Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and **ASSEMBLY OF FIRST NATIONS**

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

FACTUM OF THE ATTORNEY GENERAL OF CANADA
in response to
the First Nations Child and Family Caring Society of Canada's
Consultation Motion

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OVERVIEW

1. Over the past seven years, Canada has made intensive and meaningful efforts towards achieving a final resolution of this complaint with the consent of all parties. Throughout these efforts, Canada has conducted itself with integrity, honour, and a genuine intention to eliminate discrimination, implement final reforms to Canada's First Nations Child and Family Services Program (FNCFS Program) and Jordan's Principle, and move forward towards reconciliation.

2. Canada has met its consultation obligations pursuant to the Tribunal's orders at all times, as evidenced first and foremost by its extensive outreach, discussions and negotiations with the parties to advance reforms to the FNCFS Program and Jordan's Principle. Canada funded extensive First Nations-led research on an alternative FNCFS Program funding methodology, remoteness and Jordan's Principle; resolved the compensation claims that evolved in part from these proceedings through a $23.34 billion First Nations-led settlement agreement; and consented to Tribunal orders that implemented important advancements to the FNCFS Program and Jordan's Principle, which in turn improved services and supports to First Nations children and families and advanced the elimination of discrimination. Further, Canada negotiated:

a. the December 31, 2021 *Agreement-in-Principle on Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle* (the Agreement in Principle) with the First Nations Child and Family Caring Society of Canada (the Caring Society), the Assembly of First Nations (AFN), Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN);

b. the July 10, 2024 draft *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program* (Draft Final Agreement) with the AFN, COO and NAN;

c. the February 7, 2025 *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario* (Ontario Final Agreement) with COO and NAN, ratified by the NAN Chiefs and the Ontario Chiefs-in-Assembly on February 25 and 26, 2025 respectively; and

d. the February 7, 2025 *Trilateral Agreement in Respect of Reforming the 1965 Agreement* (Trilateral Agreement) with COO and NAN, ratified by the NAN Chiefs and the Ontario Chiefs-in-Assembly on February 25 and 26, 2025 respectively.

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3. Despite Canada's best efforts, the dialogic approach with the Caring Society and the AFN (collectively the Complainants) is no longer working. Despite their agreement on long-term FNCFS Program reform principles reached through the Agreement in Principle - and subsequently negotiated into the Draft Final Agreement - the Complainants are now making extensive further demands. These are well outside the terms to which they previously agreed, and beyond what is required to meet the Tribunal's reform orders.

4. Canada has met its obligations under the Tribunal's consultation orders, which do not require that Canada consult indefinitely or until the Complainants obtain the variable outcomes they seek. Rather than continuing unproductive consultations, it is in the best interests of First Nations children to move forward with implementing long-term reforms, beginning with COO and NAN's joint motion to approve the Ontario Final Agreement.[1]

PART I – STATEMENT OF FACTS

5. Canada's consultation efforts have been extensive and have exceeded the requirements of the Tribunal's consultation orders. Since Canada entered into the Consultation Protocol in 2018, and even before then, Canada engaged in significant consultative efforts.

A. Canada has meaningfully consulted and negotiated with the parties

6. Since 2016, Indigenous Services Canada (ISC) has consulted with the Caring Society and others regarding the FNCFS Program and Jordan's Principle through numerous committees, all of which include the Caring Society. These include the National Advisory Committee (NAC), the Jordan's Principle Action Table (JPAT), the Jordan's Principle Operations Committee (JPOC), and the Expert Advisory Committee (EAC).[2]

7. In 2018 CHRT 4, the Tribunal ordered that:

> 400 Canada is ordered under section 53(2)(a) of the *Act*, to consult not only with the Commission, but also directly with the AFN, the Caring Society, the COO and the NAN on the orders made in this ruling, the *Decision* and its other rulings. INAC is ordered to enter into a protocol with the AFN, the Caring Society, the COO, the NAN and the Commission on consultations to ensure that consultations are carried

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[1] In the OFA motion, the Tribunal is not being asked to consider the potential applicability of the OFA outside Ontario. In determining whether to approve the OFA in Ontario, the Tribunal may, however, provide advice which will assist in the future, such as whether the unanimous consent of every First Nation is required before the parties can move forward with long-term reform.

[2] Affidavit of Duncan Farthing-Nichol (affirmed March 13, 2025), at paras 10–13, 21–31 **[Farthing-Nichol Affidavit]**.

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> out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision* by *February 15, 2018*.[3]

8. In response to this consultation order, Canada entered into a Consultation Protocol in March 2018 with the parties. The Consultation Protocol led to the establishment of the Consultation Committee on Child Welfare (CCCW) as a forum to discuss implementation of the Tribunal's orders and reform of the FNCFS Program and Jordan's Principle.[4] The CCCW stopped meeting following the signing of the Agreement in Principle in late 2021, which moved consultations into a new confidential negotiation process towards long-term reform of the FNCFS Program and Jordan's Principle.[5]

9. In addition to the consultations Canada carried out through the array of committees developed in response to the Tribunal's orders, Canada also undertook significant efforts to negotiate a final resolution of this complaint, working closely with the Complainants in that context. Initial mediation efforts respecting both compensation and long-term reform were held with former Federal Court Justice Mandamin over the course of many months in 2020 and 2021.[6]

10. Following these efforts, in late 2021, Canada, the Caring Society, AFN, COO and NAN engaged in an intensive negotiation process with the assistance of the late Honourable Murray Sinclair. These negotiations led to the December 31, 2021 Agreement in Principle, signed by all of the parties - including the Caring Society and the AFN.[7]

11. In the Agreement in Principle, Canada committed $19.8 billion in funding for a reformed FNCFS Program and for major capital related to the FNCFS Program and Jordan's Principle.[8] The Agreement in Principle, informed by First Nations-led research funded by Canada and led by the Caring Society and the AFN, included a detailed outline of a reformed FNCFS Program and laid the foundation for long-term reform of both the Program and Jordan's Principle.[9] Within four days

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[3] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4 at para 400.
[4] Farthing-Nichol Affidavit at paras 16–18.
[5] Farthing-Nichol Affidavit at paras 20.
[6] Affidavit of Amber Potts (affirmed March 3, 2025), at para 11 **[Potts Affidavit]**.
[7] Potts Affidavit at paras 14–15.
[8] Indigenous Services Canada, *Executive Summary of Agreement-in-Principle on Long-Term Reform* (September 13, 2023), in Affidavit of Cindy Blackstock (affirmed January 12, 2024), Exhibit 61.
[9] Farthing-Nichol Affidavit at paras 32, 70.

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of signing the Agreement in Principle, the Caring Society announced that in their view, it was a non-binding agreement.[10]

12. Nevertheless, in early 2022, the parties to the Agreement in Principle began negotiating to entrench the Agreement in Principle commitments into a final agreement and establish more detailed parameters for the reformed FNCFS Program and Jordan's Principle, based on the Agreement in Principle's foundation. Canada met with the other parties once or twice a week and held a number of multi-day intensive in-person negotiation sessions throughout all of 2022 and into 2023.[11]

13. In 2023, the parties reached a $23.34 billion, First Nations-led settlement of the compensation claims that evolved in part from these proceedings. The settlement was approved by this Panel in 2023 CHRT 44 and subsequently by the Federal Court. The agreement represented a monumental step towards reconciliation and will provide life-changing relief to hundreds of thousands of marginalized First Nations youths and families.[12]

14. In March 2023, the AFN and Caring Society tabled their *Joint Path Forward,* which proposed a redirection of the long-term reform negotiations. As part of the redirection, the *Joint Path Forward* proposed the bifurcation of negotiations on the FNCFS Program and Jordan's Principle, such that the parties would negotiate a final agreement respecting the FNCFS Program before turning to Jordan's Principle.[13] This was a significant departure from the Agreement in Principle, which contemplated the negotiation of a single agreement covering long-term reform of both the FNCFS Program and Jordan's Principle by November 2022. It also effectively ended Canada's ability to consult with the parties on long-term reform of Jordan's Principle, absent an agreement on long-term FNCFS Program reform.

15. ISC required a revised mandate to proceed in accordance with the AFN and Caring Society's wishes. Between March and October 2023, Canada, the Caring Society, the AFN, COO and NAN continued to meet regularly to discuss operational matters related to the implementation of orders

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[10] First Nations Child & Family Caring Society of Canada, "First Nations Child & Family Caring Society statement: January 4, 2022" (4 January 2022), online: <fncaringsociety.com/sites/default/files/the_caring_society_statement_aip_4_jan_2022.pdf>.
[11] Farthing-Nichol Affidavit at paras 37–38; Potts Affidavit at paras 15–16.
[12] *Moushoom v Canada (Attorney General)*, 2023 FC 1533 at para 1 **[*Moushoom*]**; *First Nations Child and Family Caring Society of Canada et al v the Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2023 CHRT 44.
[13] Farthing-Nichol Affidavit at para 39; Potts Affidavit at para 22.

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and to move forward items that were not impacted by the Complainants' request that Canada obtain a revised mandate.[14] In October 2023, ISC secured a revised mandate to proceed in accordance with the AFN and Caring Society's requested, bifurcated approach.[15]

16. Shortly thereafter, in December 2023, the Caring Society filed a non-compliance motion with respect to Canada's implementation of the Tribunal's Jordan's Principle orders. The Caring Society further announced that it would not be bound by the Agreement in Principle or the *Joint Path Forward*, citing its desire for a new approach.[16]

17. Canada took the position that, given the agreed bifurcation of negotiations, the Caring Society could continue participating in the negotiations on the FNCFS Program while pursuing its motion. At that time, the Caring Society indicated it would not participate in the ongoing negotiations on long-term reforms to the FNCFS Program, but nonetheless expected that it would continue to be engaged on specific topics.[17]

18. Between January and July 2024, Canada, the AFN, COO, and NAN undertook exhaustive negotiations towards a final agreement, including full week-long sessions at times. Canada, the AFN, COO and NAN repeatedly invited the Caring Society to participate in negotiations and to return to the table as a full participant. However, the Caring Society would not agree to adhere to the negotiations' confidentiality. As stated by COO, this made the Caring's Society's involvement in negotiations practically infeasible.[18]

19. Nonetheless, Canada, the AFN, COO and NAN continued to seek the Caring Society's views throughout this period, inviting the Caring Society to attend negotiation sessions to present its positions. In April 2024, the AFN, COO, NAN and Canada even shared a draft of the Draft Final Agreement with the Caring Society. The Caring Society provided comments on the draft, to which Canada provided responses.[19]

20. In July 2024, the AFN, COO, NAN and Canada successfully completed negotiations on the Draft Final Agreement, modeled on and exceeding the terms of the Agreement in Principle.[20]

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[14] Potts Affidavit at paras 23–24.
[15] Farthing-Nichol Affidavit at para 40.
[16] Amended Affidavit of Craig Gideon (affirmed March 22, 2024), at para 39 **[C Gideon Affidavit]**.
[17] Farthing-Nichol Affidavit at paras 41–42; Potts Affidavit at para 27.
[18] Farthing-Nichol Affidavit at paras 43–44; Potts Affidavit at para 28; Responding Factum of the Interested Party, Chiefs of Ontario (March 31, 2025), at para 25.
[19] Farthing-Nichol Affidavit at paras 43, 46.
[20] Farthing-Nichol Affidavit at paras 47–48.

