	Solution à long terme : approvisionnement à partir d'un nouveau réseau de distribution d'eau potable, construit par le nouvel Hôtel de Ville en 2019. Solution provisoire : installation anticipée d'une unité de traitement dans la station actuelle – approuvé au départ par la Première Nation, l'installation de l'équipement de modernisation des traitements existants seront effectuées dans le cadre d'un plan contre pour réaliser des économies. L'école a été restreint en mars 2020 en raison de la COVID-19. Le 19 août 2020, la Première Nation a autorisé le retour sur le site, des négociations ont été menées avec l'entrepreneur y compris les coûts de réouverture pour retard. L'entrepreneur de l'AGEP était sur place le 24 novembre 2020, le mois en service de la chaîne de traitement précédent était provisoire, les traitements ont été endommagées pendant la période d'inactivité. Conseillère sur le site, la Première Nation a informé l'EGP que l'AGEP LT ne pouvait soit être levé dont que la deuxième chaîne de traitement n'est pas installée. L'AGEP a indiqué que l'eau de la nouvelle chaîne de traitement déposera parfois le DWA de manganèse. L'unité fonctionne normalement avec l'eau de l'ORO, et les épuisements de pH n'auront diffusion pour gérer les fluctuations saisonnières de manganèse. Des échantillons ont été envoyés au laboratoire, plusieurs paramètres de rendement n'ont pas été respectés. La production de l'unité dans la distribution est en suspens, des résultats sont très succès dans la désinfection des nouveaux chaîne de traitement pour installer une deuxième chaîne, lors de la réunion de l'EGP du 3 mai 2021, l'entrepreneur a été informé que le fournisseur de traitement avait trouvé une solution aux problèmes de manganèse et de pH. Ils travaux se poursuivent pour résoudre ces problèmes. Le 25 mai 2021, l'entrepreneur a présenté un nouveau calendrier révisionnant à septembre la date de l'AGEP en raison de retards liés à l'installation de la première chaîne de traitement. Conformément précédent de l'agrandissement et de la mise à niveau de la STE est prévu pour février 2022. L'entrepreneur a soumis des échantillons d'une nouvelle chaîne de traitement au fins d'analyses en attente des résultats. Si les paramètres sont respectées, lieu de la nouvelle unité sera désinfectée avec des réservoirs de distribution et la désaffectation de l'unité de traitement existante commencera. la Première Nation appuie cette approche. L'installation de la mise à niveau et du prolongement des conduites d'eau, au d'égout est temporairement suspendue en raison de la découverte d'un site de sépultures non interdites. une équipe indépendante a été retenue sur les lieux de 9 juin 2021 pour enquêter. Soutien opérationnel fourni par le conseil tribal de Windigo, avec le soutien financier de SAC.	30/6/2021
ON	Sandy Lake	Sandy Lake Public Water System (#7 7178) AGEP depuis octobre 2003	15/10/2003	15/10/2003	468	10	La capacité est inadéquate et est dépassée par les recommandations révisionnaires de la capacité requise.	Actuellement: Mise à niveau de l'approvisionnement en la station de traitement des eaux. Avant février: Remplacement du système de nettoyage du filtres de distribution, améliorations opérationnelles	Solution provisoire intégration et optimisation de la STE et du réseau de distribution), terminé à mars. Réparations supplémentaires terminées en juillet 2020. Défis opérationnels empêchent l'AGEP de recommander la levée de l'avis Le poste de l'OPHTSC offre aux anciens pour préparer les opérateurs à la modernisation des installations. Le chef a précisé que la levée de l'AGEP sera une priorité. Le 11 décembre, les opérateurs ont terminé up de vendre procéder à la surveillance avec le soutien de l'OPHTSC, une lettre de SAC, datée de la semaine du 14 décembre 2020, invitée à annoncer à des soutien en vue d'améliorer les opérations. Début des travaux de construction dans le cadre d'une solution à long terme en janvier 2021, restrictions d'accès en raison de la COVID en mars 2020, entrepreneur annulées en septembre 2020, date d'achèvement du projet à long terme reportée à juin 2022 (répercussions de la COVID). Les travaux de construction ont repris, ralentissement de la production en raison de la COVID, modernes de construction achèvement dans la collectivité par le réseau de routes d'hiver, nouvel puis en changement de carburant, remplacement prévu des dispositifs pour l'acheminement de marchandises au de carburant par voie aérienne. L'OPHTSC a annoncé que le personnel pour rentrer dans la collectivité, des tests rapides concernant des résultats négatifs sont requis pour que le personnel puisse rentrer que soit inclus et mis place en isolement durant les commencer à travailler. L'OPHTSC a précisé que une protocoles limitant la capacité à fournir le niveau de service approuvé, de 72 avril 2021, l'OPHTSC a levé l'autorisation de mobilisation dans la collectivité en juin 2021, en ajoutant environ 4 le poste a été installée dans la collectivité. Réunion de l'EGP le 27 juin 2021, la Première Nation a été avisée du fait qu'il n'y a pas de changements aux protocoles relatifs à la COVID. Vertissement a été présenté d'un retard de 2 semaines en raison de la COVID et du temps froid. Vertissement a remplacé à installer le calendrier pour le reste du projet. À la réunion du 25 mai 2021 de l'EGP, l'entrepreneur a publié un calendrier révisé prévoyant une prolongation de 3 semaines, le consultant de l'EGP procédera à une	1/2022

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date clos**
									Analyse des obligations contractuelles, la Première Nation a confirmé qu'il n'y a pas eu de modifications aux protocoles d'exécution de la COVID en qu'une entente avec l'OPACSC a été signée en vue de fournir le soutien du pilier aux opérateurs locaux en date du 11 juin 2021. Les travaux de construction de la solution à long terme en pourvoyeurs covered police et conformément à l'échéancier • Installation et de systèmes municipaux provinces d'uniformité	
ON	Shoal Lake No. 40	Portal house No. 1 Public Water System (n°14534) AGEP Report Number 1997	15/12/1997	15/12/1998	10	1	Procédés de traitement inadéquats (ou fournissant une eau ne respectant pas les recommandations)	Lorem ipsum. Nécessité d'avoir construire de nouveaux de traitement des l'eau en réseau de distribution. Lorem ipsum - Lo-	Concession détaillée datant de 2010 visait à aux pour respecter les exigences réglementaires en vigueur et répondre aux besoins à long terme de la collectivité. À la demande de la Première Nation, le projet a été accepté au Projet pilote d'appui d'affaires des autochtones, par l'entité et processus d'approvisionnement concurrentiel auprès d'entrepreneurs qualifiés appartenant à des Autochtones. Les travaux de construction sont en cours, des éléments importants sont en commencer, les opérations de nivellage et de creusage de tranchées devant accueil des nouvelles canalisations de distribution et de puits d'eau brute sont terminées. la nouvelle marine et les lits filtrants sont en place, les travaux de traitement sont en cours. l'immeuble est livré et une nouvelle fondation est en train. Ils ne l'ont pas' les filtre les travaux électricité et de mécanique sont en cours à l'intérieur de l'usine d'après l'échéancier de l'entrepreneur, le démarrage et les essais de performance devraient être terminés à la fin de juin 2021. La Première Nation reçoivent le projet notamment au moyen de procédures rigoureuses en matière de santé et de sécurité relatives à la COVID-19, ce qui a ralenti la cadence de l'entrepreneur a fait part d'un délai relatif dans l'évolution du projet, ne qui explique l'achèvement à juillet 2021. À la réunion de l'EGP du 09 février 2021, au collectivité s'est dite préoccupée par la capacité des forces exécutrice de certaines réponse à supporter l'utilisation accrue au lieu prévue. la Première Nation et son équipe de consultation explorent les possibilités d'incubation et les différentes options en vue d'élaborer un plan d'action. la Première Nation a reçu une approbation de financement du Programme d'infrastructure locale dans le Canada – Infrastructures rentes visant à soutenir les améliorations apportées aux foyers déployant. Des réunions de construction ont lieu tous les mois, à la réunion de l'EGP du 15 mai 2021, l'entrepreneur a fait part de la possibilité de retards par rapport à l'échéancier. Les systèmes de commande des moteurs ne fonctionnaient pas à leur capacité. et la défectuosité n'est pas réparée par le fabricant en temps opportun. le mise en service prévue pour le 10 juin 2021 sera retardée. la consultant et l'entrepreneur s'emploient à établir des options pour terminer d'autres travaux afin de maintenir le chemin critique le plus possible selon ce que nous prévu. la prochaine réunion doit avoir lieu le 22 juin 2021, alors que tous changement prévu sera vérifié. Soutien opérationnel fourni par le conseil tribal de Shibogama, sous la soutien financier de SAC	07/2021
									Entrée de service de l'eau potable à long terme en vigueur dans le réseau public des réseaux *Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports. *Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.	
ON	Shoal Lake No. 40	Portal house No. 2 Public Water System (n° 17126) AGEP Report Number 1997	15/12/1997	15/12/1998	10	1				07/2021
ON	Shoal Lake No. 40	Portal house No. 3 Public Water System (n° 17126) AGEP Report Number 1997	15/12/1997	15/12/1998	24	3				07/2021
ON	Shoal Lake No. 40	Portal house No. 4 Public Water System (n° 17127) AGEP Report Number 1997	15/12/1997	15/12/1998	8	4				07/2021
ON	Shoal Lake No. 40	Portal house No. 5 Public Water System (n° 17128) AGEP Report Number 1997	15/12/1997	15/12/1998	10	3				07/2021
ON	Shoal Lake No. 40	Portal house No. 6 Public Water System (n° 17129) AGEP Report Number 1997	15/12/1997	15/12/1998	10	3				07/2021
ON	Shoal Lake No. 40	School Portal house Public Water System (n° 17211) AGEP Report Number 1997	15/12/1997	15/12/1998	10	3				07/2021
ON	Shabaqueona Bay	Washagamis Bay East Public Water System (n° 16322) AGEP Report (décembre 2008	19/12/2008	19/12/2009	24	2	Réservoir sujet de l'eau saumâtre; traitement insuffisant capacité inadéquate	Lorem ipsum. Nécessité réalisé de traitement de l'eau au réservoir, à la mise du réseau de distribution Lorem ipsum. Nécessité prête et règlementaire provisoires de la station, nettoyage et réparation du réseau de distribution	Pompage de nouveaux puits, réparations provisoires de l'usine de traitement, usine fournit de l'eau potable Nettoyage terminé du réseau de distribution; dommages causés par l'usine de pression, réparations effectuées Travaux touchant le puits n'ont débuté pour régler les problèmes liés à la qualité bactériologique dans l'usine, puis suite du confinement de la collectivité de 7e octobre 2020 cas confirmé de COVID). En du confinement le 6 octobre 2020. Semaine du 14 décembre 2020 : échantillonnage par l'AGEP, recommandation de la levée de l'AGEP LT le 6 janvier 2021 Travaux en soutien réglementaire devrait dans l'eau potable, source de précaution pour la collectivité L'AGEP a reçu une séance d'information avec le chef et le conseil, le chef a suivi SAC, que la collectivité n'a toujours pas les recommandations relatives à la levée des AGEP avant le mise en place d'une solution à long terme. Réalisation d'une solution à long terme (nouvelle STE en cote de construction), la Première Nation a collaboré avec l'entrepreneur pour traiter des protocoles relatifs à la COVID-19 permettant que les activités de construction se poursuivent. L'entrepreneur a fait part d'un retard dans les travaux, le démarrage et la mise en service sont prévus pour mai, la formation et l'achat/étalonnage suivront. une analyse chimique complète doit toujours en sera conformes par l'entrepreneur. l'AGEP en KCA coordonnent l'échantillonnage bactériologique à la suite de la mise en service, et partagés activement aux discussion à temps en cours. La mise en service aurait été prévue pour le 17 mai 2021. Howard conseil a été avisé par l'entrepreneur que les essais de performance et la mise en service sont retardés à la suite de problèmes liés à la programmation SCADA et à des pannes de la pompe de relevé. Mise de nitrogène, la rééquilibrer et mise n'a pas encore été autorisé.	07/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves *Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports. *Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la province évaluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation projetée	Date cible**
									- À la réunion de l'ASP du 8 juin 2021, l'administrateur a déclaré que la procédure de démarrage devrait commencer "1 juin 2021". Le collectivité a embauché deux opérateurs de l'initiative Bonnes Premières (ou recrutées) qui seront avec l'équipe de construction pour tenter d'obtenir le certificat d'opérateur en formation. La collectivité obtient également un soutien opérationnel fourni par l'intermédiaire du prêt de Bonnet Internet par Intel.	
ON	Shoal Lake	Shoalagamo Bay West Public Water System (n° 1771162) AQEP depuis décembre 2005	19/12/2006	19/12/2006	6	0			- Solution provisoire d'indemnisation de la station de pompage transfert à Intel. - Échantillonnage et essais, déterminant d'un plan de visite en collaboration avec l'ASEP. - Critères d'échantillons par l'ASEP le 2 juin 2020, tenant les choix résiduel non conforme aux paramètres exigés. Mesures correctives rapportées : Collecte d'échantillons pour essais par l'ASEP du Service Chefs Association les 23 et 24 juin 2021. Les essais ont révélé que l'eau était conforme à toutes les exigences réglementaires en 19 août 2020. l'ASEP a envoyé une lettre au chef et au conseil recommandant le levée de l'AQEP pour le réseau. Ce droit et le conseil ont suspendu l'occupation de la recommandation jusqu'à ce que le réseau East Nourrisse aussi une eau potable naturel. Solution à long terme et soutien offert à l'opérateur, comme mentionné ci-dessus pour le réseau East.	TITRE1
MB	Shamattawa	Shamattawa Public Water System (1st Mich) AQEP depuis décembre 2016	9/12/2016	9/12/2016	182	14	Utilisé au début de son cycle de vie et préoccupation de la capacité requise. Problèmes d'exploitation et d'entretien.	[redacted]. Mise à niveau de approvisionnement de la station [redacted]. Responsabilité provinciale et amélioration opérationnelles	- Réparations de l'usine terminées, les travaux étaient en suspens en raison de la COVID, les travaux ont repris le 12 avril 2020. Remplacement du moulin offert à l'opérateur par l'entreprise du PFC deux opérateurs de remplacement en formation. Problèmes au panneau de commande à l'exploitation les pompes n'ont toute se sont arrêtées, ce qui fait créer des inquiétudes de capacité d'approvisionnement de la collectivité (sauf des préoccupations de PFC a préparé le panneau de commande). Vous à circuits dans le réseau de distribution avec de d'eau résiduel approprié. Problèmes avec le câblage des semaines valves, le PFC, l'ASEP en remplacement ont réglé de petits d'électricités pressoir au point de arrêt informant en octobre 2020. 11 robinets d'arrêt défectueux ou aucun ont été remplacés, la pression et le chlore résiduel ont été donnés acceptables à la décembre 2020 Faible niveau en chlore résiduel qui persiste lorsque l'opérateur procède est absent, en janvier 2021, le chef voulait maintenir la procédure de levée, la SCSPM a levé le chef que l'ASEP maintenir en place jusqu'à ce que 2 échantillons consécutifs confirment les résultats et concluent au faux de résidus approprié dans le réseau de distribution. Le 19 février, le PFC dans la collectivité a collaboré avec l'opérateur rencontre avec le chef pour discuter de l'importance d'avoir des opérateurs supplémentaires formés et engagés, remplacement ont assumé dans la collectivité le 19 février, des raisons et aux pompes ont été installés, les problèmes ont continué, de rupture d'un robinet évaluants et d'une canalisation d'eau sont très fuyantes et réparées, des entretiens indiquent que le problème de chlore résiduel persiste Du 21 au 28 avril, le PFC présent dans la collectivité, pouvant tenter d'ouvrage au lyrain et localisation d'une fuyeur (vannière en l'arrivée d'eau) à une 440 usagers, le PFC a permis de réparer une personne intéressée à travailler à la ATE, le chlore résiduel demeure une préoccupation dans le réseau de distribution Les travaux ont commencé relativement à la solution à long terme, travaux pour une modernisation majeure, un agrandissement et une nouvelle point d'eau pour de traitement d'eau terminée à l'automne 2020. Station de la date cible pour l'intervention sont la solution à long terme en ce concerne les problèmes en cours à la station existante.	PROJET2
MB	Nation crie de Tataskweyak	Tataskweyak Cree Public Water System (2nd Mich) AQEP depuis mai 2017	17/05/2017	17/05/2018	261	3	Avis émis par la Première Nation en raison de problèmes de contamination persistante (coli-formes totaux, non fondé sur une recommandation de l'ASEP	[redacted]. Amélioration de la station de traitement d'eau, filtration et UV), évaluation de la source de l'eau et analyse des TTHM. Mise à jour de l'étude de faisabilité en cours pour une solution à long terme, conception et construction d'une canalisation pour puiser l'eau dans le lac Rossier [redacted]. 1.0	- La qualité de l'eau respecte les recommandations, équipement et mises à niveau réalisées pour améliorer le traitement, évaluation de la source d'eau, réalisée en janvier 2019, recommandant le lac Rossier comme source privilégiée et une modernisation de la station de traitement existante additionnelle des TTHM. Lettres envoyées à la Première Nation concernant la bonne qualité de l'eau, plusieurs avis envoyés au février 2019), mais la Première Nation n'a pas levée l'avis. Financement accordé pour l'eau embouteillée et la destruction d'avoirs exposant de la source actuelle de l'eau concernant les cyanobactéries. Analyse des cyanobactéries en au-delà des exigences en matière d'avenir des recommandations canadiennes et de la réglementation provinciale. Réalisation d'une évaluation de la source d'eau en vue à jour de l'étude de faisabilité de 2018 en vue d'obtenir en vue d'évaluer les options pouvant répondre aux besoins à long terme en eau potable de la collectivité, après l'étude de faisabilité, le projet de puiser l'eau du lac Rossier passera à l'étape de la conception et de la construction (PAC ont déterminé à financer la conception et la construction d'une canalisation pour puiser l'eau de la collectivité dans le lac Rossier.	À déterminer

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports.

*Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la province évaluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesure corrective	Situation actuelle	Date cible**
SK	Lilac Pine	Lilac Pine Public Water System AGEP depuis novembre 2018	14/11/2018	14/11/2019	200	15	Station en mauvais état en raison de son cycle de vie d'installations d'exploitation et d'entretien	Autre devise : Modernisation de la station de traitement d'eau Échéancier de réalisation : Travaux préparatoires commencés	Les répondants à court terme visent à remettre le système à un niveau de fonctionnement approprié sont terminées. La station fournit un approvisionnement adéquat en eau potable salubre. Au début d'août 2020, la présence de la bactérie E. coli a été signalée dans un puits d'eau brute. Le puits touché a été surchargé le 10 août 2020. Initialement, il y avait des problèmes d'approvisionnement en eau, cependant, certains puits ont subi un entretien et de nouveaux puits ont été creusés et testés. À l'heure actuelle, la Première Nation est sous opérateur accrédité. Le bureau régional de SAC travaille étroitement avec celle-ci pour traiter les services d'un autre opérateur, entre temps. Les fonctions du PO continuent un accident. L'opérateur a dû se déplacer à cause la formation requise en raison de la COVID-19. HAGEP restera en place jusqu'à ce que l'opérateur soit accrédité. L'opérateur pourrait se formaliser, accumulant des heures en vue de son accréditation. La conception à long terme en cours. le processus d'appel d'offres se termine à la fin de juin, et les travaux de construction devraient commencer en juillet 2021. une solution à long terme n'est pas requise pour régler la question des avis, mais la Première Nation pourrait ne pas être éligible à la levée des AGEP LT avant la réalisation complète de la solution à long terme. SAC s'emploie à soutenir la Première Nation par des travaux de construction de la solution à long terme ne pourraient commencer de façon à ce que le 1er septembre 2020.	08/2021
SK	Pineastern	Pineastern Main Public Water System (n° 9999) AGEP depuis Rendu: 2018	02/2015	02/2016	174	12	Les procédés de traitement doivent être révisés pour répondre à la norme. Procédures d'exploitation et d'entretien	Autre devise : Mise à niveau de la station de traitement (nouvelle approbation du niveau de distribution Échéancier de réalisation : Travaux préparatoires terminées. HAGEP a recommandé la révocation des avis	Réparations terminées. levée recommandée en juillet 2019. mais la Première Nation est retenue à niveau d'eau avant que des mises à niveau à long terme de la station de traitement d'eau soient terminées 2020, in effort de partager les coûts d'un niveau de distribution à basse pression. la Première Nation n'a pas donné son accord à ce jour. Les travaux de mise à niveau à long terme sont pratiquement terminés et la station de traitement d'eau mise à niveau fournit de l'eau potable et devrait désormais la collectivité	À déterminer
SK	Pineastern	Pinfold Well (n° 11182) AGEP depuis avril 2012	13/04/2012	13/04/2016	8	1				À déterminer
ON	Big Grassy	Big Grassy Public Water System AGEP depuis mars 2021	09/03/2021	09/03/2022	80	7	Outils d'aide et points de protection de distribution	Autre devise : Mise à niveau de traitement de la station de traitement actuelle Échéancier de réalisation : s.o.	Les utilisateurs ont tous le plus probablement eau à la station actuelle. Nous AGEP au cours des six derniers mois. AGEP actuel en raison de la perte de pression de distribution. Suite prévoyez Détection et correction des fuites effectuées. séparation d'autres problèmes découlant des travaux de mise à niveau et du développement des nouveaux systèmes et équipements de traitement continuent de poser des défis importants Les dirigeants de la Première Nation ont décidé de maintenir l'AGEP en place jusqu'à la réalisation du projet de modernisation et d'agrandissement en construction depuis mars 2020 L'achèvement de l'emplacement prévoit techniquement d'une partie substantielle des travaux en août 2021. la mise en service devrait avoir lieu le 5 juillet 2021. Les réunions de l'EGP ont lieu tous les mois. la plus récente ayant été tenue le 21 mai 2021. et la prochaine, le 18 juin 2021. à la réunion du mai des AGEP. Renforcement a fait state des problèmes liés à la chaîne d'approvisionnement. des vendeurs de Nappanee (IN) et la vente de commande pour moteurs (COM) ont des répercussions sur le chantier critique. la mise en service du train de filtration est prévue pour le 21 juin 2021. en attendant la livraison du COM. dont le livraison est différée Il y a des problèmes opérationnels et la Première Nation n'est ouvrir qu'elle travaillait sur un plan de retrait dans le but d'entreprendre de nouveaux opérateurs à temps pour la mise en service Soutien opérationnel fourni par le conseil tribal NAN21. par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées, financé par SAC	09/2021
ON	Wahkaygegin Wang	Ace Lake Public Water System AGEP depuis septembre 2020	08/09/2020	08/09/2021	Environ	Environ	Le système de traitement ne répond pas aux exigences des règlements d'élimination acheminement et sont inadéquats	Autre devise : Modernisation du système de traitement Échéancier de réalisation : s.o.	Avis d'ébullition de l'eau en vigueur. car le système de traitement ne répond pas aux exigences d'élimination des registres. l'information sur la qualité de l'eau n'est pas fiable par des échantillonnages et des essais pouvoirs nécessaire de l'eau. La conception à long terme de la modernisation du système de traitement a été achevée dans le cadre du projet du système de Twi réseau de la réserve de la Wahkaygegaming Selon l'échéancier de construction actuel. la modernisation doit être terminée en juillet 2021. les répondants de SAC ont demandé à l'entrepreneur de produire un calendrier révisé. l'entrepreneur a remis un calendrier révisé le 28 mai 2021. précisant que la date d'achèvement du réseau d'eau Lake demeure inchangée.	07/2021
ON	Wahkaygegin Wang	Wahkaygegaming #28 Public Water System	07/01/2021	07/01/2022	17	0	Aucun contrôle de la qualité pour la station de traitement	Autre devise : Mise à niveau de	Défis opérationnels. l'AGEP découle des contrôle irréguliers de la station et de la qualité de l'eau	08/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves *Le nombre de maisons et d'immeubles communautaires touchés n'est qu'une estimation et doit être confirmé avant son utilisation dans les rapports. *Les données dates citées sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la province évaluent. Les dates citées seront mentionnées au fur et à mesure de l'avancement des projets.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AGEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	État	Mesures correctives	Situation actuelle	Date cible**
		AGEP (Ajout janvier 2021					problèmes opérationnels	approvisionnement de la station pour mémo : Correction des causes d'exhaustion relevées lors de l'évaluation de la station (pompes, filtres, électricité et automatismes) et amélioration des opérations	1- Évaluation de la station (Audit des causes d'exhaustion (pompes, filtres, électricité et automatismes) : WAI a approuvé un financement pour les coûts entendus pour régler ces problèmes d'exhaustion. Avant de procéder(non fait pour établir les services d'un ingénieur conseil, en cours d'appel, visite sur les lieux la semaine du 29 mars 2021, réception du rapport d'évaluation de l'ingénieur signalant des problèmes avec les membranes de nanofiltration, fournisseur de traitement évalué le 17 mai 2021, et rapport d'évaluation mis à jour comprenant les conclusions et les recommandations du fournisseur de traitement demandé(fait) reçu le 31 mai 2021, en date du 11 juin 2021. SAC n'avait pas encore reçu le rapport, car l'ingénieur conseil avait signalé que le fournisseur de traitement (Nagoor Nazir) n'avait pas encore présenté son évaluation et ses recommandations, les travaux de réparation devraient être terminés à la fin d'août 2021, mais en raison du retard accusé par le fournisseur de traitement, l'accès en risque jusqu'à l'automne prochain du retard. Soudar, opérationnel fourni par l'OPFPC, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées, financé par SAC. L'évolution de la pandémie de COVID freine les progrès du site, dans le soutien apporté à l'amélioration des opérations Une étude de faisabilité a permis d'établir une solution à long terme, à l'heure actuelle, le projet n'est pas encore financé.	

AUTRES INITIATIVES CONNEXES			
Région	Première Nation	Projet	Situation actuelle
ON	Première Nation de Curve Lake	Curve Lake New Water Treatment Plant	- La Première Nation de Curve Lake ne compte, à l'heure actuelle, aucun avis sur la qualité de l'eau potable en vigueur. En juin 2018, l'AGEP LT sur l'immeuble administratif des écoles de Curve Lake a été levé. - Curve Lake est desservi avec de l'eau souterraine pompée dans environ 300 puits individuels aux Grèque Island, en plus de la subdivision Nishnawbeg qui est desservi par un réseau collectif d'approximativement quatorze (Curve Lake (Nishnawbeg)/Shaw Supply Treatment System , qui dessert 28 maisons), un réseau sera dérivé une fois la nouvelle station de traitement mise en fonction, et le réseau de distribution mise autant de la subdivision Nishnawbeg sera intégré au nouveau système. Le réservoir compte 208 immeubles à revenu faible qui sont aussi desservis par des puits individuels. Cet article ne servira pas desservis par le nouveau réseau de traitement et de distribution d'eau. Les puits individuels de Curve Lake sont d'une qualité et d'une quantité inégales, avec un taux fondamentales parvenu d'eau et une contamination des installations septiques sur place. Le résultat des essais précédents montre la présence de niveaux élevés de sodium, de solubilité, de fer et de nitrates dans de nombreuses sources d'eau souterraine. Dans le cadre de l'Évaluation nationale (Bangor Environmental Ltd., décembre 2016), quatre puits privés ont été examinés en tant problèmes de qualité d'eau liés à la présence de coliformes, de nitrates et de nitrite, et à la dureté et aux solides dissous totaux (STD) élevés. Un rapport hydrogéologique publié en novembre 2018 (Geologic Environmental Ltd.) indiquait que quatre puits qui devaient à l'origine alimenter le réseau collectif de traitement de l'eau, efficacité de forte concentrations de solides dissous totaux (TDS), de dureté et de sodium, en plus de concentrations variables de carbone organique dissous (COD). - La station de pompage de la subdivision Nishnawbeg manque régulièrement d'eau en n'a pas la capacité suffisante pour répondre à la demande actuelle. Le dernier rapport du Système de rapports sur la qualité des eaux (2018-019) recommandait une rénovation majeure ou un remplacement. Un nouveau système de traitement et de distribution d'eau a mettre de respecter la réglementation sur l'eau potable de l'Ontario pour alimenter en eau potable saine la Première Nation pendant au moins les 20 prochaines années est nécessaire. – SAC a fourni un financement à la Première Nation de Curve Lake pour la mise à jour de son étude de faisabilité. L'étude mise à jour recommandait, et la collectivité a privilégié, une station de traitement d'eau en surface avec filtration sur membrane et un réseau de distribution étang avec débit pour les services d'incendie, au coût estimatif de plus de 50 millions de dollars. - SAC est prêt à financer la construction du système de traitement d'eau de Curve Lake, comme il est prévue dans la demande d'approbation de projet approuvée par le chef et le conseil le 2 juin 2020 et par SAC le 23 juin 2020, compte tenu de la croissance future des membres de la Première Nation vivant dans la réserve mentionnée dans l'étude connexion. - SAC a reçu la version définitive de l'étude de faisabilité le 28 mai 2020. La phase de conception du projet a été approuvée le 15 juillet 2020, soit 2,3 millions de dollars. La Première Nation collabore avec un gestionnaire de projet et un expert-conseil en conception pour terminer la conception d'ici la fin mars 2022.
ON	Neskantaga	Fuites conflance aux vannes	- La SSGPNO de la région de l'Ontario a financé, à raison de 200 000 $, la proposition « Fuites conflance aux vannes » à Neskantaga. Le but d'un plan de gadministrateur des communautés qui s'en servent sur le quartiers communautaire, fabrication à la colonie, fabrique de qui se fréalisement d'actes stratégies de réseau être appropriées pour la collectivité. Cette proposition est née au besoin de remédier aux effets psychologiques d'principale de l'AGEP « T qui n'a pas su maintenir la fournitures constant et des avis en cours, menace de la collectivité. - La financement initial de la SSGPNO de la région de l'Ontario servira surtout à habiliter la communauté et à renforcer les capacités en vue d'élaborer le plan de gadministrateur des communautés, en plus d'obtenir le soutien en santé mentale pour la mobilisation de la collectivité et en réglant les problèmes susceptibles de en jouer à la suite de ces séances. - La première contribution de la collectivité (approuvée en février 2021) sera supervisée par la Première Nation. la SSGPNO donnera à la disposition de la Première Nation pour la soutien à mesure que le mise en œuvre du projet avance. - La SSGPNO de la région de l'Ontario est déterminée à financer la mise en place et la réalisation du plan de gadministrateur des communautés qui est élaboré par l'ensemble d'un processus de mobilisation communautaire, en consultation avec la SSGPNO.

ANNEXE B

ORDONNANCE D'AUTORISATION DE LA COUR FÉDÉRALE

Voir ci-joint.

Federal Court  Cour fédérale

Date : 20201008

Dossier: T-1673-19

Ottawa (Ontario)

Le 8 octobre 2020

PRÉSENT : L'honorable juge Favel

ENTRE :

LA PREMIÈRE NATION DE CURVE LAKE ET LA CHEFFE EMILY WHETUNG POUR SON PROPRE COMPTE ET POUR LE COMPTE DE TOUS LES MEMBRES DE LA PREMIÈRE NATION DE CURVE LAKE ET LA PREMIÈRE NATION DE NESKANTAGA ET LE CHEF CHRISTOPHER MOONIAS POUR SON PROPRE COMPTE ET POUR LE COMPTE DE TOUS LES MEMBRES DE LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

et

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

ORDONNANCE

LA PRÉSENTE REQUÊTE en autorisation, présentée par les demandeurs, a été entendue le 16 septembre 2020.

À LA LECTURE du dossier de requête des demandeurs et du consentement du défendeur.

1. **LA COUR ORDONNE** que ce recours soit et est autorisé par les présentes comme un recours collectif conformément aux *Règles des cours fédérales*, 334.16 et 334.17.

2. **LA COUR ORDONNE ET DÉCLARE** que le groupe est défini comme suit :

(a) *Toutes les personnes autres que les personnes exclues :*

(i) qui sont membres d'une bande au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, c, I-5 (« **Première Nation** »), dont la disposition des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, c. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations sont visées par un avis sur la qualité de l'eau potable (qu'il s'agisse d'un avis d'ébullition d'eau, d'un avis de ne pas boire ou d'un avis de non-utilisation ou d'un autre type d'avis) qui a duré au moins un an depuis le 20 novembre 1995 jusqu'à maintenant (les «**Premières Nations touchées**»);

(ii) qui n'étaient pas décédées avant le 20 novembre 2017; et

(iii) qui résidaient habituellement dans une Première Nation touchée alors visée par un avis sur la qualité de l'eau potable qui a duré au moins un an; et

(b) *La Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation touchée qui a choisi de se joindre au présent recours à titre de représentant (les « **Nations participantes** »).*

Les « **personnes exclues** » sont les membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang et de la bande indienne d'Okanagan, et Michael Daryl Isnardy.

3. **LA COUR ORDONNE ET DÉCLARE** que, jusqu'à ce que les réclamations invoquées dans le présent recours collectif soient entièrement et définitivement décidées, réglées,

interrompues ou abandonnées, y compris l'épuisement de tous les droits d'appel, la permission de la Cour est requise pour introduire tout autre recours, instance ou procédure pour le compte d'un membre du groupe à l'égard des réclamations invoquées dans le présent recours, sauf les recours, instances ou procédures introduits pour le compte des membres du groupe qui se sont exclus du présent recours collectif de la manière prescrite ci-après.

4. **LA COUR ORDONNE ET DÉCLARE** que les questions communes suivantes soient et sont par les présentes autorisées aux fins de résolution pour le compte du groupe dans son ensemble:

(a) *Depuis le 20 novembre 1995 jusqu'à maintenant, le défendeur a-t-il un devoir ou une obligation envers les membres du groupe de prendre des mesures raisonnables pour leur fournir ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable pour l'utilisation humaine?*

5. **LA COUR ORDONNE ET DÉCLARE** qu'un sous-groupe soit et est par les présentes reconnu pour les membres de chaque Première Nation touchée, et la Première Nation elle-même, s'il s'agit d'une Nation participante;

6. **LA COUR ORDONNE ET DÉCLARE** que les questions communes suivantes soient et sont, par les présentes, autorisées aux fins de résolution pour le compte de chaque sous-groupe :

(a) *Si la réponse à la question commune 4(a) est « oui », le Canada a-t-il manqué à ses devoirs ou obligations envers les membres du sous-groupe?*

(b) *Si la réponse à la question commune 6(a) est « oui », une violation de la Charte des droits et libertés (« **Charte** ») est-elle sauvée par l'art. 1 de la Charte?*

(c) *Si la réponse à la question commune 6(a) est « oui », le manquement du défendeur a-t-il causé une entrave importante et déraisonnable à l'utilisation et à la jouissance de leurs terres par les membres du groupe ou leurs Premières Nations?*

(d) *Si la réponse à la question commune 6(a) est « oui » et que la réponse à la question commune 6(b) est « non », les membres du sous-groupe peuvent-ils obtenir des dommages en vertu de l'art. 24(1) de la Charte?*

(e) *La causalité des dommages subis par les membres du sous-groupe peut-elle être considérée comme une question commune?*

(f) *La Cour peut-elle procéder à une évaluation globale de tout ou partie des dommages subis par les membres du sous-groupe?*

(g) *La conduite du défendeur justifie-t-elle l'octroi de dommages-intérêts punitifs et, dans l'affirmative, de quel montant?*

(h) *La Cour devrait-elle ordonner au défendeur de prendre des mesures pour fournir aux membres du sous-groupe ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable?*

(i) *Dans l'affirmative, quelles mesures devraient être ordonnées?*

7. **LA COUR ORDONNE ET DÉCLARE** que la cheffe Emily Whetung, la Première Nation de Curve Lake, le chef Christopher Moonias et la Première Nation de Neskantaga sont nommés par les présentes représentants demandeurs du groupe.

8. **LA COUR ORDONNE ET DÉCLARE** que McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP sont nommés par les présentes avocats du groupe (les «**avocats du groupe** »).

9. **LA COUR ORDONNE ET DÉCLARE** que les demandeurs et le défendeur déploient des efforts raisonnables pour convenir de la nomination d'un administrateur aux fins de donner avis de l'autorisation du présent recours collectif (l'« **administrateur** »). Les parties avisent la Cour de la nomination de l'administrateur dans les soixante (60) jours suivant la date de la présente ordonnance, à défaut de quoi la Cour nomme un administrateur dûment qualifié.

10. **LA COUR ORDONNE** que les membres du groupe soient avisés que le présent recours a été autorisé en tant que recours collectif de la manière suivante, ce qui constitue et est par les présentes réputé constituer un avis adéquat :

(a) *l'avis simplifié figurant à l'**annexe A** et l'avis détaillé figurant à l'**annexe B**, ainsi que la traduction en français de ces documents sont affichés, tel que convenu par les parties, sur les sites Web respectifs des avocats du groupe, du défendeur et de l'administrateur;*

(b) *l'administrateur publie l'avis simplifié dans les journaux indiqués à l'**annexe C** jointe aux présentes, en format ¼ de page dans l'édition de fin de semaine de chaque journal, si possible;*

(c) *l'administrateur distribue l'avis simplifié à tous les bureaux de la Première Nation de Curve Lake, de la Première Nation de Neskantaga et de l'Assemblée des Premières Nations;*

(d) *l'administrateur transmet l'avis simplifié et l'avis détaillé à tout membre du groupe qui en fait la demande;*

(e) *l'administrateur transmet l'avis simplifié et l'avis détaillé aux chefs de chaque Première Nation touchée indiquée conformément au paragraphe 12 ci-après, à l'exception des personnes exclues;*

(f) *l'administrateur transmet l'avis simplifié et l'avis détaillé au bureau de la bande ou à un bureau analogue de chaque Première Nation touchée indiquée conformément au paragraphe 12 ci-après, à l'exception des personnes exclues, en demandant qu'ils soient affichés dans un endroit bien visible;*

(g) *l'administrateur établit une ligne de soutien nationale sans frais, afin de fournir de l'aide aux membres du groupe, aux familles, aux tuteurs, aux gardiens ou aux autres personnes qui font des demandes de renseignements pour leur propre compte ou pour le compte de membres du groupe.*

11. **LA COUR ORDONNE** que le défendeur soit responsable du coût de la remise d'un avis d'autorisation d'un recours collectif tel qu'il est énoncé au paragraphe 10 ci-dessus.

12. **LA COUR ORDONNE** que, dans les 30 jours qui suivent la date de la présente ordonnance, les demandeurs et le défendeur échangent une liste de leurs meilleurs renseignements sur les noms des Premières Nations qui peuvent participer au groupe, et ces listes constituent le moyen d'établir les Premières Nations qui ont droit à un avis direct aux fins des paragraphes 10(e) et (f) ci-dessus.

13. **LA COUR ORDONNE** qu'un membre du groupe puisse s'exclure du présent recours collectif en remettant un coupon d'exclusion signé, dont un modèle est joint à l'**annexe D**, ou une autre demande d'exclusion signée et lisible, dans les cent vingt (120) jours qui suivent la date à laquelle l'avis est publié pour la première fois conformément au paragraphe 10(b) ci-dessus (la «**date limite d'exclusion** »), à l'administrateur. L'avis simplifié et l'avis détaillé doivent indiquer la date limite d'exclusion et l'adresse de l'administrateur aux fins de la réception des coupons d'exclusion.

14. **LA COUR ORDONNE** qu'aucun membre du groupe ne puisse s'exclure du présent recours collectif après la date limite d'exclusion, sauf avec l'autorisation de la Cour.

15. **LA COUR ORDONNE** que l'administrateur signifie aux parties et dépose auprès de la Cour, dans les soixante (60) jours suivant l'expiration de la date limite d'exclusion, une déclaration sous serment énumérant toutes les personnes qui ont fait leur choix de s'exclure du recours collectif, le cas échéant.

16. **LA COUR ORDONNE** qu'une Première Nation touchée puisse participer au présent recours collectif en mandatant les avocats du groupe au moins cent vingt (120) jours avant le règlement de l'une ou l'autre des questions communes (la « **date limite de participation** »), aux avocats du groupe, à l'adresse indiquée au paragraphe 11 ci-dessus.

17. **LA COUR ORDONNE** qu'aucun membre du groupe ne puisse participer au présent recours collectif après la date limite de participation, sauf avec l'autorisation de la Cour.

18. **LA COUR ORDONNE** que les avocats du groupe signifient aux parties et déposent auprès de la Cour, dans les soixante (60) jours suivant l'expiration de la date limite de participation, une liste de toutes les Premières Nations touchées qui ont choisi de participer au recours collectif.

19. **LA COUR DÉCLARE** que le plan de poursuite de l'instance joint aux présentes à l'appendice 1 est une méthode pratique pour faire avancer le recours collectif pour le compte du groupe.

20. **LA COUR ORDONNE** que chaque partie supporte ses propres frais de la requête en autorisation du présent recours collectif.

« Paul Favel »
Juge

Annexe A

Avis juridique

Êtes-vous membre d'une Première Nation qui a été visée par un avis concernant la qualité de l'eau potable à long terme?

Une poursuite pourrait avoir une incidence sur vous et votre Première Nation. Veuillez lire ceci attentivement.

Vous pourriez être touché par un recours collectif en raison du manque d'accessibilité à l'eau potable propre sur les réserves des Premières Nations.

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont décidé qu'un recours collectif au nom d'un « groupe » de membres des Premières Nations et de membres d'une bande pouvait être intenté. Les membres d'une bande peuvent choisir de demeurer dans le groupe. Les Premières Nations peuvent choisir de se joindre ou non au groupe. Il n'y a pas d'argent disponible à l'heure actuelle et rien ne garantit que le recours collectif sera accueilli.

Les tribunaux ont nommé la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga et le chef Christopher Moonias à titre de représentants demandeurs pour le groupe.

De quoi s'agit-il?

Le présent recours collectif allègue que le Canada a manqué à ses obligations en ne veillant pas à ce que les communautés des Premières Nations aient un accès adéquat à de l'eau potable salubre. Le recours collectif allègue que les membres de ces communautés et les communautés elles-mêmes ont subi des préjudices émotionnels, physiques, financiers et spirituels. Le recours collectif allègue que le Canada a manqué à ses obligations fiduciaires et à son devoir de diligence et a contrevenu à la *Charte des droits et libertés*. La Cour n'a pas statué sur la véracité de ces allégations. En l'absence de règlement, les demandeurs devront prouver leurs prétentions devant le tribunal.

Si vous avez des questions au sujet du présent recours collectif, vous pouvez communiquer avec M. **Eric Khan** au 1-800-538-0009 ou à l'adresse info@classaction2.com.

Qui représente le groupe?

La Cour a nommé McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP pour représenter le groupe à titre d' « avocats du groupe ». Vous n'êtes pas tenu de payer les avocats du groupe, ni personne d'autre, pour participer. Si les avocats du groupe obtiennent de l'argent ou des avantages pour le groupe, ils peuvent demander des honoraires et des frais d'avocats, lesquels seront déduits des sommes ou des avantages recouvrés pour les membres du groupe.

Particuliers membres du groupe : Qui est inclus et qui est exclu?

Membres d'une bande inclus : Le groupe comprend les membres d'une bande (au sens de la *Loi sur les Indiens*) : a) dont la réserve était visée par un avis concernant l'eau potable (tel qu'un avis

d'ébullition de l'eau, etc.) pendant au moins un an à un moment quelconque du 20 novembre 1995 jusqu'à maintenant; b) qui n'étaient pas décédés avant le 20 novembre 2017; et c) qui vivent habituellement dans leur réserve.

Membres d'une bande exclus : Les membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang, de la bande indienne d'Okanagan et Michael Daryl Isnardy sont exclus de ce recours collectif.

Particuliers : Quelles sont vos options?

Demeurer dans le groupe : Pour demeurer dans le groupe, vous n'avez rien à faire. Si le groupe obtient de l'argent ou des avantages, les avocats du groupe donneront un avis sur la façon de réclamer votre part. Vous serez légalement lié par toutes les ordonnances et tous les jugements, et vous ne pourrez pas poursuivre le Canada au sujet des mêmes réclamations en droit.

Le fait de demeurer dans le groupe n'aura pas d'incidence sur le soutien reçu des organismes communautaires qui sont financés par un gouvernement.

S'exclure du groupe : Si vous ne souhaitez pas participer à ce recours collectif, vous devez vous en exclure. Si vous vous excluez, vous ne pouvez pas obtenir d'argent ni d'avantages de ce litige. Pour vous exclure, veuillez visiter **[NDR : Insérer le site Web de l'administrateur pour ce recours]** pour obtenir un coupon d'exclusion ou écrire à CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2 afin de demander votre exclusion du présent recours collectif. Indiquez vos nom, adresse, numéro de téléphone et apposez votre signature. **Votre demande d'exclusion doit être envoyée au plus tard le [NDR : 90 jours à partir de la date de la première publication de l'avis].**

Premières Nations : Quelles sont vos options?

Choisir de se joindre au groupe : Les Premières Nations qui souhaitent se joindre au groupe et faire valoir des réclamations au nom de leur communauté doivent prendre des mesures pour participer au recours. Pour participer au recours ou obtenir de plus amples renseignements, veuillez communiquer avec l'administrateur au 1-800-538-0009 ou à l'adresse info@classaction2.com. Les Premières Nations peuvent également communiquer avec l'avocate du groupe Stephanie Willsey (sans frais : 1-877-244-7711; swillsey@mccarthy.ca) ou l'avocat du groupe Kevin Hille 416-598-3694; khille@oktlaw.com). **Votre demande de participation doit être envoyée au plus tard 120 jours avant la décision quant aux réclamations des membres du groupe.**

Comment puis-je obtenir de plus amples renseignements?

Nom de l'administrateur : CA2
Coordonnées : 1-800-538-0009 ou info@classaction2.com

Transmettre l'information aux personnes qui en ont besoin

Les représentants demandeurs et les avocats du groupe demandent aux travailleurs de la santé, aux travailleurs sociaux, aux dirigeants communautaires des Premières Nations, aux membres de la famille, aux aidants et aux amis des membres du groupe de bien vouloir transmettre l'information

aux membres du groupe qui auraient de la difficulté à lire ou à comprendre le présent avis. On peut obtenir de plus amples renseignements sur le présent recours sur le site Web ou en communiquant avec l'administrateur. Veuillez montrer le présent avis aux personnes qui pourraient être touchées par le présent recours ou à leurs aidants.

Annexe B

Êtes-vous membre d'une Première Nation qui a été visée par un avis concernant la qualité de l'eau potable à long terme?

Si vous avez répondu « OUI », un recours collectif pourrait avoir une incidence sur vos droits et les droits des Premières Nations

Un tribunal a autorisé le présent avis

- Vous pourriez être touché par un recours collectif visant l'accès à l'eau potable propre dans vos communautés des Premières Nations.
- La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont décidé que des recours collectifs peuvent être introduits pour le compte d'un « groupe » de membres des Premières Nations et de membres d'une bande. Les membres d'une bande peuvent choisir de demeurer dans le groupe. Les Premières Nations peuvent choisir de se joindre ou non au groupe. Les tribunaux ont nommé la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga et le chef Christopher Moonias à titre de représentants demandeurs pour le groupe.
- Les tribunaux n'ont pas statué si le Canada avait eu des comportements fautifs, et la question à savoir si le Canada a fait quelque chose de mal doit éventuellement être décidée par le tribunal. Il n'y a pas d'argent offert actuellement et rien ne garantit qu'il y en aura. Cependant, vos droits sont touchés et vous avez un choix à faire maintenant. Le présent avis vise à vous aider, vous et votre Première Nation, à faire ce choix.

PARTICULIERS MEMBRES D'UNE BANDE : VOS DROITS LÉGAUX ET OPTIONS À CETTE ÉTAPE	
NE RIEN FAIRE : CONSERVER VOS DROITS DANS LE CADRE DU GROUPE	**Demeurer membre du groupe dans le cadre de ces poursuites et attendre le résultat du litige. Partager les avantages éventuels résultant du litige, mais abandonner certains droits individuels.** En ne faisant rien, vous gardez la possibilité de recevoir de l'argent ou d'autres avantages pouvant découler d'un procès ou d'un règlement. Mais vous renoncez à tout droit de poursuivre vous-même le Canada à propos des mêmes réclamations en droit que dans la présente poursuite.
VOUS EXCLURE DU GROUPE (OPTION D'EXCLUSION)	**Vous exclure du groupe dans le cadre de ces poursuites et n'en tirer aucun avantage. Conserver ses droits.** Si vous demandez de vous exclure du groupe et que de l'argent ou des avantages sont ultérieurement attribués aux membres du groupe, vous n'en bénéficierez pas. Mais vous conservez le droit de poursuivre vous-même le Canada à propos des mêmes réclamations en droit que dans la présente poursuite.
PREMIÈRES NATIONS : VOS DROITS LÉGAUX ET OPTIONS À CETTE ÉTAPE	

QUESTIONS? APPELEZ SANS FRAIS AU 1-800-538-0009 OU VISITEZ HTTPS://CLASSACTION2.COM/

CHOISIR DE SE JOINDRE AU GROUPE (OPTION DE PARTICIPATION)	**Se joindre au groupe. Si vous vous joignez au groupe, vos Premières Nations pourraient partager l'argent et les avantages résultant du litige.** En vous joignant au groupe (option de participation), les Premières Nations pourraient recevoir de l'argent ou d'autres avantages, notamment des infrastructures d'approvisionnement en eau, qui pourraient découler d'un procès ou d'un règlement dans le cadre du recours collectif. Il est facile de participer et cela ne coûte rien.

NE RIEN FAIRE: PERDRE LES DROITS DE VOTRE PREMIÈRE NATION AUX TERMES DU RECOURS COLLECTIF	**En ne faisant rien, votre Première Nation perdra la possibilité de recevoir de l'argent et d'autres avantages si le recours collectif est accueilli favorablement.** Si les Premières Nations se joignent pas au groupe (option de participation) et que de l'argent ou des avantages sont ultérieurement attribués, votre Première Nation n'en bénéficiera pas. En choisissant de ne pas participer, votre Première Nation peut conserver les droits de poursuivre le Canada à propos des mêmes réclamations en droit que dans le présent litige.

- Les avocats doivent prouver les réclamations contre le Canada lors d'un procès ou conclure un règlement. Si de l'argent ou des avantages sont obtenus, vous serez avisé de la façon de réclamer votre part.

- Vos options sont expliquées dans le présent avis. Pour être exclu du recours, les particuliers membres d'une bande doivent en faire la demande au plus tard le **[NDR : 90 jours à partir de la première publication de l'avis.]**. Pour se joindre au recours collectif, les Premières Nations doivent envoyer leur avis de participation au plus tard 120 jours avant la décision quant aux réclamations des membres du groupe.

QUE CONTIENT LE PRÉSENT AVIS?

RENSEIGNEMENTS DE BASE

1. Pourquoi le présent avis est-il remis?

Les tribunaux ont des recours collectifs « autorisés ». Cela signifie que les poursuites respectent les exigences relatives aux recours collectifs et peuvent être instruites. Si vous êtes inclus, vous pourriez avoir des droits légaux et des options avant que les tribunaux ne statuent sur le bien-fondé des réclamations intentées contre le Canada en votre nom. Le présent avis tente d'expliquer toutes ces démarches.

Le juge en chef Joyal de la Cour du banc de la Reine du Manitoba préside actuellement l'affaire *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Le juge Favel de la Cour fédérale du Canada préside actuellement l'affaire *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias v. Canada*. Les personnes qui intentent une poursuite sont appelées les demandeurs. Le Canada est le défendeur. Un lien vers la dernière version de la demande introductive d'instance (le document juridique énonçant les allégations contre le Canada) est disponible ici : https://www.mccarthy.ca/fr/action-collective-concernant-les-avis-sur-la-qualite-de-leau-potable-des-premieres-nations.

