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

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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 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 place 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:

> [28] 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.
>
> [30] 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.

[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. <u>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</u>. 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 <u>eligibility for compensation under Jordan's Principle orders have already been argued and answered by this</u>

> 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 tenant 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 trauma suffered 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 it 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)" (2015 CHRT 14 at para. 124, emphasis added). In this case, 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 and 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.

[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