21. Between July and October 2024, ISC participated in approximately twenty-seven engagement sessions held by the AFN for First Nations leaders across the country on the Draft Final Agreement. Other sessions also occurred to which ISC was not invited. ISC provided funding for these information sessions, prepared engagement materials, gave presentations, listened and answered questions at the sessions. ISC also provided detailed financial information to each individual First Nation and had follow up meetings and communications with a variety of First Nations and First Nations organizations.[21]

22. Throughout the engagement period, the Caring Society opposed the Draft Final Agreement and encouraged First Nations to oppose it as well, based on a new alternative model developed by the Caring Society that did not align with the Agreement in Principle.[22] The Caring Society publicly criticized the very reforms to which it had previously agreed, advocating in favour of their new approach to reform. This new approach went well beyond the framework for reform to which the Caring Society had agreed in the Agreement in Principle, for example by including indefinite Tribunal oversight.[23]

23. Following the engagement sessions, the AFN proposed revisions to Canada of the Draft Final Agreement, to address concerns raised during the engagement sessions. This included broadening the composition of the Reform Implementation Committee (the committee proposed to oversee and monitor the implementation of the Agreement and the reformed FNCFS Program) to ensure regional First Nations representation. Canada accepted these revisions.[24]

24. The Caring Society requested that the CCCW be reconvened in September of 2024, approximately nine months after it had abandoned negotiations. However, COO, NAN, the AFN and Canada responded that, in their view, the CCCW consultation process had been superseded by the confidential negotiation process agreed to in the Agreement in Principle, which by then had been in progress for over two years.[25]

25. In October 2024, First Nations belonging to COO and NAN ratified the amended Draft Final Agreement. However, at AFN's Special Chiefs Assembly later that month, the First Nations-in-

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[21] Farthing-Nichol Affidavit at paras 49–53.
[22] Farthing-Nichol Affidavit at paras 55–56.
[23] Farthing-Nichol Affidavit at para 55; Letter from Paul Vickery to Sarah Clarke (January 14, 2025) in Affidavit of Katherine Quintana-James (affirmed February 13, 2025), Exhibit I **[Quintana-James Affidavit]**.
[24] Farthing-Nichol Affidavit at para 54.
[25] Farthing-Nichol Affidavit at paras 57–58.

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Assembly voted to reject the amended Draft Final Agreement. The First Nations-in-Assembly also passed two resolutions calling on Canada to negotiate a new agreement through a public negotiation process, to be further funded by Canada, that would include the Caring Society and a to-be-constituted body called the National Children's Chiefs Commission (NCCC).[26] The resolutions also set out the substantive elements the Chiefs would require in a new agreement, several of which go beyond the Agreement in Principle's framework and even the scope of the complaint.[27] For example, the Chiefs called for indefinite Tribunal oversight and FNCFS Program coverage off-reserve.[28]

26. Since that time, the Caring Society, the AFN, and the NCCC have each sent letters to various federal officials, including the ISC Minister and the Prime Minister, demanding that Canada enter new, public negotiations to reach an agreement in line with the resolutions.[29]

B. Canada has discharged its consultation obligations

27. Canada has consulted extensively with the parties since the Tribunal's consultation order in 2018, the impact of which is reflected in the FNCFS Program today. Beyond the consultations reflected in the section above, Canada has agreed with the parties upon a variety of consent orders to support incremental change to the FNCFS Program, including the non-agency consent order (2021 CHRT 12), amendments to the capital order (2021 CHRT 41), and prevention and post-majority support services orders (2022 CHRT 8). To suggest Canada has failed to discharge its consultation obligation under the orders ignores this work and abstracts the Caring Society's current demands from the many years of consultation and negotiation that have occurred, and from the impact of those activities on FNCFS Program reform.

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[26] Farthing-Nichol Affidavit at para 62; *Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle*, AFN Special Chiefs Assembly, Res 60/2024, arts 1, 2, 9, 16, in Potts Affidavit, Exhibit E **[Resolution 60/2024]**; *Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services*, AFN Special Chiefs Assembly, Res 61/2024, arts 1, 2, in Potts Affidavit, Exhibit E **[Resolution 61/2024]**.

[27] Potts Affidavit at para 34.

[28] Resolution 61/2024, art 1(i), citing *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 which indicates that for the purposes of Jordan's Principle, a First Nations child includes children off-reserve, *contra* *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20 at para 280; Resolution, 61/2024, art 1(o).

[29] Farthing-Nichol Affidavit at para 64.

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28. Canada has also supported the parties to undertake extensive research to inform reform on both the FNCFS Program and Jordan's Principle. Canada provided funding to the AFN for the Institute of Fiscal Studies and Democracy (IFSD) to complete three phases of research respecting the FNCFS Program and a non-agency needs assessment. Canada also funded COO to commission the Ontario Special Study and funded NAN to hire experts to conduct remoteness research.[30] This research has influenced the current FNCFS Program (for example, the prevention funding established by consent in 2022 CHRT 8) and the vision for long-term reform reflected in the Draft Final Agreement and later the Ontario Final Agreement, for which the Tribunal's approval is being sought.

29. Regarding Jordan's Principle, Canada funded the Caring Society to undertake research through IFSD. The IFSD data assessment is complete, but the final IFSD needs assessment (or gap analysis) remains outstanding. IFSD provided an Interim Briefing in March, 2025.[31] As a separate initiative, ISC implemented a Service Alignment Initiative in an effort to identify gaps in services to First Nations children.[32]

30. Canada has also provided extensive federal funding to the Caring Society, the AFN, COO and NAN to fund their participation in consultation, engagement, research and negotiations towards long-term reform of the FNCFS Program and Jordan's Principle. Collectively, from 2018-19 to 2024-25, the Caring Society, the AFN, COO, and NAN have received at least $47.5 million from Canada for these purposes, as follows:

a. $7.6 million to the Caring Society;

b. $26.4 million to the AFN;

c. $5.4 million to COO; and

d. $8.1 million to NAN.[33]

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[30] Farthing-Nichol Affidavit at paras 69–77.
[31] IFSD, *Interim Briefing: Considerations for the sustainability of Jordan's Principle* (March 7, 2025), in Schedule B, Letter from Sarah Clarke to the Tribunal re: long term reform (March 24, 2025).
[32] Farthing-Nichol Affidavit at para 80.
[33] ISC has provided funding for EAC members in the additional amount of $0.5 million. See Farthing-Nichol Affidavit at paras 83–90.

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31. Canada negotiated these reforms with the Caring Society and the AFN for years. Canada has not refused to negotiate, as alleged by the Caring Society.[34] These negotiations led to the Agreement in Principle signed by both AFN and the Caring Society, outlining a shared vision on long-term reform. It also led to the Draft Final Agreement, tentatively agreed to by the AFN.

32. Canada has made every effort to reach a negotiated resolution with the parties. When the Caring Society and the AFN proposed the *Joint Path Forward,* Canada sought a new mandate and agreed to bifurcate the negotiations, even though it meant delaying consultations on Jordan's Principle long-term reforms.

33. In negotiating the Draft Final Agreement, Canada made meaningful compromises, including agreeing to move significantly beyond its original funding commitment in the Agreement in Principle. The Agreement in Principle's $19.8 billion in funding over five years was increased to $47.8 billion over ten years in the Draft Final Agreement.[35] The Caring Society's suggestion that the Draft Final Agreement was Canada's "preferred solution" does not reflect the extensive efforts and compromises Canada made to reach a resolution.[36]

C. Reform of the FNCFS Program and Jordan's Principle is already well underway

34. Canada has taken many progressive, significant steps, to reform the FNCFS Program and Jordan's Principle, in accordance with the Tribunal's orders and drawing on its consultative efforts. The result is that both the FNCFS program and Jordan's Principle are unrecognizable in comparison to their 2016 versions.

35. In advance of a final determination on long-term reform, a significantly reformed FNCFS Program is already in operation. Overall, FNCFS Program funding increased from $676.8 million in 2015-2016 to over $3.6 billion in 2023-2024. This represents a more than five-fold increase to the FNCFS Program budget. The FNCFS Program has shifted from a protection focus to a focus on prevention and on the well-being of children, youth, young adults and families. Prevention funding has increased substantially, first through the Tribunal's order in 2018 CHRT 4 and ISC's creation of the Community Well-Being and Jurisdiction Initiatives funding stream; then through the non-agency community consent order in 2021 CHRT 12; and finally through the reformed approach to

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[34] Written Submissions of First Nations Child and Family Caring Society of Canada (March 17, 2025), at para 48 **[Caring Society Written Submissions]**.
[35] Farthing-Nichol Affidavit at para 48; Potts Affidavit at para 15.
[36] Caring Society Written Submissions at para 72.

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prevention funding agreed to in the Agreement in Principle and encapsulated in the Tribunal's order in 2022 CHRT 8.[37]

36. Additionally with respect to the FNCFS Program, Canada continues to implement the Tribunal's actuals orders, including those respecting intake and investigation, legal fees and building repairs in 2018 CHRT 4 and respecting capital in 2021 CHRT 41. Canada has also begun implementing several new funding streams in advance of a final approval of long-term reform of the FNCFS Program. Such funding streams include post-majority support services pursuant to the consent order in 2022 CHRT 8. They also include implementation of funding for First Nation Representative Services across the country.[38]

37. Regarding Jordan's Principle, this Tribunal has recognized that ISC made fundamental, foundational changes towards ending systemic discrimination against First Nations children, including through the establishment of an entire operational sector within ISC to deliver, administer, and support Jordan's Principle.[39] There has also been a significant increase in Jordan's Principle expenditures relative to 2018-19.[40] While administration has had challenges and there remains a backlog of requests, ISC now determines more requests on an annual and daily basis than ever before.[41] Canada has announced over $8.8 billion to Jordan's Principle since 2016, supporting First Nations children through the provision of 8.7 million products, services and supports as of March 2025.[42]

PART II – POINTS IN ISSUE

38. The only point in issue is whether the Tribunal's orders, the dialogic approach or the honour of the Crown require that Canada consult and negotiate indefinitely or until the Complainants obtain the variable substantive outcomes they seek.