2. Quel est l'objet du présent recours?

Les présents recours collectifs allèguent que le Canada a manqué à ses obligations en ne veillant pas à ce que les communautés des Premières Nations aient un accès adéquat à de l'eau potable salubre. Les recours collectifs allèguent également que les membres de ces communautés et les communautés elles-mêmes ont subi des préjudices émotionnels, physiques, financiers et spirituels. Les recours collectifs allèguent que le Canada a manqué à ses obligations fiduciaires et à son devoir de diligence et a contrevenu à la *Charte des droits et libertés*. Les tribunaux n'ont pas statué (et le Canada n'a fait aucun aveu) quant à la véracité de l'une ou l'autre de ces affirmations. S'il n'y a pas de règlement avec le Canada, les demandeurs devront prouver leurs prétentions devant la Cour.

Si vous éprouvez des difficultés à comprendre cet enjeu ou si vous avez des questions au sujet du recours collectif, vous pouvez composer le 1-800-538-0009 pour obtenir de l'aide.

3. Pourquoi s'agit-il d'un recours collectif?

Dans un recours collectif, les « représentants demandeurs » (en l'espèce, la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Nesktanaga et le chef Christopher Moonias) ont poursuivi en justice au nom des particuliers membres d'une bande et de Premières Nations qui ont des revendications semblables. Tous ces particuliers membres d'une bande font partie du « groupe » ou sont des « membres du groupe », de même que les Premières Nations qui choisissent de se joindre au recours collectif. La Cour règle les questions pour tous les membres du groupe dans une même affaire, sauf (dans le cas des particuliers membres du groupe) pour ceux qui se retirent du groupe (option d'exclusion) et (dans le cas des Premières Nations) pour ceux qui ne se joignent pas au recours collectif (option de participation).

4. Qui est membre du groupe?

Le groupe comprend et exclut les personnes suivantes :

Toutes les personnes, sauf les « personnes exclues » :

(i) qui sont membres d'une bande au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, c, I-5 (« **Première Nation** »), dont la disposition des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, c. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations sont visées par un avis sur la qualité de l'eau potable (qu'il s'agisse d'un avis d'ébullition d'eau, d'un avis de ne pas boire, d'un avis de non-utilisation ou d'un autre type d'avis) qui a duré au moins un an depuis le 20 novembre 1995 (les « **Premières Nations touchées** »);

(ii) qui n'étaient pas décédées deux ans avant le début du présent recours (soit, au plus tard le 20 novembre 2017);

(iii) qui résidaient habituellement dans une Première Nation touchée pendant qu'elle était visée par un avis sur la qualité de l'eau potable qui a duré au moins un an; et

(iv) la Nation des Cris de Tataskweyak, la Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation touchée qui choisit de se joindre au présent recours à titre de représentant (les « **Nations participantes** »).

Les « **personnes exclues** » sont des membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang, de la bande indienne d'Okanagan et de la bande indienne d'Okanagan et de Michael Daryl Isnardy.

5. Que veulent les demandeurs?

Les demandeurs réclament des sommes d'argent et d'autres avantages pour le groupe, notamment des infrastructures d'approvisionnement en eau. Les demandeurs réclament également des honoraires d'avocats et des frais de justice, majorés des intérêts.

6. Y a-t-il de l'argent offert maintenant pour les membres du groupe?

Il n'y a pas d'argent ni d'avantages à l'heure actuelle parce que la Cour n'a pas encore statué quant aux comportements fautifs du Canada et que les deux parties n'ont pas conclu de règlement. Rien ne garantit que des sommes d'argent ou des avantages seront obtenus. Si de l'argent ou d'autres avantages deviennent disponibles, un avis sera donné sur la façon de réclamer votre part.

VOS DROITS ET OPTIONS

Chaque particulier membre d'une bande doit décider s'il veut rester ou non dans le groupe, et doit le faire au plus tard le **[NDR : 90 jours à partir de la première publication de l'avis]**. Les

Premières Nations doivent décider de se joindre ou non au groupe **au plus tard 120 jours avant que la Cour ne statue sur les réclamations des membres du groupe.**

7. Que se passe-t-il si je ne fais rien? Que se passe-t-il si la Première Nation ne fait rien?

Particuliers membres d'une bande : Si vous ne faites rien, vous resterez automatiquement dans le recours collectif. Vous serez lié par toutes les ordonnances de la Cour, bonnes ou mauvaises. Si des sommes d'argent ou d'autres avantages sont attribués, vous pourriez avoir à prendre des mesures après avoir reçu un avis pour recevoir des avantages.
Premières Nations : Les Premières Nations doivent choisir de se joindre au recours collectif pour recevoir les avantages éventuels et être liées par toutes les ordonnances, bonnes ou mauvaises.

8. Que se passe-t-il si je ne veux pas me joindre au recours? Que se passe-t-il si une Première Nation souhaite se joindre au recours?

Particuliers membres d'une bande : Si vous ne souhaitez pas être partie à l'instance, vous devez vous retirer – c'est-à-dire choisir « l'option d'exclusion ». Si vous vous retirez, vous ne recevrez aucun avantage pouvant découler du recours collectif. Vous ne serez pas lié par des ordonnances de la Cour et vous conservez le droit de poursuivre le Canada en tant que particulier à l'égard des questions en l'espèce.

Pour vous exclure, envoyez une communication indiquant que vous souhaitez être retiré du groupe de *Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation and Chief Christopher Moonias v. Canada,* dossier de la Cour nº CI-19-01-2466. Indiquez vos nom, adresse, numéro de téléphone et apposez votre signature. Vous pouvez également obtenir un formulaire d'exclusion à l'adresse **[insérer le lien Web de l'administrateur].** Vous devez faire parvenir votre demande d'exclusion au plus tard le **[NDR : 90 jours à partir de la première publication de l'avis]** à: CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2 ou info@classaction2.com.

Composez le **1-800-538-0009** si vous avez des questions sur la façon de vous exclure du recours collectif.

Premières Nations : Les Premières Nations qui souhaitent se joindre au recours collectif et faire valoir des réclamations au nom de leur bande ou de leur communauté doivent prendre des mesures pour s'y joindre – c'est-à-dire choisir l' « option de participation ». Pour choisir l'option de participation ou pour obtenir de plus amples renseignements, veuillez communiquer avec l'administrateur au **1-800-538-0009** ou à l'adresse info@classaction2.com. Les Premières Nations peuvent également communiquer avec les avocats du groupe et demander l'avocate du groupe Stephanie Willsey (sans frais : 1-877-244-7711 ou swillsey@mccarthy.ca) ou l'avocat du groupe Kevin Hille à khille@oktlaw.com ou au 416-598-3694. **Les demandes de participation des Premières Nations doivent être envoyées au plus tard 120 jours avant que la Cour ne statue sur les réclamations des membres du groupe.**

LES AVOCATS QUI VOUS REPRÉSENTENT

9. Les particuliers membres d'une bande sont-ils représentés par un avocat dans ce recours?

Oui. La Cour a nommé McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP pour vous représenter, ainsi que d'autres membres du groupe, à titre d'« avocats du groupe ». Vous n'aurez pas à payer d'honoraires ou d'autres frais juridiques pour ces avocats. Si vous souhaitez être représenté par un autre avocat, vous pouvez en retenir un pour comparaître devant la Cour à vos propres frais.

10. Comment les avocats seront-ils payés?

Les avocats ne seront payés que s'ils obtiennent gain de cause ou concluent un règlement. La Cour doit également approuver leur demande de rémunération. Les honoraires et frais pourraient être déduits des sommes obtenues pour le groupe, ou payés séparément par le défendeur.

PROCÈS

11. Quand et comment la Cour tranchera-t-elle qui a raison?

Si le recours collectif n'est pas rejeté ou réglé, les demandeurs doivent prouver leurs réclamations dans le cadre d'une requête en jugement sommaire ou d'un procès qui aura lieu à Ottawa (Ontario). Au cours de la requête ou du procès, la Cour entendra tous les éléments de preuve de manière à ce qu'elle puisse rendre une décision sur la question de savoir qui des demandeurs ou du Canada a raison à propos des réclamations dans le recours collectif. Rien ne garantit que les demandeurs gagneront quelque somme d'argent ou avantage pour le groupe.

12. Est-ce que je recevrai de l'argent après le procès?

Si les demandeurs obtiennent de l'argent ou des avantages à la suite d'un procès ou d'un règlement, vous serez avisé de la façon d'en demander une part ou des autres options que vous avez à ce moment-là. Ces choses ne sont pas connues à l'heure actuelle. Des renseignements importants sur cette affaire seront affichés sur le site Web **[NDR : insérer le site Web de l'administrateur]** dès qu'ils seront disponible.

OBTENIR DE PLUS AMPLES RENSEIGNEMENTS

13. Comment obtenir de plus amples renseignements? Comment puis-je transmettre l'information aux personnes qui en ont besoin?

Vous pouvez obtenir de plus amples renseignements à l'adresse **https://classaction2.com/** en composant sans frais le 1-800-538-0009, en écrivant à l'adresse suivante : CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2, ou par courriel : **info@classaction2.com.**

Les membres des Premières Nations et les particuliers membres d'une bande peuvent également communiquer avec les avocats du groupe et demander l'avocate du groupe Stephanie Willsey (sans

frais : 1-877-244-7711 ou swillsey@mccarthy.ca ou 66, rue Wellington Ouest, Toronto (Ontario) M5K 1E6) ou l'avocat du groupe Kevin Hille à khille@oktlaw.com ou au 416-598-3694 ou 250, avenue University, 8e étage, Toronto (Ontario) M5H 3E5.

La Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga, le chef Christopher Moonias, la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, et les avocats du groupe demandent aux travailleurs de la santé, aux travailleurs sociaux, aux dirigeants communautaires des Premières Nations, aux membres de la famille, aux aidants et aux amis des membres du groupe de bien vouloir transmettre l'information aux membres du groupe qui auraient de la difficulté à lire ou à comprendre le présent avis. On peut obtenir de plus amples renseignements concernant le présent recours sur le site Web ou en communiquant avec l'administrateur ou les avocats du groupe. Veuillez montrer le présent avis aux personnes qui pourraient être touchées par le présent recours ou à leurs aidants.

Annexe C

Liste des journaux

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Gazette de Montréal
La Presse de Montréal (édition numérique)
Halifax Chronicle-Herald
Moncton Times and Transcript
First Nations Drum

Annexe D

MODÈLE DE COUPON D'EXCLUSION

À: **[Insérer l'adresse de l'administrateur de la réclamation]**
[Insérer l'adresse électronique de l'administrateur]

Il ne s'agit **PAS** d'un formulaire de réclamation. Le fait de remplir le présent **COUPON D'EXCLUSION** vous empêchera de recevoir une indemnité ou d'autres avantages découlant d'un règlement ou d'un jugement dans le cadre du recours collectif désigné ci-après :

Remarque : Pour s'exclure, le présent coupon doit être dûment rempli et envoyé à l'adresse ci-dessus au plus tard **[INSÉRER LA DATE QUI TOMBE 90 JOURS APRÈS LA PREMIÈRE PUBLICATION DE L'AVIS]**

Dossier de la Cour nº : T-1673-19

LA PREMIÈRE NATION DE CURVE LAKE et LA CHEFFE EMILY WHETUNG pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE CURVE LAKE et LA PREMIÈRE NATION DE NESKANTAGA et LE CHEF CHRISTOPHER MOONIAS pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Je comprends qu'en m'excluant de ce recours collectif, je confirme que je ne souhaite pas participer à ce recours collectif.

Je comprends que toute réclamation individuelle que je pourrais avoir doit être introduite dans un délai de prescription déterminé ou cette réclamation sera légalement interdite.

Je crois comprendre que l'autorisation de ce recours collectif a suspendu l'écoulement du délai de prescription à partir du moment où le recours collectif a été déposé. Le délai de prescription recommencera à courir contre moi si je m'exclus de ce recours collectif.

Je comprends qu'en m'excluant, j'assume l'entière responsabilité de la reprise de la poursuite des démarches juridiques pertinentes relatives au délai de prescription pour protéger toute réclamation que je pourrais avoir.

Date :

Nom du membre du groupe :

_____ _____

Signature du témoin

Signature du membre du groupe qui s'exclut

Nom du témoin :

_____

Appendice 1

Dossier de la Cour nº T-1673-19

COUR FÉDÉRALE

ENTRE :

LA PREMIÈRE NATION DE CURVE LAKE et LA CHEFFE EMILY WHETUNG pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE CURVE LAKE
et LA PREMIÈRE NATION DE NESKANTAGA et LE CHEF CHRISTOPHER MOONIAS pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

–e t–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Poursuite en vertu *des Règles des Cours fédérales, 334.16 et 334.17*

PLAN DE POURSUITE DE L'INSTANCE

POUR LES QUESTIONS COMMUNES, LES REQUÊTES EN AUTORISATION ET JUGEMENT SOMMAIRE

1. Le calendrier de consentement des parties est joint en **annexe A**. Le présent plan de poursuite de l'instance vise à traiter des requêtes des demandeurs en autorisation et jugement sommaire.

2. Si la requête en jugement sommaire est accueillie, un autre plan sera proposé pour régler les questions restantes, selon le résultat.

3. Sinon, si la requête en jugement sommaire n'est pas accueillie, les demandeurs proposeront un autre plan pour l'instruction des questions communes.

4. Les demandeurs demandent l'autorisation de la question commune suivante devant être résolue pour le compte de l'ensemble du groupe (la « **question commune de l'étape 1** ») :

   (a) Depuis le 20 novembre 1995 jusqu'à maintenant, le défendeur a-t-il un devoir ou une obligation envers les membres du groupe de prendre des mesures raisonnables pour leur fournir ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable pour l'utilisation humaine?

5. Si le défendeur consent à l'autorisation d'un recours collectif, les demandeurs négocieront avec le défendeur pour résoudre les questions communes. En cas d'échec des négociations, les demandeurs exigeront la remise d'une défense, après quoi ils remettront un dossier à l'appui d'une requête en jugement sommaire sur la question commune de l'étape 1. Lors d'une conférence préparatoire à l'instruction qui suit la remise du dossier des demandeurs, ils demanderont à la Cour de décider que cette affaire est appropriée pour un jugement sommaire et de fixer une date d'audition de leur requête.

6. Si le défendeur s'oppose à l'autorisation d'un recours collectif, les demandeurs exigeront que le défendeur présente une défense. Les demandeurs produiront alors un dossier à l'appui des requêtes en autorisation et jugement sommaire sur la question commune de l'étape 1. Lors d'une conférence préparatoire à l'instruction qui suit la remise du dossier des demandeurs, ils demanderont à la Cour de décider que cette affaire est appropriée pour un jugement sommaire et de fixer le calendrier d'audition de leur requête en jugement sommaire ainsi que l'audition de leur requête en autorisation.

7. Lors de la requête en autorisation, les demandeurs demanderont également l'autorisation des questions communes suivantes devant être résolues pour le compte de chaque sous-groupe de la Première Nation touchée, soit les membres de cette Première Nation et la Première Nation elle-même, si elle est une Première Nation participante (les « **questions communes de l'étape 2** ») :

(a) Si la réponse à la question commune 4(a) est « oui », le Canada a-t-il manqué à ses devoirs ou obligations envers les membres du sous-groupe?

(b) Si la réponse à la question commune 7(a) est « oui », une violation de la *Charte des droits et libertés* (« **Charte** ») est-elle sauvée par l'art. 1 de la *Charte*?

(c) Si la réponse à la question commune 7(a) est « oui », le manquement du défendeur a-t-il causé une entrave importante et déraisonnable à l'utilisation et à la jouissance de leurs terres par les membres du groupe ou leurs Premières Nations?

(d) Si la réponse à la question commune 7(a) est « oui » et que la réponse à la question commune 7(b) est « non », les membres du sous-groupe peuvent-ils obtenir des dommages en vertu de l'art. 24(1) de la *Charte*?

(e) La causalité des dommages subis par les membres du sous-groupe peut-elle être considérée comme une question commune?

(f) La Cour peut-elle procéder à une évaluation globale de tout ou partie des dommages subis par les membres du sous-groupe?

(g) La conduite du défendeur justifie-t-elle l'octroi de dommages-intérêts punitifs et, dans l'affirmative, de quel montant?

(h) La Cour devrait-elle ordonner au défendeur de prendre des mesures pour fournir aux membres du sous-groupe ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable?

(i) Dans l'affirmative, quelles mesures devraient être ordonnées?

8. Si la question commune de l'étape 1 est tranchée en faveur des demandeurs, les parties concluront un plan de communication de la preuve pour gérer la production, en temps opportun, par le défendeur des documents pertinents à l'égard des questions communes de l'étape 2 pour chaque sous-groupe des Premières Nations touchées.

9. Au moment d'évaluer la production des documents du défendeur, les demandeurs décideront s'il y a lieu de présenter des requêtes en jugement sommaire sur les questions communes de l'étape 2 pour certains ou la totalité des sous-groupes des Premières Nations touchées, ou s'il y a lieu de prévoir une instruction sur ces questions communes.

NOTIFICATION DE L'AUTORISATION ET PROCÉDURE D'EXCLUSION

10. Lors de la requête en autorisation, les demandeurs demanderont à la Cour de fixer la forme et le contenu de la notification de l'autorisation de ce recours (l'« **avis d'autorisation** »), le

moment et la manière de fournir l'avis d'autorisation (le « **programme d'avis** ») et d'indiquer une date d'exclusion comme étant trois (3) mois suivant la date de l'ordonnance d'autorisation (la «**date d'exclusion** »), et une date de participation comme étant six (6) mois avant le début de la détermination des questions communes de l'étape 2.

11. Si une requête en jugement sommaire est entendue avec une requête en autorisation, les demandeurs demanderont au tribunal de rendre d'abord sa décision sur l'autorisation, d'ordonner la délivrance d'un avis si un recours collectif est autorisé, puis de rendre sa décision sur la question commune de l'étape 1 après la date d'exclusion.

12. Les demandeurs demanderont à la Cour d'ordonner au défendeur de payer les frais du programme d'avis, y compris les frais de l'administrateur.

13. Les demandeurs demanderont une ordonnance pour la distribution de l'avis d'autorisation comme suit :

(a) afficher l'avis sur les sites Web respectifs des avocats du groupe, du défendeur et de l'administrateur;

(b) publier l'avis dans les journaux désignés;

(c) distribuer l'avis à tous les bureaux de la Nation des Cris de Tataskweyak et de l'Assemblée des Premières Nations;

(d) faire parvenir l'avis à tout membre du groupe qui le demande et aux chefs de chaque Première Nation qui a le droit d'adhérer au groupe, ainsi qu'à chaque bureau d'une bande;

(e) établir une ligne de soutien nationale sans frais, afin de fournir de l'aide aux membres du groupe, aux familles, aux tuteurs, aux gardiens ou aux autres personnes qui font des demandes pour leur propre compte ou pour le compte de membres du groupe;

(f) et par tout autre avis que la Cour ordonne.

14. Les demandeurs demanderont à la Cour d'approuver les formulaires d'exclusion et de participation devant être utilisés par les membres du groupe qui souhaitent s'exclure du recours collectif ou y participer, ce qui exigera que le membre du groupe fournisse suffisamment de renseignements pour établir qu'il est membre du groupe.

ÉTAPES DE POURSUITE DE L'INSTANCE APRÈS LA DÉTERMINATION DES QUESTIONS COMMUNES FAVORABLES AU GROUPE

Avis de résolution des questions communes

15. Les demandeurs demanderont à la Cour de régler la forme et le contenu de l'avis de résolution des questions communes de l'étape 1 et de l'étape 2 (le « **plan d'avis de résolution** ») et la manière dont les membres du groupe déposeront des réclamations (les « **formulaires de réclamation** ») avant une date fixée avec l'administrateur. Les demandeurs demanderont également à la Cour de régler un processus approprié pour déterminer les questions individuelles restantes.

Évaluation des dommages

16. Si les questions communes sont résolues en faveur des demandeurs, les demandeurs proposent deux (2) méthodes d'évaluation et de distribution des dommages-intérêts pour les membres du groupe comme suit :

(a) l'ensemble des dommages-intérêts dont chaque particulier membre d'un groupe peut se prévaloir *au prorata* ou *au prorata* au sein d'un sous-groupe;

(b) l'ensemble des dommages-intérêts dont les Premières Nations participantes peuvent se prévaloir sur une base communautaire; et

17. À la suite de la détermination de l'ensemble des dommages-intérêts, y compris les dommages-intérêts punitifs, des dommages-intérêts supplémentaires peuvent être accordés dans le cadre d'instances individuelles.

Évaluation du nombre de demandeurs

18. Après l'expiration du délai de remise des formulaires de réclamation, l'administrateur calcule le nombre total de demandeurs aux fins de tout partage *au prorata* des dommages-intérêts globaux.

19. Les parties peuvent également retenir les services d'un actuaire pour aider à déterminer la taille du groupe et les caractéristiques démographiques du groupe.

Distribution de dommages-intérêts punitifs globaux

20. Si la Cour accorde des dommages-intérêts globaux au groupe ou à un sous-groupe, le montant total des dommages-intérêts sera attribué au groupe d'une manière que déterminera la Cour dans un délai fixé par la Cour à partir de l'avis de résolution.

Fonds non distribués

21. Toute somme non distribuée sera distribuée à *cy-près* selon les directives de la Cour. Les demandeurs proposent que les montants résiduels soient distribués *cy-près* à des organismes communautaires qui aident les Premières Nations touchées à mettre en place des infrastructures d'approvisionnement en eau.

Résolution des questions individuelles

22. Dans les trente (30) jours qui suivent la délivrance du jugement sur les questions communes, les parties se réunissent pour régler un protocole visant à résoudre des questions individuelles. Si les parties ne parviennent pas à s'entendre sur un tel protocole, les demandeurs doivent demander des directives à la Cour dans les soixante (60) jours.

EXIGENCES DIVERSES DU PLAN DE POURSUITE DE L'INSTANCE

Financement

23. Les avocats du groupe ont conclu une entente avec les représentants demandeurs à l'égard des honoraires d'avocats et débours juridiques. Cette entente prévoit que les avocats du groupe ne recevront pas de paiement pour leur travail tant que le recours collectif n'aura pas reçu une suite favorable ou que les frais n'auront pas été recouvrés du défendeur.

24. Les honoraires des avocats du groupe sont soumis à l'approbation du tribunal.

Administration des réclamations

25. L'administrateur assurera l'administration des réclamations pour tout règlement ou jugement obtenu. L'administrateur distribuera l'avis conformément au plan d'avis de résolution. Si un règlement est réalisé et qu'un fonds de règlement est fourni, ou si un jugement donne lieu à une attribution en faveur des membres du groupe, l'administrateur administrera les paiements prélevés sur le fonds aux demandeurs selon la procédure indiquée ci-dessus, après approbation et/ou modification par la Cour.

Site Web du recours collectif

26. De temps à autre, les avocats du groupe afficheront les actes de procédure et les documents de cour pertinents, les derniers documents et résumés des derniers développements et faits nouveaux, les délais prévus, la foire aux questions et les réponses et les coordonnées des avocats du groupe pour les renseignements des membres du groupe.

Gestion des conflits

27. Les avocats du groupe et les demandeurs ont pris les mesures appropriées pour établir qu'il n'existe aucun conflit d'intérêts entre les membres du groupe, et qu'aucun tel conflit n'est prévu. En cas de conflit, McCarthy Tétrault S.E.N.C.R.L., s.r.l. représentera un sous-groupe et Olthuis Kleer Townshend LLP, l'autre. Si un conflit survenait entre les Premières Nations et leurs membres, ce qui n'est pas prévu étant donné leur intérêt commun, McCarthy Tétrault S.E.N.C.R.L., s.r.l. représentera les membres et Olthuis Kleer Townshend LLP représentera les Premières Nations.

Droit applicable

28. La législation applicable est la *Loi constitutionnelle de 1982,* la *Loi constitutionnelle de 1867,* la *Charte des droits et libertés,* la *Loi sur la salubrité de l'eau potable des Premières Nations, L.C. 2013, c. 21,* la *Loi sur les Indiens*, L.R.C. 1985, c. I-5, *Loi sur la gestion des terres des Premières Nations*, L.C. 1999, c. 24, *La Loi sur les Cours fédérales,* L.R.C. 1985, c. F-7 ainsi que les règlements applicables, la common law et le droit canadien.

Coordination des instances

29. Le 14 juillet 2020, la Cour du banc de la Reine du Manitoba a autorisé un recours collectif connexe dans l'affaire intitulée *Tataskweyak Cree Nation v. Canada,* dossier de la Cour nº 19-01-24661 (l'« **action de Tataskweyak** »). Les représentants demandeurs dans l'action de Tataskweyak se sont engagés à travailler en collaboration avec les demandeurs pour faire valoir leurs intérêts communs. Aux termes du Protocole judiciaire *canadien de gestion de recours collectifs multijuridictionnels et la remise d'un avis de recours collectif*, les demandeurs demanderont à la Cour fédérale et à la Cour du banc de la Reine du Manitoba de convoquer des conférences conjointes de gestion des instances, selon le cas, afin d'assurer la coordination entre

les deux instances et de favoriser l'efficacité. Afin d'assurer la cohérence des résultats, les demandeurs peuvent demander à la Cour fédérale et à la Cour du banc de la Reine du Manitoba de se réunir pour entendre toute requête en jugement sommaire ou en vue d'un procès de l'action de Tataskweyak et du présent recours.

Annexe A

Calendrier

CALENDRIER DE POURSUITE DE L'INSTANCE PROPOSÉ		
Étapes à suivre	**Par quelle partie**	**Date à respecter**
Remise de la défense	Défendeur	À remettre sur avis de 60 jours par les demandeurs
Remise de la réponse, le cas échéant	Demandeurs	À remettre 15 jours après la remise de la défense
Remise du dossier de jugement sommaire	Demandeurs	30 juin 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'autorisation et participe à des discussions exploratoires sur le règlement)
Pré-instruction pour évaluer le jugement sommaire	Toutes les parties	Juillet 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'autorisation et participe à des discussions exploratoires sur le règlement)
Remise du dossier de réponse	Défendeur	30 octobre 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'autorisation et participe à des discussions exploratoires sur le règlement)
Remise du dossier de réplique, le cas échéant	Demandeurs	16 décembre 2020 (ou 45 jours après la remise du dossier de réponse, selon la plus tardive de ces éventualités)
Contre-interrogatoires	Toutes les parties	À terminer 75 jours après la remise du dossier de réplique, le cas échéant, ou 120 jours après la remise du dossier de réponse
Requêtes en rejet, le cas échéant	Toutes les parties	À terminer 30 jours après la fin des contre-interrogatoires

CALENDRIER DE POURSUITE DE L'INSTANCE PROPOSÉ		
Étapes à suivre	**Par quelle partie**	**Date à respecter**
Remise des réponses aux engagements	Toutes les parties	À terminer 15 jours après la requête en rejet
Remise du mémoire des demandeurs	Demandeurs	À remettre 45 jours après l'achèvement des réponses aux engagements
Remise du mémoire de réponse	Défendeur	À remettre 45 jours après la remise du mémoire des demandeurs
Remise du mémoire de réplique	Demandeurs	À remettre 15 jours après la remise du mémoire de réponse
Audition d'une éventuelle requête en jugement sommaire	Toutes les parties	Juillet-août 2021

Dossier de la Cour n° T-1673-19

COUR FÉDÉRALE

LA PREMIÈRE NATION DE CURVE LAKE et LA CHEFFE EMILY WHETUNG pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE CURVE LAKE et LA PREMIÈRE NATION DE NESKANTAGA et LE CHEF CHRISTOPHER MOONIAS pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

–e t–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

PLAN DE POURSUITE DE L'INSTANCE

(Déposé le 8e jour de septembre 2020)

McCarthy Tétrault S.E.N.C.R.L., s.r.l.
Bureau 5300, Toronto Dominion Bank Tower
Toronto (Ontario) M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO #47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Tél.: 416-601-7831
Télécopieur : 416-868-0673

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8e
étage Toronto (Ontario) M5H 3E5
L'honorable Harry S. LaForme
LSO#19338D hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S
khille@oktlaw.com
Tél: 416-981-9330
Télécopieur : 416-981-9350

Avocats des demandeurs

ANNEXE C

ORDONNANCE D'ATTESTATION DU MANITOBA

Voir ci-joint.

N° de dossier CI-19-01-24661

COUR DU BANC DE LA REINE

Winnipeg Centre

ENTRE :

LA NATION DES CRIS DE TATASKWEYAK et LA CHEFFE DOREEN SPENCE pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Procédure en vertu de la *Loi sur les recours collectifs*, CPLM c. C. 130

ORDONNANCE

LA PRÉSENTE MOTION en attestation, présentée par les demandeurs, a été entendue le 14 juillet 2020 au 408 York Ave à Winnipeg, au Manitoba.

À LA LECTURE du dossier de motion des demandeurs et du consentement du défendeur.

ET SUR AVIS que les parties consentent à la présente ordonnance.

1. **LA COUR ORDONNE** que ce recours soit et est autorisé par les présentes comme un recours collectif conformément à la *Loi sur les recours collectifs*, CPLM c. C. 130.

2. **LA COUR ORDONNE ET DÉCLARE** que le groupe est défini comme suit :

(a) Toutes les personnes autres que les personnes exclues :

(i) qui sont membres d'une bande au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, c, I-5 (« **Première Nation** »), dont la disposition des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des*

premières nations, L.C. 1999, c. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations sont visées par un avis sur la qualité de l'eau potable (qu'il s'agisse d'un avis d'ébullition d'eau, d'un avis de ne pas boire ou d'un avis de non-utilisation ou d'un autre type d'avis) qui a duré au moins un an depuis le 20 novembre 1995 jusqu'à maintenant (les «**Premières Nations touchées**»);

(ii) qui n'étaient pas décédées avant le 20 novembre 2017; et

(iii) qui résidaient habituellement dans une Première Nation touchée alors visée par un avis sur la qualité de l'eau potable qui a duré au moins un an; et

(b) La Nation des Cris de Tataskweyak et toute autre Première Nation touchée qui a choisi de se joindre au présent recours à titre de représentant (les « **Nations participantes** »).

Les « **personnes exclues** » sont les membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang et de la bande indienne d'Okanagan, et Michael Daryl Isnardy.

3. **LA COUR ORDONNE ET DÉCLARE** que, jusqu'à ce que les réclamations invoquées dans le présent recours collectif soient entièrement et définitivement décidées, réglées, interrompues ou abandonnées, y compris l'épuisement de tous les droits d'appel, la permission de la Cour est requise pour introduire tout autre recours, instance ou procédure pour le compte d'un membre du groupe à l'égard des réclamations invoquées dans le présent recours, sauf les recours, instances ou procédures introduits pour le compte des membres du groupe qui se sont exclus du présent recours collectif de la manière prescrite ci-après.

4. **LA COUR ORDONNE ET DÉCLARE** que les questions communes suivantes soient et sont par les présentes autorisées aux fins de résolution pour le compte du groupe dans son ensemble:

(a) Depuis le 20 novembre 1995 jusqu'à maintenant, le défendeur a-t-il un devoir ou une obligation envers les membres du groupe de prendre des mesures raisonnables

pour leur fournir ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable pour l'utilisation humaine?

5. **LA COUR ORDONNE ET DÉCLARE** qu'un sous-groupe soit et est par les présentes reconnu pour les membres de chaque Première Nation touchée, et la Première Nation elle-même, s'il s'agit d'une Nation participante;

6. **LA COUR ORDONNE ET DÉCLARE** que les questions communes suivantes soient et sont, par les présentes, autorisées aux fins de résolution pour le compte de chaque sous-groupe :

(a) Si la réponse à la question commune 4(a) est « oui », le Canada a-t-il manqué à ses devoirs ou obligations envers les membres du sous-groupe?

(b) Si la réponse à la question commune 6(a) est « oui », une violation de la *Charte des droits et libertés* (« **Charte** ») est-elle sauvée par l'art. 1 de la *Charte*?

(c) Si la réponse à la question commune 6(a) est « oui », le manquement du défendeur a-t-il causé une entrave importante et déraisonnable à l'utilisation et à la jouissance de leurs terres par les membres du groupe ou leurs Premières Nations?

(d) Si la réponse à la question commune 6(a) est « oui » et que la réponse à la question commune 6(b) est « non », les membres du sous-groupe peuvent-ils obtenir des dommages en vertu de l'art. 24(1) de la Charte?

(e) La causalité des dommages subis par les membres du sous-groupe peut-elle être considérée comme une question commune?

(f) La Cour peut-elle procéder à une évaluation globale de tout ou partie des dommages subis par les membres du sous-groupe?

(g) La conduite du défendeur justifie-t-elle l'octroi de dommages-intérêts punitifs et, dans l'affirmative, de quel montant?

(h) La Cour devrait-elle ordonner au défendeur de prendre des mesures pour fournir aux membres du sous-groupe ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable?

(i) Dans l'affirmative, quelles mesures devraient être ordonnées?

7. **LA COUR ORDONNE ET DÉCLARE** que la cheffe Doreen Spence et la Nation des Cris de Tataskweyak sont nommées par les présentes représentants demandeurs du groupe.

8. **LA COUR ORDONNE ET DÉCLARE** que McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP sont nommés par les présentes avocats du groupe (les «**avocats du groupe** »).

9. **LA COUR ORDONNE ET DÉCLARE** que les demandeurs et le défendeur déploient des efforts raisonnables pour convenir de la nomination d'un administrateur aux fins de donner avis de l'attestation du présent recours collectif (l'« **administrateur** »). Les parties avisent la Cour de la nomination de l'administrateur dans les soixante (60) jours suivant la date de la présente ordonnance, à défaut de quoi la Cour nomme un administrateur dûment qualifié.

10. **LA COUR ORDONNE** que les membres du groupe soient avisés que le présent recours a été attesté en tant que recours collectif de la manière suivante, ce qui constitue et est par les présentes réputé constituer un avis adéquat :

(a) l'avis simplifié figurant à l'**annexe A** et l'avis détaillé figurant à l'**annexe B**, ainsi que la traduction en français de ces documents sont affichés, tel que convenu par les parties, sur les sites Web respectifs des avocats du groupe, du défendeur et de l'administrateur;

(b) l'administrateur publie l'avis simplifié dans les journaux indiqués à l'**annexe C** jointe aux présentes, en format ¼ de page dans l'édition de fin de semaine de chaque journal, si possible;

(c) l'administrateur distribue l'avis simplifié à tous les bureaux de la Nation des Cris de Tataskweyak et de l'Assemblée des Premières Nations;

(d) l'administrateur transmet l'avis simplifié et l'avis détaillé à tout membre du groupe qui en fait la demande;

(e) l'administrateur transmet l'avis simplifié et l'avis détaillé aux chefs de chaque Première Nation touchée indiquée conformément au paragraphe 12 ci-après, à l'exception des personnes exclues;

(f) l'administrateur transmet l'avis simplifié et l'avis détaillé au bureau de la bande ou à un bureau analogue de chaque Première Nation touchée indiquée conformément au paragraphe 12 ci-après, à l'exception des personnes exclues, en demandant qu'ils soient affichés dans un endroit bien visible;

(g) l'administrateur établit une ligne de soutien nationale sans frais, afin de fournir de l'aide aux membres du groupe, aux familles, aux tuteurs, aux gardiens ou aux autres personnes qui font des demandes de renseignements pour leur propre compte ou pour le compte de membres du groupe.

11. **LA COUR ORDONNE** que le défendeur soit responsable du coût de la remise d'un avis d'attestation d'un recours collectif tel qu'il est énoncé au paragraphe 10 ci-dessus.

12. **LA COUR ORDONNE** que, dans les 30 jours qui suivent la date de la présente ordonnance, les demandeurs et le défendeur échangent une liste de leurs meilleurs renseignements sur les noms des Premières Nations qui peuvent participer au groupe, et ces listes constituent le moyen d'établir les Premières Nations qui ont droit à un avis direct aux fins des paragraphes 10(e) et (f) ci-dessus.

13. **LA COUR ORDONNE** qu'un membre du groupe puisse se retirer du présent recours collectif en remettant un coupon de retrait signé, dont un modèle est joint à l'**annexe D**, ou une autre demande de retrait signée et lisible, dans les cent vingt (120) jours qui suivent la date à laquelle l'avis est publié pour la première fois conformément au paragraphe 10(b) ci-dessus (la «**date limite de retrait** »), à l'administrateur. L'avis simplifié et l'avis détaillé doivent indiquer la date limite de retrait et l'adresse de l'administrateur aux fins de la réception des coupons de retrait.

14. **LA COUR ORDONNE** qu'aucun membre du groupe ne puisse se retirer du présent recours collectif après la date limite de retrait, sauf avec l'autorisation de la Cour.

15. **LA COUR ORDONNE** que l'administrateur signifie aux parties et dépose auprès de la Cour, dans les soixante (60) jours suivant l'expiration de la date limite de retrait, une déclaration sous serment énumérant toutes les personnes qui ont fait leur choix de se retirer du recours collectif, le cas échéant.

16. **LA COUR ORDONNE** qu'une Première Nation touchée puisse participer au présent recours collectif en mandatant les avocats du groupe au moins cent vingt (120) jours avant le règlement de l'une ou l'autre des questions communes (la « **date limite de participation** »), aux avocats du groupe, à l'adresse indiquée au paragraphe 11 ci-dessus.

17. **LA COUR ORDONNE** qu'aucun membre du groupe ne puisse participer au présent recours collectif après la date limite de participation, sauf avec l'autorisation de la Cour.

18. **LA COUR ORDONNE** que les avocats du groupe signifient aux parties et déposent auprès de la Cour, dans les soixante (60) jours suivant l'expiration de la date limite de participation, une liste de toutes les Premières Nations touchées qui ont choisi de participer au recours collectif.

19. **LA COUR DÉCLARE** que le plan de poursuite de l'instance joint aux présentes à l'appendice 1 est une méthode pratique pour faire avancer le recours collectif pour le compte du groupe.

20. **LA COUR ORDONNE** que chaque partie supporte ses propres frais de la motion en attestation du présent recours collectif.

14 juillet 2020

G.D. JOYAL

L'honorable juge en chef Joyal

CONSENTEMENT QUANT À LA FORME ET AU CONTENU :

Par : _____

Stephanie Willsey pour Catharine Moore/Scott Farlinger
Le procureur général du Canada

Par : _____
Stephanie Willsey
La Nation des Cris de Tataskweyak et la cheffe Doreen Spence

Annexe A

Avis juridique

Êtes-vous membre d'une Première Nation qui a été visée par un avis concernant la qualité de l'eau potable à long terme?

Une poursuite pourrait avoir une incidence sur vous et votre Première Nation. Veuillez lire ceci attentivement.

Vous pourriez être touché par un recours collectif en raison du manque d'accessibilité à l'eau potable propre sur les réserves des Premières Nations.

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont décidé qu'un recours collectif au nom d'un « groupe » de membres des Premières Nations et de membres d'une bande pouvait être intenté. Les membres d'une bande peuvent choisir de demeurer dans le groupe. Les Premières Nations peuvent choisir de se joindre ou non au groupe. Il n'y a pas d'argent disponible à l'heure actuelle et rien ne garantit que le recours collectif sera accueilli.

Les tribunaux ont nommé la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga et le chef Christopher Moonias à titre de représentants demandeurs pour le groupe.

De quoi s'agit-il?

Le présent recours collectif allègue que le Canada a manqué à ses obligations en ne veillant pas à ce que les communautés des Premières Nations aient un accès adéquat à de l'eau potable salubre. Le recours collectif allègue que les membres de ces communautés et les communautés elles-mêmes ont subi des préjudices émotionnels, physiques, financiers et spirituels. Le recours collectif allègue que le Canada a manqué à ses obligations fiduciaires et à son devoir de diligence et a contrevenu à la *Charte des droits et libertés*. La Cour n'a pas statué sur la véracité de ces allégations. En l'absence de règlement, les demandeurs devront prouver leurs prétentions devant le tribunal.

Si vous avez des questions au sujet du présent recours collectif, vous pouvez communiquer avec M. Eric Khan au 1-800-538-0009 ou à l'adresse info@classaction2.com.

Qui représente le groupe?

La Cour a nommé McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP pour représenter le groupe à titre d' « avocats du groupe ». Vous n'êtes pas tenu de payer les avocats du groupe, ni personne d'autre, pour participer. Si les avocats du groupe obtiennent de l'argent ou des avantages pour le groupe, ils peuvent demander des honoraires et des frais d'avocats, lesquels seront déduits des sommes ou des avantages recouvrés pour les membres du groupe.

Particuliers membres du groupe : Qui est inclus et qui est exclu?

Membres d'une bande inclus : Le groupe comprend les membres d'une bande (au sens de la *Loi sur les Indiens*) : a) dont la réserve était visée par un avis concernant l'eau potable (tel qu'un avis

d'ébullition de l'eau, etc.) pendant au moins un an à un moment quelconque du 20 novembre 1995 jusqu'à maintenant; b) qui n'étaient pas décédés avant le 20 novembre 2017; et c) qui vivent habituellement dans leur réserve.

Membres d'une bande exclus : Les membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang, de la bande indienne d'Okanagan et Michael Daryl Isnardy sont exclus de ce recours collectif.

Particuliers : Quelles sont vos options?

Demeurer dans le groupe : Pour demeurer dans le groupe, vous n'avez rien à faire. Si le groupe obtient de l'argent ou des avantages, les avocats du groupe donneront un avis sur la façon de réclamer votre part. Vous serez légalement lié par toutes les ordonnances et tous les jugements, et vous ne pourrez pas poursuivre le Canada au sujet des mêmes réclamations en droit.

Le fait de demeurer dans le groupe n'aura pas d'incidence sur le soutien reçu des organismes communautaires qui sont financés par un gouvernement.

Se retirer du groupe : Si vous ne souhaitez pas participer à ce recours collectif, vous devez vous en retirer. Si vous vous retirez, vous ne pouvez pas obtenir d'argent ni d'avantages de ce litige. Pour vous retirer, veuillez visiter **[NDR : Insérer le site Web de l'administrateur pour ce recours]** pour obtenir un coupon de retrait ou écrire à CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2 afin de demander votre retrait du présent recours collectif. Indiquez vos nom, adresse, numéro de téléphone et apposez votre signature. **Votre demande de retrait doit être envoyée au plus tard le [NDR : 120 jours à partir de la date de la première publication de l'avis].**

Premières Nations : Quelles sont vos options?

Choisir de se joindre au groupe : Les Premières Nations qui souhaitent se joindre au groupe et faire valoir des réclamations au nom de leur communauté doivent prendre des mesures pour participer au recours. Pour participer au recours ou obtenir de plus amples renseignements, veuillez communiquer avec l'administrateur au 1-800-538-0009 ou à l'adresse info@classaction2.com. Les Premières Nations peuvent également communiquer avec l'avocate du groupe Stephanie Willsey (sans frais : 1-877-244-7711; swillsey@mccarthy.ca) ou l'avocat du groupe Kevin Hille 416-598-3694; khille@oktlaw.com). **Votre demande de participation doit être envoyée au plus tard 120 jours avant la décision quant aux réclamations des membres du groupe.**

Comment puis-je obtenir de plus amples renseignements?

Nom de l'administrateur : CA2
Coordonnées : 1-800-538-0009 ou info@classaction2.com

Transmettre l'information aux personnes qui en ont besoin

Les représentants demandeurs et les avocats du groupe demandent aux travailleurs de la santé, aux travailleurs sociaux, aux dirigeants communautaires des Premières Nations, aux membres de la famille, aux aidants et aux amis des membres du groupe de bien vouloir transmettre l'information

aux membres du groupe qui auraient de la difficulté à lire ou à comprendre le présent avis. On peut obtenir de plus amples renseignements sur le présent recours sur le site Web ou en communiquant avec l'administrateur. Veuillez montrer le présent avis aux personnes qui pourraient être touchées par le présent recours ou à leurs aidants.

Annexe B

Êtes-vous membre d'une Première Nation qui a été visée par un avis concernant la qualité de l'eau potable à long terme?

Si vous avez répondu « OUI », un recours collectif pourrait avoir une incidence sur vos droits et les droits des Premières Nations

Un tribunal a autorisé le présent avis

- Vous pourriez être touché par un recours collectif visant l'accès à l'eau potable propre dans vos communautés des Premières Nations.
- La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont décidé que des recours collectifs peuvent être introduits pour le compte d'un « groupe » de membres des Premières Nations et de membres d'une bande. Les membres d'une bande peuvent choisir de demeurer dans le groupe. Les Premières Nations peuvent choisir de se joindre ou non au groupe. Les tribunaux ont nommé la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga et le chef Christopher Moonias à titre de représentants demandeurs pour le groupe.
- Les tribunaux n'ont pas statué si le Canada avait eu des comportements fautifs et la question à savoir si le Canada a fait quelque chose de mal doit éventuellement être décidée par le tribunal. Il n'y a pas d'argent offert actuellement et rien ne garantit qu'il y en aura. Cependant, vos droits sont touchés et vous avez un choix à faire maintenant. Le présent avis vise à vous aider, vous et votre Première Nation, à faire ce choix.

PARTICULIERS MEMBRES D'UNE BANDE : VOS DROITS LÉGAUX ET OPTIONS À CETTE ÉTAPE	
NE RIEN FAIRE : CONSERVER VOS DROITS DANS LE CADRE DU GROUPE	**Demeurer membre du groupe dans le cadre de ces poursuites et attendre le résultat du litige. Partager les avantages éventuels résultant du litige, mais abandonner certains droits individuels.** En ne faisant rien, vous gardez la possibilité de recevoir de l'argent ou d'autres avantages pouvant découler d'un procès ou d'un règlement. Mais vous renoncez à tout droit de poursuivre vous-même le Canada à propos des mêmes réclamations en droit que dans la présente poursuite.
VOUS RETIRER DU GROUPE (OPTION DE RETRAIT)	**Vous retirer du groupe dans le cadre de ces poursuites et n'en tirer aucun avantage. Conserver ses droits.** Si vous demandez de vous retirer du groupe et que de l'argent ou des avantages sont ultérieurement attribués aux membres du groupe, vous n'en bénéficierez pas. Mais vous conservez le droit de poursuivre vous-même le Canada à propos des mêmes réclamations en droit que dans la présente poursuite.
PREMIÈRES NATIONS : VOS DROITS LÉGAUX ET OPTIONS À CETTE ÉTAPE	

QUESTIONS? APPELEZ SANS FRAIS AU 1-800-538-0009 OU VISITEZ HTTPS://CLASSACTION2.COM/

CHOISIR DE SE JOINDRE AU GROUPE (OPTION DE PARTICIPATION)	**Se joindre au groupe. Si vous vous joignez au groupe, vos Premières Nations pourraient partager l'argent et les avantages résultant du litige.** En vous joignant au groupe (option de participation), les Premières Nations pourraient recevoir de l'argent ou d'autres avantages, notamment des infrastructures d'approvisionnement en eau, qui pourraient découler d'un procès ou d'un règlement dans le cadre du recours collectif. Il est facile de participer et cela ne coûte rien.

NE RIEN FAIRE: PERDRE LES DROITS DE VOTRE PREMIÈRE NATION AUX TERMES DU RECOURS COLLECTIF	**En ne faisant rien, votre Première Nation perdra la possibilité de recevoir de l'argent et d'autres avantages si le recours collectif est accueilli favorablement.** Si les Premières Nations se joignent pas au groupe (option de participation) et que de l'argent ou des avantages sont ultérieurement attribués, votre Première Nation n'en bénéficiera pas. En choisissant de ne pas participer, votre Première Nation peut conserver les droits de poursuivre le Canada à propos des mêmes réclamations en droit que dans le présent litige.

- Les avocats doivent prouver les réclamations contre le Canada lors d'un procès ou conclure un règlement. Si de l'argent ou des avantages sont obtenus, vous serez avisé de la façon de réclamer votre part.

- Vos options sont expliquées dans le présent avis. Pour être exclu du recours, les particuliers membres d'une bande doivent en faire la demande au plus tard le **[NDR : 120 jours à partir de la première publication de l'avis.]**. Pour se joindre au recours collectif, les Premières Nations doivent envoyer leur avis de participation au plus tard 120 jours avant la décision quant aux réclamations des membres du groupe.

QUE CONTIENT LE PRÉSENT AVIS?

RENSEIGNEMENTS DE BASE

1. Pourquoi le présent avis est-il remis?

Les tribunaux ont des recours collectifs « attestés ». Cela signifie que les poursuites respectent les exigences relatives aux recours collectifs et peuvent être instruites. Si vous êtes inclus, vous pourriez avoir des droits légaux et des options avant que les tribunaux ne statuent sur le bien-fondé des réclamations intentées contre le Canada en votre nom. Le présent avis tente d'expliquer toutes ces démarches.

Le juge en chef Joyal de la Cour du banc de la Reine du Manitoba préside actuellement l'affaire *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Le juge Favel de la Cour fédérale du Canada préside actuellement l'affaire *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias v. Canada*. Les personnes qui intentent une poursuite sont appelées les demandeurs. Le Canada est le défendeur. Un lien vers la dernière version de la demande introductive d'instance (le document juridique énonçant les allégations contre le Canada) est disponible ici : https://www.mccarthy.ca/fr/action-collective-concernant-les-avis-sur-la-qualite-de-leau-potable-des-premieres-nations.

2. Quel est l'objet du présent recours?

Les présents recours collectifs allèguent que le Canada a manqué à ses obligations en ne veillant pas à ce que les communautés des Premières Nations aient un accès adéquat à de l'eau potable salubre. Les recours collectifs allèguent également que les membres de ces communautés et les communautés elles-mêmes ont subi des préjudices émotionnels, physiques, financiers et spirituels. Les recours collectifs allèguent que le Canada a manqué à ses obligations fiduciaires et à son devoir de diligence et a contrevenu à la *Charte des droits et libertés*. Les tribunaux n'ont pas statué (et le Canada n'a fait aucun aveu) quant à la véracité de l'une ou l'autre de ces affirmations. S'il n'y a pas de règlement avec le Canada, les demandeurs devront prouver leurs prétentions devant la Cour.

Si vous éprouvez des difficultés à comprendre cet enjeu ou si vous avez des questions au sujet du recours collectif, vous pouvez composer le 1-800-538-0009 pour obtenir de l'aide.

3. Pourquoi s'agit-il d'un recours collectif?

Dans un recours collectif, les « représentants demandeurs » (en l'espèce, la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, la Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Nesktanaga et le chef Christopher Moonias) ont poursuivi en justice au nom des particuliers membres d'une bande et de Premières Nations qui ont des revendications semblables. Tous ces particuliers membres d'une bande font partie du « groupe » ou sont des « membres du groupe », de même que les Premières Nations qui choisissent de se joindre au recours collectif. La Cour règle les questions pour tous les membres du groupe dans une même affaire, sauf (dans le cas des particuliers membres du groupe) pour ceux qui se retirent du groupe (option de retrait) et (dans le cas des Premières Nations) pour ceux qui ne se joignent pas au recours collectif (option de participation).

4. Qui est membre du groupe?

Le groupe comprend et exclut les personnes suivantes :

Toutes les personnes, sauf les « personnes exclues » :

(i) qui sont membres d'une bande au sens du paragraphe 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, c, I-5 (« **Première Nation** »), dont la disposition des terres est assujettie à cette loi ou à la *Loi sur la gestion des terres des premières nations*, L.C. 1999, c. 24 (les « **terres des Premières Nations** »), et dont les terres des Premières Nations sont visées par un avis sur la qualité de l'eau potable (qu'il s'agisse d'un avis d'ébullition d'eau, d'un avis de ne pas boire, d'un avis de non-utilisation ou d'un autre type d'avis) qui a duré au moins un an depuis le 20 novembre 1995 (les « **Premières Nations touchées** »);

(ii) qui n'étaient pas décédées deux ans avant le début du présent recours (soit, au plus tard le 20 novembre 2017);

(iii) qui résidaient habituellement dans une Première Nation touchée pendant qu'elle était visée par un avis sur la qualité de l'eau potable qui a duré au moins un an; et

(iv) la Nation des Cris de Tataskweyak, la Première Nation de Curve Lake, la Première Nation de Neskantaga et toute autre Première Nation touchée qui choisit de se joindre au présent recours à titre de représentant (les « **Nations participantes** »).