39. Canada's position it has sufficiently discharged all of its consultation obligations, which arise solely pursuant to the Tribunal's orders. Regarding the FNCFS Program, Canada is not required by the Tribunal's orders, the dialogic approach or the honour of the Crown to continue consulting or

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[37] Farthing-Nichol Affidavit at paras 6–7, 33.
[38] Farthing-Nichol Affidavit at para 6.
[39] *First Nations Child and Family Caring Society of Canada et al v the Attorney General of Canada et al (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 6 at para 53 [**2025 CHRT 6**].
[40] Affidavit of Valerie Gideon (affirmed March 14, 2024), at para 12.
[41] 2025 CHRT 6 at paras 53–54.
[42] Farthing-Nichol Affidavit at para 6.

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negotiating at this time, and in particular is not required to consult until the Complainants are satisfied. Rather, Canada has fully discharged its consultation obligations to the Complainants through years of meaningful dialogue at remarkable financial cost, resulting in meaningful reforms. The Draft Final Agreement and compensation settlement not only met, but exceeded Canada's substantive equality obligations pursuant to the Tribunal's orders to remedy the proven discrimination at issue (i.e., cease, compensate, and prevent). Accordingly, no further consultations or negotiations with the Complainants are required at this time. None of the Tribunal's orders, the dialogic approach or the honour of the Crown require that Canada consult and negotiate indefinitely or until the Complainants obtain the variable substantive outcomes they seek

40. Regarding Jordan's Principle, it was the Complainants who sought to bifurcate and delay consultations on long-term Jordan's Principle reform. Canada is implementing the full scope and meaning of Jordan's Principle in accordance with the Tribunal's orders and is actively engaged in discharging the Tribunal's consultation orders on interim reforms set out in 2025 CHRT 6 through Tribunal-assisted mediation. Accordingly, no further consultations should be ordered at this time.

PART III - SUBMISSIONS

A. Introduction

41. Canada's good faith consultation and negotiation efforts, particularly since 2018, are highly relevant to this motion. The process leading to the Draft Final Agreement is entirely "material to this motion", not simply what has occurred since the Chiefs' rejection of the Draft Final Agreement.[43]

42. The Caring Society's conduct is similarly relevant, including the manner in which it hampered efforts to reach final agreed-upon reforms. The Caring Society agreed in the Agreement in Principle to an outline for long-term reform of both the FNCFS Program and Jordan's Principle;[44] then sought bifurcation of Jordan's Principle discussions, effectively discontinuing progress on Jordan's Principle consultations;[45] then abandoned FNCFS Program negotiations towards a final agreement based on the Agreement in Principle, while developing a new approach that rejected the

[43] *Contra* Caring Society Written Submissions at para 9.
[44] Farthing-Nichol Affidavit at para 32.
[45] Farthing-Nichol Affidavit at para 39.

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Agreement in Principle's approach;[46] then advocated that First Nations reject the Draft Final Agreement in favour of its new FNCFS Program approach.[47]

43. All of the consultations and negotiations that have occurred to date demonstrate that Canada has already consulted extensively in good faith and has therefore discharged its consultation obligations, as set out below. The Tribunal's orders, the dialogic approach, the Consultation Protocol, the Agreement in Principle and the honour of the Crown do not require that Canada consult indefinitely or until the Complainants are satisfied and their desired outcome is reached.

B. Canada engaged in the dialogic approach in good faith

44. Despite Canada's years of consultations, negotiations and good will, resulting in "significant movements towards remedying this unprecedented discrimination,"[48] the parties have been unable to reach a final, First Nations ratified settlement agreement for approval. This has not been for lack of effort on Canada's part.

45. In *Canada v First Nations Child and Family Caring Society*, Justice Favel considered the dialogic approach in the context of this Tribunal's retained jurisdiction. He noted that while the dialogic approach allowed the Tribunal to foster dialogue between the parties and contribute to the goal of reconciliation, ultimately the approach is about ensuring that the Tribunal has the flexibility to craft effective remedies.[49] This interpretation is consistent with academic commentary and jurisprudence with respect to the more traditional "dialogue" metaphor, which speaks to the manner in which the Courts and legislative branches address constitutional remedies over time, particularly in the Charter context.[50]

46. Canada agrees with the Federal Court that a negotiated settlement of this matter is preferable,[51] and accordingly took extensive steps towards that goal. However, the Caring Society's actions have negatively affected efforts to achieve agreement, including their deviation from the

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[46] Farthing-Nichol Affidavit at paras 42, 55, 57; C Gideon Affidavit at para 39.
[47] Farthing-Nichol Affidavit at paras 55–56.
[48] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 301 [**2021 FC 969**].
[49] 2021 FC 969 at paras 135–38.
[50] A van Kraglingen, "The Dialogic of Saga of Same-Sex Marriage: EGALE, Halpern, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights" (2004) 62 UT Fac L Rev 149 at 152, 182, as cited in *Ontario (Attorney General) v G*, 2020 SCC 38 at para 257, Côté and Brown JJ, dissenting.
[51] 2021 FC 969 at para 300.

framework for reform to which they previously agreed in the Agreement in Principle, their abandonment of negotiations, and their interventions in opposition to the Draft Final Agreement that was based on the Agreement in Principle's approach.

47. The Caring Society's interpretation of the dialogic approach in this case presumes that any resolution and effective remedy must be based on an agreement with the Complainants, on terms acceptable to the Caring Society. However, the Caring Society's action are detrimental to reaching agreement. Their goal post is shifting, as demonstrated by their repudiation of the Agreement in Principle and adoption of a new approach.[52] As with the Compensation Settlement proceedings, Justice Aylen's comments are apt: it is not for the Caring Society to "dictate" what must be done and how it must be done.[53]

48. However, even if ultimately a negotiated settlement cannot be achieved, the dialogic approach adopted in this case has served the purpose recognized by Justice Favel: it has resulted in years of intensive consultation, negotiations, dialogue, research and engagement with and reporting to the Tribunal. The Tribunal and the parties have had space and time to conduct research, consider the issues and evidence and craft remedies. Disagreement as to the appropriate way forward does not mean that consultation has not occurred.[54] Consultation with the Complainants pursuant to this approach has been fulsome, but it must end in order to move ahead with implementing long-term reform on the FNCFS Program and Jordan's Principle.

C. Canada has discharged its obligations under the Consultation Protocol

49. The Consultation Protocol, which was entered into in 2018, provides a framework for consultation for short-term reform, on the understanding that those principles might be applied to consultation on medium- and long-term reform but with a different scope and process.[55] The Protocol does not oblige Canada to consult or negotiate indefinitely or until the Complainants are satisfied.

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[52] C Gideon Affidavit at para 39.
[53] *Moushoom v Canada (Attorney General)* (June 26, 2024), Ottawa T-402-19, T-141-20, T-1120-21 (FC), at paras 26–27, 43 **[Annex A]**.
[54] *Coldwater First Nation v Canada (Attorney General),* 2020 FCA 34 at para 171, leave to appeal to SCC refused, 43130 (July 2, 2020) **[*Coldwater*]**.
[55] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada* (March 2, 2018), Ottawa T1340/7008 (CHRT), at arts 18–19, in Consultation Protocol (entered into pursuant to an order of the Tribunal), March 2, 2018 **[Consultation Protocol]**.

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50. To the contrary, the Consultation Protocol expressly states that Canada's commitment was to "consult in good faith with the Complainants, the Commission and Interested Parties… to the extent of their respective interests and mandates."[56] Canada has done precisely that, first through participation at various committees including the CCCW, and later by having obtained multiple mandates to respond to the parties' various positions throughout these proceedings and related consultation and negotiation processes. These include:

a. a mandate to enter into the Agreement in Principle;[57]

b. a mandate to extend negotiations in response to AFN Resolution 40/2022;[58]

c. a mandate to negotiate on the basis of bifurcating FNCFS Program reforms from Jordan's Principle reforms, in response to the Complainants' *Joint Path Forward*;[59]

d. a mandate to enter the Draft Final Agreement, which doubled the time commitment and more than doubled the financial commitment Canada made in the Agreement in Principle;[60] and

e. a mandate to agree to revisions to the Draft Final Agreement, proposed by the AFN in response to concerns raised during the engagement sessions.[61]

51. Further, the AFN, COO, NAN and Canada all previously took the position that the consultation process identified in the Consultation Protocol had evolved and been superseded by the Agreement in Principle's negotiation process.[62]

52. Canada has both consulted and negotiated to the fullest extent, more than satisfying its obligations under the Consultation Protocol. Further consultations with the Complainants at this stage will serve no practical utility, nor are they required by the terms of the Consultation Protocol.

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[56] Consultation Protocol, art 4.
[57] Potts Affidavit at para 15.
[58] Potts Affidavit at para 21.
[59] Potts Affidavit at paras 23–24; C Gideon Affidavit at paras 36–38.
[60] Farthing-Nichol Affidavit at para 48.
[61] Farthing-Nichol Affidavit at para 54.
[62] Potts Affidavit at para 29; Farthing-Nichol Affidavit at para 58; Letter from Maggie Wente to Sarah Clarke (October 2, 2024), in Quintana-James Affidavit, Exhibit C.

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D. Canada has fulfilled its obligations under the Agreement in Principle

53. The Caring Society says that it is only now "ready" to negotiate towards long-term reform.[63] Canada, however, has been actively and intensively working to advance long-term reform since it entered into the Agreement in Principle in 2021 and before. Canada worked diligently with the parties, including the Caring Society, to reach a final agreement consistent with the Agreement in Principle.

54. The Caring Society announced that it would not be bound by the Agreement in Principle and abandoned long-term reform negotiations.[64] However, Canada and the remaining parties were able to reach meaningful consensus in the Draft Final Agreement on funding approaches for the reformed FNCFS Program, and on robust governance and accountability structures to ensure discrimination does not recur. In addition, the Draft Final Agreement went far above the initially agreed upon funding envelope, with a final funding commitment of $47.8 billion over ten years.

55. Following interventions by the Caring Society, the Draft Final Agreement was rejected by a majority of voting First Nations at the AFN Assembly. However, the Agreement in Principle does not require that Canada negotiate indefinitely or until the Complainants are fully satisfied with the result. Rather, it required that Canada negotiate towards a final agreement using the approach contemplated in the Agreement in Principle, which Canada did.

56. The Caring Society chose to abandon the Agreement in Principle, citing its desire for a new approach that was significantly different from that to which it had agreed.[65] Paradoxically, the Caring Society now seeks to invoke the Agreement in Principle against Canada, in an attempt to require that negotiations continue indefinitely, or until they are satisfied.

57. Rather than moving forward to long-term reform, the Caring Society's approach has brought progress to an impasse due to their fluctuating demands and unwillingness to compromise. For the Caring Society, this unpredictable approach has resulted in uncapped federal funding to them totaling over $7.6 million to date in respect of consultation, research and negotiation on long-term reform of the FNCFS Program and Jordan's Principle.[66]

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[63] Letter from Sarah Clarke to the Tribunal re: long term reform (March 24, 2025), p 1.
[64] C Gideon Affidavit at para 39.
[65] C Gideon Affidavit at para 39.
[66] Farthing-Nichol Affidavit at paras 85–86; Letter from Deputy Minister Gina Wilson to Cindy Woodhouse Nepinak, Raymond Shingoose, Abram Benedict and Alvin Fiddler (February 6, 2025), in Farthing-Nichol Affidavit, Exhibit H.

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E. Canada acted in accordance with the honour of the Crown, which does not give rise to any specific duties in this case

i. The honour of the Crown

58. The parties and the Tribunal have discussed both the honour of the Crown and the concept of reconciliation throughout the proceedings.[67] Canada has approached its reconciliatory goal meaningfully and with respect, perhaps most visibly reflected in Canada's commitments, in the Draft Final Agreement, to facilitate First Nations authority over prevention services and to more than double Canada's Agreement in Principle funding commitment from $19.8 billion over 5 years to $47.8 billion over 10 years.

59. While reconciliation is at play, the Federal Court has noted that these proceedings do not involve constitutional issues or section 35 Aboriginal rights.[68] The honour of the Crown rests on the "special relationship" between the Crown and Indigenous peoples and is anchored to the goal of reconciliation.[69] It is always at stake in Crown dealings with Indigenous people.[70] It not a cause of action in and of itself but gives rise to different duties in different circumstances.[71] Not all interactions between the Crown and Indigenous people give rise to specific duties flowing from the honour of the Crown.[72]

60. Canada agrees with and adopts the submissions of COO in their factum dated March 31, 2025, at paragraphs 43-44 and 46-52, respecting the honour of the Crown and the specific duties that flow from it. In this particular factual context, the Caring Society's position does not align with the Supreme Court of Canada's guidance on the application of the honour of the Crown or the legal duties that arise from it. Instead, they mistakenly imply that the honour of the Crown gives rise in this case to legal duties on Canada to consult or negotiate indefinitely or until the Complainants are satisfied.

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[67] 2021 FC 969 at para 297–98.
[68] 2021 FC 969, at para 297.
[69] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at paras 12, 162 [***Takuhikan***].
[70] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 68 **[*MMF*]**.
[71] *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 220; *MMF* at para 73; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, 18 **[*Haida Nation*]**.
[72] *MMF* at para 68.

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ii. Canada's consultation obligations arise from the Tribunal's orders, not the honour of the Crown

61. Canada agrees with COO that a duty to consult arising from the honour of the Crown is not owed to the Complainants in the context of this complaint. The criteria on which a duty would arise are not engaged in this case. In any event, the duty, where it arises, is owed to s. 35 rights holding Indigenous groups. Since the Caring Society does not have s. 35 rights, no duty to consult flowing from the honour of the Crown is owed directly to it.

62. In this case, the honour of the Crown does not give rise to any specific obligation to consult with the Complainants. Canada's obligations, rather, are defined by the Tribunal's orders and Canada's legal obligation to fulfil those orders. Canada takes these obligations seriously and agrees that it must act in good faith and diligently implement the Tribunal's orders.

iii. No duty to continue negotiations arising from the honour of the Crown

63. While the Caring Society claims it seeks an order directing "consultation,"[73] what it in fact seeks is an order requiring that Canada continue negotiating until the Complainants are satisfied. The Caring Society wrongly asserts that Canada is in breach of consultation orders because "the parties have not yet reached a final agreement."[74]

64. A duty to negotiate only arises in certain circumstances which are not applicable here, and even then, there is no duty to reach an agreement.[75] Negotiating honourably and with integrity does not imply a duty to agree to every demand made by a counterparty,[76] or to negotiate indefinitely until the counterparty is satisfied. There will be difficult judgment calls and reasonable minds can differ.[77]

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[73] Caring Society Written Submissions at para 108.
[74] Caring Society Written Submissions at para 91.
[75] *MMF* at para 73; *Haida Nation* at paras 25, 35, 42; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 77 **[*Ktunaxa Nation*]**; *Takuhikan* at paras 156, 191.
[76] *Takuhikan* at para 248, Côté J, dissenting.
[77] *Gitxaala Nation v Canada*, 2016 FCA 187 at para 182, leave to appeal to SCC refused, 37201 (February 9, 2017) **[*Gitxaala Nation*]**. See also *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 509, 762, leave to appeal to SCC refused, 38379 (May 2, 2019) **[*TWN*]**; *Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212 at para 54 **[*Ahousaht First Nation*]**; *Canada (Attorney General) v Long Plain First Nation*, 2015 FCA 177 at para 133; *Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 at para 56.

65. In any event, Indigenous groups are not entitled to a one-sided process.[78] The honour of the Crown requires a meaningful process, but not a particular substantive result. Consultation does not require that an Indigenous group obtain the outcome they seek.[79] The question is whether the process is meaningful.[80]

66. Good faith is required on both sides. Hard bargaining by Indigenous groups is permissible, but they must not frustrate the Crown's reasonable good faith efforts, or take unreasonable positions to thwart moving forward where, despite meaningful consultation, agreement is not reached.[81]

iv. No contractual obligations engaging the honour of the Crown

67. There are no contractual obligations in this matter that engage the honour of the Crown. The elements set out by the Supreme Court of Canada in *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan* (*Takuhikan*) that would result in a duty flowing from the honour of the Crown are not met.

68. *Takuhikan* establishes that contractual undertakings that are not constitutional in nature may attract the honour of the Crown in specific circumstances. Not all agreements will attract the honour of the Crown.[82] The test for where the honour of the Crown will apply to a contractual undertaking between the Crown and an Indigenous group requires that the agreement: (1) is entered into by reason of and on the basis of the group's Indigenous difference and has a collective dimension;[83] and (2) relates to an asserted or established right of "self-government".[84] As with rights enshrined in the constitution, the honour of the Crown is engaged on account of its "special relationship" with the Indigenous group, which is different than its relationship with the public.

69. The prerequisites set out by the Supreme Court of Canada for such a duty to arise do not exist here. To the extent the Caring Society argues such a duty arises from an anticipated final agreement, the basis for consultations is not Indigenous difference with a collective dimension. This matter concerns individual rights under the *Canadian Human Rights Act*, not collective rights as

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[78] *Ktunaxa Nation* at para 80; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 60 **[*Chippewas of the Thames*]**; *Haida Nation* at paras 42, 45, 48–50; *Coldwater* at para 195.
[79] *Ktunaxa Nation* at paras 79, 83; *Coldwater* at paras 51–54.
[80] *Haida Nation* at para 42.
[81] *Haida Nation* at para 42; *Ktunaxa Nation* at para 80; *Coldwater* at paras 195–96.
[82] *Takuhikan* at para 145.
[83] *Takuhikan* at paras 161–62.
[84] *Takuhikan* at para 163. The majority did not address, but also did not exclude the possibility, that other interests could engage the honour of the Crown in the contractual context.

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asserted by s. 35 rights holders.[85] In addition, the second element of the test is not met as any agreement that would address such individual rights, while it may respect principles with respect to self-government, would not be the basis for furthering collective rights concerning self-government. To this end, it is important to distinguish the difference between the role of legislation such as *An Act respecting First Nations, Inuit and Métis children, youth and families* and the remedies which ultimately flow from this matter.

70. The dispute underlying the decision in *Takuhikan* concerned specific obligations arising from a long-term formal, contractual relationship. The majority noted that the *terms of the agreement* created an obligation to negotiate funding terms in good faith.[86] Here, the parties have not come to a binding agreement with respect to national reform. There are, therefore, no binding obligations flowing from such an agreement.

71. The Consultation Protocol and the Agreement in Principle, to the extent that they continue to operate, also do not meet the test set out in *Takuhikan* for the reasons set out above, and do not give rise to specific obligations arising from the honour of the Crown. Indeed, the Consultation Protocol was a process document concerning consultation that expressly acknowledges it does *not* engage s. 35 rights.[87]

72. In addition, the Agreement in Principle and the Consultation Protocol were entered into as interim measures in the context of ongoing litigation before the Tribunal with the parties to that litigation. In the case of the Consultation Protocol, this included both the Caring Society and the Commission, neither of whom are "Indigenous groups" with whom a contract could be entered into on account of their Indigenous difference or self-government rights.[88] The Agreement in Principle also included the Caring Society as a party, although they ultimately abandoned the agreement.

73. In any event, the Caring Society has not pointed to any specific contractual undertakings to support its assertions that Canada must continue to negotiate with them until such time as there is a final settlement.

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[85] *Takuhikan* at para 162; *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2022 CHRT 41 at para 434.
[86] *Takuhikan* at para 123.
[87] Consultation Protocol, art 27.
[88] *Takuhikan* at paras 161–62.

74. Similarly, the Federal Court's decision in *Indigenous Police Chiefs of Ontario v Canada (IPCO)*[89] is not of assistance and does not provide a basis on which to find specific obligations arising from the honour of the Crown in this case. It was, importantly, a decision on an injunction motion, subject to the tri-partite test of whether there was a serious issue to be tried, whether the moving party would suffer irreparable harm if the injunction was not granted and whether the balance of convenience was in their favour.[90] Therefore, no determinations were made on the merits of the matter, and indeed the Court's discussion of the honour of the Crown did not arise with respect to whether there was a serious issue to be tried. Rather, the Court referenced the honour of the Crown more generally as contextual analysis in the portions of the injunction test that considered irreparable harm and the balance of convenience.[91] Further, like *Takuhikan,* the *IPCO* case concerned specific factual circumstances and contractual obligations that do not arise here.[92]

F. Canada has consulted and negotiated in good faith, with integrity and honour, fully discharging its consultation obligations

75. Although Canada's consultation obligations in this case arise from the Tribunal's orders, the case law on the Crown's s.35 duty to consult is nonetheless instructive. Even on the higher standard of deep consultation owed to s.35 rights-holders, arising from the honour of the Crown, it is clear that Canada has more than discharged its consultation obligation.