Les « **personnes exclues** » sont des membres de la Nation des Tsuu T'ina, de la Première Nation de Sucker Creek, de la Nation des Cris d'Ermineskin, de la Tribu des Gens-du-Sang, de la bande indienne d'Okanagan et de la bande indienne d'Okanagan et de Michael Daryl Isnardy.

5. Que veulent les demandeurs?

Les demandeurs réclament des sommes d'argent et d'autres avantages pour le groupe, notamment des infrastructures d'approvisionnement en eau. Les demandeurs réclament également des honoraires d'avocats et des frais de justice, majorés des intérêts.

6. Y a-t-il de l'argent offert maintenant pour les membres du groupe?

Il n'y a pas d'argent ni d'avantages à l'heure actuelle parce que la Cour n'a pas encore statué quant aux comportements fautifs du Canada et que les deux parties n'ont pas conclu de règlement. Rien ne garantit que des sommes d'argent ou des avantages seront obtenus. Si de l'argent ou d'autres avantages deviennent disponibles, un avis sera donné sur la façon de réclamer votre part.

VOS DROITS ET OPTIONS

Chaque particulier membre d'une bande doit décider s'il veut rester ou non dans le groupe, et doit le faire au plus tard le **[NDR : 120 jours à partir de la première publication de l'avis]**. Les

Premières Nations doivent décider de se joindre ou non au groupe **au plus tard 120 jours avant que la Cour ne statue sur les réclamations des membres du groupe.**

7.	**Que se passe-t-il si je ne fais rien? Que se passe-t-il si la Première Nation ne fait rien?**

Particuliers membres d'une bande : Si vous ne faites rien, vous resterez automatiquement dans le recours collectif. Vous serez lié par toutes les ordonnances de la Cour, bonnes ou mauvaises. Si des sommes d'argent ou d'autres avantages sont attribués, vous pourriez avoir à prendre des mesures après avoir reçu un avis pour recevoir des avantages.
Premières Nations : Les Premières Nations doivent choisir de se joindre au recours collectif pour recevoir les avantages éventuels et être liées par toutes les ordonnances, bonnes ou mauvaises.

8.	**Que se passe-t-il si je ne veux pas me joindre au recours? Que se passe-t-il si une Première Nation souhaite se joindre au recours?**

Particuliers membres d'une bande : Si vous ne souhaitez pas être partie à l'instance, vous devez vous retirer – c'est-à-dire choisir « l'option de retrait ». Si vous vous retirez, vous ne recevrez aucun avantage pouvant découler du recours collectif. Vous ne serez pas lié par des ordonnances de la Cour et vous conservez le droit de poursuivre le Canada en tant que particulier à l'égard des questions en l'espèce.

Pour vous retirer, envoyez une communication indiquant que vous souhaitez être retiré du groupe de *Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation and Chief Christopher Moonias v. Canada,* dossier de la Cour nº CI-19-01-2466. Indiquez vos nom, adresse, numéro de téléphone et apposez votre signature. Vous pouvez également obtenir un formulaire de retrait à l'adresse **[insérer le lien Web de l'administrateur].** Vous devez faire parvenir votre demande de retrait au plus tard le **[NDR : 120 jours à partir de la première publication de l'avis]** à: CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2 ou info@classaction2.com.

Composez le 1-800-538-0009 si vous avez des questions sur la façon de vous retirer du recours collectif.

Premières Nations : Les Premières Nations qui souhaitent se joindre au recours collectif et faire valoir des réclamations au nom de leur bande ou de leur communauté doivent prendre des mesures pour s'y joindre – c'est-à-dire choisir l' « option de participation ». Pour choisir l'option de participation ou pour obtenir de plus amples renseignements, veuillez communiquer avec l'administrateur au 1-800-538-0009 ou à l'adresse info@classaction2.com. Les Premières Nations peuvent également communiquer avec les avocats du groupe et demander l'avocate du groupe Stephanie Willsey (sans frais : 1-877-244-7711 ou swillsey@mccarthy.ca) ou l'avocat du groupe Kevin Hille à khille@oktlaw.com ou au 416-598-3694. **Les demandes de participation des Premières Nations doivent être envoyées au plus tard 120 jours avant que la Cour ne statue sur les réclamations des membres du groupe.**

LES AVOCATS QUI VOUS REPRÉSENTENT

9. Les particuliers membres d'une bande sont-ils représentés par un avocat dans ce recours?

Oui. La Cour a nommé McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townshend LLP pour vous représenter, ainsi que d'autres membres du groupe, à titre d'« avocats du groupe ». Vous n'aurez pas à payer d'honoraires ou d'autres frais juridiques pour ces avocats. Si vous souhaitez être représenté par un autre avocat, vous pouvez en retenir un pour comparaître devant la Cour à vos propres frais.

10. Comment les avocats seront-ils payés?

Les avocats ne seront payés que s'ils obtiennent gain de cause ou concluent un règlement. La Cour doit également approuver leur demande de rémunération. Les honoraires et frais pourraient être déduits des sommes obtenues pour le groupe, ou payés séparément par le défendeur.

PROCÈS

11. Quand et comment la Cour tranchera-t-elle qui a raison?

Si le recours collectif n'est pas rejeté ou réglé, les demandeurs doivent prouver leurs réclamations dans le cadre d'une motion de jugement sommaire ou d'un procès qui aura lieu à Ottawa (Ontario). Au cours de la motion ou du procès, la Cour entendra tous les éléments de preuve de manière à ce qu'elle puisse rendre une décision sur la question de savoir qui des demandeurs ou du Canada a raison à propos des réclamations dans le recours collectif. Rien ne garantit que les demandeurs gagneront quelque somme d'argent ou avantage pour le groupe.

12. Est-ce que je recevrai de l'argent après le procès?

Si les demandeurs obtiennent de l'argent ou des avantages à la suite d'un procès ou d'un règlement, vous serez avisé de la façon d'en demander une part ou des autres options que vous avez à ce moment-là. Ces choses ne sont pas connues à l'heure actuelle. Des renseignements importants sur cette affaire seront affichés sur le site Web **[NDR : insérer le site Web de l'administrateur]** dès qu'ils seront disponible.

OBTENIR DE PLUS AMPLES RENSEIGNEMENTS

13. Comment obtenir de plus amples renseignements? Comment puis-je transmettre l'information aux personnes qui en ont besoin?

Vous pouvez obtenir de plus amples renseignements à l'adresse https://classaction2.com/ en composant sans frais le 1-800-538-0009, en écrivant à l'adresse suivante : CA2 Inc., 9, avenue Prince Arthur, Toronto (Ontario) M5R 1B2, ou par courriel : info@classaction2.com.

Les membres des Premières Nations et les particuliers membres d'une bande peuvent également communiquer avec les avocats du groupe et demander l'avocate du groupe Stephanie Willsey (sans

frais : 1-877-244-7711 ou swillsey@mccarthy.ca ou 66, rue Wellington Ouest, Toronto (Ontario) M5K 1E6) ou l'avocat du groupe Kevin Hille à khille@oktlaw.com ou au 416-598-3694 ou 250, avenue University, 8e étage, Toronto (Ontario) M5H 3E5.

La Première Nation de Curve Lake, la cheffe Emily Whetung, la Première Nation de Neskantaga, le chef Christopher Moonias, la Nation des Cris de Tataskweyak, la cheffe Doreen Spence, et les avocats du groupe demandent aux travailleurs de la santé, aux travailleurs sociaux, aux dirigeants communautaires des Premières Nations, aux membres de la famille, aux aidants et aux amis des membres du groupe de bien vouloir transmettre l'information aux membres du groupe qui auraient de la difficulté à lire ou à comprendre le présent avis. On peut obtenir de plus amples renseignements concernant le présent recours sur le site Web ou en communiquant avec l'administrateur ou les avocats du groupe. Veuillez montrer le présent avis aux personnes qui pourraient être touchées par le présent recours ou à leurs aidants.

Annexe C

Liste des journaux

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Gazette de Montréal
La Presse de Montréal (édition numérique)
Halifax Chronicle-Herald
Moncton Times and Transcript
First Nations Drum

Annexe D

MODÈLE DE COUPON DE RETRAIT

À: **[Insérer l'adresse de l'administrateur de la réclamation]**
[Insérer l'adresse électronique de l'administrateur]

Il ne s'agit **PAS** d'un formulaire de réclamation. Le fait de remplir le présent **COUPON DE RETRAIT** vous empêchera de recevoir une indemnité ou d'autres avantages découlant d'un règlement ou d'un jugement dans le cadre du recours collectif désigné ci-après :

Remarque : Pour se retirer, le présent coupon doit être dûment rempli et envoyé à l'adresse ci-dessus au plus tard **[INSÉRER LA DATE QUI TOMBE 120 JOURS APRÈS LA PREMIÈRE PUBLICATION DE L'AVIS]**

Dossier de la Cour nº : T-1673-19

LA PREMIÈRE NATION DE CURVE LAKE et LA CHEFFE EMILY WHETUNG pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE CURVE LAKE et LA PREMIÈRE NATION DE NESKANTAGA et LE CHEF CHRISTOPHER MOONIAS pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Je comprends qu'en me retirant de ce recours collectif, je confirme que je ne souhaite pas participer à ce recours collectif.

Je comprends que toute réclamation individuelle que je pourrais avoir doit être introduite dans un délai de prescription déterminé ou cette réclamation sera légalement interdite.

Je crois comprendre que l'attestation de ce recours collectif a suspendu l'écoulement du délai de prescription à partir du moment où le recours collectif a été déposé. Le délai de prescription recommencera à courir contre moi si je me retire de ce recours collectif.

Je comprends qu'en me retirant, j'assume l'entière responsabilité de la reprise de la poursuite des démarches juridiques pertinentes relatives au délai de prescription pour protéger toute réclamation que je pourrais avoir.

Date : _____

Nom du membre du groupe : _____

_____
Signature du témoin

_____
Signature du membre du groupe qui se retire

Nom du témoin :

_____

Appendice 1

Dossier de la Cour nº CI-19-01-24661

COUR DU BANC DE LA REINE

Winnipeg Centre

ENTRE :

LA NATION DES CRIS DE TATASKWEYAK et LA CHEFFE DOREEN SPENCE pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Procédure en vertu de la *Loi sur les recours collectifs*, CPLM c. C. 130

PLAN DE POURSUITE DE L'INSTANCE

POUR LES QUESTIONS COMMUNES, LES MOTIONS EN ATTESTATION ET DE JUGEMENT SOMMAIRE

1. Le calendrier de consentement des parties, tel qu'il est ordonné par la Cour, est joint en **annexe A**. Le présent plan de poursuite de l'instance vise à traiter des motions des demandeurs en attestation et de jugement sommaire.

2. Si les motions sont accueillies, un autre plan sera proposé pour régler les questions restantes, selon le résultat.

3. Sinon, si la motion de jugement sommaire n'est pas accueillie, les demandeurs proposeront un autre plan pour l'instruction des questions communes.

4. Dans le cadre de la motion en attestation, les demandeurs demanderont l'attestation de la question commune suivante devant être résolue pour le compte de l'ensemble du groupe (la «**question commune de l'étape 1** ») :

(a) Depuis le 20 novembre 1995 jusqu'à maintenant, le défendeur a-t-il un devoir ou une obligation envers les membres du groupe de prendre des mesures raisonnables pour leur fournir ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable pour l'utilisation humaine?

5. Si le défendeur consent à l'attestation d'un recours collectif, les demandeurs négocieront avec le défendeur pour résoudre les questions communes. En cas d'échec des négociations, les demandeurs exigeront la remise d'une défense, après quoi ils remettront un dossier à l'appui d'une motion de jugement sommaire sur la question commune de l'étape 1. Lors d'une conférence préparatoire à l'instruction qui suit la remise du dossier des demandeurs, ils demanderont à la Cour de décider que cette affaire est appropriée pour un jugement sommaire et de fixer une date d'audition de leur motion.

6. Si le défendeur s'oppose à l'attestation d'un recours collectif, les demandeurs exigeront que le défendeur présente une défense. Les demandeurs produiront alors un dossier à l'appui des motions en attestation et de jugement sommaire sur la question commune de l'étape 1. Lors d'une conférence préparatoire à l'instruction qui suit la remise du dossier des demandeurs, ils demanderont à la Cour de décider que cette affaire est appropriée pour un jugement sommaire et de fixer le calendrier d'audition de leur motion de jugement sommaire ainsi que l'audition de leur motion en attestation.

7. Lors de la motion en attestation, les demandeurs demanderont également l'attestation des questions communes suivantes devant être résolues pour le compte de chaque sous-groupe de la Première Nation touchée, soit les membres de cette Première Nation et la Première Nation elle-même, si elle est une Première Nation participante (les « **questions communes de l'étape 2** ») :

(a) Si la réponse à la question commune 4(a) est « oui », le Canada a-t-il manqué à ses devoirs ou obligations envers les membres du sous-groupe?

(b) Si la réponse à la question commune 7(a) est « oui », une violation de la *Charte des droits et libertés* (« **Charte** ») est-elle sauvée par l'art. 1 de la *Charte*?

(c) Si la réponse à la question commune 7(a) est « oui », le manquement du défendeur a-t-il causé une entrave importante et déraisonnable à l'utilisation et à la jouissance de leurs terres par les membres du groupe ou leurs Premières Nations?

(d) Si la réponse à la question commune 7(a) est « oui » et que la réponse à la question commune 7(b) est « non », les membres du sous-groupe peuvent-ils obtenir des dommages en vertu de l'art. 24(1) de la *Charte*?

(e) La causalité des dommages subis par les membres du sous-groupe peut-elle être considérée comme une question commune?

(f) La Cour peut-elle procéder à une évaluation globale de tout ou partie des dommages subis par les membres du sous-groupe?

(g) La conduite du défendeur justifie-t-elle l'octroi de dommages-intérêts punitifs et, dans l'affirmative, de quel montant?

(h) La Cour devrait-elle ordonner au défendeur de prendre des mesures pour fournir aux membres du sous-groupe ou s'assurer qu'il leur soit fourni ou s'abstenir d'interdire un accès adéquat à de l'eau potable?

(i) Dans l'affirmative, quelles mesures devraient être ordonnées?

8. Si la question commune de l'étape 1 est tranchée en faveur des demandeurs, les parties concluront un plan de communication de la preuve pour gérer la production, en temps opportun, par le défendeur des documents pertinents à l'égard des questions communes de l'étape 2 pour chaque sous-groupe des Premières Nations touchées.

9. Au moment d'évaluer la production des documents du défendeur, les demandeurs décideront s'il y a lieu de présenter des motions de jugement sommaire sur les questions communes

de l'étape 2 pour certains ou la totalité des sous-groupes des Premières Nations touchées, ou s'il y a lieu de prévoir une instruction sur ces questions communes.

NOTIFICATION DE L'ATTESTATION ET PROCÉDURE DE RETRAIT

10. Lors de la motion en attestation, les demandeurs demanderont à la Cour de fixer la forme et le contenu de la notification de l'attestation de ce recours (l'« **avis d'attestation**»), le moment et la manière de fournir l'avis d'attestation (le « **programme d'avis** ») et d'indiquer une date de retrait comme étant trois (3) mois suivant la date de l'ordonnance d'attestation (la « **date de retrait**»), et une date de participation comme étant six (6) mois avant le début de la détermination des questions communes de l'étape 2.

11. Si une motion de jugement sommaire est entendue avec une motion en attestation, les demandeurs demanderont au tribunal de rendre d'abord sa décision sur l'attestation, d'ordonner la délivrance d'un avis si un recours collectif est attesté, puis de rendre sa décision sur la question commune de l'étape 1 après la date de retrait.

12. Les demandeurs demanderont à la Cour d'ordonner au défendeur de payer les frais du programme d'avis, y compris les frais de l'administrateur.

13. Les demandeurs demanderont une ordonnance pour la distribution de l'avis d'attestation comme suit :

(a) afficher l'avis sur les sites Web respectifs des avocats du groupe, du défendeur et de l'administrateur;

(b) publier l'avis dans les journaux désignés;

(c) distribuer l'avis à tous les bureaux de la Nation des Cris de Tataskweyak et de l'Assemblée des Premières Nations;

(d) faire parvenir l'avis à tout membre du groupe qui le demande et aux chefs de chaque Première Nation qui a le droit d'adhérer au groupe, ainsi qu'à chaque bureau d'une bande;

(e) établir une ligne de soutien nationale sans frais, afin de fournir de l'aide aux membres du groupe, aux familles, aux tuteurs, aux gardiens ou aux autres personnes qui font des demandes pour leur propre compte ou pour le compte de membres du groupe;

(f) et par tout autre avis que la Cour ordonne.

14. Les demandeurs demanderont à la Cour d'approuver les formulaires de retrait et de participation devant être utilisés par les membres du groupe qui souhaitent se retirer du recours collectif ou y participer, ce qui exigera que le membre du groupe fournisse suffisamment de renseignements pour établir qu'il est membre du groupe.

ÉTAPES DE POURSUITE DE L'INSTANCE APRÈS LA DÉTERMINATION DES QUESTIONS COMMUNES FAVORABLES AU GROUPE

Avis de résolution des questions communes

15. Les demandeurs demanderont à la Cour de régler la forme et le contenu de l'avis de résolution des questions communes de l'étape 1 et de l'étape 2 (le « **plan d'avis de résolution** ») et la manière dont les membres du groupe déposeront des réclamations (les « **formulaires de réclamation** ») avant une date fixée avec l'administrateur. Les demandeurs demanderont également à la Cour de régler un processus approprié pour déterminer les questions individuelles restantes.

Évaluation des dommages

16. Si les questions communes sont résolues en faveur des demandeurs, les demandeurs proposent deux (2) méthodes d'évaluation et de distribution des dommages-intérêts pour les membres du groupe comme suit :

(a) l'ensemble des dommages-intérêts dont chaque particulier membre d'un groupe peut se prévaloir *au prorata* ou *au prorata* au sein d'un sous-groupe;

(b) l'ensemble des dommages-intérêts dont les Premières Nations participantes peuvent se prévaloir sur une base communautaire; et

17. À la suite de la détermination de l'ensemble des dommages-intérêts, y compris les dommages-intérêts punitifs, des dommages-intérêts supplémentaires peuvent être accordés dans le cadre d'instances individuelles.

Évaluation du nombre de demandeurs

18. Après l'expiration du délai de remise des formulaires de réclamation, l'administrateur calcule le nombre total de demandeurs aux fins de tout partage *au prorata* des dommages-intérêts globaux.

Distribution de dommages-intérêts punitifs globaux

19. Si la Cour accorde des dommages-intérêts globaux au groupe ou à un sous-groupe, le montant total des dommages-intérêts sera attribué au groupe d'une manière que déterminera la Cour dans un délai fixé par la Cour à partir de l'avis de résolution.

Fonds non distribués

20. Toute somme non distribuée sera distribuée à *cy-près* selon les directives de la Cour. Les demandeurs proposent que les montants résiduels soient distribués *cy-près* à des organismes communautaires qui aident les Premières Nations touchées à mettre en place des infrastructures d'approvisionnement en eau.

Résolution des questions individuelles

21. Dans les trente (30) jours qui suivent la délivrance du jugement sur les questions communes, les parties se réunissent pour régler un protocole visant à résoudre des questions individuelles. Si les parties ne parviennent pas à s'entendre sur un tel protocole, les demandeurs doivent demander des directives à la Cour dans les soixante (60) jours.

EXIGENCES DIVERSES DU PLAN DE POURSUITE DE L'INSTANCE

Financement

22. Les avocats du groupe ont conclu une entente avec les représentants demandeurs à l'égard des honoraires d'avocats et débours juridiques. Cette entente prévoit que les avocats du groupe ne recevront pas de paiement pour leur travail tant que le recours collectif n'aura pas reçu une suite favorable ou que les frais n'auront pas été recouvrés du défendeur.

23. Les honoraires des avocats du groupe sont soumis à l'approbation du tribunal en vertu de la *Loi sur les recours collectifs*.

Administration des réclamations

24. L'administrateur assurera l'administration des réclamations pour tout règlement ou jugement obtenu. L'administrateur distribuera l'avis conformément au plan d'avis de résolution. Si un règlement est réalisé et qu'un fonds de règlement est fourni, ou si un jugement donne lieu à une attribution en faveur des membres du groupe, l'administrateur administrera les paiements prélevés sur le fonds aux demandeurs selon la procédure indiquée ci-dessus, après approbation et/ou modification par la Cour.

Site Web du recours collectif

25. De temps à autre, les avocats du groupe afficheront les actes de procédure et les documents de cour pertinents, les derniers documents et résumés des derniers développements et faits nouveaux, les délais prévus, la foire aux questions et les réponses et les coordonnées des avocats du groupe pour les renseignements des membres du groupe.

Gestion des conflits

26. Les avocats du groupe et les demandeurs ont pris les mesures appropriées pour établir qu'il n'existe aucun conflit d'intérêts entre les membres du groupe, et qu'aucun tel conflit n'est prévu. En cas de conflit, McCarthy Tétrault S.E.N.C.R.L., s.r.l. représentera un sous-groupe et Olthuis Kleer Townshend LLP, l'autre. Si un conflit survenait entre les Premières Nations et leurs membres, ce qui n'est pas prévu étant donné leur intérêt commun, McCarthy Tétrault S.E.N.C.R.L., s.r.l. représentera les membres et Olthuis Kleer Townshend LLP représentera les Premières Nations.

Droit applicable

27. La législation applicable est la *Loi constitutionnelle de 1982*, la *Loi constitutionnelle de 1867*, la *Charte des droits et libertés*, la *Loi sur la salubrité de l'eau potable des Premières Nations, L.C. 2013, c. 21*, la *Loi sur les Indiens*, L.R.C. 1985, c. I-5, *Loi sur la gestion des terres des Premières Nations*, L.C. 1999, c. 24, *La Loi sur les recours collectifs*, CPLM c C130 ainsi que les règlements applicables, la common law et le droit manitobain.

Annexe A

Calendrier

CALENDRIER DE POURSUITE DE L'INSTANCE PROPOSÉ		
Étapes à suivre	**Par quelle partie**	**Date à respecter**
Remise de la défense	Défendeur	À remettre sur avis de 60 jours par les demandeurs
Remise de la réponse, le cas échéant	Demandeurs	À remettre 15 jours après la remise de la défense
Remise du dossier d'attestation/de jugement sommaire	Demandeurs	30 juin 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'attestation et participe à des discussions exploratoires sur le règlement)
Pré-instruction pour évaluer le jugement sommaire	Toutes les parties	Juillet 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'attestation et participe à des discussions exploratoires sur le règlement)
Remise du dossier de réponse	Défendeur	30 octobre 2020 (peut être ajournée jusqu'à 5 mois si le défendeur consent à l'attestation et participe à des discussions exploratoires sur le règlement)
Remise du dossier de réplique, le cas échéant	Demandeurs	16 décembre 2020 (ou 45 jours après la remise du dossier de réponse, selon la plus tardive de ces éventualités)
Contre-interrogatoires	Toutes les parties	À terminer 75 jours après la remise du dossier de réplique, le cas échéant, ou 120 jours après la remise du dossier de réponse
Requêtes en rejet, le cas échéant	Toutes les parties	À terminer 30 jours après la fin des contre-interrogatoires

CALENDRIER DE POURSUITE DE L'INSTANCE PROPOSÉ		
Étapes à suivre	**Par quelle partie**	**Date à respecter**
Remise des réponses aux engagements	Toutes les parties	À terminer 15 jours après la motion en rejet
Remise du mémoire des demandeurs	Demandeurs	À remettre 45 jours après l'achèvement des réponses aux engagements
Remise du mémoire de réponse	Défendeur	À remettre 45 jours après la remise du mémoire des demandeurs
Remise du mémoire de réplique	Demandeurs	À remettre 15 jours après la remise du mémoire de réponse
Audition d'une motion en attestation et d'une éventuelle motion de jugement sommaire	Toutes les parties	Juillet-août 2021

Dossier de la Cour n° CI-19-01-24661

COUR DU BANC DE LA REINE

Winnipeg Centre

ENTRE :

LA NATION DES CRIS DE TATASKWEYAK et LA CHEFFE DOREEN SPENCE pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Recours collectif proposé introduit aux termes des procédures en vertu de la *Loi sur les recours collectifs*, CPLM c. C. 130

PLAN DE POURSUITE DE L'INSTANCE

(Déposé le 2e jour de juillet 2020)

McCarthy Tétrault S.E.N.C.R.L., s.r.l.
Bureau 5300, Toronto Dominion Bank Tower
Toronto (Ontario) M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca

Eric S. Block LSO #47479K
eblock@mccarthy.ca

H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca

Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tél.: 416-601-7831
Télécopieur : 416-868-0673

Avocats des demandeurs

Dossier de la Cour nº CI-19-01-24661

COUR DU BANC DE LA REINE

Winnipeg Centre

ENTRE :

LA NATION DES CRIS DE TATASKWEYAK et LA CHEFFE DOREEN SPENCE pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK

Demandeurs

–et–

LE PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Recours collectif proposé introduit aux termes des procédures en vertu de la *Loi sur les recours collectifs*, CPLM.c. C. 130

ORDONNANCE

(14 juillet 2020)

McCarthy Tétrault S.E.N.C.R.L., s.r.l.
Bureau 5300, Toronto Dominion Bank Tower
Toronto (Ontario) M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca

Eric S. Block LSO #47479K
eblock@mccarthy.ca

H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca

Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca

Tél.: 416-601-7831
Télécopieur : 416-868-0673

Avocats des demandeurs

ANNEXE D

MODÈLE DE RÉSOLUTION D'ACCEPTATION DU CONSEIL DE BANDE

Voir ci-joint.

[Nom de la Première Nation]

Résolution du conseil de bande

En ce qui concerne l'entente de règlement dans le cadre des actions collectives portant sur les avis concernant la qualité de l'eau potable sur les terres des Premières Nations

ATTENDU QUE le 11 octobre 2019, certains demandeurs ont introduit l'action intitulée *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation c. Attorney General of Canada*, portant le numéro de dossier T-1673-19 devant la Cour fédérale (l'« **action devant la Cour fédérale** »);

ATTENDU QUE le 20 novembre 2019, certains demandeurs ont introduit l'action intitulée *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation c. Attorney General of Canada*, portant le numéro de dossier CI-19-01-24661 devant la Cour du banc de la Reine du Manitoba (l'« **action au Manitoba** », et conjointement avec l'action devant la Cour fédérale, les « **actions** »);

ATTENDU QUE les actions ont été attestées ou autorisées par les tribunaux respectifs comme des recours collectifs;

ATTENDU QUE le procureur général du Canada et les demandeurs dans les actions ont négocié une entente de règlement (l'« **entente de règlement** ») à l'égard des actions;

ATTENDU QUE l'entente de règlement prévoit qu'une Première Nation membre du groupe visé dans les actions (le « **groupe** ») peut donner à l'administrateur désigné par les tribunaux en vertu de l'entente de règlement (l'« **administrateur** ») un avis d'acceptation par cette Première Nation de l'entente de règlement et ainsi avoir droit à certaines indemnités et à certains avantages aux termes de l'entente de règlement dont peuvent se prévaloir les membres de cette Première Nation;

ATTENDU QUE [nom de la Première Nation] est membre du groupe et que le **[nom du conseil de bande]** (le « **conseil** ») souhaite confirmer et approuver l'acceptation de l'entente de règlement par **[nom de la Première Nation]** en adoptant la présente résolution du conseil de bande à une réunion dûment constituée convoquée à cette fin;

IL EST PAR LES PRÉSENTES RÉSOLU CE QUI SUIT :

1. Le conseil enjoint au chef **[Nom du chef]**, au nom de la **[Nom de la Première Nation]** et lui donne l'autorisation, par les présentes, d'approuver et d'accepter l'entente de règlement, dont une copie a été examinée par les signataires ci-après au nom du conseil, et il enjoint en outre à ce signataire autorisé et lui donne l'autorisation, par les présentes, de remettre à l'administrateur une copie signée de la présente résolution du conseil de bande pour confirmer l'acceptation de l'entente de règlement par [**Nom de la Première**

Nation]. Le conseil reconnaît et confirme par les présentes qu'aucune autre mesure n'est requise par le conseil pour accepter l'entente de règlement.

2. Le conseil ordonne et donne l'autorisation, par les présentes, au chef, au nom de la **[Nom de la Première Nation]**, de temps à autre, de signer et de remettre la présente résolution ainsi que les autres documents et instruments et de prendre toutes les mesures raisonnablement nécessaires pour exécuter l'entente de règlement et y donner effet, y compris, s'il le juge approprié, pour confirmer la résidence des personnes membres du groupe dans une réserve de la **[Nom de la Première Nation]** alors qu'un avis concernant la qualité de l'eau potable à long terme était en vigueur dans cette réserve pendant la période visée par l'entente de règlement.

3. Ces résolutions peuvent être signées par le chef et les membres du conseil en autant d'exemplaires pouvant se révéler nécessaire, sous forme originale ou électronique, dont chacun sera réputé être un original, et dont la totalité seront réputés constituer ensemble une seule et même résolution.

Les signataires suivants attestent et garantissent qu'un quorum du conseil a signé la présente résolution du conseil de bande, comme en font foi leurs signatures ci-dessous.

FAIT le _____ 202__.

_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	
[insérer le nom]	

ANNEXE E

MODÈLE DE CONFIRMATION DU CONSEIL DE BANDE

Voir ci-joint.

[Nom de la Première Nation]

Confirmation du conseil de bande

En ce qui concerne l'entente de règlement dans le cadre des actions collectives portant sur les avis concernant la qualité de l'eau potable sur les terres des Premières Nations

Il y a lieu de se reporter à l'entente de règlement (l'« **entente de règlement** ») intervenue en date du **[●]** septembre 2021 entre le procureur général du Canada (le « **Canada** »), la Première Nation de Curve Lake et la cheffe Emily Whetung, pour son propre compte et pour le compte de tous les membres de la Première Nation de Curve Lake, la Première Nation de Neskantaga et le chef Wayne Moonias et l'ancien chef Christopher Moonias, pour leur propre compte et pour le compte de tous les membres de la Première Nation de Neskantaga, et la Nation des cris de Tataskweyak et la cheffe Doreen Spence, pour son propre compte et pour le compte de tous les membres de la Nation des cris de Tataskweyak. Les termes clés utilisés mais non définis dans la présente confirmation du conseil de bande ont le sens qui leur est donné dans l'entente de règlement.

Conformément à l'entente de règlement, une Première Nation membre du groupe peut fournir à l'administrateur une déclaration identifiant les personnes membres du groupe qui résidaient habituellement dans une réserve de cette Première Nation membre du groupe entre le 20 novembre 1995 et le 20 juin 2021 alors qu'un avis concernant la qualité de l'eau potable à long terme était en vigueur dans cette réserve (collectivement, les « **membres du groupe visés** »). Un « résident habituel » s'entend d'une personne qui a vécue dans la réserve plus longtemps qu'elle n'a vécue ailleurs, ou d'une personne qui était âgée de dix-huit (18) ans ou moins au moment visé et qui vivait habituellement dans une réserve touchée, mais qui vivait ailleurs pendant une partie de l'année pour fréquenter un établissement d'enseignement. Les membres du groupe visé doivent avoir résidé habituellement dans la réserve pendant au moins un an au cours d'une période au cours de laquelle un avis concernant la qualité de l'eau potable à long terme était en vigueur.

[Nom de la Première Nation] est une Première Nation membre du groupe. **[Nom du conseil des Premières Nations]** (le « **conseil** ») déclare par les présentes que l'**appendice A** jointe à la présente confirmation du conseil de bande constitue une liste des membres du groupe visés de la **[Nom de la Première Nation]**.

FAIT le _____ 202__.

_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____

APPENDICE A

Membres du groupe visés de la [Nom de la Première Nation]

Nom	Réserve	Période(s) de résidence habituelle dans la réserve	Dernière adresse connue ou autre coordonnées

ANNEXE F

PROCÉDURE DE RÈGLEMENT DES RÉCLAMATIONS

FORMULAIRES DE RÉCLAMATION

1. À la nomination de l'administrateur, les parties fournissent à l'administrateur une ou plusieurs listes sous forme de tableur électronique (la « **liste** ») indiquant, à la connaissance des parties :

    a) les Premières Nations admissibles à devenir des Premières Nations membres du groupe si elles acceptent l'entente avant la date limite pour l'acceptation;

    b) les coordonnées du bureau du conseil de bande ou du bureau analogue des Premières Nations visées au paragraphe a);

    c) les réserves touchées et les dates auxquelles les avis concernant la qualité de l'eau potable d'une durée d'au moins un (1) an étaient en vigueur pour chaque Première Nation visée au paragraphe a);

    d) si l'avis concernant la qualité de l'eau potable visé au paragraphe c) était un avis d'ébullition de l'eau, un avis de ne pas boire ou un avis de non-utilisation; et

    e) si les Premières Nations visées au paragraphe a) sont des Premières Nations éloignées ou non éloignées.

2. Immédiatement après la réception de la liste, l'administrateur envoie un formulaire de réclamation à chaque bureau du conseil de bande ou bureau analogue indiqué à l'alinéa 1.b) avec une demande de remise d'une copie du formulaire de réclamation aux membres de cette Première Nation. L'administrateur envoie les formulaires de réclamation par courriel ou, si aucune adresse de courrier électronique n'est fournie, par courrier postal si une adresse est fournie. Si un courriel n'est pas distribué ou ne peut l'être, l'administrateur envoie le formulaire de réclamation par courrier postal. Si le courrier postal n'est pas distribué ou ne peut l'être, l'administrateur n'a aucune autre obligation de s'efforcer de fournir une copie du formulaire de réclamation à cette Première Nation.

3. Immédiatement après la réception de la liste, l'administrateur déploie tous les efforts raisonnables pour conserver un agent de liaison communautaire de chaque Première Nation figurant sur la liste, ou d'un conseil tribal approprié, afin de déployer tous les efforts raisonnables pour :

    a) fournir des formulaires de réclamation aux membres de cette Première Nation;

    b) encourager les membres admissibles de cette Première Nation à soumettre leurs formulaires de réclamation;

    c) aider les membres de cette Première Nation à remplir et à soumettre leurs formulaires de réclamation, notamment en les mettant en contact avec l'administrateur;

d) aviser les Premières Nations membres du groupe qu'elles doivent donner un avis d'acceptation si elles souhaitent participer à l'entente; et

e) aviser les Premières Nations membres du groupe qu'elles peuvent soumettre une confirmation du conseil de bande, si elles le souhaitent.

4. L'administrateur met le formulaire de réclamation à la disposition du public sur son site Web et le fait parvenir par courriel ou par la poste à toute personne qui en fait la demande.

5. L'administrateur inclut dans l'envoi postal une enveloppe affranchie et le formulaire de réclamation.

6. L'administrateur tient à jour une base de données de tous les formulaires de réclamation et confirmations du conseil de bande qu'il reçoit. Si les parties reçoivent des formulaires de réclamation ou des confirmations du conseil de bande, elles les transmettent immédiatement à l'administrateur.

7. À la réception d'un formulaire de réclamation ou d'une confirmation du conseil de bande, l'administrateur examine le formulaire de réclamation ou la confirmation du conseil de bande, selon le cas, pour déterminer s'il est complet et, s'il est incomplet, il fait tous les efforts raisonnables pour communiquer avec le demandeur d'indemnité ou la Première Nation membre du groupe, selon le cas, afin d'obtenir d'autres renseignements pour remplir le formulaire de réclamation ou la confirmation du conseil de bande. Toutefois, l'administrateur aura le pouvoir discrétionnaire d'accepter des irrégularités mineures et, s'il accepte un formulaire de réclamation ou une confirmation du conseil de bande comportant des irrégularités mineures, il n'est pas tenu de communiquer avec le demandeur d'indemnité ou la Première Nation membre du groupe pour obtenir de plus amples renseignements. Les demandeurs d'indemnité et les Premières Nations membres du groupe disposent de quatre-vingt-dix (90) jours à compter de la date à laquelle ils sont contactés pour remédier à toute irrégularité décelée, à défaut de quoi l'administrateur leur indiquera par écrit, selon le cas, son refus d'accepter le formulaire de réclamation ou la confirmation du conseil de bande et le motif de son refus. Malgré ce qui précède, l'administrateur peut accepter la partie incomplète d'une confirmation du conseil de bande qui contient suffisamment de renseignements pour prendre une décision quant à l'admissibilité.

8. Dans les cas d'omissions ou d'erreurs mineures dans un formulaire de réclamation ou une confirmation du conseil de bande, l'administrateur doit corriger ces omissions ou erreurs s'il dispose aisément du renseignement nécessaire pour corriger l'erreur ou l'omission.

9. Chaque demandeur d'indemnité peut seulement soumettre un (1) formulaire de réclamation à l'égard de toutes ses réclamations, tandis qu'un exécuteur testamentaire, un demandeur d'indemnité successoral ou un représentant personnel peut seulement présenter un (1) formulaire de réclamation pour le compte d'un demandeur d'indemnité concerné.

DÉCISIONS QUANT À L'ADMISSIBILITÉ CONCERNANT LES PERSONNES MEMBRES DU GROUPE

10. Immédiatement après la réception d'un formulaire de réclamation de règlement, l'administrateur prend une décision quant à l'admissibilité conformément à l'entente en fonction du formulaire de réclamation, de la liste, de toute confirmation du conseil de bande pertinente, de tout autre renseignement reçu des parties et de tout autre renseignement qu'il juge approprié. Immédiatement après la réception d'une confirmation du conseil de bande, l'administrateur prend les décisions quant à l'admissibilité conformément à l'entente (y compris le paragraphe 7.02(2)) à l'égard des demandeurs d'indemnité qui y sont indiqués, en fonction de la confirmation du conseil de bande, des formulaires de réclamation reçus à l'égard des demandeurs d'indemnité qui sont indiqués dans la confirmation du conseil de bande, de la liste, de tout autre renseignement reçu des parties et de tout autre renseignement que l'administrateur juge approprié.

11. Si un formulaire de réclamation ou une confirmation du conseil de bande indique que le demandeur d'indemnité résidait habituellement dans une réserve qui figure sur la liste depuis au moins un (1) an et qui était visée par un avis concernant la qualité de l'eau potable à long terme, mais que le demandeur d'indemnité est membre d'une Première Nation qui n'est pas une Première Nation touchée, le demandeur d'indemnité peut néanmoins être inclus dans le groupe. Si un formulaire de réclamation ou une confirmation du conseil de bande indique que le demandeur d'indemnité était habituellement résident dans une réserve qui ne figure pas sur la liste, et que l'administrateur n'en a pas encore tenu compte, alors l'administrateur :

    a) consulte le comité de mise en œuvre du règlement avant de déterminer si le nom de la réserve devrait être ajouté sur la liste au motif qu'elle était visée par un avis concernant la qualité de l'eau potable à long terme pendant la période visée et, si c'est le cas, lorsque la période la réserve était visée par un avis concernant la qualité de l'eau potable à long terme; et

    b) peut demander d'autres renseignements ou preuves avant de prendre une décision quant à l'admissibilité .

12. Si l'administrateur juge que le demandeur d'indemnité n'est pas une personne membre du groupe, il informe sans délai le demandeur d'indemnité :

    a) de la décision de l'administrateur;

    b) des motifs de la décision de l'administrateur selon lesquels le demandeur d'indemnité n'est pas une personne membre du groupe; et

    c) de sa possibilité d'interjeter appel devant le tiers évaluateur de la décision de l'administrateur conformément à la présente procédure de règlement des réclamations et à l'entente.

INDEMNITÉ POUR LES PERSONNES MEMBRES DU GROUPE

13. Si l'administrateur prend une décision quant à l'admissibilité selon laquelle un demandeur d'indemnité est une personne membre du groupe conformément à l'entente,

l'administrateur quantifie le montant payable à cette personne membre du groupe sur le Fonds en fiducie conformément à l'article 8.01 et à l'ANNEXE G de l'entente, l'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à l'entente.

14. Lorsque l'administrateur verse une indemnité conformément à l'article 8.01 de l'entente et à l'article 13 de la présente ANNEXE F, l'administrateur informe également la personne membre du groupe :

    a) du mode de calcul de la somme payée; et

    b) de sa possibilité d'interjeter appel devant le tiers évaluateur de la quantification de l'administrateur de la somme payable conformément à la présente procédure de règlement des réclamations et à l'entente.

INDEMNITÉ POUR PRÉJUDICES DÉTERMINÉS

15. Sur demande raisonnable, les avocats du groupe aident un demandeur d'indemnité à soumettre sa réclamation d'indemnité pour préjudices déterminés ou à formuler son appel d'une décision relative à un préjudice déterminé sans frais supplémentaires pour le demandeur d'indemnité, et les honoraires des avocats du groupe sont payables conformément à l'article 18.02 de l'entente.

16. Une personne membre du groupe confirmée est admissible à une indemnité pour préjudices déterminés si elle satisfait aux critères énoncés à l'article 8.02 de l'entente.

17. Un demandeur d'indemnité peut, à son gré, soumettre, au soutien de sa réclamation d'indemnité pour préjudices déterminés, à l'administrateur la totalité ou une partie des éléments suivants avec son formulaire de réclamation :

    a) les dossiers médicaux du préjudice et sa cause;

    b) les autres dossiers, y compris les dossiers écrits, les photographies et les vidéos, concernant le préjudice et sa cause;

    c) une déclaration écrite; et

    d) témoignage oral.

18. Il est entendu que la procédure de règlement des réclamations portant sur des préjudices déterminés n'est pas censée être traumatisante et que l'article 17 de la présente **Error! Reference source not found.** n'empêche pas un demandeur d'indemnité d'établir son admissibilité à une indemnité pour préjudices déterminés en se fondant uniquement sur son formulaire de réclamation.

19. Si un demandeur d'indemnité réclame une indemnité pour préjudices déterminés, mais que l'administrateur détermine que ce demandeur d'indemnité n'a pas droit à une indemnité pour préjudices déterminés lorsque les préjudices qui y sont décrits ne sont pas prévus dans la grille d'indemnisation pour préjudices déterminés, l'administrateur se conforme sans délai à l'article 7.04 de l'entente.

20. Si un demandeur d'indemnité réclame une indemnité pour préjudices déterminés, mais que l'administrateur détermine que le demandeur d'indemnité n'a pas droit à une indemnité pour préjudices déterminés concernant les préjudices qui y sont décrits pour un motif autre que celui selon lequel le préjudice n'est pas prévu dans la grille d'indemnisation pour préjudices déterminés, l'administrateur informe sans délai le demandeur d'indemnité :

    a) de la décision de l'administrateur;

    b) des motifs de la décision de l'administrateur selon lesquels le demandeur d'indemnité n'a pas droit à une indemnité pour préjudices déterminés; et

    c) de sa possibilité d'interjeter appel devant le tiers évaluateur de la décision de l'administrateur conformément à la présente procédure de règlement des réclamations et à l'entente.

21. Si l'administrateur établit qu'une personne membre du groupe confirmée a droit à une indemnité pour préjudices déterminés, il quantifie le montant payable à cette personne membre du groupe confirmée sur le fonds d'indemnisation pour préjudices déterminés conformément à l'article 8.02 de l'entente et à l'**Error! Reference source not found.**.

22. Le paiement de l'indemnité pour préjudices déterminés sera effectué conformément à l'article 8.02 de l'entente. L'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à l'entente.

23. Lorsque l'administrateur verse une indemnité pour préjudices déterminés à une personne membre du groupe confirmée, conformément à l'article 8.02 de l'entente et à la présente **Error! Reference source not found.**, l'administrateur doit également informer la personne membre du groupe confirmée :

    a) du mode de calcul de la somme payée; et

    b) de sa possibilité d'interjeter appel devant le tiers évaluateur de la quantification de l'administrateur de la somme payable conformément à la présente procédure de règlement des réclamations et à l'entente.

DOMMAGES-INTÉRÊTS DE PREMIÈRE NATION MEMBRE DU GROUPE

24. Dès la réception d'une acceptation, l'administrateur détermine si la Première Nation est admissible à titre de Première Nation membre du groupe. L'inscription sur la liste constitue une preuve concluante que la Première Nation est admissible à titre de Première Nation membre du groupe. Si la Première Nation ne figure pas sur la liste, l'administrateur :

    a) consulte le comité de mise en œuvre du règlement avant de déterminer si la Première Nation est admissible à titre de Première Nation membre du groupe; et

    b) peut demander des renseignements ou des preuves supplémentaires avant de décider si une Première Nation est admissible à titre de Première Nation membre du groupe .

25. Si l'administrateur établit qu'une Première Nation n'est pas une Première Nation membre du groupe par application de l'article 24 de la présente **Error! Reference source not found.**, il informe sans délai la Première Nation :

a) de la décision de l'administrateur;

b) des motifs de la décision de l'administrateur selon lesquels la Première Nation n'est pas une Première Nation membre de groupe; et

c) de sa possibilité d'interjeter appel devant le tiers évaluateur de la décision de l'administrateur conformément à la présente procédure de règlement des réclamations et à l'entente.

26. Si l'administrateur établit qu'une Première Nation qui a remis une acceptation est une Première Nation membre de groupe, il paie l'indemnité de base et les dommages-intérêts de Première Nation conformément à l'article 8.03 de l'entente. L'administrateur demande ces fonds au fiduciaire, le fiduciaire fournit ces fonds à l'administrateur et l'administrateur paie ces fonds conformément à l'entente.

27. Chaque fois que l'administrateur verse des dommages-intérêts de Première Nation à une Première Nation membre de groupe, il informe la Première Nation membre de groupe :

a) de la manière dont il a calculé la somme payée; et

b) de sa possibilité d'interjeter appel devant le tiers évaluateur de la quantification de l'administrateur conformément à la présente procédure de règlement des réclamations et à l'entente.

APPEL

28. Lorsqu'un demandeur d'indemnité, une personne membre du groupe, une Première Nation ou une Première Nation membre du groupe, selon le cas (un « **appelant** »), souhaite interjeter appel d'une décision de l'administrateur, l'appelant fournit à l'administrateur, dans les soixante (60) jours de la réception de la décision de l'administrateur, une déclaration écrite indiquant la décision qu'il souhaite porter en appel et les motifs pour lesquels il estime que l'administrateur a erré.

29. L'administrateur transmet sans délai les documents qu'il reçoit par application de l'article 28 de la présente annexe au tiers évaluateur pour que ce dernier tranche l'affaire.

30. Lorsqu'il examine un appel, le tiers évaluateur peut consulter l'appelant, l'administrateur et le comité de mise en œuvre du règlement. Le tiers évaluateur peut notamment demander des preuves à l'appelant et à l'administrateur.

31. Le tiers évaluateur tranche l'appel dans les meilleurs délais.

32. Dès qu'il rend sa décision, le tiers évaluateur informe sans délai l'appelant et l'administrateur :

a) de la décision du tiers évaluateur; et

b) des motifs de la décision du tiers évaluateur.

33. La décision du tiers évaluateur est définitive et n'est pas susceptible d'appel ou de révision.

34. Il est entendu qu'une personne membre du groupe ne peut interjeter appel devant le tiers évaluateur d'une réclamation d'indemnité pour préjudices déterminés lorsque l'administrateur juge que le préjudice qui y est décrit n'est pas prévu dans la grille d'indemnisation pour préjudices déterminés. L'article 7.04 de l'entente reçoit plutôt application.

GÉNÉRALITÉS

35. À moins d'indication contraire dans l'entente ou dans la présente procédure de règlement des réclamations, la norme de preuve dans tous les cas est la prépondérance des probabilités en fonction de l'entente, et le tiers évaluateur applique une norme de contrôle de la décision correcte en fonction de l'entente. Il est entendu que, pour que l'administrateur ou le tiers évaluateur conclue qu'un demandeur d'indemnité ou une Première Nation est admissible à une indemnité conformément à l'entente et sauf indication contraire dans la présente entente ou la présente procédure de règlement des réclamations, l'administrateur ou le tiers évaluateur doit conclure qu'il est plus que probable que le demandeur d'indemnité ou la Première Nation soit admissible à une indemnité selon les renseignements dont dispose l'administrateur ou le tiers évaluateur.

36. Pour déterminer si i) un demandeur d'indemnité est une personne membre du groupe et est admissible à une indemnité en vertu de l'entente ou ii) une Première Nation est une Première Nation membre du groupe, l'administrateur et le tiers évaluateur peuvent :

a) demander des renseignements supplémentaires à un demandeur d'indemnité, à une Première Nation ou aux parties; et

b) interroger un demandeur d'indemnité ou un représentant d'une Première Nation.

37. Les parties peuvent apporter des modifications à la présente procédure de règlement des réclamations si elles y consentent pour des changements de procédures, comme la prorogation de délai, et l'adoption de protocoles et de procédures, sans obtenir l'approbation du tribunal, pour autant que ces modifications n'aient pas d'incidence importante sur les droits et recours énoncés dans la procédure de règlement des réclamations. Les parties obtiennent l'approbation des tribunaux quant aux changements de fond apportés à la présente procédure de règlement des réclamations.

38. L'administrateur fournit une ligne d'assistance bilingue (français et anglais) sans frais pour aider les demandeurs d'indemnité, les membres de leur famille, leurs tuteurs ou d'autres personnes qui formulent des demandes de renseignements pour le compte des demandeurs d'indemnité.

39. Après la distribution des fonds indiqués ci-dessous conformément à la présente entente :

a) le Fonds en fiducie, y compris tout excédent du Fonds en fiducie;

b) le fonds d'indemnisation pour préjudices déterminés; et

c) le Fonds pour la relance économique et culturelle des Premières Nations,

l'administrateur demande à être libéré et dépose devant les tribunaux un rapport conformément à l'article 21.02 de l'entente, contenant des renseignements au mieux de sa connaissance concernant ce qui suit :

d) le nombre total de personnes membres du groupe et de Premières Nations membres du groupe;

e) le nombre de demandeurs d'indemnité qui ont soumis un formulaire de réclamation et le nombre de personnes qui ont reçu des dommages-intérêts individuels;

f) le nombre de demandeurs d'indemnité qui ont réclamé une indemnité pour préjudices déterminés et le nombre de demandeurs d'indemnité qui ont reçu une indemnité pour préjudices déterminés;

g) le nombre de Premières Nations membres du groupe qui ont remis l'acceptation de l'entente;

h) les montants distribués aux membres du groupe ou pour le compte de membres du groupe, à titre de dommages-intérêts individuels, d'indemnité pour préjudices déterminés ou de dommages-intérêts de Première Nation, et une description de la façon dont les montants ont été distribués;

i) le nombre de réclamations par Première Nation et les sommes payées par celle-ci; et

j) les coûts associés aux travaux de l'administrateur.

40. Une partie ou l'administrateur peut proposer qu'une partie du rapport visée à l'article 39 de la présente annexe soit placée sous scellés.

41. Dès qu'il est libéré de ses fonctions d'administrateur, l'administrateur conserve sur support papier ou électronique tous les documents se rapportant à une réclamation pendant deux (2) ans, après quoi il doit détruire ces documents.

ANNEXE G

GRILLE D'INDEMNISATION DES PRÉJUDICES INDIVIDUELS

Le comité mixte détermine les montants réels qui seront indiqués sur l'avis d'un actuaire ou d'un conseiller analogue.