76. To satisfy a constitutional duty to consult, consultation must be reasonable and meaningful.[93] Consultations are reasonable when the Crown considers and addresses the rights claimed by Indigenous peoples in a meaningful way.[94] The Crown must possess a state of open-mindedness about accommodation and exercise good faith. Two-way dialogue must lead to a demonstrably serious consideration of accommodation where necessary.[95]

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[89] *Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916 **[*IPCO*]**.
[90] *IPCO* at para 69.
[91] *IPCO* at paras 138–44, 175–79.
[92] The court in *IPCO* referenced the Quebec Court of Appeal decision in *Takuhikan* at paras 57–62, 85–91, 97–99, 143–47, 173–74, considering similarities between the cases, as both concerned the First Nations and Inuit Policing Program. The *IPCO* decision, however, was released before the Supreme Court of Canada released its own decision in *Takuhikan*.
[93] *Coldwater* at para 40; *Haida Nation* at paras 62–63, 68; *Gitxaala Nation* at paras 8, 179, 182–85; *TWN* at paras 226, 508–09; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para 31 **[*Squamish First Nation*]**.
[94] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 41 **[*Clyde River*]**; *Squamish First Nation* at para 37; *Haida Nation* at para 42 .
[95] *Coldwater* at paras 40–41. See also *Takuhikan* at paras 190–91.

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77. The duty to consult, however, is limited to addressing adverse impacts to rights flowing from the specific proposal at issue. The Crown is not obliged to resolve historical grievances or claims that are beyond the scope of the specific proposed Crown conduct.[96]

78. The following sets out how Canada discharged its consultative obligations in good faith and how, despite Canada's best efforts, the Caring Society's actions have frustrated Canada's goal of achieving consensus to move forward with long-term reforms.

i. Canada's good faith efforts towards a consensus final settlement agreement

79. Canada has made extensive, good faith, sincere efforts to fully and meaningfully discharge its consultation obligations and reach consensus on a final agreement on long-term reforms. Ultimately, as noted above, Canada negotiated the Draft Final Agreement which more than met Canada's substantive equality obligations pursuant to the Tribunal's orders to remedy the proven discrimination at issue (cease, compensate, and prevent). In addition, Canada has:

a. re-established, funded and participated in the National Advisory Committee, comprised of representatives from the AFN, the Caring Society and ISC, and of First Nations child and family service experts appointed by the AFN and representing the AFN's ten regions. NAC has a mandate to provide technical advice on the design and implementation of FNCFS Program reforms;[97]

b. engaged with JPAT, chaired by the AFN and including First Nations representatives from across Canada, towards co-development of a long-term approach to Jordan's Principle, including co-developing a paper entitled "Proposed Policy Options for the Long Term Implementation of Jordan's Principle" (Jordan's Principle Storyline) with the AFN and JPAT;[98]

c. established the NAN-Canada Remoteness Quotient Table (RQ Table), which developed the Remoteness Quotient Adjustment Factor to determine evidence-based funding adjustments for remote communities;[99]

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[96] *Chippewas of the Thames* at para 41; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 53.
[97] Farthing-Nichol Affidavit at paras 10–11.
[98] Farthing-Nichol Affidavit at paras 12–13.
[99] Farthing-Nichol Affidavit at para 14.

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d. operationalized and funded the Choose Life initiative developed by NAN and Canada;[100]

e. established the Choose Life Table with NAN to support discussions on a long-term approach to the Choose Life initiative;[101]

f. entered into the Consultation Protocol with the AFN, the Caring Society, COO, NAN and the Commission to guide consultations on immediate relief measures and ensure adequate participant funding to the AFN, the Caring Society, COO and NAN;[102]

g. established and participated in the CCCW, comprised of Canada, the Caring Society, the AFN, COO, NAN and the Commission;[103]

h. with the assistance of Justice Mandamin, engaged in mediation respecting both compensation and long-term reform with the AFN and the Caring Society;[104]

i. entered into a $23.34 billion settlement agreement on compensation;[105]

j. established and participated in JPOC with First Nations regional representatives and representatives from the Caring Society, the AFN, COO and NAN, to consult on and discuss the operational implementation of Jordan's Principle;[106]

k. established and funded the EAC, co-chaired by the Caring Society, the AFN and ISC, and with two *ex officio* members representing NAN and COO, to support the design and implementation of an independent third-party evaluation that would:

   i. identify and provide recommendations to redress internal departmental processes, procedures, and practices that contribute to the discrimination identified by the Tribunal;

   ii. lead to the development of a workplan for the implementation of departmental reforms to prevent the recurrence of discrimination; and

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[100] Farthing-Nichol Affidavit at para 15.
[101] Farthing-Nichol Affidavit at para 15.
[102] Farthing-Nichol Affidavit at para 16.
[103] Farthing-Nichol Affidavit at paras 17–20.
[104] Potts Affidavit at para 11.
[105] *Moushoom* at para 1.
[106] Farthing-Nichol Affidavit at paras 21–23.

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iii. provide advice on departmental policies, including ISC's mandatory cultural competency training and performance commitments for employees within ISC;[107]

l. with the assistance of the late Honourable Murray Sinclair, engaged in mediated discussions with the AFN, the Caring Society, COO and NAN towards the Agreement in Principle, which included immediate reforms and a $19.8 billion funding commitment informed by a revised funding methodology developed from IFSD research;[108]

m. financially supported research and studies, including with respect to the FNCFS Program, Jordan's Principle, remoteness, and the 1965 Agreement;[109]

n. engaged in intensive negotiations towards the Draft Final Agreement, including obtaining multiple mandates in response to shifting demands to extend negotiations, bifurcate negotiations and more than double the funding envelope to $47.8 billion over 10 years;[110]

o. repeatedly attempted to re-engage the Caring Society in negotiations towards the Draft Final Agreement following their announcement that they would not be bound by the Agreement in Principle and were withdrawing from negotiations;[111]

p. entered into the Draft Final Agreement to provide a fully reformed FNCFS Program with a 10-year funding commitment of $47.8 billion;[112]

q. funded and attended engagement sessions to help inform First Nations regarding the Draft Final Agreement;[113] and

r. provided funding to the AFN, the Caring Society, COO and NAN under the Consultation Protocol and the Agreement in Principle in the total amount of over $47.5 million to date.

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[107] Farthing-Nichol Affidavit at paras 24–31.
[108] Farthing-Nichol Affidavit at paras 32–38, 70.
[109] Farthing-Nichol Affidavit at paras 69–80.
[110] C Gideon Affidavit at paras 33–38; Potts Affidavit at paras 21, 23–24; Farthing-Nichol Affidavit at paras 48, 54.
[111] C Gideon Affidavit at para 39; Farthing-Nichol Affidavit at paras 41–46; Potts Affidavit at para 28.
[112] Farthing-Nichol Affidavit at paras 47–48.
[113] Farthing-Nichol Affidavit at paras 50–53, 87; Potts Affidavit at para 31.

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80. While the parties were ultimately unable to reach consensus, Canada's consultation and negotiation efforts over the past seven years were a genuine attempt by Canada to consider and address the discrimination in a meaningful way. Canada possessed a state of open-mindedness about what would be required to eliminate discrimination, and exercised good faith at all times. Canada engaged in two-way dialogue that led to a demonstrably serious consideration of long-term reform to eliminate discrimination and prevent its recurrence.[114] The Draft Final Agreement not only satisfied the Tribunal's orders, but provided additional relief that is beyond this Panel's jurisdiction.

ii. The Caring Society's conduct has detrimentally affected Canada's meaningful efforts towards finalizing long-term reform

81. Canada has embraced change in line with the research done to date. Through the Agreement in Principle and subsequent negotiations, Canada has adopted an approach towards long-term reform of Jordan's Principle, and developed a new FNCFS Program funding formula and a movement to First Nations decision-making over and delivery of child and family services.

82. However, Canada's good faith efforts to consult and negotiate have been hindered by the Caring Society's conduct. Courts have found that Indigenous groups frustrated consultations and failed to consult in good faith when they: refused to meet;[115] imposed unreasonable conditions during the consultation process;[116] engaged in a delay exercise;[117] refused to attend group discussions;[118] refused to consult within reasonable timeframes;[119] maintained intractable positions

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[114] *Coldwater* at paras 40–41.
[115] *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161 **[*Halfway River*]**; *Ahousaht First Nation* at paras 52–53.
[116] *Halfway River* at para 161; *Ahousaht First Nation* at paras 52–53.
[117] *Coldwater* at paras 234, 242, 244.
[118] *R v Douglas et al*, 2007 BCCA 265 at para 45, leave to appeal to SCC refused, 32142 (November 15, 2007).
[119] *Prophet River First Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2016 BCSC 2007 at para 181.

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and confrontational approaches;[120] took positions that can be discerned as preventing a proposal from being approved;[121] and were only willing to consult on their own terms.[122]

83. Over the past seven years, the Caring Society has engaged in all of these actions, hindering Canada's good faith efforts to consult and negotiate long-term FNCFS Program and Jordan's Principle reforms to eliminate discrimination, including by:

a. imposing unreasonable conditions on the negotiations, including refusing to adhere to the negotiations' confidentiality;[123]

b. abandoning negotiations and refusing to return to the negotiation table, despite repeated encouragement from Canada and the other parties;[124]

c. developing their own new approach to long-term FNCFS Program reform that repudiated the Agreement in Principle's approach, and a new set of demands that would have required a significant expansion of Canada's negotiation mandate beyond the terms of the Agreement in Principle, the Draft Final Agreement or even the scope of the complaint;[125] and

d. despite refusing to participate in negotiations, intervening in opposition to the Draft Final Agreement, including by urging First Nations to vote against the Draft Final Agreement and advocating in favour of retaining claims-based interim funding approaches and having the Tribunal retain oversight of the FNCFS Program.[126]

84. To the extent that the Caring Society ultimately disagreed with the provisions of the Agreement in Principle, their concerns should have been shared at the negotiation table. Instead, the Caring Society refused to negotiate and then actively undermined the good faith Draft Final

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[120] *R v Tommy*, 2008 BCSC 1095 at para 115; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para 251.
[121] *Pimicikamak v Her Majesty the Queen in Right of Manitoba*, 2016 MBQB 128 at para 44, aff'd 2018 MBCA 49, leave to appeal to SCC refused, 38221 (January 10, 2019); *Louis v British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070 at paras 221–27, aff'd 2013 BCCA 412, leave to appeal to SCC refused, 35630 (February 27, 2014) **[*Louis 2013*]**.
[122] *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 at para 118; *Louis 2013* at para 117.
[123] Farthing-Nichol Affidavit at paras 44–45.
[124] Potts Affidavit at paras 27–28; C Gideon Affidavit at para 39; Farthing-Nichol Affidavit at paras 42–46.
[125] C Gideon Affidavit at para 39; Potts Affidavit at para 34.
[126] Farthing-Nichol Affidavit at paras 55–59; Letter from Raymond Shingoose to the Minister of Indigenous Services (August 7, 2024), in Quintana-James Affidavit, Exhibit A.

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Agreement that was reached by the remaining parties at the table and was based on the Agreement in Principle (to which all parties, including the Caring Society, had agreed). Canada was ready to proceed with implementing long-term reforms. But the Caring Society's actions have deeply disrupted and damaged the substantial progress made to date and have led to expectations by First Nations that Canada is obliged to meet the Caring Society's demands beyond the Agreement in Principle.

85. As described, Canada's approach over the past seven years has embraced change. Conversely, the Caring Society's approach involves an indefinite interim reform period with ongoing CHRT oversight, indefinite agency involvement, indefinite payment of actuals, indefinite consultations and uncapped consultation funding. In Canada's view, that approach is not in the best interests of First Nations children and families.

G. <u>Next Steps</u>

86. Canada has expended seven years of intensive efforts, and over $47.5 million in consultation and negotiation funding, to consult and attempt to reach consensus on a final agreement on both the FNCFS Program and Jordan's Principle.

87. Canada has repeatedly maintained its position that resolving the issues raised in these proceedings by way of collaboration is preferable to adjudication. Indeed, Canada engaged in negotiations honourably and with integrity. However, a negotiated resolution can only be achieved when parties are willing to dialogue respectfully, compromise towards agreement and respect agreements when reached. The Complainants' recent, new position on long-term reform is unreasonable and far beyond what they previously agreed is necessary to remedy discrimination and prevent its recurrence. There is therefore no practical utility in requiring that Canada continue to consult with the Complainants at this time.

88. Canada has discharged its consultation obligations and the Panel should not order additional consultations with the Complainants. It is time to move forward with long-term reform, starting with COO and NAN's joint motion to approve the Ontario Final Agreement.

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PART IV – ORDERS SOUGHT

89. Canada respectfully requests an order dismissing the Caring Society's consultation motion in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Winnipeg, in the Province of Manitoba, this 15th day of May, 2025.

ATTORNEY GENERAL OF CANADA

Per: _____

Department of Justice Canada
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PART V – LIST OF AUTHORITIES

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7.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20
8.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36
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35.	Affidavit of Amber Potts affirmed March 3, 2025
36.	Affidavit of Cindy Blackstock affirmed January 12, 2024
37.	Amended Affidavit of Craig Gideon affirmed March 22, 2024
38.	Affidavit of Valerie Gideon affirmed March 14, 2024
39.	Affidavit of Duncan Farthing-Nichol affirmed March 13, 2025
40.	Affidavit of Katherine Quintana-James affirmed February 13, 2025
41.	Consultation Protocols: Article 4, page 7; Articles 18-19; Article 27
42.	Executive Summary of Agreement-in-Principle on Long-Term Reform
43.	First Nations Child & Family Caring Society statement: January 4, 2022
44.	Responding Factum of the Interested Party, Chiefs of Ontario
45.	A van Kraglingen, "*The Dialogic of Saga of Same-Sex Marriage: EGALE, Halpern, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights*"
46.	Unreported Reasons in *Moushoom v Canada (Attorney General)*, 2023 FC 1533
47.	Written Submissions of First Nations Child and Family Caring Society of Canada dated March 17, 2025
48.	January 14, 2025, Letter from Paul Vickery
49.	February 6, 2025, Letter from Deputy Minister Gina Wilson to all Agreement in Principle parties
50.	March 24, 2024, Letter from Caring Society to the Tribunal

ANNEX A

Federal Court Cour fédérale

Date: 20240626

Docket: T-402-19
T-141-20
T-1120-21

Ottawa, Ontario, June 26, 2024

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

BETWEEN:

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

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

T-141-20

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (by his litigation guardian, Carolyn Buffalo), CAROLYN BUFFALO AND DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HIS MAJESTY THE KING
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

T-1120-21

BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER

(Claims Approval Process – Removed Child Class and Removed Child Family Class)

[1] On June 19, 2024, the Court heard a motion brought by the Settlement Implementation Committee [SIC], on behalf of the Plaintiffs, for an order approving the proposed claims process for the Removed Child Class and the Removed Child Family Class, together with its associated draft claim forms [Claims Process]. The motion was brought on the consent of the Respondent and was, in part, opposed by the First Nations Child and Family Caring Society [Caring Society]. The Caring Society initially requested that the Court only approve the Claims Process if three additional orders were made imposing further obligations on the SIC. However, as detailed more fully below, the position of the Caring Society evolved as the hearing of the motion progressed,

with the Caring Society ultimately taking the position that it supported the approval of the Claims Process but sought directions from the Court as to whether the SIC should be compelled to submit additional items to the Court for approval.

[2] At the conclusion of the hearing of the motion, I advised the parties that I would be issuing an order approving the Claims Process, with reasons to follow, but that I would reserve on the issue of the relief sought by the Caring Society. My Order approving the Claims Process was issued on June 20, 2024, and I am now providing herein my reasons for doing so together with my determination on the relief sought by the Caring Society.

[3] By way of background, the Plaintiffs and the Defendant executed a Final Settlement Agreement in respect of the underlying class proceedings on April 19, 2023, which was amended by way of an Addendum dated October 10, 2023 [FSA], and approved by this Court on October 24, 2023, pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106 [see *Moushoom c Canada (Procureur général)*, 2023 FC 1466]. My Reasons approving the settlement detail the nature of the class action proceeding and the key provisions of the FSA [see *Moushoom v Canada (Attorney General)*, 2023 FC 1533]. For the purpose of these Reasons, the capitalized terms set out herein shall have the same meanings as set out in the FSA.

[4] Due to the complexity of this proceeding, the FSA did not prescribe the manner in which the claims processes for the nine classes would be administered. Rather, the FSA left the determination of the claims processes for future development by the SIC and approval by the Court. The SIC has brought this motion seeking approval of the first of many claims processes.

The Claims Process before the Court on this motion relates to the Removed Child Class and the Removed Child Family Class, though it is the first of a number of processes for the Court's consideration, with other processes for these classes to follow.

I. Analysis

[5] The legal test to be applied in approving a claims process is analogous to the test applied by the Court when approving a class action settlement—namely, whether the claims process is "fair, reasonable and in the best interests of the class as a whole" [see *Wenham v Canada (Attorney General)*, 2020 FC 588 at para 96, aff'd 2020 FCA 186, leave to appeal ref'd 2021 CanLII 49683 (SCC) [*Wenham*]; *Brazeau v Canada (Attorney General)*, 2020 ONSC 7229 at para 73]. The test for approving claims processes is not perfection [see *Wenham*, *supra* at para 51; *McLean v Canada*, 2019 FC 1075 at para 76 [*McLean*]; *Merlo v Canada*, 2017 FC 533 at para 18].

[6] Like settlements, claims processes must be looked at as a whole. It is not open for this Court to rewrite the substantive terms of a claims process or assess the interests of the individual class members in isolation from the whole class [see *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415 at para 62 [*Tataskweyak*]; *McLean*, *supra* at para 68]. Ultimately, when approving a claims process, this Court cannot modify or alter the claims process—it must approve it as is, or reject it [see *McLean v Canada (Attorney General)*, 2023 FC 1093 at para 37; *Tataskweyak Cree Nation*, *supra* at para 62].

A. ***The Claims Process is approved***

[7] In support of its request that the Court approve the Claims Process, the SIC has provided two affidavits from Dianne G. Corbiere, Class Counsel and counsel for the Assembly of First Nations [AFN]. Ms. Corbiere's evidence details: (a) the work that has been undertaken to develop the Claims Process over the last year; (b) the work that has gone into the preparation of the Indigenous Services Canada database [ISC Database]; (c) the piloting of the Claims Forms and financial literacy and options; (d) the engagement with First Nations on the Claims Process; and (d) the SIC's resolution endorsing the Claims Process.

[8] The SIC has also provided an affidavit from Joelle Gott, the engagement lead for Deloitte LLP in its role as Administrator of the FSA. Ms. Gott's evidence details the Administrator's work since the Court's approval of the FSA, with a focus on the efforts undertaken to develop the Claims Process and the steps taken by the Administrator to meet its obligations under the FSA.

[9] The Claims Process covers many topics including: (a) Claims Form completeness requirements; (b) adjudication on eligibility; (c) progressive disclosure; (d) the Administrator's communications with Claimants; (e) appeals to the Third-Party Assessor; (f) Claimants who are Class Members of more than one Class; (g) Claims periods and Claims Deadlines, together with Claims Deadline extensions; (h) Claims by representatives, including representatives claiming on behalf of minors, heirs, estates, Personal Representatives claiming on behalf of Living Persons Under Disability, representatives on behalf of deceased Removed Child Class Claimants, representatives of deceased approved Caregiving Parents and Caregiving Grandparents, public guardians and trustees and ISC estates; (i) assignment and garnishments of compensation; (j) non-

Class Counsel legal professionals; and (k) exceptional early payments of compensation funds to minors. While the Claims Process is detailed, it also recognizes that additional efforts remain ongoing and provides that the SIC will return to the Court to seek additional approvals in relation to other aspects of the claims process for the Removed Child Class and the Removed Child Family Class, such as in relation to the Incarcerated Class Members Process, caregiver Abuse and claims helpers.

[10] The evidence demonstrates that extensive efforts have been undertaken by the Administrator and the SIC over the last year to design and develop the Claims Process in a manner consistent with their respective obligations under the FSA. The SIC and the Administrator have consulted with a variety of stakeholders and experts including: (a) consultations and meetings with the Respondent and in particular, ISC; (b) consultations and meetings with the Caring Society; (c) regional consultations across Canada on the Claims Process with the AFN to present, answer questions and seek input on the proposed Claims Process and claims helper program; and (d) working with numerous experts to develop financial literacy information and investment vehicles for Claimants.

[11] The evidence demonstrates that, in addition to the SIC being First Nations-led, there has also been meaningful First Nations involvement at every stage of the development of the Claims Process. Counsel for the SIC has further advised that during these extensive consultations, not a single Class Member voiced opposition to the Claims Process.