	Indemnisation
Avis concernant la qualité de l'eau potable à long terme - Première Nation éloignée	2 000 $ par année
Avis concernant la qualité de l'eau potable à long terme : avis de non-utilisation - Première Nation non éloignée	2 000 $ par année
Avis concernant la qualité de l'eau potable à long terme : avis de ne pas boire - Première Nation non éloignée	1 650 $ par année
Avis concernant la qualité de l'eau potable à long terme : avis d'ébullition de l'eau - Première Nation non éloignée	1 300 $ par année

ANNEXE H

GRILLE D'INDEMNISATION DES PRÉJUDICES DÉTERMINÉS

Catégorie	Préjudice déterminé	Exemples de symptômes	Niveau 1 *Déséquilibre important et prolongé de la santé, du bien-être ou des activités quotidiennes qui : a) a persisté au moins un mois; b) a porté atteinte à la qualité de vie du demandeur; c) et pour lequel le demandeur a sollicité un traitement auprès d'un professionnel de la santé, y compris les guérisseurs traditionnels, les chamans, les Aînés, les responsables de la santé communautaire ou les gardiens du savoir (indemnisation totale pour tous les préjudices)*	Niveau 2 *Les effets du Niveau 1 qui : a) ont persisté pendant au moins un an; b) ont porté gravement atteinte à la santé et aux activités quotidiennes du demandeur; et c) pour lesquels le demandeur a sollicité et reçu un traitement d'un professionnel de la santé, y compris des guérisseurs traditionnels ou des chamans* *(indemnisation totale pour tous les préjudices)*
Gastroentérologie	Ingestion de bactéries (*Escherichia coli, Salmonella, Shigella, Campylobacter jejuni, choléra, Giardia instestinalis, Cryptosporidium, cyanobactéries [algues bleu-vert], coliformes totaux, Helicobacter pylori*) Infection virale (*rotavirus, norovirus, hépatite A*)	Crampes d'estomac, nausée, diarrhée, vomissements, douleurs abdominales, déshydratation, constipation	5 000 $	20 000 $

	Ingestion de produits chimiques en quantités nocives pour la santé humaine : *arsenic, atrazine, diquat, cuivre, plomb, glyphosate, nitrite, nitrate, phorate, chrome, sulfate* Ulcères d'estomac			
Respiratoire	Intoxication au chlore Ingestion de produits chimiques en quantités nocives pour la santé humaine : *nitrite, nitrate*	Graves difficultés respiratoires, douloureuse irritation des voies aériennes ou des poumons (pouvant s'accompagner d'une irritation oculaire), importantes douleurs thoraciques, essoufflement, bleuissement de la peau	20 000 $	50 000 $
Dermatologique	Infections cutanées (*Staphylococcus aureus, Streptococcus pyogenes*) Lésions cutanées Intoxication au chlore	Cellulite, clous (furoncles), lésions cutanées, pigmentation cutanée, fasciite nécrosante (maladie mangeuse de chair)	10 000 $	25 000 $
Santé mentale	Trouble dépressif majeur; trouble dépressif persistant (dysthymie); trouble panique; trouble de l'usage de l'alcool; trouble de l'usage du cannabis; trouble de l'usage du tabac; trouble de l'usage de sédatifs, de somnifères ou d'anxiolytiques; trouble	Voir l'appendice « H-1 »	15 000 $	30 000 $

	de stress post-traumatique; phobie spécifique; trouble de l'adaptation; anxiété généralisée			
Foie	Infection virale (*hépatite A*) Ingestion de bactéries (*cyanobactéries [algues bleu-vert]*) Atteintes hépatiques (*kystes, lésions, intoxication*) Ingestion de produits chimiques en quantités nocives pour la santé humaine : *antimoine, bromoxynil, tétrachlorure de carbone, cuivre, dicamba, dichlorométhane, 1,1-dichloroéthylène, 2,4-dichlorophénol, diclofop-méthyl, éthylbenzène, acides haloacétiques (AHA), métachlore, métribuzine, paraquat, pentachlorophénol, perfluorooctanesulfonate, acide perfluorooctanoïque, piclorame, chlorure de vinyle, benzo(a)pyrène, métachlore, trifluraline, trihalométhanes (THM)*	Décoloration des yeux et de la peau, gonflement des jambes et des chevilles, fatigue chronique, perte d'appétit, douleur abdominale, inflammation du foie, insuffisance hépatique	35 000 $	80 000 $ (en cas d'insuffisance hépatique)
Neurologique	Ingestion de produits chimiques en quantités nocives pour la santé humaine : *azinphos-méthyl, chlorite, diméthoate, plomb, malathion, manganèse, mercure, phorate, toluène*	Irritabilité, déficit de l'attention, céphalée, insomnie, étourdissements, pertes de mémoire, baisse du QI, modifications comportementales chez les enfants	20 000 $	50 000 $

Reins	Ingestion de produits chimiques en quantités nocives pour la santé humaine : *antimoine, baryum, bromate, cadmium, cuivre, acide 2,4-dichlorophénoxyacétique, acide 2-méthyl-4-chlorophénoxyacétique, diquat, malathion, acide aminotriacétique, paraquat, pentachlorophénol, picloram, trihalométhanes (THM), uranium*	Atteinte rénale, lésions aux reins, insuffisance rénale	25 000 $	65 000 $ (en cas d'insuffisance rénale)
Infections transmissibles par le sang, y compris l'endocardite infectieuse	Infections contractées après avoir utilisé une solution aqueuse issue d'injections/seringues/aiguilles	Douleurs aux articulations et aux muscles, douleurs thoraciques, fatigue, symptômes grippaux, sueurs nocturnes, essoufflement, œdème du bas du corps, souffle cardiaque	20 000 $	80 000 $ (en cas d'endocardite infectieuse)
Tumeurs/cancer	Ingestion de produits chimiques en quantités nocives pour la santé humaine	Tumeurs, cancer	40 000 $	100 000 $

Appendice H-1
Symptômes de référence en santé mentale

• Dépression majeure	A. Au moins cinq des symptômes suivants étaient présents au cours d'une même période de deux semaines et représentent un changement sur le plan du fonctionnement : au moins un de ces symptômes est (1) une humeur dépressive ou (2) une perte d'intérêt ou de plaisir. Ne pas inclure les symptômes qui sont manifestement attribuables à une autre condition médicale. 1. Humeur dépressive présente pendant la plus grande partie de la journée, presque tous les jours, qu'elle soit signalée par la personne (p. ex., en indiquant qu'elle se sent triste, vide, désespérée) ou observée par les autres (p. ex., en signalant l'avoir vue pleurer). (Remarque : Chez l'enfant et l'adolescent, il peut s'agir d'une humeur irritable.) 2. Diminution marquée de l'intérêt ou du plaisir relatif à toutes ou presque toutes les activités pendant la plus grande partie de la journée, presque tous les jours (signalée par la personne ou observée par les autres). 3. Perte de poids significative non attribuable à un régime ou gain de poids important (p. ex., changement de poids dépassant les 5 % en un mois), ou appétit accru ou réduit presque tous les jours. (Remarque : Chez l'enfant, prendre en compte la non-survenance d'une augmentation de poids attendue.) 4. Insomnie ou hypersomnie presque tous les jours. 5. Agitation ou ralentissement sur le plan psychomoteur presque tous les jours (observable par les autres, et non seulement un sentiment subjectif de fébrilité ou de ralentissement). 6. Fatigue ou perte d'énergie presque tous les jours. 7. Sentiment de dévalorisation ou de culpabilité excessive ou inappropriée (et potentiellement délirante) presque tous les jours (pas seulement se faire grief ou se sentir coupable d'être malade). 8. Diminution de l'aptitude à penser ou à se concentrer, ou indécision, presque tous les jours (signalée par la personne ou observée par les autres). 9. Pensées de mort récurrentes (pas seulement une peur de mourir), idées suicidaires récurrentes sans plan précis ou tentative de suicide ou plan précis pour se suicider. B. Les symptômes causent une souffrance cliniquement significative ou une altération du fonctionnement social, professionnel ou dans d'autres domaines importants. C. L'épisode n'est pas imputable aux effets physiologiques d'une substance ou d'une autre affection médicale.
• Trouble dépressif persistant (Dysthymie)	Ce trouble regroupe le trouble dépressif majeur et la dysthymie tels qu'ils sont définis dans le DSM-IV.

	A. Humeur dépressive présente presque toute la journée, plus d'un jour sur deux pendant au moins deux ans, signalée par la personne ou observée par les autres. **Remarque :** Chez l'enfant et l'adolescent, il peut s'agir d'une humeur irritable présente depuis d'au moins un an. B. Quand la personne est déprimée, elle présente au moins deux des symptômes suivants : 1. Perte d'appétit ou hyperphagie. 2. Insomnie ou hypersomnie. 3. Baisse d'énergie ou fatigue. 4. Faible estime de soi. 5. Difficultés de concentration ou difficultés à prendre des décisions. 6. Sentiments de perte d'espoir. C. Au cours des deux ans (ou, pour les enfants ou adolescents, de l'an) où l'humeur est perturbée, la personne n'a jamais cessé de présenter les symptômes des critères A et B pendant plus de deux mois consécutifs. D. Les symptômes du trouble dépressif majeur peuvent être continuellement présents pendant deux ans. E. Il n'y a jamais eu d'épisode maniaque ou d'épisode hypomaniaque, et les critères du trouble cyclothymique n'ont jamais été réunis. F. La perturbation ne s'explique pas mieux par un cas persistant de trouble schizoaffectif, de schizophrénie, de trouble délirant ou d'un autre trouble psychotique ou du spectre de la schizophrénie (spécifié ou non). G. Les symptômes ne sont pas dus aux effets physiologiques d'une substance (p. ex., une drogue utilisée par les toxicomanes ou un médicament) ou d'une autre affection médicale (p. ex. l'hypothyroïdie). H. Les symptômes causent une souffrance cliniquement significative ou une altération du fonctionnement social, professionnel ou dans d'autres domaines importants.
• Trouble panique	A. Attaques de panique inattendues et récurrentes. Une attaque de panique est une montée soudaine de peur ou de malaise intense qui atteint un pic en quelques minutes, et durant laquelle au moins quatre des symptômes suivants se manifestent : **Remarque :** La montée brusque peut naître d'un état de calme comme d'un état anxieux. 1. Palpitations, battements de cœur ou accélération du rythme cardiaque. 2. Transpiration. 3. Tremblements ou secousses. 4. Sensation d'essoufflement ou d'étouffement. 5. Sensation d'étranglement. 6. Douleur ou gêne thoraciques. 7. Nausées ou gêne abdominale. 8. Sensation de vertige, d'instabilité, d'étourdissement, ou de faiblesse. 9. Frissons ou sensations de chaleur.

	10. Paresthésie (engourdissement ou picotement). 11. Déréalisation (sentiment d'irréalité) ou dépersonnalisation (impression d'être détaché de soi). 12. Peur de perdre le contrôle ou de « devenir fou ». 13. Peur de mourir. **Remarque :** Des symptômes particuliers à la culture (acouphènes, douleur au cou, maux de tête, cris ou pleurs incontrôlables) peuvent être présents. Ceux-ci ne doivent pas compter comme l'un des quatre symptômes nécessaires au diagnostic. B. Au moins une attaque a été suivie de l'un ou l'autre des éléments suivants pendant au moins un mois : 1. Préoccupation ou inquiétude persistante quant à l'éventualité d'autres attaques de panique et de leurs conséquences (p. ex., craindre de perdre le contrôle, d'avoir une crise cardiaque ou de « devenir fou »). 2. Changement de comportement significatif et inadapté lié aux attaques (p. ex., adopter des comportements visant à éviter d'autres attaques, comme faire de l'exercice ou se mettre dans une situation inhabituelle). C. La perturbation n'est pas imputable aux effets physiologiques d'une substance (p. ex., une drogue utilisée par les toxicomanes ou un médicament) ou d'une autre condition médicale (p. ex., l'hyperthyroïdie ou des troubles cardio-pulmonaires). D. La perturbation ne s'explique pas mieux par un autre trouble mental (p. ex., en ce que les attaques de panique ne se produisent pas seulement en réponse à des situations sociales redoutées, comme en cas de trouble d'anxiété sociale; en réponse à des objets ou des situations phobiques précis, comme en cas de phobie spécifique; en réponse à des obsessions, comme en cas de trouble obsessionnel compulsif; en réponse à des rappels d'événements traumatiques, comme en cas de syndrome de stress post-traumatique; ou en réponse à la séparation d'une figure d'attachement, comme en cas de trouble d'anxiété de séparation).
• Trouble d'utilisation de l'alcool	A. Mode problématique d'utilisation de l'alcool conduisant à une altération du fonctionnement ou une souffrance cliniquement significatives, comme en témoigne la survenance, dans une même période de 12 mois, d'au moins deux des éléments suivants : 1. L'alcool est souvent pris en quantité plus importante ou pendant une période plus longue que prévu. 2. Désir persistant ou efforts infructueux de réduire ou de contrôler l'utilisation de l'alcool. 3. Beaucoup de temps est consacré aux activités nécessaires à l'obtention et à l'utilisation d'alcool, ou encore à la récupération rendue nécessaire par ses effets. 4. Envie, fort désir ou besoin de consommer de l'alcool. 5. L'utilisation récurrente de l'alcool entraîne le manquement à d'importantes obligations au travail, à l'école ou à la maison.

	6. Utilisation persistante de l'alcool malgré le fait que ses effets causent ou exacerbent des problèmes sociaux ou interpersonnels persistants ou récurrents. 7. La participation à des activités sociales, professionnelles ou récréatives importantes est abandonnée ou réduite en raison de l'utilisation d'alcool. 8. Utilisation récurrente d'alcool dans des situations où il pose un danger physique. 9. Utilisation persistante d'alcool bien que la personne soit consciente d'avoir un problème physique ou psychologique persistant ou récurrent qui est susceptible d'avoir été causé ou exacerbé par l'alcool. 10. Tolérance, comme définie par l'un des éléments suivants : a. Un besoin de quantités de plus en plus grandes d'alcool pour s'intoxiquer ou atteindre l'effet désiré. b. Un effet notablement réduit avec l'utilisation récurrente de la même quantité d'alcool. 11. Sevrage, comme manifesté par l'un des éléments suivants : a. Le syndrome de sevrage de l'alcool caractéristique (consulter le DSM-V pour en savoir plus). b. L'alcool (ou une substance qui s'en rapproche fortement, comme une benzodiazépine) est pris pour soulager ou éviter les symptômes de sevrage.
• Trouble d'utilisation du cannabis	A. Mode problématique d'utilisation du cannabis conduisant à une altération du fonctionnement ou une souffrance cliniquement significatives, comme en témoigne la survenance, dans une même période de 12 mois, d'au moins deux des éléments suivants : 1. Le cannabis est souvent pris en quantité plus importante ou pendant une période plus longue que prévu. 2. Désir persistant ou efforts infructueux de réduire ou de contrôler l'utilisation du cannabis. 3. Beaucoup de temps est consacré aux activités nécessaires à l'obtention et à l'utilisation de cannabis, ou encore à la récupération rendue nécessaire par ses effets. 4. Envie, fort désir ou besoin de consommer du cannabis. 5. L'utilisation récurrente de cannabis entraîne le manquement à d'importantes obligations au travail, à l'école ou à la maison. 6. Utilisation persistante de cannabis malgré le fait que ses effets causent ou exacerbent des problèmes sociaux ou interpersonnels persistants ou récurrents. 7. La participation à des activités sociales, professionnelles ou récréatives importantes est abandonnée ou réduite en raison de l'utilisation de cannabis. 8. Utilisation récurrente de cannabis dans des situations où il pose un danger physique. 9. Utilisation persistante de cannabis bien que la personne soit consciente d'avoir un problème physique ou psychologique persistant ou récurrent qui est susceptible d'avoir été causé ou exacerbé par le cannabis. 10. Tolérance, comme définie par l'un des éléments suivants :

	a. Un besoin de quantités de plus en plus grandes de cannabis pour s'intoxiquer ou atteindre l'effet désiré. b. Un effet notablement réduit avec l'utilisation continue de la même quantité de cannabis. 11. Sevrage, comme manifesté par l'un des éléments suivants : a. Le syndrome de sevrage caractéristique du cannabis (consulter le DSM-V pour en savoir plus à ce propos). b. Le cannabis (ou une substance apparentée) est pris pour soulager ou éviter les symptômes de sevrage.
• Trouble d'utilisation du tabac	A. Mode problématique d'utilisation du tabac conduisant à une altération du fonctionnement ou une souffrance cliniquement significatives, comme en témoigne la survenance, dans une même période de 12 mois, d'au moins deux des éléments suivants : 1. Le tabac est souvent pris en quantité plus importante ou pendant une période plus longue que prévu. 2. Désir persistant ou efforts infructueux de réduire ou de contrôler l'utilisation du tabac. 3. Beaucoup de temps est consacré aux activités nécessaires à l'obtention et à l'utilisation de tabac. 4. Envie, fort désir ou besoin de consommer du tabac. 5. L'utilisation récurrente du tabac entraîne le manquement à d'importantes obligations au travail, à l'école ou à la maison. 6. Utilisation persistante du tabac malgré le fait que ses effets causent ou exacerbent des problèmes sociaux ou interpersonnels persistants ou récurrents (p. ex., des conflits avec autrui sur l'utilisation du tabac). 7. La participation à des activités sociales, professionnelles ou récréatives importantes est abandonnée ou réduite en raison de l'utilisation de tabac. 8. Utilisation récurrente du tabac dans des situations où il pose un danger physique (p. ex., fumer au lit). 9. Utilisation persistante du tabac bien que la personne soit consciente d'avoir un problème physique ou psychologique persistant ou récurrent qui est susceptible d'avoir été causé ou exacerbé par le tabac. 10. Tolérance, comme définie par l'un des éléments suivants : a. Un besoin de quantités de plus en plus grandes de tabac pour atteindre l'effet désiré. b. Un effet notablement réduit avec l'utilisation continue de la même quantité de tabac. 11. Sevrage, comme manifesté par l'un des éléments suivants : a. Le syndrome de sevrage caractéristique du tabac (voir les critères A et B établis pour le sevrage du tabac). b. Le tabac (ou une substance qui s'en rapproche fortement, comme la nicotine) est pris pour soulager ou éviter les symptômes de sevrage.
• Trouble d'utilisation de sédatifs, d'hypnotiques et d'anxiolytiques	A. Mode problématique d'utilisation d'un sédatif, d'un hypnotique ou d'un anxiolytique conduisant à une altération du fonctionnement ou une souffrance cliniquement significatives, comme en

	témoigne la survenance, dans une même période de 12 mois, d'au moins deux des éléments suivants : 1. Le sédatif, l'hypnotique ou l'anxiolytique est souvent pris en quantité plus importante ou pendant une période plus longue que prévu. 2. Désir persistant ou efforts infructueux de réduire ou de contrôler l'utilisation du sédatif, de l'hypnotique ou de l'anxiolytique. 3. Beaucoup de temps est consacré aux activités nécessaires à l'obtention et à l'utilisation du sédatif, de l'hypnotique ou de l'anxiolytique, ou encore à la récupération rendue nécessaire par ses effets. 4. Envie, fort désir ou besoin d'utiliser le sédatif, l'hypnotique ou l'anxiolytique. 5. L'utilisation récurrente du sédatif, de l'hypnotique ou de l'anxiolytique entraîne le manquement à d'importantes obligations au travail, à l'école ou à la maison (p. ex., absences répétées ou mauvais rendement au travail; absences, suspensions ou expulsions de l'école; ou négligence à l'égard d'un enfant ou du ménage). 6. Utilisation persistante du sédatif, de l'hypnotique ou de l'anxiolytique malgré le fait que ses effets causent ou exacerbent des problèmes sociaux ou interpersonnels persistants ou récurrents (p. ex., disputes conjugales à propos des conséquences de l'intoxication; altercations physiques). 7. La participation à des activités sociales, professionnelles ou récréatives importantes est abandonnée ou réduite en raison de l'utilisation du sédatif, de l'hypnotique ou de l'anxiolytique. 8. Utilisation récurrente du sédatif, de l'hypnotique ou de l'anxiolytique dans des situations où il pose un danger physique (p. ex., conduite automobile ou contrôle de machinerie). 9. Utilisation persistante du sédatif, de l'hypnotique ou de l'anxiolytique bien que la personne soit consciente d'avoir un problème physique ou psychologique persistant ou récurrent qui est susceptible d'avoir été causé ou exacerbé par cette substance. 10. Tolérance, comme définie par l'un des éléments suivants : a. Besoin de quantités de plus en plus grandes du sédatif, de l'hypnotique ou de l'anxiolytique pour s'intoxiquer ou obtenir l'effet souhaité. b. Effet notablement réduit avec l'utilisation continue de la même quantité de sédatif, d'hypnotique ou d'anxiolytique. **Remarque :** Ce critère n'est pas considéré comme satisfait pour les personnes qui utilisent un sédatif, un hypnotique ou un anxiolytique sous supervision médicale. 11. Sevrage, comme manifesté par l'un des éléments suivants : a. Le syndrome de sevrage caractéristique d'un sédatif, d'un hypnotique ou d'un anxiolytique (voir les critères A et B

	établis pour le sevrage d'un sédatif, d'un hypnotique ou d'un anxiolytique). b. Le sédatif, l'hypnotique ou l'anxiolytique (ou une substance qui s'en rapproche fortement, comme l'alcool) sont pris pour soulager ou éviter les symptômes de sevrage.
• État de stress post-traumatique	**Remarque :** Les critères suivants s'appliquent aux adultes, aux adolescents et aux enfants âgés de plus de six ans. Pour les enfants de six ans et moins, voir les critères correspondants ci-dessous. A. Exposition à la mort, à des blessures graves ou à de la violence sexuelle, ou encore à leur potentialité, d'au moins une des façons suivantes : 1. Vivre directement le ou les événements traumatiques. 2. Être témoin en personne du ou des événements alors qu'ils sont vécus par d'autres. 3. Apprendre que le ou les événements traumatiques ont été vécus par un membre de la famille proche ou un ami proche. En cas du décès ou de la mise en danger mortel d'un membre de la famille ou d'un ami, le ou les événements doivent avoir été violents ou accidentels. 4. Vivre une exposition répétée ou extrême aux détails pénibles du ou des événements traumatiques (p. ex., des premiers intervenants qui recueillent des restes humains, ou des policiers qui sont exposés à répétition aux détails de la maltraitance d'enfants). **Remarque :** Le critère A4 ne s'applique pas à l'exposition par l'intermédiaire de médias électroniques, de la télévision, de films ou de photos, à moins qu'elle ne soit liée au travail. B. Présence d'au moins un des symptômes intrusifs suivants associés à ou aux événements traumatiques, pourvu qu'ils soient apparus après la survenance de ce dernier : 1. Souvenirs pénibles récurrents, involontaires, et envahissants du ou des événements traumatiques. **Remarque :** Chez l'enfant âgé de plus de six ans, il peut s'agir d'un jeu répétitif dans lequel des thèmes ou des aspects du ou des événements traumatiques sont exprimés. 2. Rêves répétitifs pénibles dont le contenu ou l'affect sont liés à ou aux événements traumatiques. **Remarque :** Chez l'enfant, il peut s'agir de rêves effrayants sans contenu reconnaissable. 3. Réactions dissociatives (p. ex., flashbacks) dans lesquelles la personne se sent ou agit comme si le ou les événements traumatiques se reproduisaient. (De telles réactions peuvent survenir sur un continuum, l'expression la plus sérieuse étant une perte totale de conscience de l'environnement actuel.) **Remarque :** Chez l'enfant, des reconstitutions du traumatisme peuvent se produire dans le jeu. 4. Détresse psychologique intense ou prolongée à l'exposition à des indices internes ou externes évoquant un aspect du ou des événements traumatiques ou y ressemblant.

	5. Réactions physiologiques marquées à des indices internes ou externes évoquant un aspect du ou des événements traumatiques ou y ressemblant. C. Évitement persistant des stimuli associés à ou aux événements traumatiques, pourvu qu'il soit apparu après la survenance de ces derniers, comme en témoigne au moins une des manifestations suivantes : 1. Évitement ou tentatives d'évitement de souvenirs, de pensées ou de sentiments pénibles concernant le ou les événements traumatiques ou y étant étroitement associés. 2. Évitement ou tentatives d'évitement de rappels externes (personnes, lieux, conversations, activités, objets, situations) qui éveillent des souvenirs, des pensées ou des sentiments pénibles concernant le ou les événements traumatiques ou y étant étroitement associés. D. Altérations négatives de cognitions et d'humeurs associées à ou aux événements traumatiques, pourvu qu'elles soient apparues ou se soient aggravées après la survenance de ce dernier, comme en témoignent au moins deux des manifestations suivantes : 1. Incapacité de se rappeler un aspect important du ou des événements traumatiques (typiquement en raison d'une amnésie dissociative, et non d'autres facteurs comme une blessure à la tête ou la consommation d'alcool ou de drogues). 2. Croyances ou attentes négatives persistantes et exagérées à propos de soi-même, des autres ou du monde (p. ex., « Je suis mauvais », « On ne peut faire confiance à personne », « Le monde est complètement dangereux », « Mon système nerveux entier est définitivement ruiné »). 3. Cognitions persistantes et déformées concernant la cause ou les conséquences du ou des événements traumatiques qui amènent la personne à se blâmer ou à blâmer autrui. 4. État émotionnel négatif persistant (p. ex., peur, horreur, colère, culpabilité ou honte). 5. Diminution marquée de l'intérêt envers des activités significatives ou de la participation à celles-ci. 6. Sentiment de détachement ou d'éloignement des autres. 7. Incapacité persistante de ressentir des émotions positives (p. ex., bonheur, satisfaction ou sentiments affectueux). E. Altérations marquées de l'éveil et de la réactivité associées à ou aux événements traumatiques, pourvu qu'elles soient apparues ou se soient aggravées après la survenance de ce dernier, comme en témoignent au moins deux des manifestations suivantes : 1. Comportement irritable et crises de colère (avec peu ou pas de provocation), généralement sous forme d'agression verbale ou physique envers des personnes ou des objets. 2. Comportement imprudent ou autodestructeur. 3. Hypervigilance. 4. Réaction de sursaut exagérée.

	5. Problèmes de concentration. 6. Troubles du sommeil (p. ex., difficultés à s'endormir ou à rester endormi, ou sommeil agité). F. La perturbation (critères B, C, D, et E) dure plus d'un mois. G. La perturbation entraîne une souffrance cliniquement significative ou une altération du fonctionnement social, professionnel ou dans d'autres domaines importants. H. La perturbation n'est pas imputable aux effets physiologiques d'une substance (p. ex., médicaments, alcool) ou d'une autre condition médicale.
• Phobie spécifique	A. Peur marquée d'un objet ou une situation en particulier (p. ex., le fait de voler, les hauteurs, les animaux, les aiguilles, le sang). **Remarque :** Chez l'enfant, l'anxiété peut s'exprimer par des pleurs, des crises de colère, ou le fait de demeurer figé ou de s'accrocher. B. L'exposition à l'objet ou à la situation phobogène provoque presque toujours une réaction anxieuse immédiate. C. Les situations phobogènes sont évitées ou endurées avec une peur ou une anxiété intense. D. La peur ou l'anxiété est disproportionnée par rapport à la menace réelle posée par la situation sociale et au contexte socioculturel. E. La peur, l'anxiété ou l'évitement sont persistants, généralement pendant six mois ou plus. F. La peur, l'anxiété ou l'évitement causent une souffrance cliniquement significative ou une altération du fonctionnement social, professionnel ou dans d'autres domaines importants. G. La peur, l'anxiété ou l'évitement ne s'explique pas mieux par les symptômes d'un autre trouble mental, par exemple la peur, l'anxiété et l'évitement liés à certaines situations accompagnées de symptômes semblables à la panique ou autrement incapacitants (comme en cas d'agoraphobie); les objets et situations liés à une obsession (comme en cas de trouble obsessionnel compulsif); le rappel d'événements traumatisants (comme en cas d'état de stress post-traumatique); la séparation du foyer ou de figures d'attachement (comme en cas de trouble d'anxiété de séparation) ou les situations sociales (comme en cas de trouble d'anxiété sociale).
• Trouble de l'adaptation	A. Développement de symptômes émotionnels et comportementaux en réaction à un ou plusieurs facteurs de stress identifiables, au cours des trois mois qui suivent leur survenance. B. Ces symptômes ou comportements sont cliniquement significatifs, comme en témoigne au moins un des éléments suivants : 1. une souffrance marquée qui est hors de proportion par rapport à la gravité ou à l'intensité du facteur de stress, étant donné le contexte externe et les facteurs culturels pouvant influencer la sévérité et la présentation des symptômes. 2. une altération significative du fonctionnement social, professionnel, ou dans d'autres domaines importants. C. La perturbation liée au stress ne répond pas aux critères d'un autre trouble mental et n'est pas simplement l'exacerbation d'un trouble mental préexistant.

	D. Les symptômes ne sont pas l'expression normale d'un deuil. E. Une fois que le facteur de stress (ou ses conséquences) a disparu, les symptômes ne persistent pas au-delà de six mois.
• Anxiété généralisée	A. Anxiété et soucis excessifs (attente avec appréhension) survenant plus d'un jour sur deux pendant au moins six mois au sujet d'un certain nombre d'événements ou d'activités (tels le travail ou le rendement scolaire). B. La personne éprouve de la difficulté à contrôler cette préoccupation. C. L'anxiété et les soucis sont associés à au moins trois des six symptômes suivants (dont au moins certains ont été présents la plupart du temps au cours des six derniers mois) : **Remarque :** Un seul item est requis chez l'enfant. 1. Agitation ou sensation d'être survolté ou à bout. 2. Fatigabilité. 3. Difficulté de concentration ou de mémoire. 4. Irritabilité. 5. Tension musculaire. 6. Troubles du sommeil (difficultés à s'endormir ou à rester endormi, ou sommeil agité et non satisfaisant). D. L'anxiété, les soucis ou les symptômes physiques entraînent une souffrance cliniquement significative ou une altération du fonctionnement social, professionnel ou dans d'autres domaines importants. E. La perturbation n'est pas due aux effets physiologiques directs d'une substance (p. ex., une drogue utilisée par les toxicomanes ou un médicament) ou d'une autre condition médicale (p. ex., hyperthyroïdie). F. La perturbation ne s'explique pas mieux par un autre trouble mental (p. ex., l'anxiété ou la préoccupation ne concernent pas seulement les attaques de panique comme en cas de trouble panique; l'évaluation négative comme en cas d'anxiété sociale [phobie sociale]; la contamination ou d'autres obsessions comme en cas de trouble obsessionnel compulsif; la séparation de figures d'attachement comme en cas de trouble d'anxiété de séparation; le rappel d'événements traumatiques comme en cas de stress post-traumatique; la prise de poids comme en cas d'anorexie mentale; les plaintes de problèmes physiques comme en cas de trouble à symptomatologie somatique; les défauts physiques comme en cas de trouble de dysmorphie corporelle; les maladies graves comme en cas de crainte excessive d'avoir une maladie; ou la teneur de croyances délirantes comme en cas de schizophrénie ou de trouble délirant).

ANNEXE I

FORMULAIRE DE RÉCLAMATION

Voir ci-joint.

[●URL du site Web du règlement]

FORMULAIRE DE RÉCLAMATION DANS LE CADRE DE L'ACTION COLLECTIVE DE L'EAU POTABLE

Mise en garde :

Remplir ce formulaire de réclamation peut être émotionnellement difficile ou traumatisant pour certaines personnes.

Si vous éprouvez un trouble émotif ou que vous avez besoin d'aide pour remplir le présent formulaire de réclamation, **veuillez contacter la Ligne d'écoute d'espoir pour le mieux-être** en composant le numéro sans frais 1-855-242-3310 ou vous connectez au clavardage à l'adresse www.espoirpourlemieuxetre.ca.

Si vous avez besoin d'aide pour remplir le formulaire de réclamation, veuillez communiquer avec l'administration au [●]. Ce service est sans frais.

Le présent formulaire de réclamation s'adresse aux **personnes** qui réclament une indemnité à titre personnel.

Les gouvernements des Premières Nations qui souhaitent obtenir une indemnité pour l'ensemble de la collectivité doivent donner un avis d'acceptation de l'entente et ne doivent pas remplir le présent formulaire. Pour obtenir de plus amples renseignements, veuillez consulter le [● URL] ou contacter [●].

FORMULAIRE DE RÉCLAMATION DANS LE CADRE DE L'ACTION COLLECTIVE PORTANT SUR LA QUALITÉ DE L'EAU POTABLE

Sont admissibles à une indemnité les personnes :

1. qui sont membres d'une Première Nation; et
2. qui pendant au moins un an entre le 20 novembre 1995 et le 30 juin 2021, résidaient habituellement sur des terres des Premières Nations visées par un avis concernant la qualité de l'eau potable qui a duré au moins un an alors qu'un tel avis concernant la qualité de l'eau potable d'au moins un an était en vigueur.

De plus :

1. Vous pouvez réclamer une indemnité pour le compte d'un membre de votre famille admissible décédé après le 20 novembre 2017.
2. Vous pourriez être admissible même si votre Première Nation n'accepte pas l'entente.

Si vous remplissez les critères précédemment mentionnés, veuillez remplir le présent formulaire de réclamation du mieux que vous pouvez.

Si vous avez besoin d'aide pour remplir le formulaire de réclamation, veuillez communiquer avec l'administration au [•]. Ce service est sans frais.

Vous devez soumettre votre formulaire de réclamation au plus tard le [• Date].

DIRECTIVES

1. Veuillez :

    a. remplir toutes les parties du formulaire de réclamation qui s'appliquent à vous;

    b. lire attentivement toutes les questions avant de répondre; et

    c. écrire clairement et lisiblement.

2. Il est possible de soumettre d'autres documents et renseignements avec le présent formulaire de réclamation au soutien de votre demande. Si vous avez besoin d'aide pour soumettre d'autres documents ou renseignements, ou si vous souhaitez faire une déclaration orale, veuillez communiquer avec l'administrateur à [●].

3. Si vous souhaitez apporter des modifications à votre formulaire de réclamation après avoir envoyé celui-ci à l'administrateur, veuillez le faire dans les plus brefs délais. Constituent des modifications importantes le changement d'adresse et la correction d'un renseignement.

4. N'envoyez pas de documents originaux à l'administrateur. Des photocopies claires seront acceptées.

5. Si votre formulaire de réclamation est incomplet ou ne contient pas tous les renseignements requis, vous devrez fournir de plus amples détails. Le traitement de votre réclamation pourrait ainsi être retardée. Les renseignements que vous fournissez dans votre formulaire de réclamation constituent un élément très important dans la décision quant à votre admissibilité au paiement d'une somme d'argent et, s'il en est, au montant de cette somme d'argent.

6. Il est possible d'envoyer votre formulaire de réclamation :

    a. en ligne, à l'adresse [● URL]; ou

    b. par la poste, à l'adresse [●].

Partie 1 : Renseignements sur l'identité Tout le monde doit remplir cette partie.	
Renseignements sur le demandeur d'indemnité	
Prénom :	
Deuxième prénom :	
Nom :	
Autres noms :	
Date de naissance:	
Si le demandeur d'indemnité est décédé, la date du décès	
Numéro du Certificat de statut d'Indien ou numéro de bénéficiaire	
Numéro d'assurance sociale	
Coordonnées	
Adresse	
Ville/municipalité/Collectivité	
Province/territoire	
Code postal	
Pays	
Numéro de téléphone	
Adresse de courrier électronique (si vous en avez une)	

Partie 2 : Renseignements sur l'admissibilité
Tout le monde doit remplir cette partie.

Vous étiez membre de quelle(s) Première(s) nation(s)?

Veuillez utiliser des lignes supplémentaires seulement si vous étiez membre de plus d'une Première Nation.

Première Nation		Dates d'adhésion	
Première Nation		Dates d'adhésion	
Première Nation		Dates d'adhésion	

Quand résidiez-vous dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme?

L'absence temporaire de votre résidence habituelle ne met pas fin à la période de résidence habituelle. Votre résidence habituelle ne change que si vous passez plus de temps à vivre ailleurs dans une année donnée. Si vous êtes âgé de 18 ans ou moins et que vous résidiez habituellement dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme, mais que vous étiez absent de cette réserve pendant une partie de l'année pour fréquenter un établissement d'enseignement, vous pouvez toujours considérer cette réserve comme votre résidence habituelle. Veuillez indiquer dans les cases ci-dessous les dates où vous résidiez habituellement dans une réserve alors visée par un avis concernant la qualité de l'eau potable à long terme dans cette réserve. Veuillez utiliser des lignes supplémentaires si vous résidiez habituellement dans plus d'une réserve touchée par un avis concernant la qualité de l'eau potable à long terme.

Réserve		Dates de résidence	
Réserve		Dates de résidence	
Réserve		Dates de résidence	

Réserve		Dates de résidence	

Partie 3 : Renseignements sur la déclaration Tout le monde doit remplir cette partie.			
Représentez-vous une autre personne? Soumettez-vous une réclamation pour le compte d'une autre personne en tant que représentant légalement autorisé? Veuillez cocher la case appropriée.			
	Oui, je soumets une réclamation pour le compte d'une autre personne.		Non, je soumets ma réclamation.
Si vous soumettez une réclamation pour le compte d'une autre personne, veuillez remplir la présente partie et joindre les documents attestant votre capacité de représenter le demandeur d'indemnité.			
Nom du représentant			
Fondement de la représentation			

Partie 5 : Déclaration et consentement
Tout le monde doit remplir cette partie.

Je reconnais et conviens :

1. que l'administrateur peut communiquer avec moi pour obtenir des renseignements;
2. que l'administrateur peut fournir les renseignements que je soumets dans le présent formulaire de réclamation au Canada, aux avocats du groupe et au comité de mise en œuvre du règlement aux fins d'évaluation de ma réclamation;
3. que le Canada peut fournir des renseignements à mon sujet à l'administrateur aux fins d'évaluation de ma réclamation.

Je confirme que tous les renseignements fournis dans le présent formulaire de réclamation sont véridiques à ma connaissance. Si une personne m'a aidé à remplir le présent formulaire de réclamation, elle m'a lu tout ce qu'elle a écrit et inclus dans le présent formulaire de réclamation.

Je comprends qu'il est possible d'obtenir des conseils juridiques sans frais auprès des avocats du groupe en communiquant ●.

Je comprends qu'en signant le présent formulaire de réclamation et en le soumettant à l'administrateur, je consens à ce qui précède et à ce que mes renseignements personnels soient communiqués et utilisés selon l'entente.

Signature	
Nom du signataire	
Date de la signature	

Consentement pour me contacter (facultatif)

L'administrateur peut essayer de communiquer avec vous pour obtenir de plus amples renseignements. L'administrateur tentera de communiquer avec vous aux coordonnées que vous avez indiquées ci-dessus. Si l'administrateur ne parvient pas à vous joindre, y a-t-il une autre personne que l'administrateur devrait contacter et qui pourrait vous joindre?

Nom de la personne-ressource	
Coordonnées de la personne-	

ressource (téléphone, adresse de courrier électronique, adresse postale, etc.)	

Partie 6 : Indemnité pour préjudices déterminés
Cette partie est facultative.

Admissibilité à des fins d'indemnité pour préjudices déterminés

Vous avez droit à une indemnité supplémentaire si vous avez subi l'un des préjudices déterminés indiqués dans la liste ci-dessous. Pour recevoir une somme d'argent à l'égard de ces préjudices, vous devez établir que le préjudice déterminé a été causé par :

1. une utilisation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme; ou
2. un accès restreint à de l'eau traitée ou à de l'eau du robinet en raison d'un avis concernant la qualité de l'eau potable à long terme.

Liste des préjudices déterminés :

[●]

Vous pouvez établir votre réclamation au moyen du présent formulaire de réclamation ou au moyen de documents ou de dossiers supplémentaires concernant le préjudice déterminé ou la cause de celui-ci, comme des dossiers médicaux. Si vous souhaitez faire une déclaration orale au sujet de votre préjudice déterminé et de la cause de celui-ci, veuillez communiquer avec l'administrateur **[●]**.

Vous devez remplir une déclaration supplémentaire devant un témoin à la fin du présent formulaire de réclamation pour être admissible à l'indemnité pour préjudices déterminés.

La réclamation d'une indemnité pour préjudices déterminés est facultative. Vous pourriez être admissible à une indemnité simplement pour avoir vécu un avis concernant la qualité de l'eau potable à long terme dans une réserve. Si vous ne réclamez pas d'indemnité pour préjudices déterminés maintenant, vous n'aurez pas d'autre possibilité de le faire.

Les avocats du groupe peuvent vous aider à réclamer une indemnité pour préjudices déterminés. Ce service est sans frais. Veuillez communiquer avec **[●]**.

Les préjudices déterminés admissibles à une indemnité sont graves et les symptômes doivent persister pendant au moins un mois. L'indemnité pour préjudices déterminés est versée en plus des dommages-intérêts individuels pour les difficultés de tous les jours en raison d'un avis concernant la qualité de l'eau potable à long terme. **Souhaitez-vous réclamer une indemnité pour préjudices déterminés?** Veuillez cocher la case appropriée.			
	Oui, je veux réclamer une indemnité pour préjudices déterminés et je remplirai le reste du formulaire de réclamation.		Non, je ne veux pas réclamer une indemnité pour préjudices déterminés. Je ne remplirai pas le reste du présent formulaire de réclamation.

Partie 6: Indemnité pour préjudices déterminés Cette partie est facultative, mais elle doit être remplie pour réclamer une indemnité pour préjudices déterminés.	
DIRECTIVES Veuillez remplir le présent formulaire une seule fois pour chaque préjudice déterminé que vous avez subi. Vous pouvez joindre tout document pertinent au soutien de votre formulaire de réclamation d'indemnité pour préjudice déterminé, y compris une autre déclaration écrite. Vous pouvez également raconter votre histoire à l'administrateur en communiquant avec [•].	
Préjudice déterminé (doit figurer sur la liste)	
Quand avez-vous commencé à subir le préjudice déterminé?	
Quand avez-vous cessé de subir le préjudice déterminé?	
Quels étaient vos symptômes du préjudice déterminé?	
Quel traitement, le cas échéant, avez-vous demandé ou reçu en raison du préjudice déterminé?	
Quelle était la cause du préjudice déterminé? Comment établissez-vous la cause du préjudice déterminé?	
Quels sont, le cas échéant, les dossiers dont vous disposez concernant le préjudice déterminé ou la cause de celui-ci? Sont jugés pertinents les photographies et les vidéos.	

Partie 6: Indemnité pour préjudices déterminés Cette partie est facultative.	
DIRECTIVES Veuillez remplir le présent formulaire une seule fois pour chaque préjudice déterminé que vous avez subi. Le présent formulaire est un double de la page précédente. Si vous soumettez une réclamation pour un seul préjudice déterminé et que vous avez rempli la page précédente, vous n'avez pas à remplir cette page. Vous pouvez joindre tout document pertinent au soutien de votre formulaire de réclamation d'indemnité pour préjudice déterminé, y compris une autre déclaration écrite. Vous pouvez également raconter votre histoire à l'administrateur en communiquant avec [●].	
Préjudice déterminé (doit figurer sur la liste)	
Quand avez-vous commencé à subir le préjudice déterminé?	
Quand avez-vous cessé de subir le préjudice déterminé?	
Quels étaient vos symptômes du préjudice déterminé?	
Quel traitement, le cas échéant, avez-vous demandé ou reçu en raison du préjudice déterminé?	
Quelle était la cause du préjudice déterminé? Comment établissez-vous la cause du préjudice déterminé?	
Quels sont, le cas échéant, les dossiers dont vous disposez concernant le préjudice déterminé ou la cause de celui-	

ci? Sont jugés pertinents les photographies et les vidéos.	

Partie 7 : Déclaration faite sous serment concernant les préjudices déterminés

Vous devez remplir cette partie seulement si vous soumettez une réclamation à l'égard des préjudices déterminés.

DIRECTIVES

Vous devez déclarer sous serment devant l'un des garants suivants :

1. l'administrateur
2. un notaire ou un commissaire à l'assermentation (y compris un avocat du groupe);
3. un responsable élu ou un dirigeant communautaire, y compris un chef ou un conseiller; ou
4. un autre professionnel (*par exemple,* un avocat, un médecin, un comptable ou un agent de police).

Déclaration

Je déclare que les renseignements que j'ai fournis sont véridiques à ma connaissance.

Signature	
Nom du signataire	
Date de la signature	

Garant

Le garant doit voir le demandeur d'indemnité signer la présente page et vérifier l'identité de ce dernier. Le garant n'a pas besoin de lire le présent formulaire de réclamation ni de vérifier les renseignements qui y sont indiqués. Le garant doit remplir le reste de la présente partie.

Signature	
Nom du garant	
Date	

Titre/poste du garant	
Adresse	
Numéro de téléphone	
Adresse courrier électronique	

ANNEXE J

PLAN D'ACTION DE SERVICES AUX AUTOCHTONES CANADA VISANT À LEVER TOUS LES AVIS CONCERNANT LA QUALITÉ DE L'EAU POTABLE À LONG TERME

Voir ci-joint.

Plan d'action relatif aux avis concernant la qualité de l'eau potable à long terme : rapport d'étape aux deux semaines

Mise à jour : 8 septembre 2021

Progression relativement aux AQEP à long terme depuis novembre 2015							
Région	AQEP > 1 an signalé	Nbre de collectivités touchées par les AQEP > 1 an	AQEP > 1 an ajoutés depuis nov. 2015	AQEP > 1 an levés depuis nov. 2015	Nbre d'AQEP > 1 an désactivés depuis novembre 2015	AQEP en vigueur depuis 5 à 10 mois	AQEP levés en vigueur depuis 2 à 12 mois
ATL	[redacted]	4	[redacted]	1	1	4	4
QC	[redacted]	3	[redacted]	4	3	4	4
ON	[redacted]	23	[redacted]	11	3	9	19
MB	[redacted]	7	[redacted]	10	3	7	10
SK	[redacted]	6	[redacted]	10	3	8	10
AB	[redacted]	8	[redacted]	9	3	8	10
C.-B.	[redacted]	5	[redacted]	10	3	7	10
YK	[redacted]	4	[redacted]	6	3	3	6
Total	[redacted]	60	[redacted]	61	19	50	63

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves									
*La totalité de maisons et d'immeubles contemporaines touchés n'est qu'une estimation. **Les dates cibles susceptibles d'être peut-être être sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la première nation(s) [redacted] cernent les problèmes ou les étapes pratiques du projet. Les dates cibles seront réévaluées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP à L2 restants le plus tôt possible.									
Région	Première Nation	Nom du réseau	Date (AAAA-MM-JJ)	Date à laquelle l'avis est devenu un AQEP à L2 (AAAA-MM-JJ)	Nombre de maisons touchées*	Nombre d'immeubles contemporains touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
ON	[redacted]	[redacted] Community Centre Fresh Centre Semi-Public Water System (n° 11210) Par puit foré (Year Report mars 2008	27/03/2008	21/02/2007	4	1	Les limites d'arsenic sont supérieures aux recommandations de l'Ontario.	[redacted] Mises à niveau majeures de la station, enregistrement du réseau, de canalisations [redacted] Installation de la chlorine au centre communautaire	- La Première Nation a accepté une solution provisoire (installation d'une chlorine au centre communautaire) - Les restrictions liées à la COVID-19 ont choisi la date et depuis de la version provisoire DAC a été informé par le conseil le 19 janvier 2021 que la nouvelle chlorie avait été installée à l'arsenic. la livraison de la chlorie au centre provisoire a été retardée. l'équipement a été livré en février 2021 - Le 27 avril 2021, l'entrepreneur a indiqué que le nouveau réservoir était sur place. A la demande de la collectivité, l'entrepreneur a été installer sur le site le 8 juin 2021 - Tous les travaux ont été terminés en février/mars 2021 - SAC poursuit ses activités de sensibilisation, en organisant les autres activités de la collectivité, y compris le santé publique par le président et le décorité publique en raison des faux de forêt à proximité. le gite Windigo et fonctionnement de la Première Nation ont tous deux confirmé que les travaux sont terminés et que le raccordement existant est prêt à être mis hors service. Windigo travaille avec l'agent de santé environnementale en publique pour confirmer les exigences en matière d'essais afin de recommander la levée de l'avis. mais il y a eu des retards en raison des feux de forêt. - Le secteur à long terme tandis compte des recommandations relatives à l'eau, des eaux usées et aux services publics un entrée actuellement qu'il faudra de trois à quatre ans pour terminer les travaux. des discussions en avril/mai 2021 avec la direction de la collectivité ont permis de convenir d'une approche en plusieurs volets. l'équipe de gestion de projet, avec le conseil tribal de Windigo à la tête, travaille à l'élaboration de documents d'approbation pour le conception détaillée de la modernisation de la station de traitement d'eau et de l'étang d'aération. Réalisation des documents connexes sur le projet et présentation de ces documents à la direction de la collectivité en août 2021 aux fins d'examen et d'approbation. - Soutien opérationnel fourni à la collectivité par le conseil tribal de Windigo, avec le soutien financier de SAC	09/2021
ON	[redacted]	[redacted] Lake Nursing Station Semi-Private Water AQEP depuis Nombre 2020	09/03/2020	06/03/2021	5	1	Puits d'eau souterraine sans traitement ni désinfection	[redacted] Installation d'un système de traitement pour l'arsenic [redacted] Il n	- Bearskin Lake a déclaré l'état d'urgence en raison de la COVID-19 avec restrictions subséquentes sur les déplacements dans la collectivité - Une première rencontre entre SAC et le conseil tribal de Windigo a eu lieu le 28 juillet 2020 - SAC collabore avec la Première Nation et le gite concerné à l'eau du conseil tribal de Windigo pour la conception, l'installation et l'exploitation d'un système de traitement des eaux autonome pour le poste de soins infirmiers et la résidence - SAC a reçu une demande de financement de la Première Nation avec la portée, le calendrier et le coût du projet proposés. le financement a été approuvé et une lettre d'engagement a été engagée pour construire les travaux en vue de définir le système de traitement de la source d'eau souterraine existante	12/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des résidences *La totalité de matières et d'immeubles communautaires touchés n'est qu'une estimation. *Les dates citées auxquelles l'avis pourrait être levé sont des estimations approximatives seulement et peuvent changer à mesure que les représentants de la première nation, Sans certaines cas, les dates citées auront été déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet. Les dates citées seront mises à jour et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivants le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés	Problématique	Mesure corrective	Situation actuelle	Date Levée**
ON	Chippewas de l'île Georgina	Georgina Island Public Water System n° 71421 AQEP depuis avril 2017	24/04/2017	24/04/2018	61	3	La désinfection est inefficace	Mise à niveau : Modernisation de la station de traitement d'eau existante Autre mesure : s.o.	Modernisation de la station de traitement d'eau terminée en décembre 2019. Avis levée suivant nos suggestions Opérateur responsable général (ORG) accrédité engagé par contrat pour assurer la surveillance opérationnelle En février 2021, la Première Nation a indiqué que l'opérateur local avait obtenu l'accréditation de catégorie 3 - I (ES) et indiqué qu'une surveillance à une heure à jour périodiques des données opérationnelles étaient nécessaires suivre de recommandé la levée de l'avis Coûts d'un financement supplémentaire en février 2021 pour la modernisation du réseau de distribution évalué En janvier 2021, SAC a discuté d'un plan de levée avec la Première Nation qui a demandé une expansion du réseau de distribution L'étude de faisabilité financée par la Première Nation a déterminé que l'eau courante soit le solution la plus rentable sur 20 ans. la conception financée par la Première Nation a été en cours et ne l'eau pas l'objet d'un appel d'offres tant que le financement de SAC n'aura pas été confirmé. les documents d'approbation sont en cours d'élaboration. l'expert-conseil vise septembre 2021 pour l'achèvement de l'appel d'offres de conception et de construction. qui comprendra des mises à niveau du réseau de distribution existant et une prolongation. les travaux de construction sont prévues pour le printemps 2022. Soutien opérationnel fourni par le conseil tribal d'Ogemawahj, avec le soutien financier de SAC.	À déterminer
ON	Chippewas de Rama	Cape Croker Public Water System AQEP depuis janvier 2019	31/01/2019	31/01/2020	284	22	Le réseau satisfait aux exigences minimales de traitement	Mise à niveau : Nouvelle station de traitement et prolongement du réseau de distribution Autre mesure : Option non préférée par la Première Nation.	Conception des réseaux de distribution et de la station de traitement d'eau terminée. Nombreux des services de traitement séparément, préqualification des entrepreneurs généraux pour le réseau de distribution et la station de traitement d'eau terminée. SAC et le chef ont été informés en février 2021 pour discuter de la demande de la Première Nation pour des éléments de projet en dehors des normes sur les niveaux de service (NNS) de SAC. le collectivité a indiqué qu'elle était favorable à un partage partiel des coûts pour les éléments en dehors des NNS Projet approuvé par SAC Les appels d'offres pour le réseau de distribution et la station de traitement d'eau ont été clôturés le 04 du mois d'août 2021. l'expert-conseil a terminé l'analyse des soumissions et l'équipe de gestion du projet doit se réunir en septembre 2021 pour discuter des résultats et des options.	12/2021
ON	Deer Lake	Deer Lake Public Water System AQEP depuis octobre 2018	15/10/2018	15/10/2020	220	4	Échantillonnage inadéquat	Autre mesure : À déterminer, en raison d'une étude de faisabilité Autre mesure : Remplacement des activités et de la surveillance	AQEP en vigueur en raison d'échantillonnage inadéquates La collectivité reçoit les soutien opérationnel fourni par le conseil tribal de Keewaytinook Okimakanak (KTO), suivi le soutien financier de SAC SAC a rencontré le chef et le conseil en septembre 2020 pour encourager l'entreprendre des activités Le puits N-01 a donné de la formation sur les techniques d'échantillonnage Le puits N-01 a indiqué le 12 mai 2021 qu'il n'y a pas de problèmes techniques à court terme. le tuteur Ritesh et le cadre de contrôle du débit ont été installés avec succès. les essais effectués le 05 avril 2021 indiquaient que l'eau était conforme aux recommandations La collectivité a été entièrement évacuée le 16 juillet 2021 en raison des feux de forêt à proximité Le puits N-01 était non prêts le 22 juillet 2021 pour traiter les problèmes de filetez d'alimentation en eau. le puits N-01 a commencé des pleins et de l'épuisement et est censuré sur le site le 7e août 2021 pour terminer les épuisants et surveiller les activités. au 23 août 2021, les réparations à l'unité de traitement sont terminées avec que les nouveaux instruments de la station. la qualité de l'eau est demeurée bonne. le puits #10 est demeuré sur les lieux jusqu'au retour de la collectivité après les évacuations SAC travaille avec la collectivité pour faire progresser l'étude de faisabilité pour les travaux à long terme. le financement de cette étude et les réparations immédiates au système incluent remplacement des filtres ont été approuvés par SAC en décembre 2020. approximativement nouvelle licence, durant de documentation pour	À déterminer

Avis concernant la qualité de l'eau potable à long terme en raison dans le réseau public des réservoir

*La totalité de matières et d'immeubles commerciaux touchés n'est qu'une estimation.

*Les dates cibles auxquelles l'eau peut être bue sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates cibles auront être différentes (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates cibles seront réexaminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivants le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'eau est devenue un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles commerciaux touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
									de 24 avril 2021, relatifs dans le rapport sur les travaux causés par les événements de la collectivité SAC collabore avec la pour discuter avec la collectivité au besoin de surveillance et pour offre du soutien	
ON	Première Nation d'Eabametoong	Eabametoong Public Water System (n° 7132; AQEP depuis août 2021)	01/08/2021	01/08/2021	287	14	Le processus de traitement et de réseau de distribution ne sont pas fiables et ne respectent pas les recommandations.	Lettre écrite Prolongement et modernisation de la station de traitement d'eau existante Court terme - 1 à	Prolongement, modernisation et mise en service terminés Inspection du MEPP effectuée en octobre 2019; les déficiences opérationnelles ont été corrigées La Première Nation a demandé un financement pour des travaux supplémentaires dans la station de traitement d'eau et pour remplacer le système d'eaux usées existant, le financement a été approuvé en octobre 2020 L'inspection de garantie a été effectuée en novembre 2020; certains petits des travaux sur les eaux usées ont été achevées avant janvier 2021; les restrictions en raison de la COVID ont entravé des travaux; des travaux sur les dernières éléments (déplacées de sable, patère, travaux de garde civil mineurs) sont nécessaires L'agent de santé environnementale en publique de Wabaseca a indiqué le 7 mai 2021 que des échantillons démontrent et la résolution des problèmes opérationnels évalués nécessaires avant la publication d'une recommandation. Résumés le 10 mai 2021 pour résoudre des problèmes d'eaux usées; demande de financement pour l'évaluation du système d'égout reçue en juillet 2021 La correspondance envoyée à SAC indique l'intérêt pour la réception de l'AEPEQ LT une fois qu'il sera inscrit à certain des travaux en matière d'exploitation et de construction a été traité. L'emplacement n'est pas en mesure de se mobiliser pour la collectivité avant novembre 2021 pour certain les travaux, le gestionnaire de projet a demandé une réunion de mise à jour au projet en septembre 2021 Soutien opérationnel fourni par le conseil tribal de Wabaseca, avec le soutien financier de SAC	A déterminer
ON	Wauken Falls	Wauken Falls Public Water System (n° 7134); AQEP depuis juillet 2019	19/07/2019	19/07/2019	61	6	Le système de traitement produit de l'eau qui ne respecte pas les recommandations.	Lettre écrite Remplacement du système de traitement et à avoir existante et modernisation des installations Court terme - 1 à	La construction a été achevée en mars 2019; le système relatif de mise en service a été achevée avec succès en juin 2019 Fin du rinçage du réseau de distribution en juillet 2019 Le rapport d'évaluation du MEPP publié 2019[1] a révélé des déficiences opérationnelles; les problèmes ont été réglés en novembre 2019 L'échantillonnage répond aux exigences, mais l'agent de santé environnementale et publique de Wabaseca ne recommande pas encore la levée de l'avis Inspection de garantie terminée, au 26 mars 2021, toutes les lacunes de la station de traitement d'eau ont été corrigées comme suivi des corrigées; rapport d'achèvement présenté le 10 mars 2021 Correspondance de l'agent de santé environnementale et publique de Wabaseca datée du 5 mars 2021, la Première Nation a été avisée que l'AQEP demeurerait en vigueur jusqu'à ce que deux échantillons d'eau bactériologiques consécutifs soient prélevés à 24 heures d'intervalle pour se conformer aux exigences applicables; le plus récent a pu avoir lieu, le chef et le conseil pour élaboré leur levées Dans le cadre de l'approche axée sur la collectivité, SAC s'efforce de rencontrer le chef et le conseil pour une réunion en personne qui devrait avoir lieu en septembre 2021 selon la situation de la COVID, des discussions sur un plan de levée d'avis au sud Soutien opérationnel fourni par le conseil tribal de Wabaseca, par l'intermédiaire du centre de gestion de l'eau potable et des eaux usées (transit par SAC)	A déterminer
ON	Wahnapagamang	Wahnapagamang Two Houses Systems (ESK) (n° 7146); AQEP depuis juin 2019	13/06/2019	13/06/2020	30	2	Le système de traitement ne satisfait pas aux exigences 4.6(3)(a)(i). Problèmes d'exploitation et d'entretien	Lettre écrite Nouveau réseau de traitement d'eau Long terme Modernisation du système de traitement	**Problème** – Nouveau système mis en fonctionnement de secours achevé en novembre 2020 L'agent de santé environnementale et publique (ASEP) a indiqué que quatre semaines d'échantillonnage étaient nécessaires pour confirmer la sécurité. L'opérateur responsable général (ORG) souhaite les calibrateurs Les résultats de l'échantillon de janvier 2021 indiquaient des résultats négatifs pour le manganèse. ORG et FORTIS, dont les clients peuvent être sensibles, en mai 2021. ORG a confirmé que les niveaux de manganèse étaient conformes – grâce à des ajustements de traitement et à utilisez de l'eau sans résultats Le chef a informé se personnel en mars 2021 de l'importance d'une surveillance périodique (soutien opérationnel offert par l'entreprise de FORTIS). Avec le soutien financier de SAC, et des visites mensuelles périodiques sur les lieux L'ORG a soumis des essais internes à l'AQEP les 10 et 16 juin 2021. ORG, le gilet de FORTIS, c'est rendu sur place du 5 au 30 juillet 2021 pour fournir du soutien à tous les niveaux d'intervention et des tests ou collectivité. L'AQEP a visité la collectivité le 21 juillet 2021. l'AQEP a signalé qu'à la suite de discussions avec l'opérateur local, le chef et le conseil, les exigences en sont préférées, et maintenu et le chef est satisfait	A déterminer

Avis concernant la qualité de l'eau potable à long terme en raison dans le réseau public des réservoir

*La totalité de matières et d'immeubles communautaires touchés n'est qu'une estimation.

*Les dates citées auxquelles l'avis pour être levé sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates citées auront être différentes (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates citées seront réévaluées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivants le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles communautaires touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
									que le rechlore/filtrage visible que l'eau satisfait aux exigences applicables, une recontamination de deux "trois séries ajoutés. YAMAT a acquitté des échantillons, des résultats des essais sont très récent, de chlore résiduel à un point de distribution était insuffisant. YAMAT a indiqué le 10 août 2021 que l'opérateur n'était plus à l'aise avec l'idée de rouvrir l'AQEP. Les problèmes opérationnels s'améliorent avec le soutien du pôle de l'OFNTSC. **Long terme** – La phase de conception de la modernisation à long terme de la station de traitement de l'eau est terminée. la Première Nation a reçu l'approbation du financement pour la phase de construction. Construction en cours, achèvement prévu en août 2022, retards de construction en raison de problèmes de chaîne d'approvisionnement. L'immunité préliminaire devrait être levé en septembre et l'installation devrait être en service	
ON	Wahnapitaehenay	Aux Lake Public Water System AQEP depuis septembre 2020	08/09/2020	08/09/2021	Inconnu	Inconnu	Le système de traitement ne répond pas aux exigences d'élimination des organismes entraînant/pathogènes et reste inadéquate	Autre action Modernisation du système de traitement Projet terminé – s.o.	Avis d'ébullition de l'eau en vigueur. Un le système de traitement ne répond pas aux exigences d'élimination des organismes La conception à long terme de la modernisation du système de traitement a été achevée dans le cadre du projet du système de Tim Hausen de la réserve de la Wahnapitaehenay. Avant le calendrier de construction initial, la modernisation devrait être achevée d'ici juillet 2021. Cependant à mesure un calendrier révisé d'ici le 28 juin 2021, indiquant que le délai d'achèvement du réseau d'eux Lake demeure le même, en date du 23 juin 2021, la construction a été signalée comme respectant les délais, des travaux sur les systèmes mécaniques étant en cours, la géométrique de secours non forte sur le site en l'installation est en attente Elle intends ont été suivi par les sous-traitants, l'achèvement est maintenant prévu en septembre 2021, un calendrier révisé n'a pas encore été publié DAC a fait appel à l'agent de santé environnementale et publique (AQEP) pour établir les exigences en matière d'avance et le calendrier prévu de ces activités. l'AQEP a visité la collectivité le 21 juillet 2021 et a signalé une amélioration des activités Les résultats des essais ont montré que l'eau était conforme aux exigences applicables, l'opérateur local n'est pas tel, de pouvoir être l'AQEP Soutien opérationnel fourni par l'OFNTSC, avec le soutien financier de SAC	12/2021
ON	Première Nation des Mississaugas de Scugog Island	Scugog Community Water System 1 Public Water System (n° 10866) AQEP depuis octobre 2008	01/10/2008	01/10/2009	6	0	Les systèmes de traitement ne satisfont pas aux exigences d'élimination	Autre action Nouvelle station de traitement, stockage accru et réseau de distribution Projet terminé – s.o.	- Construction de nouveaux puits et d'une station de traitement, stockage accru modernisation de la station de pompage et réseau de distribution terminée. des travaux, ensuite d'aménagement paysager et d'autres travaux demeurent en suspens, en raison circulé travaille à engager un nouvel entrepreneur pour s'acquitter de ses obligations contractuelles. Un agent de santé environnementale et publique (AQEP) a été engagé et les échantillons de mise en service exécuté aux exigences contractuelles. La Première Nation exige que 08 maisons soient reconstitués au moyenne. Mises comptent des travaux à l'intérieur des maisons. des retards liés à la COVID ont entravé l'achèvement des travaux Les travaux de construction est commercial. l'entrepreneur a effectué des forages directionnels sur diverses propriétés dans la collectivité et à l'intérieur des reconstruits du service d'eau aux limites de celles. Le 22 août, le chef et le conseil ont informé fondamentaux qu'en raison des restrictions provinciales liées à la COVID, aucun travaux pour être effectué dans les maisons privées et que le contrôleront sont tenir. en raison d'engagements contractuels antérieurs, le retour de l'entrepreneur sur le site n'a pas pu avoir lieu avant août 2021 L'entrepreneur a commencé les travaux pour terminer les raccordements le 16 août, et tous les raccordements d'environ terminent être terminés d'ici le 30 de septembre 2021, le contrat était devrait être terminé en octobre 2021 étant donné que le chef et le conseil préfèrent que tous les travaux soient terminés avant la réception des AQEP. les dates citées pour la résolution pourraient plan en octobre Soutien opérationnel fourni par le conseil tribal d'Ogemawahj, avec le soutien financier de SAC	09/2021
ON	Wahnapitae de la baie de Quirke	Ski Mtn Apts Public Water System (n° 11220) AQEP depuis juin 2009	09/06/2009	09/06/2009	64	0	« approvisionnement en eau systématiquement risqué d'être contaminé.	Autre action Modernisation de la station de traitement d'eau de Genevrier, prolongement de la conduite principale et du réseau d'eau (phase II)	Le Premiers Nation considère tous les systèmes touchés comme un seul système La modernisation de la station de Genevrier satisfait aux exigences de l'entente de service municipale (EETM). Achèvement de la phase 2 du prolongement de la conduite d'eau principale et du réseau d'eau, mise en service du réseau le 14 novembre 2020. actuellement substantiel mené à l'achèvement L'appui d'offrir de la phase 3 (prolongement de la conduite d'eau pour le contournement a été retenu en septembre 2020), le cout a dépassé le budget approuvé.	11/2021
ON	Wahnapitae de la baie de Quirke	MBG Aspot Public Water System (n° 11247) AQEP depuis octobre 2009	17/10/2009	17/10/2009	10	0	Désinfection insuffisante			11/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves *La totalité de maisons et d'immeubles commerciaux touchés n'est qu'une estimation. *Les dates citées auxquelles l'avis peut être levé sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates citées auront été déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet. Les dates citées seront réexaminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivés le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles commerciaux touchés*	Problématique	Mesures correctives	Situation actuelle	Date Levée**
ON	Wikwemikong	Wikwemikong Unceded Indian Reserve (n° 17226) AQEP depuis juin 2009	[redacted]	[redacted]	4	3	L'approvisionnement est en eau souterraine risque d'être contaminé.	Lorsque l'étude [redacted] [redacted]	En octobre 2020, Première Nation a été informé que des travaux majeurs sur le projet du point Boueux du NPO et a demandé que le projet soit avancé afin d'obtenir l'approbation du financement de SAC. Ils avaient été approuvé et le conseil a été informé la construction été en cours. les travaux de la phase 3 pendant ou les cinq AQEP LT dans la collectivité Contamination du sol (pétrole) découverte sur le route de la construction l'entrepreneur doit installer une conduite d'eau principale avec une gaine en plastique isolante autour de la conduite, des regulateurs avec le pétrolier sont en cours pour résoudre les cause du projet associées à la contamination Après quelques retards, les travaux de forage et de supervie à Kelvin Road en cours/ouvrage à cent été achevés L'approvisionnement contaminations non provoqué par l'état de la conduite principale accidentel de la cour (démoli) au début de juillet 2021. l'analyse des options a été effectuée et on a demandé le remplacement de tous les tronçons de conduite en fer, les travaux de remplacement sont maintenant terminés Au 2 septembre 2021, les travaux de construction de poursuivent, mais l'entrepreneur a publié un calendrier révisé pour l'achèvement des travaux le 31 octobre 2021, des retards comme pose d'étanchéité à des conditions de sol imprévues (forage, contamination par les hydrocarbures, etc.).	[redacted]
ON	Wikwemikong	Wikwemikong Unceded Indian Reserve (n° 17226) AQEP depuis juin 2009	[redacted]	[redacted]	0	0	L'approvisionnement est en eau souterraine risque d'être contaminé.			[redacted]
ON	Wunnumin Dam Lake	Wunnumin Dam Public Water System (n° 5542) AQEP depuis octobre 2020	[redacted]	[redacted]	58	3	Le système de filtration est inadapté et la capacité de la station est insuffisante.	[redacted] Modernisation des systèmes de filtration et de désinfection [redacted] [redacted]	- Le bras de raccord de la station de traitement d'eau a été intermittent en mars 2020 en raison de la COVID, elle a redémarré et a été activée en juillet 2020 En septembre 2020, l'agent de santé environnementale et publique (ASEP) a publié une lettre recommandant la révocation du l'AQEP LT en octobre 2020, le chef a indiqué aux résidents, le nouveau chef a été élu peu de temps après et a fourni une recommandation de levé l'avis et des renseignements connexes Le 15 décembre 2020, à la demande de la Première Nation, SAC a procédé à la révocation de l'AQEP, la collectivité a soulevé des préoccupations antérieures concernant la contamination possible au cas à proximité de la station de traitement Le projet d'investissement des eaux communes financé précédemment par SAC a été livré à bon SAC a offert des félicitations et son appui à la révocation de l'AQEP, en réponse au suivi effectué par SAC en mars 2021, la collectivité a indiqué qu'elle communiquerait avec SAC lorsqu'elle sera prête, en septembre 2021, aucun changement de statut n'a été apporté Le 28 mai 2021, l'ASEP avisé que des résultats bien-aimés n'ont pas été reçus depuis l'automne 2020, la recommandation de lever l'avis de septembre 2020 exige une autre série d'essais Le 7 juin 2021, soutien technique en tout temps demandé par la Première Nation et approuvé par SAC. Ingénieur local éprouve des difficultés Le fournisseur de services en tout temps a relevé des problèmes opérationnels. SAC collabore avec la cible de l'FNIH pour établir un plan de travail pour un soutien en formation supplémentaire La phase de garantie a pris fin le 27 juillet 2021. L'expert-conseil a été saisi que les, absence d'inspection et de formation sur la garantie ont eu lieu du 4 au 5 août, des échantillons d'eau ont été prélevés avec les résultats d'essais indiquant que la qualité de l'eau satisfait à toutes les exigences applicables de la station et de tout le réseau de distribution SAC a demandé l'avis de l'ASEP pour savoir si les résultats des essais justifient ou non une nouvelle série de recommandation de prélèvés, réponse en attente Soutien opérationnel fourni par le conseil tribal d'FNIH, avec le soutien financier de SAC	À déterminer
ON	Neskantaga	Neskantaga Public Water System (n° 5197) AQEP depuis février 1995	[redacted]	[redacted]	78	4	Le système de traitement ne respecte pas les recommandations, devoir du chlore combiné/ajouté	[redacted] Mise à niveau et agrandissement de la station de traitement [redacted] [redacted]	En raison de retards, la Première Nation a mis fin à un contrat de mise à niveau en février 2019 (un nouvel entrepreneur a été engagé) Construction achevée, la Première Nation augmente le système pendant un an avant que l'AQEP ne soit levé Des travaux devaient être apportés au réseau de distribution et au système d'eaux usées, le feu vert a été donné le 1er octobre 2020 Le 15 octobre 2020, des volontaires ont été observées sur l'eau du réservoir, ce service a la présence d'une mentalité (non fumeur) provenant de la pompe, le réseau de distribution a été purgé, les tests effectués par la suite ont confirmé l'absence d'odeurs et de goûts La collectivité a été évacuée pour environ le 23 décembre 2020, le nouveau réseau est en fonction depuis le 12 novembre 2020 Des tests ont été effectués le 12 décembre 2020, l'eau répondait les exigences Gouvernement de SAC et soutient aux place à lancer plan de l'AEM	À déterminer

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*La totalité de stations et d'immeubles communautaires touchés n'est qu'une estimation.

**Les dates citées ci-après n'ont pas été fixé sont des estimations approximatives seulement et peuvent changer à mesure que les repercussions de la pandémie évoluent. Bien certains cas, les dates citées doivent être déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates citées seront réévaluées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les ASEP LT restants le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'eau est devenue un ASEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
									Travaux du poste de refoulement achevés, pompes remplacées, une submersible poste de refoulement en réseau de pompes non-colmatantes sont à régulier, l'expert-conseil a recommandé de remplacer le conduit de refoulement. Entièrement approuvé, le tuyau de conduite de refoulement de remplacement a été livré à la collectivité. En raison du confinement d'avril 2021, tous les entrepreneurs sont partis. Il travaillent à nouveau, le 14 juin 2021. ISC a reçu de mise à jour des protocoles de COVID-19 de la collectivité. Nous a obligent les entrepreneurs à s'assurer qu'ils sont pleinement vaccinés et à présenter un résultat de dépistage négatif. Les exigences ont entraîné l'interruption des projets relatifs à l'eau potable et aux eaux usées. L'entrepreneur chargé de remplacer le conduite de refoulement d'égout est installé. Les travaux sont en cours et devraient se terminer en septembre 2021. Le fournisseur de traitement doit revenir sur le site fin septembre 2021 pour vérifier que le réseau respecte les spécifications de conception. Les entrepreneurs chargés de combler des lacunes dans le station de traitement de l'eau ne sont toujours pas revenus. Des exigences de vaccination de la Première Nation leur posent problème. Cependant, du côté négatif, SAC ne prépare à la communiquer aux autorités appropriées concernant une fois les éventuelles préoccupations réglées.	
Ont.	Wawakapewin	Wawakapewin Public Water System (47 TDB) ASEP depuis Février 2013	05/02/2013	05/02/2018	141	6	Le système est inadéquat et ne respecte pas les recommandations de l'Ontario Administration de la capacité requise	**Autre action** : Mise à niveau de approvisionnement de la station actuelle, et révision de distribution **Autre action** : Option non privilégiée par la Première Nation	Planification de la mise à niveau et de l'agrandissement de la station terminée, une modification apportée à la conception en novembre 2019 en vue visant l'achèvement. Équipement soldé à l'avance, contrat de construction attribué. Matériaux et équipement achetés au cas à l'hiver 2020. La Première Nation a fermé son frontière en mars 2020 en raison de la COVID-19. La Première Nation a subi contagieuse en juillet 2020 que la construction serait reportée au printemps 2021 en raison de restrictions d'accès à la collectivité et de manque d'hébergement. Des matériaux et de l'équipement relatifs à l'hébergement ont été livrés au moyen de la route d'hiver 2021. La réunion de lancement des travaux de construction a eu lieu le 6 mai 2021. L'entrepreneur a indiqué que la construction des locations commencerait le 14 mai 2021. En mai et en mai 2021, la Première Nation était en confinement compte en raison de la COVID, l'entrepreneur était censé revenir le 25 mai 2021, mais la Première Nation lui a demandé de reporter son retour. Les travaux de construction ont repris le 14 juin 2021. l'entrepreneur a soumis nouveau déplacement de la conduite traitement, le calendrier pour l'achèvement subsistent les travaux au 28 août 2022. L'entrepreneur a remis l'équipe de gestion de projet de retards potentiels en raison des interruptions qui ont suivies les travaux (confinement de à la COVID, mesures préventives, révision). Soutien opérationnel fourni à la collectivité par le conseil tribal de Mikisew, avec le soutien financier de SAC.	31/12/22
Ont.	North Caribou Lake	North Caribou Lake Public Water System ASEP depuis mars 2020	31/03/2020	31/03/2021	281	7	Le système ne peut pas répondre à la demande et ne respecte pas les exigences relatives au traitement	**Autre action** : Agrandissement de la station et remplacement du système de traitement **Autre action** : À déterminer	Une étude de faisabilité a été menée quant aux besoins en matière d'eau potable et d'eaux usées. Huit options solides possibles n'ont été judgeées, le principal problème à tout à ce sujet de l'âge de l'équipement et l'impossibilité de se fournir durant le problème difficile à régler. La Première Nation a terminé de réparer et réparer les tuiles du réseau de distribution ce qui comprend l'ajout de régulateurs de pression résidentielle visant à réduire la consommation. la collectivité a voyant nous terminé le réseau de distribution. la recherche de fuites efficiente par la suite n'a révélé aucun autre problème. la station de traitement de l'eau brossonne en non-service afin de déposition à la demande, grâce aux réparations apportées au réseau de distribution par la collectivité, l'approvisionnement n'a plus à être interrompu pour permettre aux vivaricoit de se rétablir. La Première Nation exige que l'on s'engage à mettre en œuvre une solution à long terme pour l'eau potable et les eaux usées avant que soit envisagée une solution provisoire pour la station de traitement de l'eau. Des travaux sont en cours pour faire progresser l'élaboration d'une solution à long terme pour l'eau potable en fonction des recommandations de l'étude de faisabilité, le lac, est à ces effet favorisant un plainte. la documentation du projet a été transmise à la Première Nation pour examen et approbation. Des solutions provisoires ont été certaines, et la location n'est ou de plusieurs systèmes de traitement centralisés est recommandée. l'accompagnement des capacités d'encouragement à rôle de solution provisoire est sujet technique/permis de fonctionnement disponible.	À déterminer — En attente du projet n'est plus actuelle établi

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves

*La totalité de stations et d'immeubles commerciaux touchés n'est qu'une estimation.

**Les dates citées ci-après n'ont pas été fixé sont des estimations approximatives reposant et pouvant changer à mesure que les repercussions de la pandémie évoluent. Bien certains cas, les dates citées auront été déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates citées seront réévaluées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT restants le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'eau est devenue un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles commerciaux touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
									• La Première Nation n'a pas confirmé être prête à aller de l'avant avec une solution provisoire dont elle est saisie. • La Première Nation et le pôle fiduciaire évaluent les documents d'approbation. • Les documents d'approbation de la solution provisoire sont en préparation, en collaboration avec Services aux autochtones Canada, en vue d'un financement sur les coûts de la part de l'expert-conseil de la Première Nation.	
ON	North Spirit Lake	North Spirit Lake Public Water System (n° 7138) AQEP depuis avril 2019	03/04/2019	03/04/2020	66	3	Pulse dans le réseau de distribution (très) ou station de traitement ou (très) présente des problèmes de défaillance et de capacité. Problèmes d'exploitation et d'entretien	[redacted] Entretien et réparation de la station et du réseau de distribution, améliorations à l'exploitation [redacted] - 1-1-	• La collectivité a déclaré (très) d'urgence en octobre 2019 en raison de graves problèmes techniques. • Les opérateurs locaux sont difficiles à obtenir. La Première Nation s'engage un contrôleur non accrédité, ce pilote a augmenté la fréquence de son contrôle et de son soutien à distance. • Trois nouvelles pompes à haute pression ont été installées en octobre 2020. L'installation d'un contrôleur de transfert pour l'alimentation de secours n'est (car installée par l'indisponibilité de l'entrepreneur (en raison de la COVID). Les travaux comprennent la construction de deux cuves de stockage du chlore et d'un système de protection contre les incendies pour l'école de la collectivité. Le pôle fiduciaire indique que l'autochtonisation des (très) pompes à haute pression et de contrôleurs programmables a été effectuée. En février 2021, la collectivité était inaccessible en raison de la COVID. Le 28 avril 2021, la collectivité a indiqué souhaiter qu'une étude sur la faisabilité d'une solution à long terme soit réalisée. Le chef et le conseil en sont à étudier une demande de financement visant une telle étude relativement au traitement de l'eau potable et des eaux usées, (en matière) à été soulevée (suspendu en raison) de (feux de forêt). Le pôle fiduciaire a indiqué que les travaux relatifs au contrôleur de transfert et à la génératrice de secours (n'ont pu) pu/ou à reprendre du 15 mai 2021. Des générateurs d'appoint ont été requis (e installées et services du 5 juillet 2021. Tous les panneau de raccordement des eaux usées sont fonctionnels grâce au (revoir) d'opérateurs locaux et à la (réalisation) du pôle, le pôle a présenté des échantillons aux fins de contrôle de la conformité, mais les faux de forêt (ont empêché de) en rendre au laboratoire. Le pôle fiduciaire a indiqué que les feux de forêt (étaient) (ont) dans la région (ont) contenu à (avoir limiter l'échantillonnage. des eaux (réserve) effectués sur (eux (ont indiqué) que l'eau respecte toutes les exigences applicables. la collectivité a effectué des évacuations partielles en raison de la fumée (environ (des feux et des risques qu'ils présentent). le pôle de (école) a été (subjects) jusqu'à ce (que les urgences (aient (pu) (les feux de forêt) prennent fin et que le pôle fiduciaire (a) pu/ou de nouveau se rendre à la collectivité en toute sécurité. les générateurs locaux sont (entretenu ou) placé à (fins de nécessaires) essentiels. Le pôle fiduciaire a (eu) ses (plus (été)) (est) pour accueillir des échantillons aux fins d'analyse par un laboratoire agréé. nous sommes en attente des résultats. Le pôle fiduciaire (a) continue de consulter le chef et le conseil quant aux prochaines (opérations) à réaliser.	À déterminer
ON	Northwest Angle No. 33	East Pump House Plant Public Water System (partie du Angle Inlet Public Water System) (n° 7138) AQEP depuis avril 2011	11/04/2011	11/04/2012	17	3	Station de pompage (très) distribution insuffisante	[redacted] Nouvelle station de traitement de l'eau, canalisations à Angle Inlet [redacted] - 1-1-	• Des systèmes provisoires permettent (actuellement) la (vente de l'eau (ont été envisagées, (mais (ce ne sont) autorisés (il (possibles) (à économiques). • La collectivité (a (appel d'offres pour (e nouvelle usine (sont terminés. l'équipement a été (livré) à l'avance et (sont sur le site. La collectivité a été fermée en (mars 2020 et la construction, interrompue, en raison de la (COVID-19. une résurrection limitée en (mai 2020 a permis le (annuelle des travaux. Les travaux de construction de la station de traitement de l'eau se poursuivent (En avril 2021, l'entrepreneur a (subi) et (abandon) (initial (équivalent) (actuellement (plus (travaux à octobre 2021, pour justifier ce report. (Le (municipal le défaut par certains (sous-traitants (affectées (au (retard) (l'effectuer (leurs (travaux, ainsi que (l'autres problèmes (non (attribuables à la Première Nation) ou à la COVID. Lors d'une réunion (du (équipe de gestion du projet, le 28 avril 2021, (entrepreneur a signalé (rencontrer (il (un (nouveau (sous-traitant (de la (sécurité du (chantier et (un (nouveau (superviseur de (chantier. l'administrateur du (contrat a (rapporté une (réduction de la (productivité et de l'(organisation au (le (projet). Le 13 juillet 2021, l'entrepreneur a indiqué que les (plus (grandes (équipes (soudaient) (sur le (chantier. et que la (collectivité (pouvait (toujours (être (requise. Retard (les travaux qui (restent à (accomplir. Il (a (plus (que les AQEP LT (ne (soient (pas (levés (en (raison (de (la (COVID. (DAC (continue (de (contrôler la (situation, et (les (dates (cibles (seront (ajustées (au (besoin). Situation (opérationnelle (fournir par le (conseil (tribal (WWC, (via (l'(intermédiaire (du (centre de (gestion de l'eau (potable et (des (eaux (usées (fournie (par (SAC. le (collectivité (collecte) (avec le (pôle (des (eaux (usées (potable (EC) (au (Canada (le ((e)(chlorure) (de (chlore) (à (la	11/2021
ON	Northwest Angle No. 33	West Pump House Plant Public Water System (partie du Angle Inlet Public Water System) (n° 7138) AANDC depuis février 2018	12/02/2018	12/02/2017	(inconnu)	(inconnu)	Station de pompage (très) distribution insuffisante, (sont (supérieure) aux (recommandations)			11/2021
ON	Northwest Angle No. 33	East Backhoe Pump House Public Water System (n° 7138) AQEP depuis avril 2011	11/04/2011	11/04/2012	5	1	Ne satisfait pas aux recommandations minimales de distribution			11/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves *La totalité de maisons et d'immeubles communautaires touchés n'est qu'une estimation. **Les dates citées auxquelles l'avis pour être levé sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates citées auxquels être déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet. Les dates citées seront mises à jour si la mesure de l'assainissement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivants le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés	Problématique	Mesures correctives	Situation actuelle	Date cible**
									cette de catégorie 2, ce sont qui nous avons candidats relativement le certificat d'opérateur en formation)	
ON	Première Nation	Équipement Installation Système AQEP depuis 2019	JJ/MM/AAAA	JJ/MM/AAAA	4	1	Les niveaux de turbidité sont supérieurs aux recommandations		Formation de travail physique pour la réparation et la réhabilitation de puits achevés grâce au Programme de formation forestière (PFF) en vue d'un technologique indique une communication électronique actuellement distribuée aux installations distinctes Dans son évaluation de novembre 2019, l'expert conseil a recommandé l'installation d'un nouveau puits et de nouvelles unités de traitement pour chaque différent touché conception détaillée achevée en janvier 2021 Contrat attribué le 19 février 2021. Livraison de certains matériaux a été retardée des problèmes de chaîne d'approvisionnement en lien au respect des fermeture des routes. Le 13 mai 2021, l'entrepreneur attendait toujours de matériaux importants, dont des revêtements de puits installés en usine. d'autres composantes, notamment une pompe, sont en retard de plus d'un mois, et le fournisseur ne donne aux plus de renseignements sur leur livraison. L'entrepreneur a achevé d'installer le système du centre de santé le 14 juin 2021. des commentaires de certaines parties d'équipement électronique du contact au chlore nécessitaient pour achever les systèmes de traitement au point d'entrée de l'école et du multiplex sont en inefficace. Le 6 juillet 2021, SAC a été informée que le délai de livraison des réservoirs de mélange demeurait inconnu, en raison des perturbations aux problèmes de chaîne d'approvisionnement causées par la COVID-19 et autres facteurs. d'autres options ont été envisagées. mais aucune ne respecte les paramètres de conception. L'entrepreneur a confirmé la livraison sur place des réservoirs de mélange, il est mécanisé sur le site le semaine du 9 août et a achevé l'installation de l'équipement de réservoirs du mélange au centre de santé Nakahi achevé d'un défaut de fabrication. Il a été remplacé la semaine du 23 août 2021. Inspection des systèmes fonctionnel installés a eu lieu le 26 août 2021. on prévoit que le public devrait d'actualiser sous trois à semaine d'attente toujours des résultats et le rapport d'inspection de l'ingénieur-conseil. Soutien opérationnel fourni à la collectivité par (1)PNW(2)[illegible], avec le soutien financier de [illegible]	JJ/MM/AAAA
ON	Première Nation et Six Nations	Première Nation Système (n° 1114) AQEP depuis septembre 2019	JJ/MM/AAAA	JJ/MM/AAAA	246	23	Le système de traitement ne satisfait pas aux exigences d'ESTEE.	Installation du broyeur d'une étude de faisabilité Système provisoire à envisager	Le lancement du document de l'étude de faisabilité a eu lieu en septembre 2020. il n'est autre) disponible de concevoir et mettre en service des solutions provisoires avant mars 2021 Une augmentation des coûts du projet a été approuvée afin que soit établie la viabilité à long terme de la source d'eau souterraine actuellement utilisée. des travaux indiquent que le puits n'est vraisemblable et l'aquifère ne pouvant pas répondre à la demande projetée. L'expert-conseil étudie l'opportunité d'une solution de service municipale (ESTEE). il a également examiné la technique des solutions provisoires. des options possibles comprennent la création d'un système à membranes mobile. mais on se préoccupe de la capacité du système de traitement des eaux usées de supporter une destination ainsi que des renseignements électriques et mécaniques devant être apportées à la station actuelle. une solution provisoire pourrait ne pas être techniquement ou financièrement possible. À la demande de l'équipe de gestion de projet du 3 février 2021, l'expert-conseil a indiqué que le raccordement au réseau municipal devrait s'effectuer dès que possible à titre de solution provisoire. la Première Nation a exprimé son appui à cet égard. il y a deux options : l'une d'elles pourrait potentiellement répondre aux besoins de certains foyers des communautés de Première Nations visitées. Des représentants du projet de la collectivité ont indiqué que le chef et le conseil discutaient une solution comportant une ESTEE. une rencontre a eu lieu le 24 juin 2021 pour discuter des commentaires techniques avec la Première Nation et leurs ingénieurs conseils. Le rapport final a été présenté à la Première Nation et à SAC pour examen final le 30 août 2021. SAC a demandé à la Première Nation de fixer une date de décision pour décider des étapes suivantes. La Première Nation n'est toujours favorable à envisager une solution provisoire tant que le financement d'une solution à long terme n'est pas assuré.	À déterminer – Le calendrier du projet n'est pas encore établi.
ON	Eabtigo Lake	Eabtigo Lake Public Water System AQEP depuis octobre 2019	19/10/2018	19/10/2018	160	0	Le dépassé de la limite de traitement de l'eau fait ses la	Long terme Approvisionnement de la station actuelle Unités mobile Installation de	Solution à long terme - Approvisionnement et mise à niveau de la station de traitement de l'eau actuelle. usine de traitement livrée au moyen de la route d'hiver 2019 Solution provisoire - Installation mobile d'une station de traitement dans la station actuelle L'usine a été retirée en mars 2020 en raison de la COVID-19. le 19 août 2020, la Première Nation a autorisé le retour sur le site.	12/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*La totalité de stations et d'immeubles communautaires touchés n'est qu'une estimation.

**Les dates citées susceptibles l'avis peut être levé sont des estimations approximatives seulement et peuvent changer à mesure que les repercussions de la pandémie évoluent. Bien certains cas, les dates citées peuvent être déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates citées seront réévaluées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour mettre tous les ASEP s.f. rencontre le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un ASEP s.f. (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés*	Problématique	Mesure corrective	Situation actuelle	Date c/de**
							gérant de réseau de l'eau	nouvelles unités de traitement dans la station actuelle des eaux usées	Le 24 novembre 2020, l'entrepreneur était sur les lieux, des membres en entraînement ont reçu leur dîplôme. Lorsqu'elle sur le site, la Première Nation a informé l'équipe de gestion de projet que l'ASEP s.f. n'a pas pu être levé tant que la deuxième chaîne de traitement n'est pas installée. L'agent de santé environnementale et publique (ASEP) a indiqué que l'eau de la nouvelle chaîne de traitement répondait portée la CMA de manganèse, l'unité fonctionne normalement avec l'aide de l'opérateur responsable général (OSG), et les questionnaire de p/r s'avèrent efficaces pour gérer les fluctuations saisonnières de manganèse. Le 20 mai 2021, l'entrepreneur a présenté un nouveau calendrier révisant à septembre 2021 la levée de l'ASEP en raison de retards liés à l'installation de la première chaîne de traitement, l'entrepreneur submettait de l'agrossissements et de la mise à niveau de la station de traitement de l'eau est ajouté à la partie pour février 2022. Des entretiens publiques à mettre la nouvelle chaîne de traitement indiquent que l'eau est conforme aux exigences. - Le 29 juin 2021, l'eau de la nouvelle chaîne de traitement a été mélangée dans le réservoir et le réseau de distribution, et les travaux de désaffection de l'ancienne chaîne de traitement et d'installation d'une deuxième chaîne seront soit conformes. L'expert conseil a indiqué que une mesure durant s'étendre sur 8 semaines. La deuxième chaîne de traitement est entre mise en marche début septembre, une fois des travaux achevés. La première sera installée à son emplacement définitif. SAC a été informée de plusieurs points de vérif et qu'aucun avant à la levée de l'ASEP après la mise en marche de la deuxième chaîne, la possibilité d'ASEP intermittents risquant d'entraîner des débranchements et d'entamer la confiance de la collectivité dans le réseau d'eau potable. Ils étaient préférer que l'ASEP soit levé lorsque tous les travaux seront achevés, et la date cible a été ajustée en conséquence. Soutien opérationnel fourni par le conseil tribal de Windigo, avec le soutien financier de SAC.	
ON	Sandy Lake	Sandy Lake Public Water System (s/ ????) ASEP #xxxx Levée #xxx	??/??/2016	??/??/2020	600	14	Le réseau est inadéquat et ne répond pas aux recommandations évaluation de la capacité requise	[redacted] - Mise à niveau et agrandissement de la station de traitement de l'eau. [redacted] - Acquisition et [redacted] de camion réparation et nettoyage du réseau de distribution, entretiennes opérationnelles	Solution provisoire (réparation et optimisation de la station de traitement de l'eau et du réseau de distribution, montée à bien, dépendra supplémentaire, livraison en juillet 2022 SNN) opérationnels empêchant des agents de santé environnementale et publique (ASEP) de recommander la levée de l'avis, soutien offert au site par ??/??/???? La levée de l'ASEP est une priorité pour le chef selon de SNC. Selon de la survenue du ?? décembre 2020 qui note la nécessité à un soutien opérationnel Début des travaux de construction dans le cadre d'une solution à long terme en janvier 2021 maintenance d'accès en raison de la COVID en mars 2020, entrepreneur recruté en septembre 2021 date d'achèvement du projet à long terme reportée à juin 2022 (répercussions de la COVID) Report des travaux de construction, ralentissement de la production en raison de la COVID, matériaux de construction acheminés dans la collectivité au moyen du réseau des routes d'hiver DFN(TSC a été informée que le personnel pourrait être admis dans la collectivité, soit COVID, négatif lorsque avant le vol retour et maintenant suivre des procédures à la suite de la Première Nation n'a pas encore confirmé l'autorisation de DFN(TSC à de rendre aux place. DFN(TSC encourage les membres à prendre part au Programme de formation Anishinabe en vidéo virtuel et demander la permission pour se rendre sur le chantier Recours à un ASEP des SAC pour annuler les échantillons et procéder à des essais afin de mieux comprendre les évolutions opérationnelles en 2021	?/?/2021
ON	Shoal Lake No. 40	Pump House No. 1 Public Water System (# 4934) ASEP #xxxx levée: ????	13/02/1997	15/02/1996	18	1	Procédés de traitement inadéquats qui fournissent une eau ne répondant pas aux recommandations	[redacted] - Nouvelle station permettant de remplacer de l'eau et réseau de distribution [redacted] - 1-4- [redacted]	Conception détaillée prévue de 2021 mise à jour pour intégration des exigences réglementaires en vigueur et répondre aux besoins à long terme de la collectivité Projet prévu à savoir d'offre des Autochtones qui diminuer un processus d'approvisionnement concurrentiel auprès d'entrepreneurs qualifiés appartenant à des Autochtones Réunions mensuelles de construction, dont de l'équipe de gestion de projet le 22 juin 2021, entrepreneur informé du retard dans les travaux en raison de la livraison tardive de systèmes de commande des moteurs efficaces, retardant principal un démarrage manuel le 12 juillet 2021 et le 30 des niveaux le 20 août 2021. Séquice de conseillers créateurs avec l'entrepreneur pour soutenir les choses. Il possible, les autres problèmes soumarins mise en service comprennent la coordination des textes fournisseurs et sous-traitants sur place pour la date de démarrage clés en raison des protocoles de COVID-19 et d'un manque subvenger, et retards dans l'installation par Bell Canada d'une connexion internet à large bande à la nouvelle station de traitement	09/2021
ON	Shoal Lake No. 40	Pump House No. 2 Public Water System (# 11141)	13/02/1997	15/02/1996	18	1				09/2021
ON	Shoal Lake No. 40	Pump House No. 3 Public Water System (# ????) ASEP #xxxx levée: ????	13/02/1997	15/02/1996	24	1				09/2021
ON	Shoal Lake No. 40	Pump House No. 4 Public Water System (# 11141)	13/02/1997	15/02/1996	0	0				09/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux

*La totalité de stations et d'immeubles commerciaux touchés n'est qui sur-estimation.

**Les dates citées susceptibles l'avis peut être levé sont des estimations approximatives seulement et peuvent changer à mesure que les repercussions de la pandémie évoluent. Bien certains cas, les dates citées auront être déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet.

Les dates citées seront déterminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour mettre tous les AQEP LT rencontre le plus tôt possible.

Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'eau est devenue un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles commerciaux touchés*	Problématique	Mesures correctives	Situation actuelle	Date LEVÉ**
		AQEP depuis février 1997								
ON	Grand Lake No. 40	Pump House No. 2 Public Water System (n° 11126) AQEP depuis février 1997	15/02/1997	15/02/1998	15	0				09/2021
ON	Grand Lake No. 40	Pump House No. 5 Public Water System (n° 11130) AQEP depuis février 1997	15/02/1997	15/02/1998	15	0				09/2021
ON	Grand Lake No. 40	School Public Water System (n° 11211) AQEP depuis février 1997	15/02/1997	15/02/1998	15	0				09/2021
ON	Washagamis Bay	Washagamis Bay East Public Water System (n° 10722) AQEP depuis décembre 2008	15/12/2008	15/12/2009	34	2	Mauvaise qualité de l'eau souterraine; traitement insuffisant; risque de contamination	**Actuellement:** Nouvelle station de traitement en cours à l'entrée du réseau de distribution **Autres devant** Nouvelles unités en laboratoire; procédures de la station; campagne de réparation du réseau de distribution	- Forage de nouveaux puits, réparations provisoires de l'usine terminées, usine sur fournir de l'eau potable - Nettoyage terminé du réseau de distribution, dommages causés par l'hiver de prévenir, réparations effectuées - Travaux touchant le privé (eau) établis pour régler les problèmes liés à la qualité - Interruption des travaux par suite du confinement de la collectivité en 1er octobre 2020, une contrôle de (11/12); fin du confinement le 6 octobre 2020 - Séances du 14 décembre 2020: échantillonnage par l'agent de santé environnementale et publique (ASEP) et recommandation de la levée de l'AQEP LT le 6 janvier 2021 - Travaux en cours réglement levées dans cela traités, source de préoccupation pour la collectivité L'ASEP a fait une séance d'information suivi de chef et le conseil, le chef a avisé SAC que la collectivité n'a toujours pas été recommandations relatives à la levée des AQEP durant la mise en place d'une solution à long terme - Construction de la nouvelle station de traitement (eau terminée, après plusieurs retards de mai à juin 2021, essai de performance réalisé avec succès le 30 juin 2021, collaboration entre la Première Nation et l'entrepreneur pour traiter des protocoles de COVID-19 permettant la poursuite des activités de construction - Analyse chimique complète et tests bactériologiques (eau obtenue depuis) à toutes les exigences; collecte d'échantillons bactériologiques pour levée par l'ASEP les 15 et 20 juillet 2021, résultats acceptables, selon de recommandation pour la levée de l'AQEP LT délivrée par l'ASEP le 27 juillet 2021 aux fins d'examen par le chef et le conseil - Travaux en cours sur service des unités desservissant terminés, les stations de l'eau, terminés (eux toutes les exigences sont respectées, sauf une turbidité élevée) l'exploitant conseil effectuera un nettoyage et une inspection afin de trouver des opportunités; l'ASEP a formulé une recommandation relative à la levée de l'avis pour la nouvelle usine et les réseaux desservissant, en date du 23 août 2021. - Entreprise par la collectivité de deux opérateurs de l'Initiative Bimose Water(First) qui travaillent de concert avec l'équipe de construction pour obtenir le certificat d'exploitant de formation, la collectivité obtient un soutien opérationnel fourni par l'intermédiaire du poste de Bimose financé par SAC	09/2021
ON	Washagamis Bay	Washagamis Bay Water Public Water System (n° 11132) AQEP depuis décembre 2008	15/12/2008	15/12/2009	0	0			Solution provisoire: modernisation de la station de pompage; travaux à faire - Échantillonnage et essais, distribution d'un plan de levée en collaboration avec l'agent de santé environnementale et publique (ASEP) - Collecte d'échantillons par l'ASEP le 3 juin 2020, tenue un choix réseaux non conforme aux paramètres exigés - Mesures correctives appropriées - Collecte d'échantillons pour retests par l'ASEP de Bimose Chefs Advisory les 23 et 24 juin 2021, les essais ont révélé que l'eau était conforme à toutes les exigences réglementaires et, le 15 août 2020, l'ASEP a envoyé une lettre au chef et au conseil recommandant la levée de l'AQEP pour le réseau. Je chef et le conseil ont suspendu l'acceptation de la recommandation jusqu'à ce que de levées East Bay/Ishkay soient une eau potable salubre - Solution à long terme et soutien offert et l'opérateur, comme mentionné ci-dessus pour le réseau Est Recommandation par l'ASEP d'annuler l'AQEP LT en 27 juillet 2021	09/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réservoir *La totalité de matières et d'immeubles commerciaux touchés n'est qu'une estimation. *Les dates citées auxquelles l'avis pour être levé sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates citées auparavant (ou déterminées) en raison de la nature du problème ou du stade précoce du projet. Les dates citées seront réexaminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT motivés le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées*	Nombre d'immeubles commerciaux touchés*	Problématique	Mesure corrective	Situation actuelle	Date cible**
MB	Shamattawa	Shamattawa Public Water System (« SPS ») #1811 #1837 #back mai #avance 2018	6/12/2018	6/12/2018	150	14	Usine au delà de son cycle de vie et défaillance de la capacité requise. Problèmes d'exploitation et d'entretien	Long terme : Mise à niveau ou agrandissement de la station Court terme : Programme de formation, procédures et protocoles opérationnels	- Déploiement de l'usine temporaire des Nations Ansishi en soutien en raison de la COVID, les travaux ont repris le 23 avril 2020 - Renforcement du soutien offert à l'opérateur par l'entremise du Programme de formation itinérante, deux opérateurs de remplacement en formation - Nombreux problèmes à la station actuelle et dans le réseau de distribution, équipement terminaux, Programme de formation itinérante, soutien offert par l'agent de santé environnementale en poste(e) (ASEP) - Faible niveau au choix résolue qui perturbe lorsque l'opérateur principal est absent - Programme de formation itinérante prévu du 1/Décembre au 19 février 2021 pour travailler avec l'opérateur, remontée avec le chef pour discuter de l'importance d'avoir des opérateurs de remplacement formés et certifiés - Problèmes avec des conformes basse et le besoin en chlore résolue à l'école et au poste de quinn référence au protocole maintien d'une turbidité élevée et absence continue de chlore résolue dans le réseau de distribution le 28 juin 2021, bon résultat de l'échantillon bactériologique - Programme de formation itinérante qui prévu à la fin août 2021, découverte de dommage à la conduite d'eau causé par le feu, dépendance en cours pour des deux pompes d'eau brute hors service après de fortes pluies, un électricien viendra sur place pour régler le problème - Travaux en cours pour une solution à long terme, travaux pour une modernisation majeure, un agrandissement et une nouvelle usine d'eau pour le traitement d'eau terminée et fonctionne 2021, la date cible pour la remise de l'AQEP LT cadre avec la solution à long terme, compte tenu des problèmes non résolus à la station actuelle - Rencontre avec la direction de la région, le chef et le conseil le 4 août 2021, l'opérateur assumera la surveillance du traitement des l'école, le projet de station de traitement d'eau prévoit l'ajout d'une installation de déshydrate supplémentaire dans la réception de l'école, l'opérateur pourra examiner à distance la teneur en chlore de la station, suite formation offerte par le Programme de formation itinérante et modification de l'emplacement de la valve à l'entrée et au poste de santé informant des convoit avec la solution à long terme, une fournit du chlore résolue à l'école et au poste de santé informant, après l'agrandissement de la station de traitement d'eau, le problème de pression au poste de santé informant devrait s'atténuer. - Rencontre prévue avec le chef en octobre 2021 pour discuter des activités de la station de traitement d'eau mise à niveau et agrandie	09/2023
MB	Station cris de Tataskweyak	Tataskweyak Cree Public Water System n° #843 #QEP depuis mai 2017	17/05/2017	17/05/2018	350	5	Eau brut par la Première Nation en raison de problèmes de contamination pendant la crue printanière, non fiable sur une recommandation de l'ASEP	Long terme : Modernisation de la station de traitement d'eau. Division en cinq évaluation de la source de l'eau et analyse des TTHM (THM 4 sur) En raison de nouvelle en cours pour une solution à plus long terme, conception et construction d'une canalisation pour puiser l'eau dans le lac Rowan Court terme : S.O.	- La qualité de l'eau respecte les recommandations, dépendance et mises à niveau réalisée pour améliorer le traitement, évaluation de la source d'eau, réalisée en janvier 2019, recommande le lac Rowan comme source privilégiée et une modernisation de la station de traitement, analyse additionnelle des THM - Lettres remises à la Première Nation concernant la bonne qualité de l'eau (dernière lettre envoyée en février 2019), mais la Première Nation n'a pas levée l'avis - Financement accordé pour l'eau embouteillée et la restauration d'autres analyses de la source actuelle de l'eau concernant les cyanotoxines, l'analyse des cyanotoxines va au delà des exigences en matière d'avoirs des recommandations canadiennes et de la réglementation provinciale - Réalisation d'une évaluation de la source d'eau en mise à jour de l'étude de faisabilité de 2019 en vue d'obtenir un Lac d'Arbalet les options pouvant répondre aux besoins à long terme en eau potable de la collectivité, après l'étude de faisabilité, le projet de puiser l'eau du lac Arbalet passera à l'étape de la conception et de la construction - SAC est déterminé à financer la conception et la construction d'une canalisation pour puiser l'eau de la collectivité dans le lac Rowan	À déterminer
ON	Lake Pine	Lake Pine Public Water System, #QEP depuis novembre 2018	14/11/2018	14/11/2019	300	15	Station de traitement vieil et ou #eau est sur cycle de vie. Problèmes d'exploitation et d'entretien	Long terme : Remplacement de la station de traitement d'eau Court terme : Programme de formation, procédures et protocoles opérationnels	- Réparations à court terme terminées, la station fournit un approvisionnement adéquat d'eau potable salubre - Au début d'avril 2020, la présence de bactérie E. coli a été signalée dans un puits d'eau brute, et l'avis est devenu un ordre, le puits touche a été supprimée le 15 août 2020 - Usine a été remplacé et un ordre d'ébullition de l'eau initialement, il y avait des problèmes d'approvisionnement en eau, cependant, certains puits ont subi un entretien et de nouveaux puits ont été creusés en août. - À l'heure actuelle, la Première Nation est sans opérateur accrédité. SAC travaille directement avec celle-ci pour obtenir les services d'un opérateur accrédité, entre-temps, les formateurs du programme itinérant offrent un soutien. L'opérateur a dû la difficulté à suivre la formation requise en raison de la COVID-19. ON2IT restera en place jusqu'à ce que l'opérateur soit accrédité. L'opérateur suivrait un formation, accumulera des heures en vue de son accréditation	À déterminer

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réseaux *La totalité de réseaux et d'immeubles contaminantes touchés n'est qu'une estimation. **Les dates cibles susceptibles l'avis peut être levé sont des estimations approximatives seulement et peuvent changer à mesure que les repercussions de la pandémie évoluent. Bien certains cas, les dates cibles doivent être déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet. Les dates cibles seront déterminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour mettre tous les AQEP s.l. remporte le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'eau est devenu un AQEP s.l. (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés*	Problématique	Mesures correctives	Situation actuelle	Date cible**
									La solution à long terme est la construction d'une nouvelle station de traitement d'eau, le projet est en cours de construction.	
BA	Peepeekisis	Peepeekisis Main Public Water System (1st Street) AQEP depuis février 2019	2019/07/31	2020/07/31	174	11	Les procédés de traitement des eaux brutes ne peuvent faire l'objet d'un entretien et n'ont d'effet à moyen. Problèmes d'exploitation et d'entretien	Mise à niveau de la station de traitement d'eau) approvisionnement du réseau de distribution Projet terminé Responsable : KBEP a recommandé la fermeture des sud	Réparations terminées, levée recommandée en juillet 22-10, suite la Première Nation son décision à savoir l'eve levé que des mises à niveau à long terme de la station de traitement (eau) soient terminées et, pour être, qu'un prolongement au réseau de distribution soit considéré soit planifié. SAC a offert de partager les coûts d'un réseau de distribution à basse pression de Première Nation s'il a pas donné son accord à ce jour Les mises de mise à niveau à long terme sont probablement terminé et la station de traitement d'eau mise à niveau fournit de l'eau potable et devant désormais de consommé	À déterminer
BA	Peepeekisis	Poplar Well (# 17-MW) AQEP depuis avril 2013	13/08/2013	13/08/2014	4	1				À déterminer
ON	Animakee Wa Zhing # 37	Windigo Island Public Water System AQEP depuis juin 2021	2021-06-30	2020-04-30	10	4	Résultats négatifs de l'analyse bactériologique en raison de la détérioration de l'intérieur de distribution	Mise à niveau de la station de traitement d'eau et mise à niveau du réseau de distribution Projet terminé Responsable : s.o.	Les résultats négatifs de l'analyse bactériologique et la détérioration de la distribution ont entraîné l'émission d'un AQEP visant des bâtiments du chef et du conseil, aucun autre bâtiment ne sera fait dans des solutions provisoires, puisque la solution à long terme est en cours d'achèvement. La solution à long terme, soit construire une nouvelle station de traitement d'eau et mettre à niveau le réseau de distribution, est bien entamée. Les essais de performance débuteront pour le début septembre 2021 et l'achèvement substantiel du contrat devrait prévu à la fin septembre 2021. l'Agent de santé environnementale et publique (ASEP) de KCH est au courant de l'état du projet et travaille à appuyer l'échantillonnage et en visite. Solution opérationnelle fournit par le conseil tribal MWO, avec le soutien financier de SAC	10/2021
ON	Big Grassy	Big Grassy Public Water System AQEP depuis mars 2021	09/03/2021	09/03/2020	30	7	Puits d'eau et perte de pression de distribution	Mise à niveau et agrandissement de la station de traitement actuelle Projet terminé Responsable : s.o.	Problèmes liés à la station actuelle. Avis AQEP les cours des six derniers mois. AQEP actuel en raison de la perte de pression de distribution, faible pénurabilité. Retenue de l'eau effectuée et correction des cycles, cependant il existe problèmes découlant des travaux de mise à niveau et du raccordement des nouveaux systèmes et équipements de traitement (entraînant de pour des défis matériel) Les dirigeants de la Première Nation ont décidé de maintenir l'AQEP en place jusqu'à la réalisation du projet de modernisation et d'agrandissement en construction depuis mars 2020 Entrepreneur informé en juin 2021 que les retards dans la chaîne d'approvisionnement causés par la COVID ont eu des répercussions sur le plan de mise en service. Le PNCM fait la mise suite de fabricant WW, de discuter la protection de du chlorage qui n'a pas encore été livré. le démarrage et la mise en service ne devraient avoir lieu qu'à ce fin juillet 2021. l'entrepreneur n'a pas encore remis le plan de mise en service à l'expert-conseil pour examen. Entrepreneur informé en juillet 2021 des retards dans le démarrage en raison des problèmes touchant le chlore d'approvisionnement causés par la COVID. le nouveau calendrier prévoit le début des essais de performance à la fin août 2021, tout les travaux seront terminés d'ici la fin septembre 2021 selon l'expert-conseil. des travaux ont encore un mois de retard par rapport au calendrier. SAC continue de surveiller le projet en raison du calendrier de nouveau calendrier dans communiqué en septembre 2021. Il y a une ambivalence opérationnelle et la Première Nation n'est sauve qu'elle travaillait sur un plan de retour dans et sur d'embaucher de nouveaux opérateurs à temps pour la mise en service Soutien opérationnel fourni par le conseil tribal MWO, avec le soutien financier de SAC	11/2021

Avis concernant la qualité de l'eau potable à long terme en vigueur dans le réseau public des réserves										
"La totalité de matières et d'immeubles communautaires touchés n'est qu'une estimation. *Les dates citées auxquelles l'avis pourrait être levé sont des estimations approximatives seulement et peuvent changer à mesure que les répercussions de la pandémie évoluent. Dans certains cas, les dates citées auront été déterminées (à déterminer) en raison de la nature du problème ou du stade précoce du projet. Les dates citées seront réexaminées au fur et à mesure de l'avancement des projets. Tous les efforts sont déployés pour traiter tous les AQEP LT restants le plus tôt possible.										
Région	Première Nation	Nom du réseau	Date (JJ/MM/AAAA)	Date à laquelle l'avis est devenu un AQEP LT (JJ/MM/AAAA)	Nombre de maisons touchées	Nombre d'immeubles communautaires touchés	Problématique	Mesures correctives	Situation actuelle	Date Levé*
ON	Wahnapitaegamang	Wahnapitaegamang (ON) Public Water System #1600* (Nouvel) Janvier 2021	07/01/2021	07/01/2022	17	4	Avis à l'ordre de faire bouillir l'eau – problèmes opérationnels	Long terme : Mise à niveau de l'approvisionnement en eau Court terme : Correction des lacunes d'exploitation relevées lors de l'évaluation de la station (pompes, filtres, électricité et automatisation) et amélioration des opérations	- Selon opérateurs, l'AQEP décrivait des conditions inexactes de la station et de la qualité de l'eau. - L'évaluation de la station a révélé des lacunes (techniques (pompes, filtres, électricité et automatisation), SAC) à apporter au fonctionnement pour les voies potentielles pour régler ces problèmes d'entretien. Appel de propositions lors pour réaliser les services d'un ingénieur-conseil, en cours (limite : visite sur les lieux la semaine du 20 mars 2021, réception du rapport d'évaluation de l'ingénieur, ingénieur des problèmes avec les interférences de canalisations). Rencontrez de traitement évalué en mai 2021 (le rapport d'évaluation vise à aussi comprendre des conclusions et des recommandations de l'opérateur de traitement concernant à SAC, une conception dans une proposition de 56 % à livrer en septembre 2021 Les travaux de réparation devaient être terminés en août 2021, cependant, des retards ont entravé la progression, une nouvelle date cible sera établie une fois le calendrier de construction révisés connu. Soutien opérationnel fourni par l'OSPNTSC, par l'intermédiaire du comité de gestion de l'eau potable et des eaux usées, financé par SAC Solution à long terme évaluée au cours de l'étude de faisabilité. SAC collabore avec la Première Nation pour l'aider au point de documents d'approbation du projet afin de faire passer le projet à l'étape de la conception.	13/2021

AUTRES INITIATIVES CONNEXES			
Région	Première Nation	Projet	Situation actuelle
ON	Première Nation de Curve Lake	Curve Lake Area Water Treatment Plant	- La Première Nation de Curve Lake se compte à l'heure actuelle, aucun avis sur la qualité de l'eau potable en vigueur. En juin 2018, l'AQEP LT sur l'immeuble administratif des écoles de Curve Lake a été levé. - Curve Lake est desservi avec de l'eau souterraine pompée dans environ 309 puits individuels pour chaque maison, en plus de la substance fonctionnelle qui est desservie par un réseau collectif d'approvisionnement souterrain (Curve Lake Watervalley) (Water Supply Treatment System - qui desservi 89 maisons), ce réseau sera retiré une fois la nouvelle station de traitement d'eau en fonction, et le réseau de distribution d'eau actuel de la substance fonctionnelle sera intégré au nouveau système. Le réseau compte 208 immeubles à revenu locatif qui sont aussi desservis par des puits individuels. Ces puits ne seront pas desservis par le nouveau réseau de traitement et de distribution d'eau. Les puits individuels de Curve Lake sont d'une qualité et d'une quantité inégales, avec un taux relativement élevés d'eau et une contamination des installations exposées aux eaux. Le résultat des essais précédents montre la présence de niveaux élevés de sodium, de turbidité, de fer et de nitrates dans les nombreuses sources d'eau souterraine. Dans le cadre de l'évaluation nationale (Beegan Borreal Ltd., décembre 2019), quatre puits privés ont été examinés et des problèmes de qualité d'eau liés à la présence de nitrates/nitrites, de nitrates et de nitrites, à la turbidité et aux bactéries étaient notés sur ces sources. Un rapport hydrogéologique publié en novembre 2018 (Cambridge Environmental Ltd.) indiquait que quatre puits sur dix devaient à l'origine atteindre la station collective de traitement de l'eau efficaces de fortes concentrations de solides dissous totaux (TDS), de dureté et de sodium, en plus de concentrations variables de carbone organique dissous (COD). La station de pompage de la substance fonctionnelle manque l'équipement d'eau et n'a pas la capacité suffisante pour répondre à la demande actuelle. Le dernier rapport du Système de mesure sur la condition des biens (2018-2019) recommandait une élévation majeure ou un remplacement. Un nouveau système de traitement et de distribution d'eau, à même de respecter la réglementation sur l'eau potable des Ontario pour alimenter en eau potable saine la Première Nation pendant au moins les 20 prochaines années. SAC a fourni un financement à la Première Nation de Curve Lake pour le volet 1 pour de son étude de faisabilité. L'étude vous a pour recommandée, et la collectivité a privilégié, une station de traitement d'eau en surface avec filtration sur membrane et un réseau de distribution élargi avec WMS pour les services d'incendie. SAC est prêt à financer la construction du système de traitement d'eau de Curve Lake. Lorsque il est prévu dans la demande d'approbation du projet approuvée par le chef et le conseil le 2 juin 2020 et par SAC, le 22 juin 2020, compte tenu de la croissance future des membres de la Première Nation vivant dans la réserve mentionnée dans l'étude conceptuel. SAC a reçu la version définitive de l'étude de faisabilité le 28 mai 2020. L'étape de conception du projet a été approuvée le 15 juillet 2020. La Première Nation collabore avec un gestionnaire de projet et un expert-conseil en conception pour terminer la conception. Il est à ce jour 2022.
ON	Wabaseega	Fosses conformes aux normes	- La SOSPPN de la région de l'Ontario a financé, à raison de 200 000 $, la préparation « Fosses conformes aux normes » à Wabaseega. Il s'agit d'un plan de gestion/mesure être communautaires qui vise l'accroît sur la gestion communautaire, l'éducation à la culture, l'action de un et l'établissement d'action stratégies de mieux-être appropriées pour la collectivité. Cette proposition est née au besoin de remédier aux effets psychologiques et physiques de l'AQEP LT qui n'a fait la couverture, le traumatisme constant et les défis en santé mentale de la collectivité. - La financement initial de la SOSPPN de la région de l'Ontario servira surtout à mobiliser la communauté et à renforcer les capacités en vue d'élaborer le plan de gestion/mesure être communautaires, et pour s'orienter et soutien du santé mentale pour la mobilisation de la collectivité et de régler les problèmes susceptibles de se poser à la suite de ces services. - La première mobilisation de la collectivité approuvée en février 2021 sera organisée par la Première Nation, la SOSPPN restera à la disposition de la Première Nation pour la soutenir à mesure que le mise en œuvre du projet suivra. - La SOSPPN de la région de l'Ontario est désormais à finance le mise en place et la réalisation du plan de gestion/mesure être communautaires qui est élaboré par l'ensemble d'un processus de mobilisation communautaire, en consultation avec la SOSPPN.	

ANNEXE K

PROCÉDURE DE RÈGLEMENT DES DIFFÉRENDS RELATIFS À L'ENGAGEMENT (ET APPENDICES)

Voir ci-joint.

1. Régler les différends ensemble : Procédure de règlement des différends relatifs à l'engagement

1.1. Dispositions générales

1.1.1. La présente annexe s'applique aux différends qui surviennent entre le Canada et les Premières Nations insuffisamment desservies portant sur le respect par le Canada de ses engagements aux termes de l'entente et sur les plans proposés pour respecter les engagements (collectivement, les « **différends** »).

1.1.2. Le Canada et le groupe partagent les mêmes objectifs :

1.1.2.1. coopérer l'un avec l'autre pour veiller au respect constant de l'engagement;

1.1.2.2. tendre à un consensus et à l'harmonie;

1.1.2.3. convenir de plans pour respecter l'engagement de façon rapide et précise (« **plans de réparation** »);

1.1.2.4. cibler rapidement les différends et les régler de la façon la plus rapide et la moins coûteuse possible;

1.1.2.5. résoudre les différends de façon non accusatoire, collaborative et informelle;

1.1.2.6. résoudre les différends d'une façon qui reflète et incorpore les traditions et les protocoles juridiques de la Première Nation insuffisamment desservie;

1.1.2.7. trouver le processus pour résoudre les différends dans les communautés des Premières Nations insuffisamment desservies et mettre en œuvre ces processus d'une façon qui est accessible à ces communautés et qui les respecte.

1.1.3. Sauf indication contraire, le Canada et toute Première Nation insuffisamment desservie peuvent convenir de modifier une exigence procédurale contenue dans la présente annexe, qui s'applique à un différend en particulier.

1.1.4. Le Canada et le groupe souhaitent et prévoient que la plupart des différends seront résolus grâce à des discussions informelles sans qu'il soit nécessaire que la présente annexe soit utilisée.

1.1.5. Sauf indication contraire dans la présente entente, les différends qui ne sont pas résolus de façon informelle se poursuivront jusqu'à ce qu'ils soient résolus, en suivant les étapes suivantes :

1.1.5.1. Étape un : efforts formels et sans aide pour arriver à une entente sur un plan de redressement entre le Canada et la Première Nation insuffisamment desservie, dans des négociations collaboratives en conformité avec l'appendice K-1;

1.1.5.2. Étape deux : efforts structurés pour arriver à une entente entre le Canada et la Première Nation insuffisamment desservie dans le cadre d'une médiation, en conformité avec l'appendice K-2;

1.1.5.3. Étape trois : décision définitive dans le cadre de procédures arbitrales en conformité avec l'appendice K-3.

1.1.6. Sauf indication contraire dans la présente entente, personne ne peut faire passer un différend à l'étape trois (arbitrage final) sans d'abord passer par les étapes un et deux, comme il est prévu dans la présente annexe.

1.1.7. Rien dans la présente annexe n'empêche le Canada ou une Première Nation insuffisamment desservie d'entreprendre des procédures arbitrales urgentes à tout moment :

1.1.7.1. pour traiter une perte urgente d'accès régulier à l'eau;

1.1.7.2. obtenir une mesure provisoire ou interlocutoire qui est autrement offerte en attendant la résolution du différend aux termes de la présente annexe,

et l'arbitre a le pouvoir d'entendre ces audiences de façon urgente et d'autoriser cette mesure provisoire ou interlocutoire.

1.2. Étape un : négociations collaboratives

1.2.1. Si un différend n'est pas résolu par des discussions informelles et qu'une Première Nation insuffisamment desservie souhaite invoquer la présente annexe, cette Première Nation insuffisamment desservie remettra un avis au Canada, demandant le début de négociations collaboratives.

1.2.2. À la réception de l'avis, le Canada et la Première Nation insuffisamment desservie participent aux négociations collaboratives.

1.2.3. Les négociations collaboratives doivent être menées selon les conditions suivantes :

1.2.3.1. de bonne foi;

1.2.3.2. créer un espace sécuritaire et respectueux pour les membres de la Première Nation insuffisamment desservie participante;

1.2.3.3. promouvoir la compréhension mutuelle et la transparence à l'égard des questions soulevées dans le différend, en prenant les mesures suivantes : le Canada fournira des renseignements suffisants et expliquera suffisamment ces questions d'une façon qui est accessible aux membres de la Première Nation insuffisamment desservie;

1.2.3.4. permettre et promouvoir l'utilisation des langues indigènes;

1.2.3.5. être situées dans la communauté de la Première Nation insuffisamment desservie et être accessibles à leurs membres;

1.2.3.6. respecter les traditions et les protocoles juridiques de la Première Nation insuffisamment desservie, y compris :

1.2.3.6.1. l'attribution des sièges;

1.2.3.6.2. l'ordre de prise de parole;

1.2.3.6.3. les prières, discours et reconnaissances;

1.2.3.6.4. l'échange de cadeaux;

1.2.3.6.5. la sagesse des aînés;

1.2.3.6.6. l'importance des enseignements traditionnels;

1.2.3.6.7. l'expérience de la communauté;

1.2.3.6.8. la compréhension par la communauté des questions dans le différend;

1.2.3.6.9. les protocoles de prise de décision de la communauté.

1.2.4. Les négociations collaboratives se terminent dans les circonstances décrites à l'appendice K-1.

1.3. Étape deux : médiation

1.3.1. Dans les quinze (15) jours suivant la fin des négociations collaboratives qui n'ont pas réglé le différend, une Première Nation insuffisamment desservie peut demander le début d'un processus simplifié en remettant un avis décrivant le différend et comprenant les plans de redressement du Canada et de la Première Nation insuffisamment desservie.

1.3.2. Dans les trente (30) jours suivant la livraison d'un avis, le Canada et la Première Nation insuffisamment desservie impliqués dans le différend (les « **parties participantes** ») auront recours à la médiation pour essayer de régler le différend.

1.3.3. Les parties dressent une liste de médiateurs disponibles pour faciliter les négociations qui connaissent ce qui suit :

1.3.3.1. les conditions de vie dans les réserves des Premières Nations;

1.3.3.2. les langues, les coutumes et les traditions juridiques des Premières Nations.

1.3.4. Le médiateur et les parties participantes doivent engager le processus simplifié de la façon suivante :

1.3.4.1. créer un espace sécuritaire et respectueux pour les membres de la Première Nation insuffisamment desservie participante;

1.3.4.2. promouvoir la compréhension mutuelle et la transparence à l'égard des questions soulevées dans le différend, en prenant les mesures suivantes : le Canada fournira des renseignements suffisants et expliquera suffisamment ces questions d'une façon qui est accessible aux membres de la Première Nation insuffisamment desservie;

1.3.4.3. permettre et promouvoir l'utilisation des langues indigènes dans le cadre de ce processus;

1.3.4.4. être situées dans la communauté de la Première Nation insuffisamment desservie et être accessibles à leurs membres;

1.3.4.5. respecter les traditions et les protocoles juridiques de la Première Nation insuffisamment desservie, y compris :

1.3.4.5.1. l'attribution des sièges;

1.3.4.5.2. l'ordre de prise de parole;

1.3.4.5.3. les prières, discours et reconnaissances;

1.3.4.5.4. l'échange de cadeaux;

1.3.4.5.5. la sagesse des aînés;

1.3.4.5.6. l'importance des enseignements traditionnels;

1.3.4.5.7. l'expérience de la communauté;

1.3.4.5.8. la compréhension par la communauté des questions dans le différend;

1.3.4.5.9. les protocoles de prise de décision de la communauté.

1.3.5. La Première Nation insuffisamment desservie peut désigner un gardien du savoir ou un aîné à titre de représentant pour fournir au médiateur des renseignements sur les traditions et les protocoles juridiques.

1.3.6. La Première Nation peut élaborer des lignes directrices énonçant ses traditions et protocoles juridiques à utiliser par le médiateur et les parties.

1.3.7. Les parties participantes peuvent demander un rapport du médiateur.

1.3.8. Une médiation se termine dans les circonstances décrites à l'appendice K-2.

1.4. Étape trois : arbitrage

1.4.1. Après la fin des négociations collaboratives à l'étape précédente ou d'un processus simplifié exigé, le différend sera réglé, à la livraison d'un avis d'arbitrage conforme à l'appendice K-3, par arbitrage en conformité avec cet appendice.

1.4.2. Voici ce qui doit accompagner l'avis d'arbitrage :

1.4.2.1. tout plan de redressement préparé par les parties participantes;

1.4.2.2. tout rapport d'évaluation neutre;

1.4.2.3. le rapport du médiateur que les parties ont accepté peut être fourni à l'arbitre.

1.4.3. Les parties dressent une liste des arbitres disponibles pour entendre l'arbitrage des différends.

1.4.4. Les arbitres indiqués sur la liste des arbitres doivent connaître ce qui suit :

1.4.4.1. les conditions de vie dans les réserves des Premières Nations;

1.4.4.2. les langues, les coutumes et les traditions juridiques des Premières Nations.

1.4.5. L'arbitre doit tenir compte des plans de redressement proposés et des efforts raisonnables du Canada à veiller à l'accès régulier comme défini dans l'engagement. Les facteurs pertinents comprennent :

1.4.5.1. les avis de la Première Nation insuffisamment desservie, notamment :

1.4.5.1.1. l'importance physique, sociale et culturelle de l'eau;

1.4.5.1.2. les traditions juridiques de la Première Nation insuffisamment desservie se rapportant à l'utilisation et à la protection de l'eau et à son accès;

1.4.5.1.3. les effets historiques et permanents du manque d'accès à l'eau de la Première Nation insuffisamment desservie;

1.4.5.1.4. les efforts précédents déployés par le Canada pour veiller à l'accès régulier à l'eau;

1.4.5.1.5. les besoins urgents en eau de la Première Nation insuffisamment desservie;

1.4.5.2. les exigences fédérales ou les normes et protocoles provinciaux relatifs à l'eau;

1.4.5.3. la surveillance et l'examen du réseau d'aqueduc;

1.4.5.4. l'emplacement physique de la résidence, y compris la proximité à des réseaux d'aqueduc centralisé et la distance.

1.4.6. L'arbitre doit mener les procédures d'arbitrage de la manière suivante :

1.4.6.1. créer un espace sécuritaire et respectueux pour les membres de la Première Nation insuffisamment desservie participante;

1.4.6.2. promouvoir la compréhension mutuelle et la transparence à l'égard des questions soulevées dans le différend;

1.4.6.3. permettre et promouvoir l'utilisation des langues indigènes dans le cadre de ce processus;

1.4.6.4. être situées dans la communauté de la Première Nation insuffisamment desservie et être accessibles à leurs membres;

1.4.6.5. respecter les traditions et les protocoles juridiques de la Première Nation insuffisamment desservie, y compris :

1.4.6.5.1. l'attribution des sièges;

1.4.6.5.2. l'ordre de prise de parole;

1.4.6.5.3. les prières, discours et reconnaissances;

1.4.6.5.4. l'échange de cadeaux;

1.4.6.5.5. l'admissibilité et la pertinence de la preuve, notamment :

1.4.6.5.5.1. la sagesse des aînés;

1.4.6.5.5.2. les enseignements traditionnels;

1.4.6.5.5.3. l'expérience de la communauté;

1.4.6.5.5.4. la compréhension par la communauté des questions dans le différend;

1.4.6.5.5.5. les protocoles de prise de décision de la communauté.

1.4.7. La Première Nation insuffisamment desservie peut recommander un gardien du savoir ou un aîné comme représentant, qui peut, à la discrétion de l'arbitre, siéger avec l'arbitre pour fournir des renseignements sur les traditions et les protocoles juridiques.

1.4.8. La Première Nation peut élaborer des lignes directrices énonçant ses traditions et protocoles juridiques à utiliser par l'arbitre et les parties.

1.4.9. Après avoir passé en revue les plans de redressement proposé et entendu les parties participantes, l'arbitre rend une décision arbitrale de la façon suivante :

1.4.9.1. ordonner la mise en œuvre du plan de redressement de la Première Nation insuffisamment desservie s'il est raisonnable dans toutes les circonstances;

1.4.9.2. ordonner la mise en œuvre du plan de redressement du Canada s'il est raisonnable et que le plan de redressement de la Première Nation insuffisamment desservie n'est pas raisonnable; ou

1.4.9.3. remettre aux parties participantes des directives dans le cas où aucun des plans de redressement n'est raisonnable.

1.4.10. Une décision arbitrale, comme définie à l'appendice K-3, est définitive et lie toutes les parties participantes, qu'une partie participante ait participé ou non à l'arbitrage.

1.4.11. Les parties doivent conserver un registre public des décisions arbitrales à utiliser par le Canada, les Premières Nations insuffisamment desservies et les arbitres.

Procédures de résolution des différends

DISPOSITIONS GÉNÉRALES

(1) Si, dans les circonstances énoncées à l'article 9.07 de l'entente, une Première Nation insuffisamment desservie souhaite invoquer le processus de résolution des différends énoncé dans la présente annexe relativement à un différend applicable (chacun, un « **différend** »), la Première Nation insuffisamment desservie peut remettre au Canada un avis de négociation, et les parties doivent régler le différend en utilisant la procédure énoncée dans la présente annexe.

(2) Le terme « **annexe** » désigne la présente **Error! Reference source not found. :** Règlement des différends.

Appendice K-1 : négociations collaboratives

Appendice K-2 : médiation

Appendice K-3 : arbitrage

APPENDICE K-1
Négociations collaboratives

DISPOSITIONS GÉNÉRALES

(3) Les négociations collaboratives commencent à la date de livraison d'un avis écrit par une Première Nation insuffisamment desservie demandant le début de négociations collaboratives (un « **avis de négociation** »).

AVIS

(4) Un avis de négociation comprendra ce qui suit :

a) le nom des parties participantes;

b) un sommaire des détails du différend;

c) une description des efforts déployés jusqu'à ce jour pour régler le différend;

d) le nom des personnes qui ont déployé ces efforts;

e) tout autre renseignement qui aidera les parties participantes.

REPRÉSENTATION

(5) Une partie participante peut participer aux négociations collaboratives avec ou sans conseiller juridique ou autre conseiller.

(6) Au début de la première réunion de négociation, chaque partie participante informera les autres parties participantes de toute limite quant au pouvoir de ses représentants.

PROCESSUS DE NÉGOCIATION

(7) Les parties participantes conviendront de leur première réunion de négociations collaboratives dans les vingt et un (21) jours suivant le début des négociations collaboratives.

(8) Avant la première réunion de négociation prévue, les parties participantes essaieront de convenir de toute question procédurale qui facilitera les négociations collaboratives.

(9) Les parties participantes essaieront réellement de régler le différend en :

a) déterminant les intérêts sous-jacents;

b) isolant les points d'entente et de désaccord;

c) explorant d'autres solutions;

d) envisageant des compromis;

e) prenant toute autre mesure qui aidera au règlement du différend.

(10) Aucune transcription ni aucun enregistrement des négociations collaboratives ne sera conservé, mais cela n'empêche pas une personne de prendre des notes des négociations.

CONFIDENTIALITÉ

(11) Pour aider au règlement d'un différend, les négociations collaboratives ne seront pas ouvertes au public, mais le présent paragraphe n'empêche pas un chef des Premières Nations insuffisamment desservies et ses représentants d'y assister.

(12) Les parties et toutes les personnes assureront la confidentialité de ce qui suit :

a) tous les renseignements oraux et écrits communiqués lors des négociations collaboratives;

b) le fait que les renseignements ont été communiqués.

(13) Les négociations collaboratives ne porteront pas atteinte aux droits des parties participantes, et aucun renseignement communiqué dans les négociations collaboratives ne peut être utilisé en dehors des négociations collaboratives.

DROIT DE SE RETIRER

(14) Une partie participante peut se retirer des négociations collaboratives à tout moment.

FIN DES NÉGOCIATIONS COLLABORATIVES

(15) Les négociations collaboratives prennent fin à la survenance de l'un des événements suivants :

a) l'expiration d'un délai de soixante (60) jours;

b) une partie participante se retire des négociations collaboratives aux termes du paragraphe (14);

c) les parties participantes conviennent par écrit de mettre fin aux négociations collaboratives; ou

d) les parties participantes signent une convention écrite pour régler le différend.

FRAIS

(16) Le Canada doit payer les frais raisonnables des négociations collaboratives menées aux termes du présent appendice en conformité avec l'article 9.08 de l'entente.

APPENDICE K-2
Médiation

GÉNÉRALITÉ

(17) Une médiation peut commencer à tout moment après la conclusion des négociations collaboratives, conformément à l'appendice K-1, lorsqu'une Première Nation insuffisamment desservie remet un avis écrit exigeant le début d'une médiation (un « **avis de médiation** »).

(18) La médiation commence à la date à laquelle les parties participantes directement impliquées dans le différend ont convenu par écrit de commencer la médiation conformément à l'alinéa 1.3.2 de l'annexe.

AVIS

(19) Un avis de médiation comprendra les éléments suivants :

a) le nom des parties participantes;

b) un sommaire des détails du différend;

c) une description des efforts déployés à ce jour pour régler le différend;

d) le nom des personnes qui ont déployé ces efforts;

e) tout autre renseignement qui aidera les parties participantes.

NOMINATION D'UN MÉDIATEUR

(20) Une médiation sera menée par un médiateur choisi par la Première Nation insuffisamment desservie à partir de la liste de médiateurs établie conformément à l'annexe.

(21) Sous réserve des limites convenues par les parties participantes, un médiateur peut faire appel à des services administratifs ou d'autres services de soutien raisonnables ou nécessaires.

DEMANDE DE RETRAIT

(22) Une partie participante peut donner en tout temps au médiateur et aux autres parties participantes un avis écrit, motivé ou non, demandant au médiateur de se retirer de la médiation au motif que la partie participante a des doutes légitimes quant à l'indépendance ou l'impartialité du médiateur.

(23) À la réception d'un avis écrit conformément au paragraphe (22), le médiateur se retirera immédiatement de la médiation.

FIN DE LA NOMINATION

(24) La nomination d'un médiateur prend fin si :

a) le médiateur doit se retirer conformément au paragraphe (23);

b) le médiateur se retire de sa charge pour quelque raison que ce soit;

c) les parties participantes conviennent de la cessation.

(25) Si la nomination d'un médiateur prend fin, un médiateur de remplacement sera nommé conformément au paragraphe (20).

REPRÉSENTATION

(26) Une partie participante peut assister à une médiation avec ou sans conseiller juridique ou autre conseiller.

(27) Si un médiateur est un avocat, il n'agira pas à titre de conseiller juridique d'une partie participante.

(28) Au début de la première réunion de médiation, chaque partie participante informera le médiateur et les parties participantes des limites quant au pouvoir de ses représentants.

DÉROULEMENT DE LA MÉDIATION

(29) Les parties participantes :

a) essaieront réellement de régler le conflit en :

(i) déterminant les intérêts sous-jacents;

(ii) isolant les points d'entente et de désaccord;

(iii) explorant d'autres solutions;

(iv) envisageant des compromis;

b) coopéreront pleinement avec le médiateur et prêteront rapidement attention à toutes les communications du médiateur et y répondront.

(30) Le médiateur mène une médiation fondée sur les traditions et les protocoles juridiques autochtones tels qu'ils sont énoncés à l'annexe, et peut prendre toute autre mesure qu'il juge nécessaire et appropriée pour aider les parties participantes à régler le différend de manière équitable, efficace et rentable.

(31) Dans les sept (7) jours suivant la nomination d'un médiateur, chaque partie participante peut remettre un sommaire écrit au médiateur des faits pertinents, des questions en litige et de son point de vue à cet égard, et le médiateur remettra des copies des sommaires à chaque partie participante à l'issue de la période de sept jours.

(32) Le médiateur peut mener une médiation dans le cadre de réunions conjointes ou d'un caucus privé convoqué aux endroits qu'il désigne après avoir consulté les parties participantes.

(33) Les renseignements divulgués par une partie participante à un médiateur lors d'un caucus privé ne seront pas divulgués par le médiateur à une autre partie participante sans le consentement de la partie participante divulgatrice.

(34) Aucune transcription ni aucun enregistrement d'une réunion de médiation ne sera conservé, mais il n'est pas interdit à une personne de prendre des notes des négociations.

CONFIDENTIALITÉ

(35) Pour aider au règlement d'un différend, les médiations ne seront pas ouvertes au public, mais le présent paragraphe n'empêche pas un chef de la Première Nation insuffisamment desservie ni ses représentants d'y assister.

(36) Les parties et toutes les personnes assureront la confidentialité de ce qui suit :

a) tous les renseignements oraux et écrits communiqués lors de la médiation;

b) le fait que ces renseignements ont été communiqués.

(37) Les parties participantes n'invoqueront ni ne produiront comme preuve dans une procédure, qu'elle porte ou non sur l'objet de la médiation, tout renseignement oral ou écrit divulgué dans le cadre de la médiation ou en découlant, notamment :

a) tout document d'autres parties participantes produit au cours de la médiation qui n'est pas autrement produit ou qui ne peut être produit dans le cadre de cette procédure;

b) les points de vue exprimés, les suggestions ou les propositions faites en vue d'un éventuel règlement du différend;

c) les admissions faites par une partie participante dans le cadre de la médiation, sauf stipulation contraire de la partie participante admettant le différend;

d) les recommandations de règlement faites par le médiateur;

e) le fait qu'une partie participante ait manifesté sa volonté de faire ou d'accepter une proposition ou une recommandation de règlement.

(38) Un médiateur, ou toute personne qu'il engage ou emploie, ne peut être contraint, dans le cadre d'une procédure, à témoigner sur des renseignements oraux ou écrits qu'il a acquis ou toute opinion qu'il a formé à la suite de la médiation, et toutes les parties participantes s'opposeront à toute tentative d'assignation de cette personne ou de présentation de ces renseignements.

(39) Un médiateur, ou toute personne qu'il engage ou emploie, est disqualifié comme consultant ou expert dans toute procédure relative au différend, y compris toute procédure impliquant des personnes qui ne sont pas des parties participantes à la médiation.

RENVOI DE QUESTIONS À D'AUTRES PROCESSUS

(40) Au cours d'une médiation, les parties participantes peuvent convenir de renvoyer des questions particulières du différend à des enquêteurs indépendants, à des groupes d'experts ou à d'autres processus pour obtenir des avis ou des conclusions qui pourraient les aider à résoudre le différend, et dans ce cas, les parties participantes préciseront :

a) le mandat du processus;

b) le délai dans lequel le processus sera terminé;

c) la façon dont les coûts du processus seront répartis entre les parties participantes.

(41) Le délai précisé pour la conclusion d'une médiation sera prolongé de quinze (15) jours suivant la réception des conclusions ou des avis rendus dans le cadre d'un processus décrit au paragraphe (40).

DROIT DE SE RETIRER

(42) Une partie participante peut se retirer d'une médiation à tout moment en donnant avis de son intention au médiateur.

(43) Avant qu'un retrait soit effectif, la partie participante qui se retire devra :

a) parler au médiateur;

b) divulguer les motifs de son retrait;

c) donner au médiateur l'occasion de discuter des conséquences d'un retrait.

FIN DE LA MÉDIATION

(44) Une médiation prend fin à la survenance de l'un des événements suivants :

a) sous réserve du paragraphe (41), l'expiration d'un délai de soixante (60) jours suivant la nomination du dernier médiateur désigné pour aider

les parties à résoudre le différend, ou d'un délai plus long convenu par les parties participantes;

b) les parties participantes ont convenu par écrit de mettre fin à la médiation ou de ne pas nommer de médiateur de remplacement conformément au paragraphe (25);

c) une partie participante se retire de la médiation conformément au paragraphe (42);

d) les parties participantes signent une convention écrite pour régler le différend.

RECOMMANDATION DU MÉDIATEUR

(45) Si une médiation prend fin sans accord entre les parties participantes, celles-ci peuvent demander conjointement au médiateur de formuler une recommandation non contraignante écrite en vue d'un règlement, mais le médiateur peut refuser la demande sans motif.

(46) Dans les quinze (15) jours suivant la présentation de la recommandation du médiateur conformément au paragraphe (45), les parties participantes rencontreront le médiateur pour tenter de régler le différend.

FRAIS

(47) Sous réserve du paragraphe (40), le Canada doit payer les frais raisonnables des médiations menées aux termes du présent appendice en conformité avec l'article 9.08 de l'entente.

APPENDICE K-3
Arbitrage

DÉFINITIONS

(48) Dans le présent appendice :

a) « **cour** » s'entend de la cour supérieure de la province où se trouve la réserve de la Première Nation insuffisamment desservie sous-jacente au différend;

b) « **demandeur** » s'entend de la partie participante qui a remis l'avis d'arbitrage;

c) « **décision arbitrale** » s'entend d'une décision de l'arbitre sur le fond du différend qui lui est soumis, et comprend :

(i) une sentence provisoire;

(ii) un octroi d'intérêt;

d) « **convention d'arbitrage** » comprend

(i) l'obligation de renvoyer les différends à l'arbitrage conformément à l'annexe;

(ii) un accord des parties participantes pour soumettre un différend à l'arbitrage;

e) « **arbitre** » s'entend d'un arbitre unique nommé conformément au présent appendice;

f) « **défendeur** » s'entend d'une autre partie participante que le demandeur;

(49) Une mention dans le présent appendice, autre qu'au paragraphe (96) ou (118)a), d'une demande s'applique à une demande reconventionnelle, et une mention dans le présent appendice d'une défense s'applique à une défense reconventionnelle.

(50) Malgré toute disposition contraire dans l'annexe, les parties participantes ne peuvent modifier les paragraphes (63) ou (108) du présent appendice.

COMMUNICATIONS

(51) Sauf en ce qui concerne les détails administratifs, les parties participantes ne communiqueront pas avec l'arbitre :

a) oralement, sauf en présence de toutes les autres parties participantes;

b) par écrit, sans envoyer immédiatement une copie de cette communication à toutes les autres parties participantes.

ÉTENDUE DE L'INTERVENTION JUDICIAIRE

(52) Dans les questions régies par le présent appendice :

a) aucun tribunal n'interviendra sauf dans les cas prévus au présent appendice ou à l'annexe;

b) aucune procédure arbitrale d'un arbitre, ni aucune ordonnance, décision ou décision arbitrale rendue par un arbitre ne sera portée en appel, remise en question, révisée ou limitée par une procédure prévue par une loi, sauf dans la mesure prévue par le présent appendice.

c) dans la mesure où la loi le permet, les parties participantes renoncent à tout droit d'appel, de question, de révision ou de limitation de la procédure arbitrale d'un arbitre, ou d'une ordonnance, d'une décision ou d'une décision arbitrale rendue par un arbitre.

DÉBUT DE LA PROCÉDURE ARBITRALE

(53) La procédure arbitrale à l'égard d'un différend commence au moment de la remise de l'avis d'arbitrage par le demandeur aux défendeurs (l'« **avis d'arbitrage** »).

AVIS D'ARBITRAGE

(54) Un avis d'arbitrage sera envoyé par écrit et contient les renseignements suivants :

a) un énoncé de l'objet ou des questions du différend;

b) l'exigence que le différend soit soumis à l'arbitrage;

c) la réparation demandée;

d) les qualifications privilégiées des arbitres.

(55) L'avis d'arbitrage peut comprendre le nom des arbitres proposés, y compris les renseignements précisés au paragraphe (58).

ARBITRE

(56) Dans chaque arbitrage, il y aura un arbitre.

NOMINATION DES ARBITRES

(57) Les parties participantes feront des efforts de bonne foi pour s'entendre sur l'arbitre parmi les arbitres figurant sur la liste. Si les parties participantes ne parviennent pas à s'entendre sur l'arbitre dans les quinze (15) jours suivant le début de l'arbitrage, elles demanderont aux tribunaux ou à l'une ou l'autre d'entre elles de nommer un arbitre sur la liste des arbitres.

(58) En nommant un arbitre, les tribunaux tiendront compte de ce qui suit :

a) toutes les qualifications exigées de l'arbitre, telles qu'elles sont énoncées dans l'avis d'arbitrage ou convenues par écrit par les parties participantes;

b) toute autre considération susceptible d'assurer la nomination d'un arbitre indépendant et impartial.

CESSATION DU MANDAT ET REMPLACEMENT DE L'ARBITRE

(59) Le mandat d'un arbitre prend fin :

a) si l'arbitre se retire de sa charge pour quelque raison que ce soit;

b) par accord des parties participantes ou conformément à un tel accord.

(60) Si le mandat d'un arbitre prend fin, un arbitre de remplacement sera nommé conformément au paragraphe (57).

MESURES PROVISOIRES ORDONNÉES PAR LE TRIBUNAL D'ARBITRAGE

(61) Sauf si les parties participantes en conviennent autrement, l'arbitre peut, à la demande d'une partie participante, ordonner à cette dernière de prendre toute mesure provisoire de protection qu'il juge nécessaire à l'égard de l'objet du différend.

ÉGALITÉ DE TRAITEMENT DES PARTIES

(62) Les parties participantes seront traitées sur un pied d'égalité et chaque partie participante aura pleinement l'occasion de présenter ses arguments.

DÉTERMINATION DES RÈGLES DE PROCÉDURE

(63) Sous réserve de l'annexe et du présent appendice, les parties participantes peuvent convenir de la procédure à suivre par l'arbitre dans le déroulement de la procédure.

(64) À défaut d'une entente conformément au paragraphe (63), l'arbitre, sous réserve de l'annexe et du présent appendice, peut mener l'arbitrage de la manière qu'il juge appropriée compte tenu des traditions et des protocoles juridiques autochtones de la Première Nation insuffisamment desservie.

(65) L'arbitre n'est pas tenu d'appliquer les règles juridiques de la preuve et peut déterminer l'admissibilité, la pertinence, le caractère substantiel et le poids de toute preuve. Conformément à l'annexe, l'arbitre tiendra dûment compte des traditions et des protocoles juridiques autochtones de la Première Nation insuffisamment desservie pour déterminer la présentation et l'admission de la preuve.

(66) Sous réserve uniquement de l'annexe et des lois et protocoles autochtones de la Première Nation insuffisamment desservie, l'arbitre déploiera tous les efforts raisonnables pour mener la procédure d'arbitrage de la façon la plus efficace, expéditive et rentable qui soit appropriée dans toutes les circonstances de l'affaire.

(67) L'arbitre peut prolonger ou abréger une période :

a) figurant dans le présent appendice, sauf la période précisée au paragraphe (109);

b) établie par l'arbitre.

RÉUNION PRÉALABLE À L'AUDIENCE

(68) Dans les dix (10) jours suivant la nomination de l'arbitre, celui-ci convoquera une réunion préalable à l'audience des parties participantes afin de parvenir à un accord et de rendre les ordonnances nécessaires sur les questions suivantes :

a) toute question de procédure découlant du présent appendice;

b) la procédure et les protocoles communautaires à suivre dans le cadre de l'arbitrage;

c) tout aîné ou gardien du savoir qui siégera avec l'arbitre et le conseillera sur le protocole communautaire et le droit autochtone;

d) les délais de prise de mesures en arbitrage;

e) le calendrier des audiences ou des réunions, le cas échéant;

f) les demandes préliminaires ou les objections;

g) toute autre question qui aidera l'arbitrage à procéder de façon efficace et expéditive.

(69) L'arbitre préparera et distribuera rapidement aux parties participantes un registre écrit de toutes les affaires traitées, ainsi que des décisions et des ordonnances prises, à la réunion préparatoire à l'audience.

(70) La réunion préalable à l'audience peut se dérouler par téléconférence ou vidéoconférence.

LIEU DE L'ARBITRAGE

(71) Dans la mesure du possible, l'arbitrage doit avoir lieu dans la réserve de la Première Nation insuffisamment desservie ou à proximité de celle-ci.

(72) Un arbitre peut

a) avec le consentement des parties participantes, se réunir à tout autre endroit qu'il estime indiqué pour entendre des témoins, des experts ou les parties participantes;

b) se rendre à n'importe quel endroit pour examiner des documents, des effets ou d'autres biens personnels, ou pour voir des endroits physiques.

LANGUE

(73) Dans la mesure du possible, l'arbitrage favorisera l'utilisation de la langue autochtone de la Première Nation insuffisamment desservie.

(74) Le Canada assume les frais de traduction des présentations orales et des procédures, ainsi que des documents que l'arbitre peut ordonner dans les circonstances d'un différend particulier.

DÉCLARATIONS ET DÉFENSE

(75) Dans les vingt et un (21) jours suivant la nomination de l'arbitre, la Première Nation insuffisamment desservie, à titre de demandeur, remettra son plan de redressement et une déclaration écrite au Canada, le défendeur, énonçant les faits à l'appui de sa revendication ou de sa position, les points en litige et le redressement ou la réparation demandés.

(76) Dans les quinze (15) jours suivant la réception de la déclaration du demandeur, le défendeur remettra à toutes les parties participantes une déclaration écrite énonçant sa défense ou sa position à l'égard de ces détails.

(77) Chaque partie participante joindra à sa déclaration une liste de documents :

a) sur lesquels la partie participante a l'intention de s'appuyer;

b) qui décrit chaque document par nature, date, auteur, destinataire et sujet.

(78) Les parties participantes peuvent modifier ou compléter leurs déclarations, y compris la liste des documents, à moins que l'arbitre ne juge inapproprié de permettre la modification, le complément ou les actes de procédure supplémentaires en ce qui concerne :

a) le retard à le faire;

b) tout préjudice subi par les autres parties participantes.

(79) Les parties participantes remettront des copies de tous les documents modifiés, complétés ou nouveaux livrés conformément au paragraphe (78) à toutes les parties participantes.

DIVULGATION

(80) L'arbitre peut ordonner à une partie participante de produire, dans un délai précis, tout document :

a) qui n'a pas été inscrit conformément au paragraphe (77);

b) dont la partie participante en a la garde ou le contrôle;

c) que l'arbitre juge pertinent.

(81) Chaque partie participante donnera aux autres parties participantes l'accès nécessaire à des moments raisonnables pour inspecter et prendre des copies de tous les documents que la partie participante a énumérés conformément au paragraphe (77), ou que l'arbitre a ordonné de produire conformément au paragraphe (80).

(82) Les parties participantes prépareront et enverront à l'arbitre un exposé conjoint des faits dans le délai précisé par l'arbitre, à défaut de quoi les parties établiront leurs divergences et demanderont à l'arbitre de trancher les faits.

(83) Au plus tard vingt et un (21) jours avant le début d'une audience, chaque partie participante remettra à l'autre partie participante :

a) le nom et l'adresse de tout témoin et un résumé ou une déclaration écrite de son témoignage;

b) dans le cas d'un témoin expert, une déclaration écrite ou un rapport préparé par le témoin expert.

(84) Au plus tard quinze (15) jours avant le début d'une audience, chaque partie participante remettra à l'autre partie participante et à l'arbitre un ensemble de tous les documents à présenter à l'audience.

AUDIENCES ET PROCÉDURE ÉCRITES

(85) À moins que les parties participantes n'aient convenu qu'aucune audience ne sera tenue, l'arbitre convoquera une audience si une partie participante le demande.

(86) L'arbitre donnera aux parties participantes un préavis suffisant de toute audience et de toute réunion de l'arbitre aux fins de l'inspection de documents, de marchandises ou d'autres biens ou de l'examen de tout emplacement physique.

(87) Tous les énoncés, documents ou autres renseignements fournis à l'arbitre ou les demandes présentées à l'arbitre par une partie participante seront communiqués aux autres parties participantes, et les rapports d'expert, les documents de preuve ou la jurisprudence sur lesquels l'arbitre peut s'appuyer pour rendre sa décision seront communiqués aux parties participantes.

(88) À moins que l'arbitre n'en décide autrement, toutes les audiences et réunions des procédures d'arbitrage autres que les réunions de l'arbitre sont ouvertes au public.

(89) L'arbitre organisera des audiences qui se tiendront des jours consécutifs jusqu'à ce qu'elles soient terminées.