[12] Having reviewed the Claims Process, I am satisfied that it meets the requirements of the FSA as a whole. Importantly, I find that it meets the requirements of Article 5.01(3) of the FSA in that, as designed, the Claims Process is expeditious, cost-effective, user-friendly, culturally sensitive, trauma-informed and non-traumatizing, with any necessary accommodations for persons with disabilities or vulnerabilities. Moreover, it meets the requirement of Article 6(2) of the FSA in that no member of the Removed Child Class will be required to submit to an interview, examination or other form of *viva voce* evidence taking.

[13] I am satisfied that the Claims Process is fair, reasonable and in the best interests of the Class as a whole. Accordingly, the Claims Process is approved.

B. *The directions sought by the Caring Society will not be issued*

[14] Before turning to the specific directions sought by the Caring Society, I want to begin by clarifying their standing on this motion and their role in the implementation of the FSA.

[15] The Caring Society is not a party to this class proceeding and they do not represent the interests of the Representative Plaintiffs or any Class Member. The Caring Society has also not been granted intervener status in this proceeding by the Court. To the contrary, the Caring Society was expressly denied intervener status on the motion to approve the FSA. In her Order dated September 23, 2022, Case Management Judge Molgat stated:

> [19] Considering the first criteria set out in *Sport Maska*, the Caring Society is a non-profit organization—it is not a member of the class of individuals who suffered as a result of Canada's discrimination on whose behalf these proceedings were brought. Nor does the Caring Society act for class members. Yet it is essentially seeking to make submissions on behalf of the class (or a

> sub-set of them) whose interests are already represented by Class Counsel and the Representative Plaintiffs.
>
> [20] The Court agrees with the reasoning of Justice Phelan in *McLean v Canada (Attorney General)* and finds that the Caring Society does not have a "direct interest" and that it may, at best, be "indirectly affected" by the outcome of the Settlement Approval Motion such that the first criteria of *Sport Maska* is not met (see *McLean v Canada (Attorney General)*, 2019 FC 515 at para 3).

[16] Instead, the Caring Society's standing to make submissions on this motion is grounded in Article 22.05(1) of the FSA, which provides:

> The Caring Society will have standing to make submissions on any applications brought for Court approval by the Settlement Implementation Committee or the Parties pertaining to the administration and implementation of this Agreement after the Settlement Approval hearing, including approval of the Claims Process and distribution protocol to the extent that issues impact the rights of the following classes:
>
> (a) Removed Child Class Members placed off-Reserve as of and after January 1, 2006, and Removed Child Family Class Members in relation to Children placed off-Reserve as of and after January 1, 2006, including deceased members of these classes;
>
> (b) Kith Child Class Members and Kith Family Class Members, including deceased members of these classes; and
>
> (c) Jordan's Principle Class Members and Jordan's Principle Family Class Members, including deceased members of these classes.

[17] As such, the Caring Society has a contractual right to make submissions on any applications brought by the parties, or the SIC, for approval before this Court pertaining to specific issues, as they impact specific classes, related to the administration and the implementation of the FSA.

[18] To be clear, Article 22.05(1) does not empower the Caring Society to bring its own motions before this Court. Rather, their contractual rights are limited to participating in specific motions

brought by the parties, or the SIC. Accordingly, there is no basis in the FSA for the Caring Society to be seeking orders from this Court.

[19] In their written representations, the Caring Society's support for approving the Claims Process was conditional on this Court issuing the following three orders:

A. An order that the SIC submit a companion claims process for identifying and approving Removed Child Class Members who have not been identified on the ISC Database, but are otherwise eligible for compensation under the FSA, by September 1, 2024.

B. An order that the SIC submit a safe, evidence-based and expert/clinically informed approach for Removed Child Class Members to identify Abuse in connection with their removal if they choose, including a safe and expert/clinically informed approach that may include the sharing of this information with the Administrator on behalf of the Removed Child Class Member by a trusted support person, by September 1, 2024.

C. An order that the SIC submit a detailed description of the supports set out in Schedule 1 of the FSA, the status of the hiring and training of claims helpers and the status of the Caring Society's suggestions regarding increasing surge capacity and measures to ensure that existing services such as mental health, addictions, domestic violence, cultural and child welfare services have the capacity to support Class Members before the launch date, throughout the claims process and after the claims process, by September 1, 2024.

[20] However, after the SIC raised objections in their written representations in reply as to the Caring Society's standing to seek orders from the Court, and following similar concerns raised by the Court at the commencement of the hearing, the Caring Society's position changed. The Caring Society stated that it was no longer seeking orders, but rather was asking for directions or guidance from the Court, which directions were conditional on their support for the approval of the Claims Process. However, by the end of the hearing, when pushed to clarify their position, the Caring Society stated that they did not want to delay the approval of the Claims Process and were simply looking for guidance or direction from the Court on the issues that they had raised.

[21] The Caring Society asserted that it was open to the Court to issue any directions it deems appropriate pursuant to the powers vested by Article 1.14 of the FSA, which provides:

> Notwithstanding any other provision of this Agreement, the Court will maintain exclusive jurisdiction to supervise the implementation of this Agreement in accordance with its terms, including the adoption of protocols and statements of procedure, and the Parties attorn to the jurisdiction of the Court for that purpose. The Court may give any directions or make any orders that are necessary for the purposes of this Article.

[22] I agree with the Caring Society that the Court retains an ongoing supervisory jurisdiction over the implementation of the FSA which includes the ability to issue directions. However, I find that it is not open to the Caring Society to independently apply to the Court for directions regarding the implementation of the FSA. Nonetheless, I will go on to consider the three directions requested by the Caring Society in the context of this motion.

[23] Briefly, before doing so, it is important to comment on the interactions between the Caring Society and the parties/the SIC in the administration of the FSA as it is apparent to the Court that

there is significant animosity between them which has resulted in a breakdown in communications. This animosity appears to be driven by a misapprehension of the role of the Caring Society in the administration of the FSA.

[24] Article 5.01(1) provides that:

> The design and implementation of the distribution protocol within the Claims Process will be within the sole discretion of the Plaintiffs, subject to the approval of the Court. The Plaintiffs will establish the Claims Process and may seek input from the Caring Society, as well as from experts and First Nations stakeholders as the Plaintiffs deem in the best interests of the Class Members. The Plaintiffs will finalize the distribution protocol within the Claims Process in accordance with this Agreement, and will submit same for approval of the Court.
>
> [Emphasis added.]

[25] The SIC, on behalf of the Plaintiffs, has sole discretion over the design and implementation of the Claims Process (subject to the Court's approval). The SIC may, but is not obligated to, seek input from the Caring Society over any aspect of the design and implementation of the Claims Process. The evidence before the Court is that the Caring Society has thus far been invited to participate in numerous meetings related to the Claims Process and has provided other written submissions.

[26] It must be stressed, however, that what the SIC chooses to do with the submissions received from the Caring Society is up to the SIC. There is no obligation on the part of the SIC to implement any suggestions made by the Caring Society. Rather, the obligation of the SIC is to design and implement a Claims Process that complies with the FSA. It is also not open to the Caring Society to demand reports or evidence from the SIC. While the Caring Society may be frustrated by the

lack of responsiveness from the SIC to certain submissions or inquiries, the manner in which the Caring Society has provided their submissions may, in large measure, be responsible for the reception that their submissions have received, as it is not open to the Caring Society to dictate to the SIC what must be done by the SIC or how the SIC should do it.

[27] It is evident to the Court that many of the concerns raised by the Caring Society, which resulted in the filing of extensive evidence on this motion and the cross-examination of two affiants, could have been addressed (and likely resolved) by better cooperation between the parties/SIC and the Caring Society. It is in none of the Class Members' best interests for the animosity between the Caring Society and the parties/SIC to continue, as the Caring Society undoubtedly has valuable insight to offer to the SIC to assist them with the design and implementation of the various claims processes. The Court expects that the dealings between the Caring Society and the parties/SIC will improve going forward.

(a) Direction regarding a companion claims process

[28] As stated above, the Caring Society seeks a direction that the SIC submit a companion claims process for identifying and approving Removed Child Class Members who have not been identified in the ISC Database, but are otherwise eligible for compensation under the FSA, by September 1, 2024.

[29] After extensive questioning at the hearing, it became evident that the Caring Society's underlying concern is based on the fact that the SIC has not expressly confirmed to the Caring Society that a further claims process will be developed and submitted to the Court to ensure that

an eligible Removed Child Class Member whose name does not appear in the ISC Database will be eligible for compensation. While the Caring Society filed extensive evidence regarding the completeness of the ISC Database, it is not their position that the ISC Database should not be used to approve the claims of the Removed Child Class Members; rather, the Caring Society is concerned that there is a possibility that an eligible Removed Child Class Member may not appear on the ISC Database and thus, not receive compensation. At this point, this concern is speculative, as the ISC Database remains under construction and no Claimant has yet to have their name run through the ISC Database. However, this issue is on the SIC's radar.

[30] By way of context, Article 5.01(10) of the FSA empowers the SIC to develop claims processes for the various classes in phases. The development of the claims process for some classes is more difficult, whereas for others, such as the Removed Child Class, it is more straightforward. By coming to the Court seeking approval of these processes in stages, the Administrator has an ability to ensure that settlement funds begin to flow as soon as possible to some Class Members while the claims process for others remains under development.

[31] In the case of the Removed Child Class, Article 6.02(3) of the FSA provides that eligibility for compensation (and Enhancement Factors) "will be based on objective criteria and data primarily from ISC and Supporting Documentation as the case may be." Accordingly, the FSA, as approved by the Court, does not limit Removed Child Class eligibility to only those Claimants who appear in the ISC Database.

[32] Article 4 of the Claims Process sets out how the Administrator will determine whether a Removed Child Class Claimant is eligible for compensation. As of the launch date of the Claims Process, all potential Removed Child Class Members may submit their applications. Those identified in the ISC Database will receive an eligibility decision. Those who are plainly not eligible (such as an individual claiming as a Removed Child Class Member verified to have been born in 1950) will receive a denial. Other Claimants who are not identified in the ISC Database but who are not plainly ineligible will receive an inconclusive eligibility letter from the Administrator. For those whose eligibility is inconclusive, the Administrator will continue to run the Claimant's name through the ISC Database against new additions thereto until such time as the construction of the ISC Database is complete (estimated to be the end of 2025). If a Claimant is later found in the ISC Database, they will receive an eligibility letter.

[33] Article 4.7(B) of the Claims Process addresses the situation of a Claimant who has received an inconclusive eligibility letter and is never found in the ISC Database. Article 4.7(B) provides:

> A process is under development for Claimants who will have received an Inconclusive Eligibility Letter. This process will provide direction on next steps for Claimants who, by the time it is finalized, are still awaiting an Eligibility Decision.

[34] By virtue of Article 4.7(B) of the Claims Process, I find that the SIC has committed to the Court that they will return with a further claims process to address claims made by eligible Removed Child Class Members whose names do not appear in the ISC Database. Whether or not there will be any such Claimants is a matter yet to be determined. However, in order for the SIC to comply with the FSA and, in particular, Article 6.02(3) thereof, there will have to be a process

implemented for an eligible Removed Child Class Member to receive compensation even if they do not appear in the ISC Database.

[35] In that regard, I would note that at the time that I approved the FSA, Class Counsel advised the Court that a further claims process would be developed to ensure that eligible Removed Child Class Members who were not in the ISC Database would receive compensation. Paragraph 109 of the affidavit of Robert Kugler, sworn October 16, 2023, stated:

> For those claimants whose claims cannot be verified through the ISC Database, the plaintiffs and the Administrator are working on a process intended to be as simple as possible to enable the claimant to substantiate their eligibility for compensation. This process will recognize that class members' circumstances may require flexibility in the type of documentation necessary to support their claims, and the timelines for doing so, as guided by the principles in the FSA. This involves communication with the provinces and agencies which are underway.

[36] As such, I am not satisfied that the Caring Society's requested direction is necessary, as the SIC is already obligated to return to the Court to submit a claims process for any eligible Removed Child Class Members not found in the ISC Database. With respect to the timing of this further claims process, I see no basis to require the SIC to return to the Court with such a process by September 1, 2024, or any other date in the near future. As noted above, the SIC is vested with the sole discretion to design the claims processes which are to be undertaken in stages. As such, it is in the SIC's discretion to determine when it is appropriate to return to the Court. Furthermore, no point is served in designing such a process prior to the conclusion of the construction of the ISC Database or the determination that there are, in fact, Claimants that require a further claims process and, if so, what identifiable characteristics such Claimants might have so as to guide the further claims process.

(b) Direction regarding Abuse

[37] As detailed above, the Caring Society requests that the Court direct the SIC to submit a "safe, evidence-based and expert/clinically informed approach for Removed Child Class Members to identify abuse in connection with their removal if they choose, including a safe and expert/clinically informed approach that may include the sharing of this information with the Administrator on behalf of the Removed Child Class Member by a trusted support person" by September 1, 2024.

[38] By way of context, the FSA provides for direct compensation of Caregiving Parents or Caregiving Grandparents of a Removed Child Class Member under the Removed Child Family Class. However, Article 6.04(4) of the FSA provides that a Caregiving Parent or Caregiving Grandparent who has committed Abuse that has resulted in the Removed Child Class Member's removal is not eligible for compensation in relation to that Child. The FSA defines "Abuse" as "sexual abuse (including sexual assault, sexual harassment, sexual exploitation, sex trafficking and child pornography) or serious physical abuse causing bodily injury, but does not include neglect or emotional maltreatment."

[39] Section 5.12 of the Claims Process addresses the issue of Abuse by a Caregiving Parent or Caregiving Grandparent. Subsection D provides that "[a] process is under development to address instances where a Claimant committed Abuse that resulted in the Associated Removed Child's removal." The Claims Process does not require a Removed Child Class Claimant to identify any abuser or to provide any particulars of any Abuse.

[40] The evidence before the Court from the Administrator is that they engaged in consultation with the Parties and the Caring Society on the issue of Abuse. Specifically, Ms. Gott's affidavit, sworn April 12, 2024, states at paragraph 14(m):

> (i) We collaborated with the plaintiffs to research and consult regarding the process to confirm that a child's removal was not due to Abuse (as defined under the FSA) by the Claimant caregiver, including the options of self-declaration by Family Class Member (in Claims Form), voluntary report by Removed Child, Child Welfare Agency confirmation or records, with consideration given to a trauma-informed approach.
>
> (ii) The work on the Abuse portion of the Claims Process is ongoing. Given that the Claims of Caregiving Parents or Caregiving Grandparents will not be processed before approximately four years following the launch of the Claims Process, after the expiration of the Claims Deadline (Article 6.05 1) [*sic*] of FSA), we continue to work with the plaintiffs to develop a trauma-informed approach to Abuse determination – one of the most sensitive and potentially traumatizing implementation points in the Settlement Agreement.

[41] When questioned at the hearing as to why the requested direction is required, the Caring Society asserted that the SIC had not provided the Court with any evidence to establish that the SIC's approach—which does not include an opportunity for Removed Child Class Members to voluntarily disclose Abuse—was trauma-informed based on consultations with experts. Moreover, the Caring Society asserted that it was possible that victims of Abuse could be more traumatized by waiting to address the issue of Abuse until later in the process, when the Removed Child Family Class Member determinations are made. While the Caring Society's written representations included a specific request that the Claims Form for the Removed Child Class Members be amended to include an opportunity for voluntary disclosure of Abuse, the Caring Society abandoned this request at the hearing.

[42] I see no basis to interfere with the SIC's work in determining how best to address the issue of Abuse, which remains ongoing and which will ultimately result in a further claims process that will be put before the Court for approval. I am satisfied that the work being undertaken by the Administrator, in consultation with the SIC, the parties and the Caring Society, is consistent with the Administrator's obligations under the FSA and properly recognizes the sensitive and traumatic nature of this issue. While the Caring Society is critical of the absence of expert evidence before this Court on this issue, the same criticism could be levied at the Caring Society, who advocates for the Court to impose a particular approach without themselves providing any evidence that their approach is, in fact, trauma-informed and the better approach to take.

[43] Again, as noted above, it is not the role of the Caring Society to dictate to the SIC and the Administrator how issues are to be addressed. The Caring Society has been given the opportunity to provide their submissions on this issue, which they have done, and it is up to the SIC to determine how to proceed (subject to Court approval). That said, I would note that the evidence before the Court is that, despite their participation in various consultations related to the issue of Abuse, the Caring Society did not raise with the SIC/Administrator the suggestion that the Claims Forms should be amended to permit the voluntary disclosure of Abuse by Removed Child Class Members. It should go without saying that it is not helpful to the development of the Claims Processes, for feedback to be provided for the first time only once the Claims Process is before the Court for approval.

[44] Accordingly, the direction requested by the Caring Society will not be granted.

(c) Direction regarding supports

[45] As detailed above, the Caring Society requests that the Court direct the SIC to submit a detailed description of the supports set out in Schedule 1 of the FSA, the status of the hiring and training of claims helpers and the status of the Caring Society's suggestions regarding increasing surge capacity and measures to ensure that existing services (such as mental health, addictions, domestic violence, cultural and child welfare services) have the capacity to support Class Members before the launch date, throughout the claims process and after the claims process, by September 1, 2024.

[46] There is a dispute between the Caring Society and the SIC as to whether what the Caring Society seeks is an expansion, and thus a renegotiation, of the supports agreed to in the FSA. The Caring Society denies that it is seeking to change the landscape of the supports required under the FSA. Rather, they stressed at the hearing that their concern is with respect to the timing of the availability of the supports. The Caring Society asserts that the supports prescribed by the FSA must be available to Class Members before, during and after the Claims Process and, despite the Caring Society's engagement with the SIC on the issue of supports, the Caring Society asserts that it has not received clear and cogent evidence that the robust supports prescribed by the FSA will be available to Class Members in a timely manner. The Caring Society states that the direction they seek will provide a level of comfort by requiring the SIC to assure stakeholders that the required supports will be in place, given that no such assurances have been provided by the SIC to the Caring Society.

[47] The Claims Process currently before the Court for approval does not prescribe supports for Claimants. Rather, the requirement to provide supports to Claimants is addressed in the FSA. As such, the Caring Society's requested direction does not have a direct nexus to the issue of whether the Claims Process should be approved. Rather, the Caring Society is raising a concern with the SIC's compliance with the FSA, which is not an issue properly before the Court on this motion.

[48] As set out in Article 3.02(1)(j) of the FSA, one of the duties of the Administrator is to provide:

> […] navigational supports to Class Members in the Claims Process as outlined out in Schedule I, Framework for Supports for Claimants in Compensation Process, including: (i) assistance with the filling out and submission of Claims Forms; (ii) assistance with obtaining Supporting Documentation; (iii) assistance with appeals to the Third-Party Assessor pursuant to this Agreement; (iv) reviewing Claims Forms, Supporting Documentation, and First Nations Council Confirmations; and (v) determining a Claimant's eligibility for compensation in the Class;

[49] Article 9 of the FSA identifies certain supports that will provided to Class Members in the Claims Process. Specifically, Article 9(1) states that:

> The Parties will agree to culturally sensitive health, information, and other supports to be provided to Class Members in the Claims Process, as well as funding for health care professionals to deliver support to Class Members who suffer or may suffer trauma for the duration of the Claims Process, consistent with Schedule I, Framework for Supports for Claimants in Compensation Process, and the responsibilities of the Administrator in providing navigational and other supports under Article 3.02.

[50] Contrary to the assertion of the Caring Society, Article 9 does not impose an obligation on the parties to have the required supports in place prior to the roll out of the Claims Process. Notwithstanding, there are certain supports that have already been implemented, such as the Hope

for Wellness Help Line. As such, there is no issue at this stage of the settlement implementation of any non-compliance with the obligation to provide supports as prescribed by the FSA.

[51] The evidence before the Court is that the Administrator and the SIC are working towards ensuring that all of the required supports are in place in time for the roll out of the Claims Process. While the Caring Society wants assurances that this will be done, and that the support providers will have the necessary training and capacity, there is no obligation on the SIC/Administrator to provide the Caring Society with those assurances. Moreover, there is also no obligation on the part of the SIC/Administrator to report to the Court at this time or to obtain the Court's approval of their planned supports. If there are any issues with the roll out of the required supports, the SIC confirmed at the hearing that they will advise the Court. In any event, the Court will be receiving a status report from the SIC in late October of 2024 as part of the SIC's annual reporting obligation as prescribed by Article 12.03(1)(l) and (m) of the FSA.

[52] As such, I am not satisfied that the requested direction related to supports is necessary or appropriate.

II. Conclusion

[53] For all of these reasons, I am satisfied that the Claims Process is fair, reasonable and in the best interests of the Class as a whole, and that the directions sought by the Caring Society should not be issued.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-402-19
STYLE OF CAUSE:	XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-141-20
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-1120-21
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 19, 2024
ORDER AND REASONS:	AYLEN J.
DATED:	JUNE 26, 2024

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