(90) Tous les témoignages seront recueillis en présence de l'arbitre et de toutes les parties participantes, à moins qu'une partie participante ne soit absente par défaut ou ait renoncé au droit d'être présente.

(91) L'arbitre peut ordonner à toute personne d'être interrogée par l'arbitre sous serment ou sur affirmation solennelle relativement au différend et de produire devant l'arbitre tous les documents pertinents dont la personne a la garde ou le contrôle.

(92) Les ensembles de documents remis conformément au paragraphe (84) seront réputés avoir été introduits en preuve à l'audience sans autre preuve et sans être lus à l'audience, mais une partie participante peut contester l'admissibilité de tout document ainsi produit.

(93) Si l'arbitre estime qu'il est juste et raisonnable de le faire, il peut permettre qu'un document qui n'a pas été précédemment énuméré conformément au paragraphe (77), ou produit conformément au paragraphe (80) ou (84), soit produit à l'audience.

(94) Si l'arbitre permet que le témoignage d'un témoin soit présenté sous forme de déclaration écrite, l'autre partie participante peut exiger que ce témoin soit disponible pour le contre-interrogatoire à l'audience.

(95) L'arbitre peut ordonner à un témoin de comparaître et de témoigner et, dans ce cas, les parties participantes peuvent contre-interroger ce témoin et présenter une contre-preuve.

DÉFAUT D'UNE PARTIE

(96) Si, sans explication, le demandeur omet de communiquer sa déclaration conformément au paragraphe (75), l'arbitre peut mettre fin à la procédure. Si, sans explication, un défendeur omet de communiquer sa défense conformément au paragraphe (76), l'arbitre poursuivra la procédure sans traiter ce manquement en lui-même comme une admission des allégations du demandeur.

(97) Si, sans justification suffisante, une partie participante ne se présente pas à l'audience ou ne produit pas de preuve documentaire, l'arbitre peut poursuivre les procédures et rendre la décision arbitrale en fonction de la preuve dont il dispose.

(98) Avant de mettre fin à la procédure visée au paragraphe (96), l'arbitre donnera à toutes les parties un avis écrit leur donnant l'occasion de fournir une explication et de déposer une déclaration relativement au différend dans un délai précis.

(99) Il est entendu que la cessation aux termes du paragraphe (96) ne porte pas atteinte à la capacité du demandeur d'entamer une nouvelle procédure d'arbitrage, sans retourner d'abord aux processus des étapes 1 et 2.

EXPERT NOMMÉ PAR LE TRIBUNAL D'ARBITRAGE

(100) Après avoir consulté les parties participantes, l'arbitre peut :

a) nommer un ou plusieurs experts pour lui faire rapport sur des questions précises à déterminer par l'arbitre;

b) à cette fin, exiger d'une partie participante qu'elle fournisse à l'expert tout renseignement pertinent ou qu'elle produise les documents, effets ou autres biens personnels ou bien-fonds pertinents ou y donne accès aux fins d'inspection ou de consultation.

(101) L'arbitre remettra une copie du rapport de l'expert aux parties participantes qui auront l'occasion d'y répondre.

(102) Si une partie participante le demande, ou si l'arbitre le juge nécessaire, l'expert participera, après avoir remis un rapport écrit ou oral, à une audience au cours de laquelle les parties participantes auront la possibilité de contre-interroger l'expert et de présenter une contre-preuve.

(103) À la demande d'une partie participante, l'expert devra :

a) mettre à la disposition de cette partie participante, aux fins d'examen, tous les documents, effets ou autres biens en sa possession et les remettre à l'expert pour qu'il prépare un rapport;

b) fournir à cette partie participante une liste de tous les documents, effets ou autres biens personnels ou bien-fonds que l'expert n'a pas en sa possession, mais qui lui ont été fournis ou auxquels il a eu accès, ainsi qu'une description de l'emplacement de ces documents, effets, biens personnels ou bien-fonds.

LOIS APPLICABLES AU FOND DU DIFFÉREND

(104) Un arbitre tranchera le différend conformément au droit, y compris le droit autochtone, et à l'annexe.

(105) Si les parties participantes le lui ont expressément autorisé, un arbitre peut trancher le différend en se fondant sur des considérations d'équité.

(106) Dans tous les cas, un arbitre prendra ses décisions conformément à l'esprit et à l'intention de l'entente.

RÈGLEMENT

(107) Si, au cours d'une procédure d'arbitrage, les parties participantes règlent le différend, l'arbitre mettra fin à la procédure et, à la demande de ces parties participantes, consignera le règlement sous forme de décision arbitrale selon les modalités convenues.

(108) Une décision arbitrale selon les modalités convenues :

a) sera rendue conformément aux paragraphes (110) à (112);

b) indiquera qu'il s'agit d'une décision arbitrale;

c) a le même statut et le même effet que toute autre décision arbitrale sur le fond du différend.

FORME ET CONTENU DE LA DÉCISION ARBITRALE

(109) L'arbitre rendra sa décision arbitrale définitive le plus tôt possible et, en tout état de cause, au plus tard soixante (60) jours après que :

a) les audiences sont terminées;

b) les arguments finaux ont été présentés, la date la plus tardive étant retenue.

(110) Une décision arbitrale sera rendue par écrit et signée par l'arbitre.

(111) Une décision arbitrale énoncera les motifs sur lesquels elle est fondée, à moins que :

a) les parties participantes aient convenu qu'aucun motif ne doit être donné;

b) la décision est une décision arbitrale selon les modalités convenues prévues aux paragraphes (107) et (108).

(112) L'arbitre remettra une copie signée de la décision arbitrale à toutes les parties participantes et au comité mixte.

(113) À tout moment au cours de la procédure d'arbitrage, un arbitre peut rendre une décision arbitrale provisoire sur toute question à l'égard de laquelle il peut rendre une décision arbitrale définitive.

(114) Un arbitre peut accorder des intérêts.

(115) À moins qu'un arbitre n'en décide autrement, le Canada doit payer les frais d'un arbitrage aux termes du présent appendice, conformément à l'article 9.08 de la convention.

FIN DE LA PROCÉDURE

(116) L'arbitre mettra fin aux audiences si :

a) les parties participantes indiquent qu'elles n'ont pas d'autres éléments de preuve ou observations à présenter;

b) l'arbitre estime qu'il est inutile ou inapproprié de tenir d'autres audiences.

(117) Une décision arbitrale définitive ou une ordonnance de l'arbitre conformément au paragraphe (118) met fin à la procédure d'arbitrage.

(118) Un arbitre émettra une ordonnance de résiliation de la procédure arbitrale si :

a) le demandeur retire sa demande, à moins que le défendeur ne s'oppose à l'ordonnance et que l'arbitre ne reconnaisse un intérêt légitime à obtenir un règlement final du différend;

b) les parties participantes conviennent de mettre fin à la procédure;

c) l'arbitre conclut que la poursuite de la procédure est devenue inutile ou impossible pour toute autre raison.

(119) Sous réserve des paragraphes (120) à (125), le mandat d'un arbitre prend fin avec la fin de la procédure arbitrale.

CORRECTION ET INTERPRÉTATION DE LA DÉCISION; DÉCISION SUPPLÉMENTAIRE

(120) Dans les trente (30) jours suivant la réception d'une décision arbitrale :

a) une partie participante peut demander à l'arbitre de corriger dans la décision arbitrale toute erreur de calcul, erreur d'écriture ou erreur typographique ou toute autre erreur de nature similaire;

b) une partie participante peut, si toutes les parties participantes y consentent, demander à l'arbitre de donner une interprétation d'un point précis ou d'une partie de la décision arbitrale.

(121) Si un arbitre estime qu'une demande faite conformément au paragraphe (120) est justifiée, il apportera la correction ou donnera l'interprétation dans les trente (30) jours suivant la réception de la demande et l'interprétation fera partie de la décision arbitrale.

(122) L'arbitre peut, de sa propre initiative, corriger toute erreur du type mentionné à l'alinéa (120)a) dans les trente (30) jours suivant la date de la décision arbitrale.

(123) Une partie participante peut demander, dans les trente (30) jours suivant la réception d'une décision arbitrale, que l'arbitre rende une autre décision arbitrale concernant les demandes présentées dans le cadre de la procédure arbitrale, mais omises de la décision arbitrale.

(124) Si l'arbitre estime qu'une demande présentée conformément au paragraphe (123) est justifiée, il rendra une décision arbitrale supplémentaire dans les trente (30) jours.

(125) Les paragraphes (110) à (112), et les paragraphes (114) à (115), s'appliquent à la correction ou à l'interprétation d'une décision arbitrale rendue conformément au paragraphe (121) ou (122) à une décision arbitrale supplémentaire rendue conformément au paragraphe (124).

AUCUN APPEL

(126) La décision arbitrale est définitive et exécutoire pour les parties participantes et ne peut faire l'objet d'un appel ou d'une révision.

RECONNAISSANCE ET APPLICATION

(127) Une décision arbitrale sera reconnue comme étant exécutoire et, sur demande présentée à la Cour, sera reconnue et appliquée.

(128) Sauf ordonnance contraire de la cour, la partie participante qui invoque une décision arbitrale ou qui en demande l'exécution fournira la décision arbitrale originale dûment authentifiée ou une copie certifiée conforme de celle-ci.

ANNEXE L

PLAN DE NOTIFICATION

I. APERÇU

Objectif

Fournir des renseignements clairs, concis et dans un langage simple au plus grand nombre possible de membres du groupe et des membres de leur famille concernant :

a) l'entente de règlement et leurs droits de recevoir une indemnité en vertu de celle-ci; et

b) la procédure de règlement des réclamations et l'échéancier qui s'y rapporte.

Membres du groupe

Le groupe se compose des membres suivants :

- les personnes membres du groupe, soit environ 142 300 personnes qui sont membres du groupe et qui ne se sont pas exclues des actions;
- les Premières Nations membres du groupe, soit les Premières Nations qui sont membres du groupe et qui donnent à l'administrateur un avis d'acceptation. Il y a jusqu'à 258 Premières Nations touchées qui pourraient remettre des avis d'acceptation et être considérées comme des Premières Nations membres du groupe.

Facteurs connus

Les facteurs connus pris en considération dans l'élaboration du présent plan de notification sont les suivants :

1. Les réserves visées par les avis concernant la qualité de l'eau potable à long terme pendant la période visée comprennent les réserves dans les régions éloignées, posant d'autres défis en matière de communication (par exemple, retards ou restrictions dans la livraison de la documentation relative aux avis par la poste).
2. Les niveaux de scolarité des membres du groupe varient considérablement, allant des membres qui n'ont pas terminé leurs études secondaires aux membres qui ont suivi des études universitaires de cycle supérieur.
3. Les membres du groupe parlent diverses langues, dont l'anglais, le français et un certain nombre de langues autochtones.
4. Les Premières Nations touchées sont géographiquement dispersées dans toutes les provinces du Canada, en particulier en Ontario, en Colombie-Britannique et au Manitoba.

5. Les données du recensement de 2016 indiquent qu'environ deux tiers des membres des Premières Nations ne résident pas dans des réserves[1]. Il est possible que les membres du groupe ayant résidé dans des réserves touchées pendant la période visée ne résident plus dans la réserve à laquelle leur réclamation est associée ou dans la même province ou le même territoire. Il est possible que certains membres résident à l'extérieur du Canada.

Stratégies

1. CA2 donnera l'« **avis de règlement** » au moyen du même plan de notification qu'il a utilisé pour donner l'avis d'autorisation, comme il est plus amplement précisé ci-dessous. L'avis de règlement sera essentiellement selon le modèle reproduit en ANNEXE M, avec les modifications raisonnables que peut suggérer CA2, et approuvée par les tribunaux. CA2 diffusera l'avis de règlement d'une manière essentiellement semblable à celle qu'elle a utilisée pour la diffusion de l'avis d'autorisation des actions.

2. L'administrateur donnera l'« **avis d'approbation du règlement** » essentiellement selon le modèle reproduit en ANNEXE N, avec les modifications raisonnables qu'il peut suggérer, et approuvée par les tribunaux. L'avis d'approbation du règlement avisera les personnes membres du groupe de la date limite pour les réclamations et les Premières Nations membres du groupe de la nécessité d'accepter l'entente de règlement. L'avis d'approbation du règlement sera diffusé selon les méthodes suivantes, comme il est plus amplement précisé ci-dessous :

    a) Publipostage direct des avis aux Premières Nations membres du groupe;

    b) Diffusion d'un communiqué de presse national;

    c) Tenue de réunions communautaires en personne et virtuelles pour les Premières Nations membres du groupe intéressées;

    d) Création d'un site Web d'information sur lequel il sera possible de consulter l'entente de règlement, le formulaire de réclamation, la FAQ et d'autres sources de renseignements et de télécharger des copies de ces documents, et l'hyperlien de ce site Web devra être indiqué dans la documentation et les messages publicitaires se rapportant aux avis;

    e) Mise en place d'une ligne d'assistance nationale sans frais à l'intention des membres du groupe, des membres de leurs familles, de leurs tuteurs ou d'autres personnes qui font des demandes de renseignements pour leur propre compte ou pour le compte de membres du groupe pour obtenir des renseignements supplémentaires et de l'assistance à l'égard des réclamations, et le numéro de cette ligne d'assistance devra être indiqué dans la documentation et les messages publicitaires se rapportant aux avis;

---

[1] Identité autochtone (9), résidence selon la géographie autochtone (10), statut d'Indien inscrit ou des traités (3), âge (20) et sexe (3) pour la population dans les ménages privés du Canada, provinces et territoires, Recensement de 2016 – Données-échantillon (25 %) (tableau), Statistique Canada, Recensement de la population de 2016, produit numéro 98-400-X2016154 au catalogue de Statistique Canada. Ottawa : date de diffusion le 25 octobre 2017.

f) Publication dans les journaux et les publications des Premières Nations partout au pays;

g) Placement de messages publicitaires télévisuels de 30 et de 60 secondes sur APTN;

h) Placement de messages publicitaires radiophoniques de 30 et de 60 secondes sur les principales stations de radio des Premières Nations dans toutes les régions concernées;

i) Placement de messages publicitaires sur les médias sociaux et en ligne pour diffusion sur les plateformes populaires, dont Facebook, Twitter et YouTube;

j) Traduction des avis en français, et déploiement d'efforts raisonnables pour traduire les avis dans les langues autochtones, à la demande des membres du groupe; et

k) Mise en place d'une ligne d'assistance sans frais pour aider les membres à soumettre leurs réclamations.

3. L'administrateur donnera un « **avis de rappel** » huit mois après la première publication de l'avis d'approbation du règlement, au moyen du même plan de notification. L'avis de rappel sera en la forme convenue raisonnablement par les parties, sur recommandation de l'administrateur, et approuvée par les tribunaux.

4. L'administrateur donnera un « **avis de réclamation tardive** » si les réclamations tardives sont autorisées. La diffusion de l'avis de réclamation tardive, le cas échéant, se fera selon le même plan de notification que celui de l'avis d'approbation du règlement et de l'avis de rappel, avec les modifications que l'administrateur juge nécessaires et que les tribunaux approuvent pour cibler les Premières Nations dont la participation est en deçà des attentes.

5. Le Canada assumera les frais de notification des avis conformément au présent plan de notification.

II. PLAN DE NOTIFICATION DU RÈGLEMENT

Sites Web

Les avocats du groupe, le défendeur et CA2 publieront sur leur site Web respectif l'avis simplifié prévu à l'ANNEXE M et l'avis détaillé prévu à l'ANNEXE M, ainsi que la traduction en français de ces documents, comme convenu par les parties;

Message publicitaire dans les médias imprimés

CA2 publiera l'avis simplifié prévu à l'ANNEXE M dans les publications suivantes, en format de 1/4 de page, dans l'édition du week-end de chaque journal : *Globe and Mail*; *National Post*; *Winnipeg Free Press; Vancouver Sun; Edmonton Sun; Calgary Herald; Saskatoon Star Phoenix; Regina Leader Post; Thunder Bay Chronicle-Journal; Toronto Star; Ottawa Citizen; Montreal Gazette;* La Presse – Montréal (édition numérique)*; Halifax Chronicle-Herald; Moncton Times and Transcript; First Nations Drum.*

Publipostage direct des avis

CA2 transmet l'avis simplifié prévu à l'ANNEXE M et l'avis détaillé prévu à l'ANNEXE M à l'Assemblée des Premières Nations et aux chefs de chaque Première Nation touchée dont l'identité est visée par, sauf pour les personnes exclues;

CA2 transmet l'avis simplifié prévu à l'ANNEXE M et l'avis détaillé prévu à l'ANNEXE M au bureau du conseil de bande ou au bureau analogue à celui-ci de chaque Première Nation touchée, sauf pour les personnes exclues, avec une demande d'affichage dans un endroit bien visible.

Ligne d'assistance sans frais

CA2 établira une ligne d'assistance nationale sans frais pour offrir de l'aide aux membres du groupe, aux membres de leur famille, à leurs tuteurs ou à d'autres personnes qui font des demandes de renseignements pour leur propre compte ou pour le compte de membres du groupe.

III. PLAN DE NOTIFICATION DE L'APPROBATION DU RÈGLEMENT

Publipostage direct des avis

Les avis doivent être imprimés et envoyés par la poste ordinaire, à chacun des endroits ou des personnes qui sont indiqués ci-dessous :

- bureau du conseil de bande ou bureau analogue à celui-ci de toutes les Premières Nations touchées, et joindre à l'avis une demande d'affichage des avis dans des endroits bien visibles ainsi qu'un nombre suffisant de copies de la documentation relative aux avis aux fins de distribution aux résidents de la collectivité;
- chef de chaque Première Nation touchée;
- Centres d'amitié associés aux Premières Nations touchées;
- conseil tribal ou conseil analogue de chaque Première Nation touchée;
- bureaux principaux et bureaux régionaux de l'Assemblée des Premières Nations;
- dans la mesure où leurs adresses sont connues, toutes les personnes membres du groupe qui sont identifiées à l'administrateur par une Première Nation dans une confirmation du conseil de bande ou autrement; et
- quiconque fait la demande d'une copie des avis d'approbation du règlement.

Lorsque les avis sont envoyés par la poste à un centre communautaire, veuillez joindre une demande d'affichage des avis dans un endroit bien visible.

Message publicitaire dans les médias imprimés

Les avis sous forme simplifiée et approuvée par le tribunal doivent être imprimés et diffuser à deux reprises, à 60 jours d'intervalle, le meilleur jour de diffusion, en format de 1/4 page et à une partie à visibilité maximale et attirant le plus grand nombre de lecteurs, dans chacune des publications indiquées ci-dessous, ou dans des publications de substitution que l'administrateur juge raisonnable :

Publication	**Portée géographique**
Globe & Mail	Nationale
National Post	Nationale
Vancouver Sun	Colombie-Britannique
Vancouver Province	Colombie-Britannique
Calgary Sun	Alberta
Calgary Herald	Alberta
Edmonton Journal	Alberta
Edmonton Sun	Alberta
Saskatoon Star Phoenix	Saskatchewan
Winnipeg Free Press	Manitoba
Winnipeg Sun	Manitoba
Regina Leader Post	Manitoba.
Thunder Bay Chronicle-Journal	Nord-ouest de l'Ontario
Toronto Star	Ontario
Ottawa Citizen	Sud-est de l'Ontario
Montreal Gazette	Québec
La Presse – Montréal (édition numérique)	Québec
Halifax Chronicle-Herald	Nouvelle-Écosse et Canada atlantique
Moncton Times and Transcript	Nouveau-Brunswick et Canada atlantique
First Nations Drum	Nationale

NationTalk	Nationale
Turtle Island News	Nationale
Windspeaker	Nationale
BC Raven's Eye	Colombie-Britannique
Alberta Sweetgrass	Alberta
Saskatchewan Sage	Saskatchewan
Ontario Birchbark	Ontario

Messages publicitaires à la radio et à la télévision et à la fonction publique

Les messages publicitaires radiophoniques, dont le contenu est essentiellement semblable à celui de l'avis simplifié approuvé par le tribunal prévu à l'ANNEXE N, doivent être diffusés sur les stations de radio desservant les régions où se trouvent les Premières Nations touchées qui sont indiquées ci-dessous, en période de grande écoute (p. ex., durant les heures de pointe du matin et de l'après-midi) :

Station	**Langue**	**Durée approximative**	**Nombre de diffusions hebdomadaire**	**Nombre total de messages publicitaires**
CBC	Anglais	60 s	1	52
Radio-Canada	Français	60 s	1	52
CKUR-FM 106.3 (Terrace, C.-B.)	Anglais	30 s	2	52
CFNR Network (C.-B.)	Anglais	30 s	2	52
CJWE-FM 88.1 FM (Calgary)	Anglais	30 s	2	52
CIWE-FM 89.3 FM (Edmonton)	Anglais	30 s	2	52
ELMNT Radio 106.5 (Toronto)	Anglais	60 s	2	52
ELMNT Radio 95.7 FM (Ottawa)	Anglais	60 s	2	52

Autres stations de radio ciblées par l'administrateur	[•]	[•]	[•]	[•]

Les messages publicitaires télévisuels, dont le contenu est essentiellement semblable à celui de l'avis simplifié approuvé par le tribunal prévu à l'ANNEXE N, doivent être diffusés sur les réseaux nationaux qui sont indiqués ci-dessous et qui ciblent le public des Premières Nations et les stations de télévision locales desservant les régions où se trouvent les Premières Nations touchées qui sont indiquées ci-dessous, aux moments où le nombre de téléspectateurs est élevé (p. ex., durant l'heure du bulletin de nouvelles du soir, l'heure de grande écoute, ou Radio-Canada Espaces autochtones) :

Station	**Langue**	**Durée approximative**	**Nombre de diffusions hebdomadaire**	**Nombre total de messages publicitaires**
APTN	Anglais	60 s	2	104
Radio-Canada Espaces autochtones	Anglais/français	30 s	2	104
Autres stations de radio ciblées par l'administrateur	[•]	[•]	[•]	[•]

Sites Web

- L'administrateur crée un site Web d'information donnant accès à des exemplaires de l'entente de règlement, du formulaire de réclamation, des questions fréquentes et d'autres ressources d'information. L'hyperlien de ce site Web devra être indiqué dans la documentation et les messages publicitaires se rapportant aux avis.

- La documentation relative aux avis devra être publiée sur les sites Web des avocats du groupe, du Canada et de l'administrateur.

Messages publicitaires sur les médias sociaux

- Les messages publicitaires en ligne ciblés, dont de courtes vidéos, devront être diffusés sur les plateformes de médias sociaux populaires, dont Facebook, Instagram, Twitter, Google Ads, TikTok, YouTube.

- Les tirages devront être ciblés géographiquement selon les membres du groupe et les personnes qui recherchent des renseignements sur les recours collectifs portant sur la qualité de l'eau potable.

- Au moins 3,5 millions tirages seront attribués selon la recommandation de l'administrateur.

Réunions communautaires

- L'administrateur devra tenir des réunions communautaires en personne et des réunions en ligne, de façon indépendante, en collaboration avec les Premières Nations membres du groupe.

- L'administrateur devra rencontrer une Première Nation membre du groupe qui en fait la demande.

- Les réunions viseront à fournir des renseignements sur l'entente de règlement et la procédure de règlement des réclamations et du temps sera accordé aux participants pour la FAQ.

- Des copies papier de la documentation relative aux avis et des formulaires de réclamations devront être mises à la disposition des participants aux réunions communautaires tenues en personne.

Communiqué de presse

- L'administrateur publiera un communiqué de presse national de Canadian Newswire (CNW) en vue d'inciter des organes de presse partout au Canada à annoncer l'approbation du règlement, si c'est le cas, et d'attirer une couverture médiatique non rémunérée.

- Le communiqué de presse comprendra le numéro sans frais et l'hyperlien du site Web.

Ligne d'assistance sans frais

L'administrateur devra établir une ligne d'assistance nationale sans frais visant à aider les membres du groupe, les membres de leur famille, leurs représentants et toute autre personne formulant des demandes de renseignements au sujet de l'entente ou requérant de l'aide pour soumettre leurs réclamations.

ANNEXE M

AVIS D'AUDITION DE L'APPROBATION DU RÈGLEMENT (FORMULAIRES DÉTAILLÉ ET SIMPLIFIÉ)

Voir ci-joint.

Avis de règlement simplifié

Visé par des avis concernant la qualité de l'eau potable dans une réserve?

Vous pourriez être concerné par un règlement proposé. Veuillez lire attentivement le présent avis.
Pour lire cet avis en anglais : [URL du site Web de l'entente]

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont approuvé le présent avis. Il ne s'agit pas d'une sollicitation d'un avocat.

Les Premières Nations et leurs membres visés par des avis concernant la qualité de l'eau potable depuis le 20 novembre 1995 poursuivent en justice le Canada pour obtenir une indemnisation dans le cadre de deux recours collectifs. Le représentant des Premières Nations et de leurs membres et le Canada sont arrivés à un règlement proposé.

Sous réserve de son approbation par les tribunaux, le règlement proposé indemniserait les Premières Nations et leurs membres admissibles. Les personnes admissibles peuvent recevoir un paiement pour les années où elles résidaient habituellement sur des terres des Premières Nations alors visées par des avis concernant la qualité de l'eau potable à long terme. Il est prévu que le montant annuel variera entre environ 1 300 $ à 2 000 $ pour les années admissibles. Des montants supplémentaires peuvent être offerts aux personnes admissibles qui ont subi certains préjudices déterminés en raison de la consommation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme, ou en raison d'un accès restreint à de l'eau traitée ou de l'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme.

Chaque Première Nation admissible qui accepte le règlement recevra 500 000 $ plus la moitié du montant payé aux personnes admissibles qui résidaient habituellement dans la réserve de cette Première Nation alors visée par un avis concernant la qualité de l'eau potable à long terme. De plus, le Canada s'engagera à déployer des efforts raisonnables pour veiller à ce que les personnes admissibles aient accès à une source fiable d'eau potable dans leurs foyers, et il consacrera au moins 6 milliards de dollars à l'infrastructure de l'eau et des eaux usées dans les réserves.

Si les tribunaux approuvent le règlement proposé, les personnes et les Premières Nations renonceront à leur droit de poursuivre le Canada pour manquement à son obligation de fournir de l'eau potable salubre dans leurs réserves. Sous réserve de l'approbation des tribunaux, les avocats seront payés par le Canada sur des fonds négociés séparément et non sur l'argent de l'indemnisation offerte.

Les tribunaux doivent d'abord approuver le règlement proposé avant que des fonds ou tout autre avantage ne soient offerts.

Si vous avez droit à une indemnité, vos droits légaux seront touchés même si vous ne faites rien.

Vous avez trois options :

1. **Vous y opposer par écrit :** vous pouvez écrire aux tribunaux si vous n'aimez pas le règlement proposé ou les honoraires des avocats et ne voulez pas qu'il soit approuvé. Si le règlement n'est pas approuvé, personne n'en bénéficiera.

2. **Vous y opposer en personne :** vous pouvez demander à comparaître devant les tribunaux pour expliquer pourquoi vous n'aimez pas le règlement proposé ou les honoraires des avocats le 7 décembre 2021, en personne à la Cour fédérale, à Ottawa, ou par vidéoconférence. Vous pouvez contacter la Cour fédérale pour obtenir les détails sur la vidéoconférence. Si le règlement n'est pas approuvé, personne n'en bénéficiera.

3. **Ne rien faire :** vous renoncer à tout droit que vous avez de contester le règlement proposé.

Si vous souhaitez vous opposer au règlement proposé ou comparaître à l'audition, vous devez agir au plus tard le 23 novembre 2021.

Si vous êtes un résident des Premières Nations suivantes : Nation des Oneidas de la Thames; Bande de Deer Lake; Première Nation de Mitaanjigamiing; North Caribou Lake; et Nation crie de Ministikwan Lake, vous pourriez vous exclure de ces recours collectifs en écrivant à l'administrateur du règlement au plus tard le [•date 45 jours après la première publication de l'avis].

Pour en apprendre davantage sur vos options et pour déterminer si vous ou votre Première Nation êtes inclus, veuillez visiter le [•URL du site Web de l'entente] ou composer le [• numéro de téléphone de l'administrateur].

Renseignements supplémentaires pour les Premières Nations :

Les Premières Nations admissibles ne recevront une indemnité que si elles acceptent le règlement proposé au plus tard le [•date]. Les Premières Nations qui n'acceptent pas le règlement proposé au plus tard le [•date] ne sont admissibles à aucun des avantages prévus par l'entente de règlement.

Pour obtenir de plus amples renseignements sur la façon dont une Première Nation peut accepter l'entente de règlement, veuillez visiter le [•URL du site Web de l'entente] ou composer le [•numéro de téléphone de l'administrateur].

Avis de règlement détaillé

Visé par des avis concernant la qualité de l'eau potable dans une réserve?

Vous pourriez être concerné par un règlement proposé. Veuillez lire attentivement le présent avis.
Pour lire cet avis en anglais : [•URL du site Web de l'entente]

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont approuvé le présent avis. Il ne s'agit pas d'une sollicitation d'un avocat.

Les Premières Nations et leurs membres visés par des avis concernant la qualité de l'eau potable depuis le 20 novembre 1995 poursuivent en justice le Canada pour obtenir une indemnisation dans le cadre de deux recours collectifs. Le représentant des Premières Nations et de leurs membres et le Canada sont arrivés à un règlement proposé.

Sous réserve de son approbation par les tribunaux, le règlement proposé indemniserait les Premières Nations et leurs membres admissibles. Les personnes admissibles peuvent recevoir un paiement pour les années où elles résidaient habituellement sur des terres des Premières nation alors visées par des avis concernant la qualité de l'eau potable à long terme. Il est prévu que le montant annuel variera entre environ 1 300 $ à 2 000 $ pour les années admissibles. Des montants supplémentaires peuvent être offerts aux personnes admissibles qui ont subi certains préjudices déterminés en raison de la consommation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme, ou en raison d'un accès restreint à de l'eau traitée ou de l'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme.

Chaque Première Nation admissible qui accepte le règlement recevra 500 000 $ plus la moitié du montant payé aux personnes admissibles qui résidaient habituellement dans la réserve de cette Première Nation alors visée par un avis concernant la qualité de l'eau potable à long terme. De plus, le Canada s'engagera à déployer des efforts raisonnables pour veiller à ce que les personnes admissibles aient un accès à une source fiable d'eau potable dans leurs foyers, et il consacrera au moins 6 milliards de dollars à l'infrastructure de l'eau et des eaux usées dans les réserves.

Si les tribunaux approuvent le règlement proposé, les personnes et les Premières Nations renonceront à leur droit de poursuivre le Canada pour manquement à son obligation de fournir de l'eau potable salubre dans leurs réserves. Sous réserve de l'approbation des tribunaux, les avocats seront payés par le Canada sur des fonds négociés séparément et non sur l'argent de l'indemnisation offerte.

Les tribunaux doivent d'abord approuver le règlement proposé avant que des fonds ou tout autre avantage ne soient offerts.

Si vous avez droit à une indemnité, vos droits légaux seront touchés même si vous ne faites rien.

Vous avez trois options :

1. **Vous y opposer par écrit :** vous pouvez écrire aux tribunaux si vous n'aimez pas le règlement proposé ou les honoraires des avocats et ne voulez pas qu'il soit approuvé. Si le règlement n'est pas approuvé, personne n'en bénéficiera.

2. **Vous y opposer en personne :** vous pouvez demander à comparaître devant les tribunaux pour expliquer pourquoi vous n'aimez pas le règlement proposé ou les honoraires des avocats le 7 décembre 2021, en personne à la Cour fédérale, à Ottawa, ou par vidéoconférence. Vous pouvez contacter la Cour fédérale pour obtenir les détails sur la vidéoconférence. Si le règlement n'est pas approuvé, personne n'en bénéficiera.

3. **Ne rien faire :** vous renoncer à tout droit que vous avez de contester le règlement proposé.

Si vous souhaitez vous opposer au règlement proposé ou comparaître à l'audition, vous devez agir au plus tard le 23 novembre 2021.

Si vous êtes un résident des Premières Nations suivantes : Nation des Oneidas de la Thames; Bande de Deer Lake; Première Nation de Mitaanjigamiing; North Caribou Lake; et Nation crie de Ministikwan Lake, vous pourriez vous exclure de ces recours collectifs en écrivant à l'administrateur du règlement au plus tard le [•date].

Renseignements supplémentaires pour les Premières Nations :

Les Premières Nations admissibles ne recevront une indemnité que si elles acceptent le règlement proposé au plus tard le [•date]. Les Premières Nations qui n'acceptent pas le règlement proposé au plus tard le [•date] ne sont admissibles à aucun des avantages prévus par l'entente de règlement.

Le présent avis explique vos droits et options et la manière de les exercer.

INFORMATION DE BASE

POURQUOI SUIS-JE AVISÉ DE CE RÈGLEMENT PROPOSÉ?

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont approuvé le présent avis pour vous informer du règlement proposé et de vos options avant que les tribunaux ne décident d'approuver ou non le règlement. Un avis est donné aux Premières Nations et à leurs membres qui pourraient être concernés par le règlement proposé.

QU'EST-CE QU'UN RECOURS COLLECTIF?

Dans un recours collectif, une ou plusieurs personnes appelées « **demandeurs** » ou « **représentants demandeurs** » introduisent une action pour le compte de personnes qui ont des réclamations semblables. Toutes ces personnes sont appelées collectivement le « groupe » ou les « membres du groupe ». Les tribunaux statuent sur les questions pour l'ensemble des intéressés.

Les représentants demandeurs devant la Cour du Banc de la Reine du Manitoba sont la Nation des Cris de Tataskweyak et la cheffe Doreen Spence.

Les représentants demandeurs devant la Cour fédérale du Canada sont i) la Première Nation de Curve Lake et la cheffe Emily Whetung et ii) la Première Nation de Neskantaga, le chef Wayne Moonias et l'ancien chef Christopher Moonias.

Le Canada est le défendeur dans les deux recours collectifs. Le Canada est représenté par le procureur général du Canada.

QUE SONT LES AVIS CONCERNANT LA QUALITÉ DE L'EAU POTABLE?

Les avis concernant la qualité de l'eau potable sont émis pour informer les gens de ne pas boire l'eau qui pourrait être insalubre. Les avis concernant la qualité de l'eau potable comprennent des avis d'ébullition de l'eau, des avis de ne pas boire et des avis de non-utilisation.

EN QUOI CONSISTENT LES RECOURS COLLECTIFS?

Les représentants allèguent que le Canada n'a pas remédié au problème des avis concernant la qualité de l'eau potable à long terme dans les réserves des Premières Nations dans l'ensemble du Canada. La principale allégation est que le Canada a manqué à ses obligations envers les Premières Nations et leurs membres en ne veillant pas à ce que les collectivités des réserves aient accès à de l'eau salubre.

POURQUOI Y A-T-IL UN RÈGLEMENT PROPOSÉ?

Les représentants demandeurs et le Canada ont convenu d'un règlement proposé. En convenant d'un règlement proposé, les parties évitent les frais et les incertitudes d'un procès et les retards dans l'obtention du jugement, et les membres du groupe reçoivent les avantages décrits dans le présent avis (sous réserve de l'approbation du règlement proposé par les tribunaux).

Les représentants demandeurs et leurs avocats estiment que le règlement proposé est dans l'intérêt véritable de tous les membres du groupe.

QUI EST INCLUS DANS LE RÈGLEMENT PROPOSÉ?

QUELLES PERSONNES SONT INCLUSES DANS LE GROUPE?

Sont incluses dans le groupe les personnes :

1. qui étaient vivantes le 20 novembre 2017;

2. qui sont membres d'une bande, au sens de la *Loi sur les Indiens*, ou des peuples autochtones du Canada, sauf les Inuits et les Métis du Canada, qui sont parties à un traité moderne (une « **Première Nation** »), dont les terres sont visées par cette loi, par la *Loi sur la gestion des terres des premières nations* ou par un traité moderne (les « **terres des Premières Nations** »); et

3. qui pendant au moins un an entre le 20 novembre 1995 et le 30 juin 2021, résidaient habituellement sur des terres des Premières Nations visées par un avis concernant la qualité de l'eau potable (qu'il s'agisse notamment d'un avis d'ébullition de l'eau, d'un avis de ne pas boire ou d'un avis de non-utilisation) qui a duré au moins un an entre le

20 novembre 1995 et le 30 juin 2021 (les « **Premières Nations touchées** ») alors qu'un tel avis concernant la qualité de l'eau potable d'au moins un an était en vigueur.

Les personnes qui sont incluses dans le groupe ont droit à une indemnité même si leur Première Nation, ou la Première Nation sur les terres des Premières Nations de laquelle elles résidaient, n'accepte pas l'entente.

À QUI PEUVENT S'ADRESSER LES PERSONNES QUI ONT DES QUESTIONS?

L'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou au numéro de téléphone [•numéro de téléphone de l'administrateur].

QUELLES SONT LES PREMIÈRES NATIONS INCLUSES DANS LE GROUPE?

Les Premières Nations touchées ne sont admissibles à une indemnité que si elles acceptent le règlement proposé. Toute Première Nation touchée qui souhaite participer au règlement doit approuver le règlement par voie d'une résolution d'acceptation du conseil de bande et en fournir une copie à l'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou à l'adresse postale [•adresse postale de l'administrateur].

Les Premières Nations doivent accepter le règlement proposé au plus tard le [•date for Acceptance Deadline] pour pouvoir y participer. L'administrateur du règlement peut vous fournir le modèle de résolution d'acceptation du conseil de bande qui est nécessaire pour accepter le règlement proposé.

À QUI PEUVENT S'ADRESSER LES PREMIÈRES NATIONS QUI ONT DES QUESTIONS?

L'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou au numéro de téléphone [•numéro de téléphone de l'administrateur].

QUELS SONT LES AVANTAGES DU RÈGLEMENT?

QUELLE INDEMNITÉ SERA VERSÉE EN VERTU DU RÈGLEMENT PROPOSÉ SI LES TRIBUNAUX L'APPROUVENT?

Les personnes peuvent recevoir un paiement pour chaque année où elles résidaient habituellement sur des terres des Premières Nations alors visées par un avis concernant la qualité de l'eau potable à long terme. Le montant annuel devrait varier de 1 300 $ à 2 000 $ selon le type d'avis et l'éloignement des terres des Premières Nations. Ces montants sont assujettis à des délais de prescription : les personnes qui ont atteint l'âge de 18 ans avant le 20 novembre 2013 ne sont admissibles à une indemnité qu'à compter du 20 novembre 2013, à moins qu'elles n'aient été incapables en raison de leur état physique, mental ou psychologique d'introduire une instance à l'égard de leur réclamation avant le 20 novembre 2013.

Les personnes qui ont subi des préjudices particuliers peuvent avoir droit à une indemnité supplémentaire.

Les Premières Nations touchées qui acceptent le règlement proposé recevront 500 000 $ plus 50 % des sommes versées aux personnes pour les avis concernant la qualité de l'eau potable dans leurs réserves.

Pour obtenir de plus amples détails, veuillez consulter le règlement proposé ici : [•URL].

QUELS SONT LES AUTRES AVANTAGES POUR LES PREMIÈRES NATIONS ET LEURS MEMBRES DANS LE RÈGLEMENT PROPOSÉ?

1. Le Canada a convenu de déployer tous les efforts raisonnables pour contribuer à l'élimination des avis concernant la qualité de l'eau potable à long terme qui visent le groupe.

2. Le Canada a convenu de déployer tous les efforts raisonnables pour veiller à ce que les membres du groupe qui vivent dans les réserves aient un accès à une source fiable d'eau potable dans leurs foyers. Le Canada consacrera au moins 6 milliards de dollars d'ici le 31 mars 2030 à la mise en œuvre de cet engagement en finançant le coût réel de la construction, de l'amélioration, de l'exploitation et de l'entretien de l'infrastructure de l'eau dans les réserves.

3. Le Canada a convenu d'un mécanisme extrajudiciaire de règlement des différends afin de déterminer quelles autres mesures sont raisonnablement nécessaires pour aider les personnes à avoir un accès à une source fiable d'eau potable dans leurs foyers.

4. Le Canada a convenu de déployer tous les efforts raisonnables pour abroger la *Loi sur la salubrité de l'eau potable des Premières Nations*, L.C. 2013, ch. 21 d'ici le 31 mars 2022 et pour la remplacer par une loi qui contribue à l'amélioration de l'eau potable dans les réserves des Premières Nations.

5. Le Canada a convenu de verser 20 millions de dollars pour la création d'un comité consultatif des Premières Nations sur l'eau potable salubre.

6. Le Canada a convenu de mettre 9 millions de dollars à la disposition des Premières Nations pour le financement d'initiatives en matière de gouvernance et l'établissement d'une réglementation.

Pour obtenir de plus amples détails, veuillez consulter le règlement proposé ici : [•URL].

QUAND LES PERSONNES ET LES PREMIÈRES NATIONS RECEVRONT-ELLES UNE INDEMNITÉ?

Une indemnité ne sera payée que si les tribunaux approuvent le règlement proposé. L'indemnité de base des Premières Nations sera payée dans les 90 jours suivant la date de l'ordonnance d'approbation du règlement en sa forme définitive. Le paiement des autres indemnités aux personnes et aux Premières Nations ne commencera qu'un an après la date de l'ordonnance d'approbation du règlement en sa forme définitive.

COMMENT LES PERSONNES ET LES PREMIÈRES NATIONS RECEVRONT-ELLES UNE INDEMNITÉ?

Les personnes et les Premières Nations admissibles à une indemnité doivent soumettre leurs réclamations à l'administrateur du règlement pour recevoir un paiement. Aucun formulaire de réclamation ne sera disponible avant que les tribunaux n'approuvent le règlement proposé.

COMMENT LES AVOCATS SERONT-ILS PAYÉS?

Les avocats qui représentent les demandeurs demanderont aux tribunaux d'accepter que le Canada puisse les payer sur des fonds négociés séparément qui ne seront pas déduits des sommes devant servir à indemniser des personnes ou des Premières Nations. Le montant de ces fonds s'élève à 53 millions de dollars au titre des honoraires et débours, taxes comprises, en sus des 5 millions de dollars au titre des services juridiques continus.

Les avocats ne seront pas payés tant que les tribunaux n'auront pas statué sur le caractère juste et raisonnable des honoraires réclamés. Les tribunaux décideront du montant que les avocats devraient recevoir.

QU'EST-CE QUE J'ABANDONNE DANS LE RÈGLEMENT PROPOSÉ?

Si les tribunaux approuvent le règlement, vous renoncerez à votre droit de poursuivre le Canada pour les réclamations réglées par le règlement proposé. Cela signifie que vous ne pourrez pas poursuivre le Canada en justice pour des préjudices subis avant le 20 juin 2021 en raison du manquement du Canada de fournir de l'eau potable salubre dans votre réserve.

Les Premières Nations qui n'acceptent pas le règlement proposé ne sont pas (contrairement à leurs membres) liées par celui-ci.

PUIS-JE M'EXCLURE DU RÈGLEMENT PROPOSÉ?

Les personnes ne peuvent pas s'exclure du règlement sans l'approbation des tribunaux. Les avocats du groupe n'aideront aucune personne à s'exclure. Les personnes qui souhaitent s'exclure devraient consulter un autre avocat.

Toutefois, si vous êtes un résident des Premières Nations suivantes : Nation des Oneidas de la Thames; Bande de Deer Lake; Première Nation de Mitaanjigamiing; North Caribou Lake; et Nation crie de Ministikwan Lake, vous pourriez vous exclure de ces recours collectifs en écrivant à l'administrateur du règlement au plus tard le [•date 45 jours après la première publication de l'avis]..

Les Premières Nations ne sont pas obligées d'accepter le règlement proposé. Si une Première Nation n'accepte pas le règlement proposé, le règlement proposé ne touchera pas cette Première Nation.

QUI ME REPRÉSENTE?

QUI SONT LES AVOCATS QUI ME REPRÉSENTENT?

Les représentants demandeurs et le groupe sont représentés par McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townsend LLP (les « **avocats du groupe** »). Vous pouvez communiquer avec les avocats du groupe à [•coordonnées de la personne-ressource].

DOIS-JE PAYER LES AVOCATS DU GROUPE?

Non. Les avocats du groupe demanderont aux tribunaux d'approuver leurs honoraires.

ET SI JE VEUX MON PROPRE AVOCAT?

Si vous souhaitez retenir les services de votre propre avocat, vous pouvez le faire à vos frais.

COMMENT PUIS-JE M'OPPOSER AU RÈGLEMENT PROPOSÉ?

COMMENT PUIS-JE DIRE AUX TRIBUNAUX QUE JE N'AIME PAS LE RÈGLEMENT PROPOSÉ?

Si vous n'aimez pas une partie du règlement proposé, y compris les honoraires des avocats, vous pouvez vous y opposer. Les tribunaux tiendront compte de votre point de vue. Pour s'opposer, vous devez présenter un formulaire d'opposition comprenant les éléments suivants :

1. vos nom, adresse, numéro de téléphone et adresse de courrier électronique;
2. une déclaration indiquant que vous vous opposez au règlement proposé;
3. les raisons pour lesquelles vous vous opposez au règlement proposé;
4. la Première Nation dont vous êtes membre et la réserve dans laquelle vous résidez habituellement; et
5. votre signature.

Vous devez envoyer votre opposition par courriel ou par la poste au plus tard le 23 novembre 2021 à l'adresse de courrier électronique [•adresse de courrier électronique des avocats du groupe] ou à l'adresse postale [•adresse postale des avocats du groupe].

QUAND ET OÙ LES TRIBUNAUX DÉCIDERONT-ILS D'APPROUVER OU NON LE RÈGLEMENT PROPOSÉ?

Les tribunaux tiendront une audition conjointe les 7, 8 et 9 décembre 2021. Vous pouvez y assister en personne à la Cour fédérale, à Ottawa, ou y participer par vidéoconférence [• ou téléconférence].

DOIS-JE COMPARAÎTRE POUR M'OPPOSER?

Non. Si vous envoyez une opposition, vous n'avez pas à comparaître en cour. Les tribunaux tiendront compte des oppositions reçues dans les délais, même si vous ne comparaissez pas à l'audition. Vous ou votre avocat pouvez y assister en personne à la Cour fédérale, à Ottawa, ou y participer par vidéoconférence [• ou téléconférence] à vos frais.

PUIS-JE PRENDRE LA PAROLE À L'AUDITION?

Vous pouvez demander aux tribunaux la permission de prendre la parole à l'audition d'approbation. Pour ce faire, vous devez déposer un avis d'opposition et indiquer que vous souhaitez prendre la parole. Les tribunaux entendront les objections le 7 décembre 2021.

ET SI JE NE FAIS RIEN?

Les personnes qui sont admissibles au règlement proposé et qui ne font rien seront liées par le règlement si les tribunaux l'approuvent. Ces personnes seront admissibles à une indemnité, mais renonceront à leur droit de s'opposer au règlement.

Les Premières Nations qui sont admissibles au règlement proposé et qui ne font rien ne seront pas liées par le règlement proposé si les tribunaux l'approuvent. Ces Premières Nations ne seront pas admissibles à une indemnité et renonceront à leur droit de s'opposer au règlement.

Si le règlement est approuvé, les personnes, ainsi que les Premières Nations, qui acceptent le règlement, renonceront à leur droit de poursuivre le Canada pour manquement à son obligation de fournir de l'eau potable salubre dans leurs réserves.

COMMENT LES PREMIÈRES NATIONS ACCEPTENT-ELLES LE RÈGLEMENT PROPOSÉ?

COMMENT LES PREMIÈRES NATIONS ACCEPTENT-ELLES LE RÈGLEMENT PROPOSÉ?

Les Premières Nations qui sont admissibles au règlement proposé doivent l'approuver par voie d'une résolution d'acceptation du conseil de bande et en fournir une copie à l'administrateur du règlement au plus tard le [•date].

De plus amples renseignements, y compris un modèle de résolution d'acceptation du conseil de bande, sont présentés ici : [•URL].

Vous pouvez également consulter les avocats du groupe à [•coordonnées de la personne-ressource].

À QUI DOIVENT S'ADRESSER LES PREMIÈRES NATIONS POUR ADHÉRER AU RÈGLEMENT PROPOSÉ?

Les Premières Nations qui ont des questions devraient s'adresser aux avocats du groupe à [•coordonnées de la personne-ressource].

Les Premières Nations qui ont adopté une résolution d'acceptation du conseil de bande doivent en fournir une copie à l'administrateur du règlement au plus tard le [•date] à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou à l'adresse postale [•adresse postale de l'administrateur].

ET SI J'AI BESOIN DE PLUS AMPLES RENSEIGNEMENTS?

À QUI DOIS-JE M'ADRESSER POUR OBTENIR DE PLUS AMPLES RENSEIGNEMENTS?

Vous pouvez communiquer avec l'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou à l'adresse postale [•adresse postale de l'administrateur].

Vous pouvez également communiquer avec les avocats du groupe à [•coordonnées de la personne-ressource].

ANNEXE N
AVIS D'APPROBATION DU RÈGLEMENT
(FORMULAIRES DÉTAILLÉ ET SIMPLIFIÉ)

Voir ci-joint.

Avis d'approbation du règlement simplifié

Règlement des recours collectifs sur les avis concernant la qualité de l'eau potable des Premières Nations

Vous pourriez avoir droit à une indemnité. Veuillez lire attentivement le présent avis.
Pour lire cet avis en anglais : [•URL du site Web de l'entente]

Les tribunaux ont approuvé un règlement entre le Canada et certaines Premières Nations et leurs membres qui ont été visés par des avis concernant la qualité de l'eau potable à long terme de 1995 à 2021.

Qui est inclus dans le règlement?

Sont incluses dans le groupe les personnes :

1. qui étaient vivantes le 20 novembre 2017;

2. qui sont membres d'une bande, au sens de la *Loi sur les Indiens*, ou des peuples autochtones du Canada, sauf les Inuits et les Métis du Canada, qui sont parties à un traité moderne (une « **Première Nation** »), dont les terres sont visées par cette loi, par la *Loi sur la gestion des terres des premières nations* ou par un traité moderne (les « **terres des Premières Nations** »); et

3. qui pendant au moins un an entre le 20 novembre 1995 et le 30 juin 2021, résidaient habituellement sur des terres des Premières Nations visées par un avis concernant la qualité de l'eau potable (qu'il s'agisse notamment d'un avis d'ébullition de l'eau, d'un avis de ne pas boire ou d'un avis de non-utilisation) qui a duré au moins un an entre le 20 novembre 1995 et le 30 juin 2021 (les « **Premières Nations touchées** ») alors qu'un tel avis concernant la qualité de l'eau potable d'au moins un an était en vigueur.

Les personnes qui sont incluses dans le groupe ont droit à une indemnité même si leur Première Nation, ou la Première Nation sur les terres des Premières Nations de laquelle elles résidaient, n'accepte pas le règlement.

Les Premières Nations touchées sont incluses si elles acceptent le règlement au plus tard le [•date]. Les Premières Nations touchées qui n'acceptent pas le règlement d'ici là ne seront pas indemnisées.

Que prévoit le règlement?

Les personnes recevront un paiement pour chaque année où elles résidaient habituellement sur des terres des Premières Nations alors visées par un avis concernant la qualité de l'eau potable. Le montant annuel devrait varier de 1 300 $ et 2 000 $ pour les années admissibles, selon le type d'avis et l'éloignement des terres des Premières Nations. Ces montants sont assujettis à des délais de prescription. Les personnes qui ont subi des préjudices particuliers peuvent avoir droit à une indemnité supplémentaire.

Les Premières Nations touchées qui acceptent le règlement recevront 500 000 $ plus 50 % des sommes versées aux personnes pour les avis concernant la qualité de l'eau potable dans leurs réserves.

Le Canada doit également prendre d'autres mesures pour lever les avis concernant la qualité de l'eau potable à long terme et veiller à ce que les personnes aient accès à une source fiable d'eau potable dans leurs foyers. Le Canada consacrera au moins 6 milliards de dollars à l'infrastructure de l'eau et des eaux usées dans les réserves. Les personnes qui sont mécontentes des efforts du Canada peuvent recourir à un mécanisme extrajudiciaire de règlement des différends.

Comment puis-je réclamer de l'argent?

Les personnes doivent soumettre un formulaire de réclamation, ou leur conseil de bande peut soumettre une résolution, confirmant qu'elles résidaient habituellement sur les terres des Premières Nations de cette Première Nation alors visées par un avis concernant la qualité de l'eau potable à long terme. Les Premières Nations doivent accepter le règlement et en informer l'administrateur du règlement. Pour afficher et soumettre des formulaires de réclamation, veuillez visiter le [•URL].

Pour obtenir de plus amples renseignements, veuillez visiter le [•URL du site Web de l'entente] ou composer le [•numéro de téléphone de l'administrateur].

Avis d'approbation du règlement détaillé

Règlement des recours collectifs sur les avis concernant la qualité de l'eau potable des Premières Nations

Vous pourriez avoir droit à une indemnité. Veuillez lire attentivement le présent avis.
Pour lire cet avis en anglais : [•URL du site Web de l'entente]

Les tribunaux ont approuvé un règlement entre le Canada et certaines Premières Nations et leurs membres qui ont été visés par des avis concernant la qualité de l'eau potable à long terme de 1995 à 2021.

Les Premières Nations et leurs membres visés par des avis concernant la qualité de l'eau potable depuis le 20 novembre 1995 poursuivent en justice le Canada pour obtenir une indemnisation dans le cadre de deux recours collectifs. La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont approuvé un règlement dans le cadre des recours collectifs. Le règlement indemnise les Premières Nations et leurs membres admissibles.

Le présent avis explique qui est admissible à une indemnité et comment réclamer celle-ci. Les personnes qui ne réclament pas une indemnité au plus tard le [•date] et les Premières Nations qui n'acceptent pas le règlement au plus tard le [•date] ne recevront aucune indemnité.

INFORMATION DE BASE

POURQUOI SUIS-JE AVISÉ DU RÈGLEMENT?

La Cour du Banc de la Reine du Manitoba et la Cour fédérale du Canada ont approuvé le règlement le [•date]. Elles ont également approuvé le présent avis pour vous informer du règlement et de la façon dont vous pouvez réclamer une indemnité.

QUI EST INCLUS DANS LE RÈGLEMENT?

QUELLES PERSONNES SONT INCLUSES DANS LE GROUPE?

Sont incluses dans le groupe les personnes :

1. qui étaient vivantes le 20 novembre 2017;

2. qui sont membres d'une bande, au sens de la *Loi sur les Indiens*, ou des peuples autochtones du Canada, sauf les Inuits et les Métis du Canada, qui sont parties à un traité moderne (une « **Première Nation** »), dont les terres sont visées par cette loi, par la *Loi sur la gestion des terres des premières nations* ou par un traité moderne (les « **terres des Premières Nations** »); et

3. qui pendant au moins un an entre le 20 novembre 1995 et le 30 juin 2021, résidaient habituellement sur des terres des Premières Nations visées par un avis concernant la qualité de l'eau potable (qu'il s'agisse notamment d'un avis d'ébullition de l'eau, d'un avis de ne pas boire ou d'un avis de non-utilisation) qui a duré au moins un an entre le 20 novembre 1995 et le 30 juin 2021 (les « **Premières Nations touchées** »)

alors qu'un tel avis concernant la qualité de l'eau potable d'au moins un an était en vigueur.

Les personnes qui sont incluses ont droit à une indemnité même si leur Première Nation, ou la Première Nation sur les terres des Premières Nations de laquelle elles résidaient, n'accepte pas le règlement.

À QUI PEUVENT S'ADRESSER LES PERSONNES QUI ONT DES QUESTIONS?

L'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou au numéro de téléphone [•numéro de téléphone de l'administrateur].

QUELLES SONT LES PREMIÈRES NATIONS INCLUSES DANS LE RÈGLEMENT?

Les Premières Nations touchées ne sont admissibles à une indemnité que si elles acceptent le règlement. Toute Première Nation touchée qui souhaite participer au règlement doit accepter le règlement par voie d'une résolution d'acceptation du conseil de bande et en fournir une copie à l'administrateur du règlement à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou à l'adresse postale [•adresse postale de l'administrateur].

Les Premières Nations touchées doivent accepter le règlement au plus tard le [•date] pour pouvoir y participer. L'administrateur du règlement peut vous fournir le modèle de résolution d'acceptation du conseil de bande qui est nécessaire pour accepter le règlement.

À QUI PEUVENT S'ADRESSER LES PREMIÈRES NATIONS QUI ONT DES QUESTIONS?

Les avocats du groupe à [•coordonnées de la personne-ressource].

COMMENT PUIS-JE OBTENIR UNE INDEMNITÉ?

QU'EST-CE QUE LES MEMBRES DU GROUPE PEUVENT OBTENIR?

Les personnes peuvent recevoir un paiement pour chaque année où elles résidaient habituellement sur des terres des Premières Nations alors visées par un avis concernant la qualité de l'eau potable à long terme. Le montant devrait varier d'environ 1 300 $ à 2 000 $ pour chaque année admissible, selon le type d'avis et l'éloignement des terres des Premières Nations. Ces montants sont assujettis à des délais de prescription : les personnes qui ont atteint l'âge de 18 ans avant le 20 novembre 2013 ne sont admissibles à une indemnité qu'à compter du 20 novembre 2013, à moins qu'elles n'aient été incapables en raison de leur état physique, mental ou psychologique d'introduire une instance à l'égard de leur réclamation avant le 20 novembre 2013.

Les personnes qui ont subi des préjudices particuliers peuvent avoir droit à une indemnité supplémentaire.

Les Premières Nations touchées qui acceptent le règlement recevront 500 000 $ plus 50 % des sommes versées aux personnes pour les avis concernant la qualité de l'eau potable dans leurs réserves.

Pour obtenir de plus amples détails, veuillez consulter le règlement ici : [•URL].

QUELS SONT LES AUTRES AVANTAGES POUR LES PREMIÈRES NATIONS ET LEURS MEMBRES DANS LE RÈGLEMENT?

1. Le Canada a convenu de déployer tous les efforts raisonnables pour contribuer à l'élimination des avis concernant la qualité de l'eau potable à long terme qui visent le groupe.

2. Le Canada a convenu de déployer tous les efforts raisonnables pour veiller à ce que les membres du groupe qui vivent dans les réserves aient un accès à une source fiable d'eau potable dans leurs foyers. Le Canada consacrera au moins 6 milliards de dollars d'ici le 31 mars 2030 à la mise en œuvre de cet engagement en finançant le coût réel de la construction, de l'amélioration, de l'exploitation et de l'entretien de l'infrastructure de l'eau dans les réserves.

3. Le Canada a convenu d'un mécanisme extrajudiciaire de règlement des différends afin de déterminer quelles autres mesures sont raisonnablement nécessaires pour aider les personnes à avoir un accès à une source fiable d'eau potable dans leurs foyers.

4. Le Canada a convenu de déployer tous les efforts raisonnables pour abroger la *Loi sur la salubrité de l'eau potable des Premières Nations*, L.C. 2013, ch. 21 d'ici le 31 mars 2022 et pour la remplacer par une loi qui contribue à l'amélioration de l'eau potable dans les réserves des Premières Nations.

5. Le Canada a convenu de verser 20 millions de dollars pour la création d'un comité consultatif des Premières Nations sur l'eau potable salubre.

6. Le Canada a convenu de mettre 9 millions de dollars à la disposition des Premières Nations pour le financement d'initiatives en matière de gouvernance et l'établissement d'une réglementation.

Pour obtenir de plus amples détails, veuillez consulter le règlement ici : [•URL].

QUAND LES PERSONNES ET LES PREMIÈRES NATIONS RECEVRONT-ELLES UNE INDEMNITÉ?

Les personnes peuvent soumettre leurs formulaires de réclamation jusqu'au [•date]. Après l'expiration de la période de réclamation, l'administrateur du règlement paiera les réclamations d'indemnité valides.

Les Premières Nations recevront l'indemnité de base de 500 000 $ dans les 90 jours suivant la date de leur acceptation de l'entente de règlement ou, si elle est antérieure, la date de son approbation par les tribunaux. Tous les six mois, chaque Première Nation recevra un versement correspondant à 50 % des montants payés aux personnes admissibles qui résidaient habituellement sur une réserve de Première Nation alors visée par un avis concernant la qualité de l'eau potable à long terme.

COMMENT LES PERSONNES ET LES PREMIÈRES NATIONS RECEVRONT-ELLES UNE INDEMNITÉ?

Les personnes doivent soumettre un formulaire de réclamation, ou leur conseil de bande peut soumettre une résolution, confirmant qu'elles résidaient habituellement sur les terres des Premières Nations de cette Première Nation alors visées par un avis concernant la qualité de l'eau potable à long terme.

Les Premières Nations doivent accepter le règlement et en informer l'administrateur du règlement. Pour afficher et soumettre des formulaires de réclamation, veuillez visiter le [●URL].

Les personnes peuvent recevoir une indemnité même si leur Première Nation, ou la Première Nation sur les terres des Premières Nations de laquelle elles résidaient, n'accepte pas l'entente de règlement.

On peut obtenir des formulaires de réclamation ici [● URL]. Les formulaires de réclamation peuvent être soumis à l'administrateur du règlement à l'adresse de courrier électronique [●adresse de courrier électronique de l'administrateur] ou à l'adresse postale [●adresse postale de l'administrateur].

AI-JE BESOIN DE MON PROPRE AVOCAT POUR FAIRE UNE RÉCLAMATION?

Non. Les avocats du groupe vous représentent. Vous pouvez communiquer avec les avocats du groupe à [●coordonnées de la personne-ressource].

COMMENT LES AVOCATS SERONT-ILS PAYÉS?

Le Canada, plutôt que les membres du groupe, paiera les honoraires des avocats du groupe dans le cadre des recours collectifs et de l'aide qu'ils continueront d'offrir aux personnes et aux Premières Nations. Les tribunaux ont approuvé les honoraires des avocats et vous n'avez pas à verser de l'argent pour faire une réclamation.

QU'EST-CE QUE J'ABANDONNE DANS LE RÈGLEMENT?

Les membres du groupe renoncent à leur droit de poursuivre le Canada pour les réclamations réglées par le règlement. Cela signifie que vous ne pourrez pas poursuivre le Canada en justice pour des préjudices subis avant le 20 juin 2021 en raison du manquement du Canada de fournir de l'eau potable salubre dans votre réserve.

Les Premières Nations qui n'acceptent pas le règlement ne seront pas liées par celui-ci. Toutefois, les réclamations individuelles de leurs membres seront visées par le règlement.

PUIS-JE M'EXCLURE DU RÈGLEMENT?

Les personnes ne peuvent en général pas s'exclure du règlement sans l'approbation des tribunaux. Les avocats du groupe ne peuvent pas aider une personne à s'exclure du règlement. Les personnes qui souhaitent demander aux tribunaux l'autorisation de s'exclure du règlement devraient consulter un autre avocat.

Les Premières Nations ne sont pas obligées d'accepter le règlement. Si une Première Nation n'accepte pas le règlement, le règlement ne réglera pas les réclamations collectives ou communautaires de cette Première Nation.

Vous n'êtes pas tenu de soumettre une réclamation, mais si vous ne vous excluez pas du règlement et ne soumettez pas une réclamation, et qu'un conseil de bande ne fournit pas à l'administrateur du règlement la confirmation de votre résidence, vous ne recevrez aucune indemnité et vous renoncerez tout de même à votre droit de poursuivre le Canada en justice.

QUI ME REPRÉSENTE?

QUI SONT LES AVOCATS QUI ME REPRÉSENTENT?

Les représentants demandeurs et le groupe sont représentés par McCarthy Tétrault S.E.N.C.R.L., s.r.l. et Olthuis Kleer Townsend LLP (les « **avocats du groupe** »). Vous pouvez communiquer avec les avocats du groupe à [•coordonnées de la personne-ressource].

DOIS-JE PAYER LES AVOCATS DU GROUPE?

Non. Les tribunaux ont approuvé les honoraires des avocats du groupe.

ET SI JE VEUX MON PROPRE AVOCAT?

Si vous souhaitez retenir les services de votre propre avocat, vous pouvez le faire à vos frais.

COMMENT LES PREMIÈRES NATIONS ACCEPTENT-ELLES LE RÈGLEMENT?

Les Premières Nations qui sont admissibles au règlement doivent l'accepter par voie d'une résolution d'acceptation du conseil de bande et en fournir une copie à l'administrateur du règlement au plus tard le [•date].

De plus amples renseignements, y compris un modèle de résolution d'acceptation du conseil de bande, sont présentés ici : [•URL].

Vous pouvez également adresser vos questions aux avocats du groupe à [•coordonnées de la personne-ressource].

À QUI DOIVENT S'ADRESSER LES PREMIÈRES NATIONS POUR ACCEPTER LE RÈGLEMENT?

Les Premières Nations qui ont des questions devraient s'adresser aux avocats du groupe à [•coordonnées de la personne-ressource].

Les Premières Nations qui ont adopté une résolution d'acceptation du conseil de bande acceptant l'entente de règlement doivent en fournir une copie à l'administrateur du règlement au plus tard le [•date] à l'adresse de courrier électronique [•adresse de courrier électronique de l'administrateur] ou à l'adresse postale [•adresse postale de l'administrateur].

À QUI DOIS-JE M'ADRESSER POUR OBTENIR DE PLUS AMPLES RENSEIGNEMENTS?

Vous pouvez communiquer avec l'administrateur du règlement à l'adresse de courrier électronique [●adresse de courrier électronique de l'administrateur] ou à l'adresse postale [●adresse postale de l'administrateur].

Vous pouvez également communiquer avec les avocats du groupe à [●coordonnées de la personne-ressource].

ANNEXE O

MODÈLE DE L'ORDONNANCE D'AUTORISATION DE LA COUR FÉDÉRALE ET DE L'ORDONNANCE D'ATTESTATION DU MANITOBA

Voir ci-joint.

COUR FÉDÉRALE

Date :

N° de dossier : T-1673-19

Ottawa (Ontario), le [•date]

En présence de monsieur le juge Favel

ENTRE

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE CURVE LAKE et PREMIÈRE NATION DE NESKANTAGA et CHEF CHRISTOPHER MOONIAS, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE NESKANTAGA,

demandeurs,

et

PROCUREUR GÉNÉRAL DU CANADA,

défendeur.

ORDONNANCE

(Recours collectif introduit en vertu de la partie 5.1 des *Règles des Cours fédérales*, DORS/98-106)

LA PRÉSENTE REQUÊTE, présentée par les demandeurs en vue d'obtenir un jugement approuvant le règlement de la présente action conformément aux modalités de l'entente de règlement intervenue le **[•date]**, a été entendue le **[•]**, à **[•location]**.].

APRÈS LECTURE du dossier de requête des parties et des mémoires des parties;

APRÈS AUDITION de la requête présentée par les demandeurs en vue d'obtenir une ordonnance approuvant les modalités de l'entente de règlement datée du **[•date]** et jointe à la présente ordonnance en **ANNEXE A** (l'« **entente de règlement** »), y compris les observations orales des avocats des demandeurs et du défendeur ainsi que les observations orales des membres du groupe défenseurs de l'entente de règlement et des membres du groupe

opposants à l'entente de règlement ou, dans le cas de ces derniers, de l'avocat désigné par ces opposants pour formuler des observations orales pour leur compte;

LA COUR ORDONNE ce qui suit :

1. Aux fins de la présente ordonnance, les définitions de l'entente de règlement s'appliquent à la présente ordonnance et y sont intégrées.

2. L'entente de règlement est juste, raisonnable et dans l'intérêt véritable des demandeurs et du groupe.

3. L'entente de règlement (y compris toutes ses annexes) est expressément intégrée par renvoi dans la présente ordonnance et a la même force exécutoire qu'une ordonnance de la Cour.

4. L'entente de règlement sera, et elle est par les présentes, approuvée et sera mise en application conformément à la présente ordonnance et aux autres ordonnances de la Cour.

5. L'avis d'approbation du règlement sera donné conformément au plan de notification joint à la présente ordonnance en **ANNEXE B** et constituera un avis adéquat, et le meilleur avis possible dans les circonstances.

6. Les personnes énumérées à l'**ANNEXE C** se sont exclues et ne pourront plus participer à cette action.

7. Les Premières Nations membres du groupe et les personnes membres du groupe qui ne se sont pas exclues sont liées par les quittances prévues au paragraphe 10.03(1) de l'entente de règlement et la Cour déclare ceci :

> Sauf comme il est prévu dans l'entente de règlement, et en contrepartie des obligations et des responsabilités du Canada qui lui incombent en vertu de l'entente de règlement, chaque personne membre du groupe ou son exécuteur testamentaire, demandeur d'indemnité successoral ou représentant personnel pour le compte de la personne membre du groupe ou de sa succession, et chaque Première Nation membre du groupe (collectivement ci-après, les « **donneurs de quittance** ») dégage entièrement et définitivement le Canada et ses fonctionnaires, mandataires, dirigeants et employés, prédécesseurs,

successeurs et ayants cause (collectivement ci-après, les « **bénéficiaires de quittance** »), de quelque action, cause d'action, réclamation et demande de quelque nature ou type, qu'elle soit ou non connue ou prévue, que les donneurs de quittance avaient, ont aujourd'hui ou pourraient avoir à l'avenir contre les bénéficiaires de quittance à l'égard ou en raison de l'omission du Canada d'assurer ou de financer l'approvisionnement en eau potable salubre dans la ou les réserves alors visées par un avis concernant la qualité de l'eau potable à long de cette Première Nation membre du groupe, ou dans lesquelles cette personne membre du groupe était un résident habituel, dans chaque cas avant la fin de la période visée.

8. La présente ordonnance et l'entente de règlement, y compris les bénéficiaires de quittance mentionnés au paragraphe 7 ci-dessus, lient toutes les personnes membres du groupe qui ne se sont pas exclues, y compris les personnes frappées d'incapacité.

9. La présente ordonnance et l'entente de règlement, y compris les bénéficiaires de quittance mentionnés au paragraphe 7 ci-dessus, lient toutes les Premières Nations membres du groupe ayant remis un avis d'acceptation.

10. La Cour se réserve, sans que cela ait d'incidence sur le caractère définitif de la présente ordonnance, la compétence exclusive et continue à l'égard de cette action, des demandeurs, de toutes les personnes membres du groupe qui ne se sont pas exclues, de toutes les Premières Nations membres du groupe ayant remis un avis d'acceptation et du défendeur aux fins de la mise en application de l'entente de règlement.

11. Sauf comme il est indiqué ci-dessus, la présente action est abandonnée contre le défendeur sans dépens et de façon définitive.

12. La Cour peut rendre d'autres ordonnances, notamment accessoires, qu'elle juge nécessaires à la mise en application de l'entente de règlement et de la présente ordonnance.

[•date]

Monsieur le juge Favel

Nº de dossier : T-1673-19

COUR FÉDÉRALE

ENTRE

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE CURVE LAKE et PREMIÈRE NATION DE NESKANTAGA et CHEF CHRISTOPHER MOONIAS, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE NESKANTAGA,

demandeurs,

et

PROCUREUR GÉNÉRAL DU CANADA

défendeur.

ORDONNANCE

McCarthy Tétrault, S.E.N.C.R.L, s.r.l.
Toronto Dominion Bank Tower, bureau 5300
Toronto (Ontario) M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Patrick Williams LSBC#510862
pwilliams@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Alana Robert LSO#79761P
alrobert@mccarthy.ca

Téléphone : 416-601-7831
Télécopieur : 416-868-0673

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8e étage
Toronto (Ontario) M5H 3E5

Harry S. LaForme LSO#19338D
hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S
khille@oktlaw.com
Jaclyn McNamara LSO# 66694B
jmcnamara@oktlaw.com

Téléphone : 416-981-9330
Télécopieur : 416-981-9350

Avocats des demandeurs

N° de dossier de la Cour : CI-19-01-24661

BANC DE LA REINE

Winnipeg-Centre

MONSIEUR LE	)	LE [•] [•]
	)	
	)	
JUGE EN CHEF JOYAL	)	

E N T R E

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE, pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK,

demandeurs,

– et –

PROCUREUR GÉNÉRAL DU CANADA,

défendeur.

Recours collectif introduit en vertu de la *Loi sur les recours collectifs*, C.P.L.M. ch. C130

ORDONNANCE

LA PRÉSENTE MOTION, présentée par les demandeurs en vue d'obtenir un jugement approuvant le règlement de la présente action conformément aux modalités de l'entente de règlement intervenue le **[•date]**, a été entendue le **[•]**, à **[•location]**, et est jointe à la présente ordonnance en **ANNEXE A** (l'« **entente de règlement** »),

APRÈS LECTURE du dossier de motion des parties et des mémoires des parties et après audition des observations des avocats des demandeurs et du défendeur ainsi que des observations orales des avocats des membres du groupe défenseurs de l'entente de règlement et des membres du groupe opposants à l'entente de règlement ou, dans le cas de ces derniers, de l'avocat désigné par ces opposants pour formuler des observations orales pour leur compte;

APRÈS AUDITION des observations orales des avocats des demandeurs et du défendeur ainsi que les observations orales des membres du groupe défenseurs de l'entente de règlement et des membres du groupe opposants à l'entente de règlement ou, dans le cas

de ces derniers, de l'avocat désigné par ces opposants pour formuler des observations orales pour leur compte;

LA COUR ORDONNE ce qui suit :

1. Aux fins de la présente ordonnance, les définitions de l'entente de règlement s'appliquent à la présente ordonnance et y sont intégrées.

2. L'entente de règlement est juste, raisonnable et dans l'intérêt véritable des demandeurs et du groupe.

3. L'entente de règlement (y compris toutes ses annexes) est expressément intégrée par renvoi dans la présente ordonnance et a la même force exécutoire qu'une ordonnance de la Cour.

4. L'entente de règlement sera, et elle est par les présentes, approuvée et sera mise en application conformément à la présente ordonnance et aux autres ordonnances de la Cour.

5. L'avis d'approbation du règlement sera donné conformément au plan de notification joint à la présente ordonnance en **annexe B** et constituera un avis adéquat, et le meilleur avis possible dans les circonstances.

6. Les personnes énumérées à l'**annexe C** se sont exclues et ne pourront plus participer à cette action.

7. Les Premières Nations membres du groupe et les personnes membres du groupe qui ne se sont pas exclues sont liées par les quittances prévues au paragraphe 10.03(1) de l'entente de règlement et la Cour déclare ceci :

> Sauf comme il est prévu dans l'entente de règlement, et en contrepartie des obligations et des responsabilités du Canada qui lui incombent en vertu de l'entente de règlement, chaque personne membre du groupe ou son exécuteur testamentaire, demandeur d'indemnité successoral ou représentant personnel pour le compte de la personne membre du groupe ou de sa succession, et chaque Première Nation membre du groupe (collectivement ci-après, les « **donneurs de quittance** ») dégage entièrement et définitivement le Canada et ses fonctionnaires, mandataires, dirigeants et employés,

prédécesseurs, successeurs et ayants cause (collectivement ci-après, les « **bénéficiaires de quittance** »), de quelque action, cause d'action, réclamation et demande de quelque nature ou type, qu'elle soit ou non connue ou prévue, que les donneurs de quittance avaient, ont aujourd'hui ou pourraient avoir à l'avenir contre les bénéficiaires de quittance à l'égard ou en raison de l'omission du Canada d'assurer ou de financer l'approvisionnement en eau potable salubre dans la ou les réserves alors visées par un avis concernant la qualité de l'eau potable à long de cette Première Nation membre du groupe, ou dans lesquelles cette personne membre du groupe était un résident habituel, dans chaque cas avant la fin de la période visée.

8. La présente ordonnance et l'entente de règlement, y compris les bénéficiaires de quittance mentionnés au paragraphe 7 ci-dessus, lient toutes les personnes membres du groupe qui ne se sont pas exclues, y compris les personnes frappées d'incapacité.

9. La présente ordonnance et l'entente de règlement, y compris les bénéficiaires de quittance mentionnés au paragraphe 7 ci-dessus, lient toutes les Premières Nations membres du groupe ayant remis un avis d'acceptation.

10. La Cour se réserve, sans que cela ait d'incidence sur le caractère définitif de la présente ordonnance, la compétence exclusive et continue à l'égard de cette action, des demandeurs, de toutes les personnes membres du groupe qui ne se sont pas exclues, de toutes les Premières Nations membres du groupe ayant remis un avis d'acceptation et du défendeur aux fins de la mise en application de l'entente de règlement.

11. Sauf comme il est indiqué ci-dessus, la présente action est abandonnée contre le défendeur sans dépens et de façon définitive.

12. La Cour peut rendre d'autres ordonnances, notamment accessoires, qu'elle juge nécessaires à la mise en application de l'entente de règlement et de la présente ordonnance.

[•date]

Monsieur le juge en chef Joyal

N° de dossier de la Cour : CI-19-01-24661

COUR DU BANC DE LA REINE DU MANITOBA

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE, pour son propre compte et pour le compte de tous les membres de la NATION DES CRIS DE TATASKWEYAK,

demandeurs,

– et –

PROCUREUR GÉNÉRAL DU CANADA,

défendeur.

Recours collectif introduit en vertu de la *Loi sur les recours collectifs*, C.P.L.M. ch. C130

ORDONNANCE

McCarthy Tétrault, S.E.N.C.R.L, s.r.l.
Toronto Dominion Bank Tower, bureau 5300
Toronto (Ontario) M5K 1E6

John P. Brown LSO#22635H
jbrown@mccarthy.ca
Eric S. Block LSO#47479K
eblock@mccarthy.ca
H. Michael Rosenberg LSO#58140U
mrosenberg@mccarthy.ca
Patrick Williams LSBC#510862
pwilliams@mccarthy.ca
Stephanie Willsey LSO#77866J
swillsey@mccarthy.ca
Alana Robert LSO#79761P
alrobert@mccarthy.ca
Téléphone : 416-601-7831
Télécopie : 416-868-0673

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8e étage
Toronto (Ontario) M5H 3E5
Harry LaForme LSO# 19338D
hlaforme@oktlaw.com
Bryce Edwards LSO# 48271E
bedwards@oktlaw.com
Kevin Hille LSO# 57439S

khille@oktlaw.com
Jaclyn McNamara LSO# 66694B
Téléphone : 416-981-9330
Télécopie : 416-981-9350

Avocats des demandeurs

ANNEXE P

MODÈLE DE RÉSOLUTION D'ACCEPTATION DU CONSEIL DE BANDE APPROUVANT DES RÉSEAUX D'APPROVISIONNEMENT EN EAU PRIVÉS DANS LA RÉSERVE

Voir ci-joint.

[Nom de la Première Nation]

Résolution du conseil de bande

Approuvant des réseaux d'approvisionnement en eau privés dans la réserve

ATTENDU QUE certains demandeurs ont introduit l'action intitulée *Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Christopher Moonias on his own behalf and on behalf of all members of Neskantaga First Nation c. Attorney General of Canada*, portant le numéro de dossier T-1673-19 devant la Cour fédérale (l'« **action devant la Cour fédérale** »);

ATTENDU QUE certains demandeurs ont introduit l'action intitulée *Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation c. Attorney General of Canada*, portant le numéro de dossier CI-19-01-24661 devant la Cour du banc de la Reine du Manitoba (l'« **action au Manitoba** », et conjointement avec l'action devant la Cour fédérale, les « **actions** »);

ATTENDU QUE les actions ont été attestées ou autorisées par les tribunaux respectifs comme des recours collectifs;

ATTENDU QUE le procureur général du Canada et les demandeurs dans les actions ont négocié une entente de règlement (l'« **entente de règlement** ») à l'égard des actions;

ATTENDU QUE l'entente de règlement prévoit que le Canada déploie tous les efforts raisonnables pour veiller à ce que les personnes membres du groupe (au sens de l'entente de règlement) qui vivent dans des réserves (au sens de l'entente de règlement) aient un accès à une source fiable d'eau potable dans leurs foyers, que ce soit à partir d'un réseau d'approvisionnement en eau public ou d'un réseau d'approvisionnement en eau privé approuvé par voie d'une résolution du conseil de bande, y compris, notamment des réseaux sur place, qui respectent les exigences fédérales ou les normes provinciales les plus rigoureuses en matière de qualité de l'eau à domicile (l'« **engagement** »);

ATTENDU QUE [Nom du conseil des Premières Nations] (le « **conseil** ») souhaite approuver les réseaux d'approvisionnement en eau privés énumérés ci-dessous pour l'application de l'engagement par l'adoption de la présente résolution du conseil de bande;

ATTENDU QUE la présente résolution du conseil de bande ne constitue pas une reconnaissance de responsabilité du conseil de quelque façon que ce soit à l'égard des réseaux d'approvisionnement en eau privés énumérés ci-dessous;

IL EST PAR LES PRÉSENTES RÉSOLU CE QUI SUIT :

1. Pour l'application de l'engagement seulement, le conseil approuve par les présentes, sans confirmation ni acceptation de responsabilité de sa part, les réseaux d'approvisionnement en eau privés suivants :

    a. **[Indiquer ou décrire les réseaux d'approvisionnement en eau privés, y compris les puits.]**

2. Le conseil déclare par les présentes qu'il peut révoquer l'approbation énoncée au paragraphe 1 ci-dessus à tout moment.
3. Le conseil déclare par les présentes qu'il peut compléter l'approbation énoncée au paragraphe 1 ci-dessus à tout moment par l'ajout d'autres réseaux d'approvisionnement en eau.
4. Ces résolutions peuvent être signées par le chef et les membres du conseil en autant d'exemplaires pouvant se révéler nécessaires, sous forme originale ou électronique, dont chacun sera réputé être un original, et dont la totalité seront réputés constituer ensemble une seule et même résolution.

Les signataires suivants attestent et garantissent qu'un quorum du conseil a signé la présente résolution du conseil de bande, comme en font foi leurs signatures ci-dessous.

FAIT le _____ 202__.

_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	_____
[insérer le nom]	**[insérer le nom]**
_____	
[insérer le nom]	

ANNEXE Q

PLAN DE RECHERCHE D'ADRESSE DE MEMBRES DU GROUPE ADMISSIBLES

1. Si l'administrateur reçoit une confirmation du conseil de bande ou un formulaire de réclamation qui ne fournit pas d'adresse postale lisible pour une personne membre du groupe, ou qu'une personne membre du groupe n'a pas déposé de chèque ou n'a pas demandé un paiement fait conformément à l'entente dans les cent quatre-vingts (180) jours suivant l'émission de ce chèque ou de ce paiement, cette personne membre du groupe sera considérée comme un « **membre du groupe admissible disparu** », et la date à laquelle elle deviendra un membre du groupe admissible disparu sera la « **date de début de la recherche** ».

2. Pour chaque membre du groupe admissible disparu, l'administrateur effectue ou fait effectuer toutes les recherches suivantes afin de trouver les coordonnées actuelles du membre du groupe admissible disparu :

a) la base de données canadienne du Programme national sur les changements d'adresse;

b) la recherche inversée par numéro de téléphone;

c) Canada 411;

d) consulter les coordonnées de ce membre du groupe admissible disparu dans une confirmation du conseil de bande, s'il y a lieu, et faire une demande écrite ou téléphonique pour obtenir les coordonnées du membre du groupe admissible disparu auprès du bureau du conseil de bande de la Première Nation où il réside habituellement ou bien où il a résidé habituellement pour la dernière fois, le cas échéant; et

e) faire une demande écrite ou téléphonique pour obtenir les coordonnées du membre du groupe admissible disparu auprès du bureau du conseil de bande de la Première Nation dont ce membre du groupe admissible disparu est membre, si différent de l'alinéa 2d) ci-dessus.

3. Les recherches indiquées au paragraphe 2 ci-dessus seront effectuées dans les quarante-cinq (45) jours suivant la date de début de la recherche.

4. Si l'administrateur localise plus d'une nouvelle adresse postale pour un membre du groupe admissible disparu, il demandera des renseignements raisonnables pour déterminer la bonne adresse.

5. Si l'administrateur localise une nouvelle adresse postale pour un membre du groupe admissible disparu, l'administrateur émettra et postera un nouveau chèque ou un autre mode de paiement au membre du groupe admissible disparu du montant payable conformément à la présente entente, lequel chèque ou paiement sera périmé dans les quatre-vingt-dix (90) jours suivant de son émission. Si un chèque ou un autre mode de paiement avait déjà été émis au membre du groupe admissible disparu, mais qu'il n'avait pas été déposé ou réclamé, l'administrateur annulera ce paiement avant l'émission du nouveau chèque ou d'un autre mode de paiement.

6. Si l'administrateur ne trouve pas une nouvelle adresse postale pour un membre du groupe admissible disparu, mais que le formulaire de réclamation du membre du groupe admissible disparu indique qu'il réside actuellement dans une réserve, l'administrateur émettra et postera à ce membre du groupe admissible disparu, aux soins du bureau du conseil de bande ou à un autre endroit semblable dans cette réserve, un nouveau chèque ou un autre mode de paiement d'une somme payable conformément à la présente entente, lequel chèque ou paiement sera périmé dans les quatre-vingt-dix (90) jours suivant de son émission. Si un chèque ou un autre mode de paiement avait déjà été émis au membre du groupe admissible disparu, mais qu'il n'avait pas été déposé ou réclamé, l'administrateur annule ce paiement avant l'émission du nouveau chèque ou d'un autre mode paiement.

8. Si l'administrateur ne peut toujours pas trouver un membre du groupe admissible disparu malgré le respect du présent plan de recherche d'adresse de membres du groupe admissibles, et le fait que tout chèque ou paiement émis et envoyé à ce membre du groupe admissible disparu soit périmé, il doit attendre une période de cent quatre-vingts (180) jours (dont l'expiration est la « **date de fin de la recherche)** ». Si l'administrateur n'est toujours pas en mesure de trouver le membre du groupe admissible disparu à la date de fin de la recherche, la réclamation du membre du groupe admissible disparu sera entièrement et définitivement éteinte et annulée, l'administrateur n'aura aucune obligation de faire quelque paiement que ce soit à ce membre du groupe admissible disparu, et l'administrateur, le Canada, les avocats du Canada, les avocats du groupe, le comité mixte et ses membres, le comité de mise en œuvre du règlement et ses membres, le fiduciaire et le CCPNEPS sont dégagés de toute responsabilité.

N° de dossier de la Cour du Banc de la Reine du Manitoba : CI-19-01-24661

N° de dossier de la Cour fédérale : T-1673-19

PREMIER ADDENDA À L'ENTENTE DE RÈGLEMENT

LE BANC DE LA REINE, Winnipeg Centre

ENTRE :

NATION DES CRIS DE TATASKWEYAK et CHEFFE DOREEN SPENCE, pour son propre compte et pour le compte de tous les membres de LA NATION DES CRIS DE TATASKWEYAK

Demandeurs

- et -

PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Recours collectif introduit en vertu de la *Loi sur les recours collectifs*, C.P.L.M. c. C. 130

- et -

COUR FÉDÉRALE

ENTRE :

PREMIÈRE NATION DE CURVE LAKE et CHEFFE EMILY WHETUNG, pour son propre compte et pour le compte de tous les membres de la PREMIÈRE NATION DE CURVE LAKE et PREMIÈRE NATION DE NESKANTAGA et CHEF CHRISTOPHER MOONIAS, pour son propre compte et pour le compte de tous les membres de LA PREMIÈRE NATION DE NESKANTAGA

Demandeurs

- et -

PROCUREUR GÉNÉRAL DU CANADA

Défendeur

Recours collectif introduit en vertu de la partie 5.1 des *Règles des Cours fédérales*, DORS/98-106

PREMIER ADDENDA À L'ENTENTE DE RÈGLEMENT

Le présent addenda (l' « **addenda** ») est intervenu en date du 8 octobre 2021.

ATTENDU QUE :

A. La Nation des Cris de Tataskweyak et la cheffe Doreen Spence, pour leur propre compte et pour le compte de tous les membres du groupe individuels (collectivement, les « **demandeurs du recours du Manitoba** »), la Première Nation de Curve Lake et la cheffe Emily Whetung, pour leur propre compte et pour le compte de tous les membres du groupe individuels (collectivement, les « **demandeurs de la Première Nation de Curve Lake** »), la Première Nation de Neskantaga et le chef Wayne Moonias et l'ancien chef Christopher Moonias, chacun pour son propre compte et pour le compte de tous les membres du groupe individuels (collectivement, les « **demandeurs de la Première Nation de Neskantaga** », et collectivement avec les demandeurs de la Première Nation de Curve Lake, les « **demandeurs du recours fédéral** ») et Sa Majesté la Reine du chef du Canada (tous ceux qui précèdent collectivement, les « **parties** ») ont conclu une entente de règlement datée du 15 septembre 2021 (l' « **entente de règlement** »); et

B. Les parties souhaitent modifier l'entente de règlement afin de préciser la mise à disposition d'une indemnité pour préjudices déterminés;

PAR CONSÉQUENT, les parties conviennent de modifier l'entente de règlement comme suit :

1. Les termes et expressions clés utilisés dans les présentes sans y être définis ont le sens qui leur est attribué dans l'entente de règlement (en anglais seulement).

2. Le paragraphe 8.02(2) de l'entente de règlement est par les présentes modifié afin d'ajouter les mots (traduction) « L'indemnité pour préjudices déterminés ne sera versée que si le membre du groupe individuel a subi un préjudice déterminé ou les symptômes persistants d'un préjudice déterminé antérieur, tel qu'il est indiqué à l'annexe H, au cours d'une année pour laquelle des dommages-intérêts individuels seraient payables au membre du groupe individuel conformément à la formule de calcul des dommages-intérêts individuels prévue au paragraphe 8.01(2), s'il s'agissait d'une année de consultation (mais qui, pour plus de certitude, n'est pas tenue d'être une année de consultation). », à la fin du paragraphe, comme suit :

> (Traduction) Les membres du groupe individuels confirmés auront droit à une indemnité pour préjudices déterminés d'un montant indiqué à l'annexe H (l' « **indemnité pour préjudices déterminés** »), à condition que le demandeur établisse que le préjudice a été causé en raison de la consommation d'eau traitée ou d'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme ou en raison d'un accès restreint à de l'eau traitée ou de l'eau du robinet conformément à un avis concernant la qualité de l'eau potable à long terme dans le cadre du processus de réclamation et de l'annexe H. L'indemnité pour préjudices déterminés ne sera versée que si le membre du groupe individuel a subi un préjudice déterminé ou les symptômes persistants d'un préjudice déterminé antérieur, tel qu'il est indiqué à l'annexe H, au cours d'une année pour laquelle des dommages-intérêts individuels seraient payables au membre du groupe individuel conformément à la formule de calcul des dommages-intérêts individuels prévue au paragraphe 8.01(2), s'il s'agissait d'une

année de consultation (mais qui, pour plus de certitude, n'est pas tenue d'être une année de consultation).

3. Les clauses 1.12, 1.13, 1.14, 1.15, 2.01 et 2.02 de l'entente de règlement sont intégrées par renvoi dans les présentes et s'appliquent au présent addenda.

4. Le paragraphe 16.12(1) de l'entente de règlement est par les présentes modifié afin de remplacer les mots « le paragraphe 81(g.3) de la *Loi de l'impôt sur le revenu* » par « le paragraphe 81(1)(g.3) de la *Loi de l'impôt sur le revenu* ».

5. Les parties, par leurs conseillers juridiques, conviennent que le présent addenda sera intégré dans l'entente de règlement.

EN FOI DE QUOI les soussignés ont signé le présent addenda pour le compte des parties à la date indiquée au début des présentes.

POUR LES DEMANDEURS DU RECOURS DU MANITOBA ET LES DEMANDEURS DU RECOURS FÉDÉRAL

Par : 

Michael Rosenberg
Associé, McCarthy Tétrault S.E.N.C.R.L., s.r.l.
Avocat des demandeurs du recours du Manitoba et des demandeurs du recours fédéral

POUR SA MAJESTÉ LA REINE DU CHEF DU CANADA

Par : 

Scott Farlinger
Chef du contentieux, Ministère de la justice
Avocat du défendeur

APPENDIX 3

NOTICE PLAN

SCHEDULE L

NOTICE PLAN

I. OVERVIEW

Objective:

To provide clear, concise, plain-language information to the greatest practicable number of Class Members and their family members regarding:

a. the Settlement Agreement and their rights to receive compensation under it; and

b. the Claims Process and timeline.

Class Members:

The Class Consists of the following:

- Individual Class Members, consisting of an estimated 142,300 individuals who are members of the Class and have not Opted Out of the Actions.

- First Nation Class Members, consisting of First Nations that are members of the Class and provide the Administrator with notice of Acceptance. There are up to a total of 258 Impacted First Nations that could deliver notices of Acceptance and become First Nation Class Members.

Known Factors:

Known factors considered in designing this Notice Plan include:

1. The Reserves subject to Long-Term Drinking Water Advisories during the Class Period include Reserves in remote areas, posing additional communication challenges (for example, delays or limitations in delivery of mailed notice materials).

2. Education levels of Class Members vary widely, from members who have not completed high school to members with graduate-level university education.

3. Class Members speak a variety of languages, including English, French, and a number of Indigenous languages.

4. Impacted First Nations are geographically dispersed across Canada's provinces, with particular concentration in Ontario, British Columbia, and Manitoba.

5. 2016 census data indicates that approximately two thirds of First Nation people do not reside on Reserves.[1] Class Members who lived on impacted Reserves during the Class

---

1 Aboriginal Identity (9), Residence by Aboriginal Geography (10), Registered or Treaty Indian Status (3), Age (20) and Sex (3) for the Population in Private Households of Canada, Provinces and Territories, 2016 Census - 25% Sample Data (table), Statistics Canada, 2016 Census- of Population, Statistics Canada Catalogue no. 98-400-X2016154. Ottawa: Released October 25, 2017.

Period may no longer reside on the Reserve with which their Claim is associated or in the same province or territory. Some Class Members may reside outside of Canada.

Strategies:

1. CA2 will give the "**Settlement Notice**" using the same notice plan that it used to give Certification Notice, as particularized further below. The form of the Settlement Notice will be substantially as set out in Schedule M, with such reasonable modifications as CA2 may suggest, and as approved by the Courts. CA2 will disseminate the Settlement Notice in a manner that is substantially similar to the way in which it disseminated the notice of certification of the Actions.

2. The Administrator will give the "**Settlement Approval Notice**" substantially in the form set out in Schedule N, with such reasonable amendments as the Administrator may suggest, and as approved by the Courts. The Settlement Approval Notice will advise Individual Class Members of the Claims Deadline and First Nation Class Members of the need to accept the settlement agreement. The Settlement Approval Notice will be disseminated by the following methods, as particularized further below:

    a. Direct mailed notice to Class member First Nations;

    b. A national press release in two parts: one at the time of settlement approval and the second at the opening of the claims period.

    c. Live in-person and virtual community meetings for interested First Nation Class Members;

    d. Creation of an informational website providing access to copies of the Settlement Agreement, Claims Form, FAQs, and other informational resources, to be referenced in all notice materials and advertisements;

    e. Establishment of a national toll-free support line for Class Members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class Members to call for further information and support with Claims, to be cited in all notice materials and advertisements.

    f. Publication in newspapers and First Nation publications across the country

    g. Placement of 30- and 60-second television advertisements on APTN;

    h. Placement of 30- and 60-second radio advertisements on leading First Nation radio stations in all relevant regions;

    i. Social media/online advertisements to run on popular platforms, including Facebook, Twitter, and YouTube;

    j. Translation of the notice into French, and all reasonable efforts to translate notice into Indigenous languages, as requested by Class Members; and

    k. Toll-free support line to assist members in making Claims.

3. The Administrator will give a "**Reminder Notice**" eight months after first publication of Settlement Approval Notice, using the same notice plan. The Reminder Notice will be in a form to be agreed by the Parties, acting reasonably, on the advice of the Administrator, and approved by the Courts.

4. The Administrator will give a "**Late Claims Notice**" in the event that late claims are permitted. The Late Claims Notice, if any, will use the same notice plan as the Settlement Approval Notice and the Reminder Notice, modified as the Administrator advises and the Courts approve to target those First Nations where participation has fallen below expectations.

5. Canada will be responsible for the cost of giving notice in accordance with this Notice Plan.

II. SETTLEMENT NOTICE PLAN

Websites

Class Counsel, the Defendant, and CA2 shall post on their respective websites the Short Form Notice set out in Schedule M and the Long Form Notice set out in Schedule M, and the French language translations of these documents, as agreed upon by the parties;

Print Media Advertising

CA2 shall publish the Short Form Notice set out in Schedule M, in the following publications in ¼ of a page size in the weekend edition of each newspaper, if possible: Globe and Mail; National Post; Winnipeg Free Press; Vancouver Sun; Edmonton Sun; Calgary Herald; Saskatoon Star Phoenix; Regina Leader Post; Thunder Bay Chronicle-Journal; Toronto Star; Ottawa Citizen; Montreal Gazette; Montreal La Presse (digital edition); Halifax Chronicle-Herald; Moncton Times and Transcript; First Nations Drum.

Direct Mailed Notices

CA2 shall forward the Short Form Notice set out in Schedule M and Long Form Notice set out in Schedule M to the Assembly of First Nations and the Chiefs of every Impacted First Nation identified in accordance with, except for Excluded Persons;

CA2 shall CA2 shall forward the Short Form Notice set out in Schedule M and Long Form Notice set out in Schedule M to the band office or similar office of every Impacted First Nation, except for Excluded Persons, together with a request that they be posted in a prominent place.

Toll-Free Support Line

CA2 shall establish a national toll-free support line, to provide assistance to Class Members, their family, their guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

III. SETTLEMENT APPROVAL NOTICE PLAN

Direct Mailed Notices

Print notices to be mailed by regular postal mail to each of the following:

- The band office or similar office of all Impacted First Nations, requesting that the notices be posted in prominent locations, with sufficient copies of notice materials to distribute to community residents;
- The Chief of each Impacted First Nation;
- Friendship Centres associated with Impacted First Nations;
- Tribal council or similar for each Impacted First Nation;
- Head office and regional offices of the Assembly of First Nations;
- To the extent that their addresses are known, all Individual Class Members who are identified to the Administrator by a First Nation in a Band Council Confirmation or otherwise; and
- Any person who requests a copy of the Settlement Approval Notices,

Where mailed to a community hub, mailer to be accompanied by request to post the notice in a prominent location.

Print Media Advertising Print and/or online notices in Court-approved short form or display advertisements that contain relevant information and direct class members to the website. These notices will run 2-4 times in a 10 week period, 60 days apart, on the best circulation day, in 1/4 page size (or the most effective size for cost), and placed to maximize visibility and readership, in each of the following publications, or such reasonable substitutions as the Administrator may advise:

Publication	Geographical Scope
Globe & Mail	National
National Post	National
Vancouver Sun	British Columbia
Vancouver Province	British Columbia
Calgary Sun	Alberta
Calgary Herald	Alberta
Edmonton Journal	Alberta

Edmonton Sun	Alberta
Saskatoon Star Phoenix	Saskatchewan
Winnipeg Free Press	Manitoba
Winnipeg Sun	Manitoba
Regina Leader Post	Manitoba
Thunder Bay Chronicle-Journal	Northwestern Ontario
Toronto Star	Ontario
Ottawa Citizen	Southeastern Ontario
Montreal Gazette	Québec
Montreal La Presse (digital edition)	Québec
Halifax Chronicle-Herald	Nova Scotia and Atlantic Canada
Moncton Times and Transcript	New Brunswick and Atlantic Canada
First Nations Drum	National
NationTalk	National
Turtle Island News	National
Windspeaker - (online only)	National
BC Raven's Eye - (online only)	British Columbia
Sweetgrass- (online only)	Alberta
Saskatchewan Sage - (online only)	Saskatchewan
Ontario Birchbark – (online only)	Ontario

Radio and Television Advertisements and Public Service Announcements

Radio advertisements providing content substantially similar to the Court-approved Short Form Notice in Schedule N, to be run on the following radio stations serving areas in which Impacted First Nations are situated, with ads to be run at times of high listenership (e.g., morning and afternoon drive times):

Station	Language	Approximate Duration	Estimated Number of Broadcasts per Week	Total Minimum Number of Spots
CBC	English	0:60	1	52
Radio-Canada	French	0:60	1	52
CKUR-FM 106.3 (Terrace, BC)	English	0:30	2	52
CFNR Network (BC)	English	0:30	2	52
CJWE-FM 88.1 FM (Calgary)	English	0:30	2	52
CIWE-FM 89.3 FM (Edmonton)	English	0:30	2	52
ELMNT Radio 106.5 (Toronto)	English	0:60	2	52
ELMNT Radio 95.7 FM (Ottawa)	English	0:60	2	52
NCI FM (Manitoba)	English	0:30	2	52
Administrator to identify additional targeted radio stations	[•]	[•]	[•]	To be confirmed based on stations chosen

Television advertisements providing content substantially similar to the Court approved Short Form Notice in Schedule N, to be run on the following national networks focused on First Nations audiences and local television stations serving regions in which Impacted First Nations are located, at times of high viewership (e.g., evening news time, prime time, or CBC News Indigenous).

Station	Language	Approximate Duration	Estimated Number of Broadcasts per Week	Total Minimum Number of Spots
APTN	English	0:60	2	104
CBC News Indigenous	English/French	0:30	2	104
Administrator to identify additional targeted television stations	[•]	[•]	[•]	To be confirmed based on networks chosen

Websites

- Administrator to create informational website providing access to copies of the Settlement Agreement, Claims Form, FAQs, and other informational resources. Website to be referenced in all notice materials and advertisements.
- Notice materials to be posted on websites of Class Counsel, Canada, and the Administrator.

Social Media Advertising

- Targeted online advertisements, including short videos, to run on popular social media platforms, including Facebook, Instagram, Twitter, Google Ads, TikTok, YouTube.
- Impressions to be geo-targeted to Class Members and persons searching for information about drinking water class actions.
- Minimum 3.5 million impressions, to be allocated as advised by the Administrator.

Community Meetings

- Administrator to host in-person and online community meetings, both independently, and in collaboration with First Nation Class Members.
- Administrator to offer a meeting to any First Nation Class Member that requests it.
- Meetings to provide details of Settlement Agreement and Claims Process and provide time for attendee Q&A.
- Printed notice materials and Claims Forms to be made available at all in-person community meetings.

Press Release

- Administrator will issue a national press release by Canadian Newswire (CNW) to press outlets across Canada announcing settlement approval, if granted, to attract unpaid news coverage.
- The press release will include the toll-free number and website information.

Toll-Free Support Line

The Administrator shall establish a national toll-free support line, to provide assistance to Class members, their families, their representatives, and other who make inquiries about the Agreement, or who request assistance in making Claims.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	CI-19-01-24661
STYLE OF CAUSE:	TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF, AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1673-19
STYLE OF CAUSE:	CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 7-9, 2021
ORDER AND REASONS:	FAVEL J.
DATED:	DECEMBER 22, 2021

APPEARANCES:

Michael Rosenberg Eric Block John Brown Stephanie Willsey Alana Robert Harry Laforme Bryce Edwards Kevin Hille Jaclyn McNamara	FOR THE PLAINTIFFS (TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION AND CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION)

Chief Emily Whetung	FOR THE PLAINTIFF (CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE)
Catharine Moore Scott Farlinger Samar Musallam Courtney Davidson Sheila Read	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario Olthuis Kleer Townshend LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS (TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION AND CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION)
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT