

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 and Northern Affairs Canada)**

Respondent

– and –

**CHIEFS OF ONTARIO and NISHNAWBE ASKI NATION
and AMNESTY INTERNATIONAL CANADA and GEORGINA ISLAND FIRST
NATION and TAYKWA TAGAMOU NATION**

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NISHNAWBE ASKI NATION
VOLUME II**

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Table of Authorities

Tab	Title

Case law

Volume I

1	<i>Baker v Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 SCR 817
2	<i>Ball v Ontario (Community and Social Services)</i> , 2010 HRT0 360
3	<i>Canada (Attorney General) v Dominique</i> , 2025 FCA 24
4	<i>Canada (Attorney General) v First Nations Child and Family Caring Society of Canada</i> , 2021 FC 969
5	<i>Canada (Attorney General) v Grover</i> , 1994 CanLII 18487 (FC)
6	<i>Closs v Fulton Forwarders Incorporated and Stephen Fulton</i> , 2012 CHRT 30
7	<i>Clyde River (Hamlet) v Petroleum Geo-Services Inc</i> , 2017 SCC 40
8	<i>CN v Canada (Canadian Human Rights Commission)</i> , [1987] 1 SCR 1114
9	<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010
10	<i>Doucet-Boudreau v Nova Scotia (Minister of Education)</i> , 2003 SCC 62
11	<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624
12	<i>First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2016 CHRT 2
13	<i>First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2016 CHRT 10
14	<i>First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs)</i> , 2016 CHRT 16
15	<i>First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)</i> , 2017 CHRT 7

- 16 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2017 CHRT 14](#)
- 17 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2017 CHRT 35](#)
- 18 *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](#)
- 19 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2019 CHRT 7](#)

Volume II

- 20 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2020 CHRT 7](#)
- 21 *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](#)
- 22 *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 24](#)
- 23 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2021 CHRT 41](#)
- 24 *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 8](#)
- 25 *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 26](#)
- 26 *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](#)

- 27 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2023 CHRT 44](#)
- 28 *First Nations Child & Family Caring Society of Canada and Assembly of First Nations v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2025 CHRT 6](#)
- 29 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2025 CHRT 80](#)
- 30 *Gitxaala v British Columbia (Chief Gold Commissioner)*, [2025 BCCA 430](#)
- 31 *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#)

Volume III

- 32 *Liu (on behalf of IPCO) v Public Safety Canada*, [2025 CHRT 90](#)
- 33 *Malec et al v Conseil des Montagnais de Natashquan*, [2012 CHRT 8](#)
- 34 *Ontario Human Rights Commission v Simpsons-Sears*, [\[1985\] 22 SCR 536](#)
- 35 *Ontario v Association of Ontario Midwives*, [2020 ONSC 2839](#)
- 36 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, [2004 SCC 30](#)
- 37 *R v Desautel*, [2021 SCC 17](#)
- 38 *R v Hape*, [2007 SCC 26](#)
- 39 *R v Sparrow*, [\[1990\] 1 SCR 1075](#)
- 40 *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5](#)
- 41 *Shot Both Sides v Canada*, [2024 SCC 12](#)

Statutes

- 42 *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#)
- 43 *Canadian Human Rights Act*, [RSC 1985, c H-6](#)
- 44 *Child, Youth and Family Services Act, 2017*, [SO 2017, c 14, Sch 1](#)

- 45 *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#)

Letters from the Canadian Human Rights Tribunal

- 46 Letter from Canadian Human Rights Tribunal to Parties re Long-Term Reform, dated 10 February 2025

Volume IV

International Law and UN Commentary

- 47 *Convention on the Rights of the Child*, 20 November 1989, [1577 UNTS 3](#) (entered into force 2 September 1990)
- 48 UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 34th Sess, UN Doc [CRC/GC/2003/5](#) (2003)
- 49 UN Committee on the Rights of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention*, 50th Sess, UN Doc [CRC/C/GC/11](#) (2009)
- 50 UN Human Rights Council, *Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples*, 48th Sess, UN Doc [A/HRC/48/74](#) (2021)
- 51 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc [A/RES/61/295](#) (2007) GA Res 61/295

Secondary Sources

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- 54 Kent Roach, “9.5.1 Indigenous Self-determination and Negotiated Remedies” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)
- 55 Kent Roach, “9.6 Conclusion” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)

- 56 Elsa Stamatopoulou, "Indigenous Children and Children's Rights" in *Oxford Handbook of Indigenous Peoples and International Law*, online eds (Oxford University Press, 2025)

Other

- 57 Chief Archie Wabasse's remarks at the Chiefs of Ontario Special Chiefs Assembly, "Special Chiefs Assembly: Strength in Unity" (10 October 2025), <https://www.youtube.com/live/BjpoRyvHEdQ?t=14266s>
- 58 Chief Joe Miskokomon's remarks at the Chiefs of Ontario Special Chiefs Assembly, "Special Chiefs Assembly: Strength in Unity" (10 October 2025), <https://www.youtube.com/live/BjpoRyvHEdQ?t=13741s>

TAB 20

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

Source: Canadian Human Rights Tribunal

Date: 2020-04-16

File number: T1340/7008

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Citation: 2020 CHRT 7

Date: April 16, 2020

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

Reasons on Three Questions Regarding Eligibility for Compensation 1

I. Context 1

II. Question 1) At what age should beneficiaries gain unrestricted access to the compensation? 3

A. The First Nations Child and Family Caring Society of Canada's Position 3

B. The Assembly of First Nations' Position 5

C. The Canadian Human Rights Commission's Position 6

D. The Chiefs of Ontario's Position 6

E. The Nishnawbe Aski Nation's Position 6

F. Canada's Position 6

G. Analysis 7

H. Order 9

III. Question 2) Should compensation be available to children who entered care prior to January 1, 2006 but remained in care as of that date? 9

A. The First Nations Child and Family Caring Society of Canada's Position 10

B. The Assembly of First Nations' Position 10

C. The Canadian Human Rights Commission's Position 11

D. The Chiefs of Ontario's Position 11

E. The Nishnawbe Aski Nation's Position 11

F. Canada's Position 11

G. Analysis 12

H. Orders 23

IV. Question 3) Should compensation be paid to the estates of deceased individuals who otherwise would have been eligible? 23

A. The First Nations Child and Family Caring Society of Canada's Position 24

B. The Assembly of First Nations' Position 25

C. The Canadian Human Rights Commission's Position 27

D. The Chiefs of Ontario's Position 29

E. The Nishnawbe Aski Nation's Position 29

F. Canada's Position 29

G. Analysis 30

H. Order 40

I. Other Important Considerations 40

V. Retention of Jurisdiction 42

Reasons on Three Questions Regarding Eligibility for Compensation

I. Context

[1] On September 6, 2019, the Tribunal rendered its decision on the issue of compensation remedies (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [Compensation Decision]) and found Canada liable to pay compensation under the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*) to victims/survivors of its discriminatory practices, namely First Nations children and their parents or grandparents (caregivers).

[2] The Panel finds it important to reiterate the significant context and findings in which the compensation order was decided and has reproduced a summary of its decision in the *Compensation Decision* below:

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being \$40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which [...] and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as

proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its Decision that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada.

(*Compensation Decision* at paras. 13-15)

[3] Furthermore, in its decision, the Panel also directed the First Nations Child and Family Caring Society of Canada (Caring Society), the Assembly of First Nations (AFN) and Canada to discuss possible options, to consult with the Commission, Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN) on a process for identifying specific victims or distributing the compensation and to return to the Tribunal on February 21, 2020 with their proposals.

[4] After discussions, the Caring Society, the AFN and Canada have created a draft "Framework for the Payment of Compensation under 2019 CHRT 39" (the "Draft Framework") that sets out proposals on implementation that they have agreed to as of February 21, 2020. This Draft Framework has not yet been finalized and the parties have now requested the Tribunal to rule on three questions where they did not reach a consensus and required further guidance from this Panel.

[5] On February 28, 2020, the Attorney General of Canada (AGC) wrote a letter to the Tribunal indicating that no party wished to file a reply on those three questions and confirmed that the three questions could now be taken under reserve by the Panel.

[6] On March 3, 2020, the Panel sought the parties' views on a specific case related to one of the three questions and the parties' submissions were received on March 11, 2020.

[7] Finally, on March 16, 2020, the Panel reached a decision on the three questions, and in the interests of expediency and to facilitate resolution, its determinations were provided in a short form with full reasons to follow shortly. That format is consistent with an oral ruling issued from the bench. The full reasons are outlined in this ruling.

II. Question 1) At what age should beneficiaries gain unrestricted access to the compensation?

[8] **Decision:** The provincial/territorial age of majority

A. The First Nations Child and Family Caring Society of Canada's Position

[9] The Caring Society argues that compensation should only be paid to victims/survivors who are 25 years of age and older, rather than by relying on the provincial/territorial ages of majority, with an exception for those aged 18-25 who wish to access funds for education or for “compelling compassionate reasons”. The Caring Society argues that children are a highly vulnerable group, and society recognizes this, building structures to protect them from making decisions they are not adequately prepared to make is appropriate.

[10] The Caring Society contends that current age of majority presumptions, are premised on a societal belief that the once they transition to adulthood, people are less impulsive and susceptible to peer pressure, better able to understand complex concepts and appreciate risks and consequences. However, the Caring Society's position is that such growth should not be presumed to occur at an age which was somewhat arbitrarily chosen by legislatures.

[11] The Caring Society cites Lord Scarman from his concurring 1985 reasons in *Gillick v. West Norfolk and Wisbech Area Health Authority*, which were quoted by the Supreme Court of Canada in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 51:

... The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of “growing up” fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change

[12] The Caring Society argues that research in the areas of child development and neuroscience provide the same conclusion as Lord Scarman: effectively, the process of maturation is a continuous one, and that the “age of transition” is closer to 25 years. The Caring Society provided the Tribunal with an expert report prepared by Dr. Sidney Segalowitz, a professor of psychology and neuroscience, to support its position. Dr. Segalowitz's evidence advances that brain development continues past age 18 and levels off at approximately 25 years old for healthy individuals.

[13] Dr. Segalowitz's research is summarized at page 4 of his report as follows:

There is growing consensus that, for many important functions, the average age at which brain development in healthy individuals' asymptotes is about 25 years. However, there will be a sizable group whose trajectory is behind this schedule as well as some ahead of it. This can be for a number of reasons. [...] The research [...] has led us to this average figure of 25 years for some developmental process and the various factors that can interfere with this normative trajectory.

[14] In arriving at this finding, Dr. Segalowitz reviews the current research on brain development and suggests that the mental functions most associated with adult maturity involve emotional self-regulation and complex cognitive functions involving attention, memory and inhibitory control. Risk-taking is a key concern among young people, especially when in the presence of peers. Impulsivity and sensation-seeking behaviours decrease gradually through adolescence, according to Dr. Segalowitz, and there is a major reduction in such behaviour in the 26-30 years range.

[15] Importantly, Dr. Segalowitz notes that negative early life experiences (such as chronic stress, poverty, poor nutrition, exposure to air and water pollution, pre- and post-natal drug exposure, traumatic brain injury and PTSD) can put an individual's mental health trajectory at risk by compromising brain growth in regions related to emotional self-regulation and cognitive processing.

[16] Dr. Segalowitz's evidence, the Caring Society argues, is illustrative of the fact that scientific knowledge on brain development has made significant advances since the time when provincial ages of majority were set in the 1970's. The scientific evidence provided by Dr. Segalowitz, coupled with the 'egregious nature of the harm and adverse impacts experienced by the child victims in this case' points to payment at age 25 as the only appropriate result, according to the Caring Society.

B. The Assembly of First Nations' Position

[17] The AFN disagrees with the Caring Society's proposal on this issue, pointing instead to provincial legislation on age of majority as well as laws which lay out duties of property guardians upon a minor attaining the age of majority. Section 53 of Ontario's *Children's Law Reform Act*, RSO 1990, c C.12, for example, provides that guardians of property must transfer to the child all property in the care of the guardian when the child attains the age of eighteen years. Similarly, the *Indian Act*, RSC 1985, c I-5 provides at s. 52 that the Minister can appoint guardians of property for infant children under the Act's jurisdiction, but at s. 52.3(1) specifies that any property held for them must be conveyed to the child in lump sum upon attaining the age of majority.

[18] The AFN points to trust law in support of its argument that distribution at an age higher than the provincial/territorial age of majority would be problematic. They cite the rule in *Saunders v. Vautier*, summarized by the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28 as follows at para 21:

The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

[19] The AFN also cites two cases where structured settlements (arrangements through which claimants can receive all or part of a settlement by way of periodic payments rather than via lump sum) established by court order were modified or extinguished where trust beneficiaries were capable of managing their own affairs. (See *Hubbard v Hubbard*, 140 ACWS (3d) 216, 2005 CanLII 20811 (ONSC) and *Grieg v National Trust Co*, 47 BCLR (3d) 42, 1998 CanLII 4239 (BCSC)).

C. The Canadian Human Rights Commission's Position

[20] The Commission ultimately takes no position on the question of the appropriate age for receiving compensation. That said, in light of the evidence provided by the Caring Society in support of its position, the Commission does share a concern that young persons in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. The Commission points out that potential beneficiaries will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. For these reasons, regardless of what minimum age may eventually be selected for paying out compensation awards, it will be critically important for Canada to follow through on the laudable commitments made in the Draft Framework to adequately fund the delivery of culturally-appropriate financial and other supports to beneficiaries.

D. The Chiefs of Ontario's Position

[21] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[22] The NAN did not take any position on this question.

F. Canada's Position

[23] The AGC advances that a child's unrestricted access to the compensation should coincide with attaining the age of majority set by their home province or territory. Even Indigenous Services Canada's own Social Programs National Manual 2017-2018 refers back to the provincial or territorial legislation to determine age of majority. Such an approach, according to the AGC, would ensure that First Nations children who may receive a benefit are treated equally to their same-age peers in the place where they reside. No other approach, the AGC argues (including the one proposed by the Caring Society) is justifiable. The AGC suggests that approaches encouraging deviation from well-established norms around age of majority would be best directed at the legislatures who set the approach to age of majority.

G. Analysis

[24] Throughout all of its decisions and rulings, the Panel has consistently stressed the importance of responding to the specific needs of First Nations children and families and avoiding a one-size-fits-all approach. This reasoning was applied in crafting its orders and remains the backdrop for all its considerations. While the Panel also discussed the need to respond to the specific needs of First Nations Child and Family Services Agencies, it emphasized that the decision was about children and their families and meeting their specific needs. The Panel believes that this reasoning respects substantive equality and upholds each child's fundamental human rights in recognizing that each child is unique and may have different needs, culture, teachings, values, aspirations and circumstances.

[25] This being said, the Panel does share the Caring Society and the Commission's concerns, outlined above, that young adults in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. Some of them will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. The Panel also shares the same concerns for other vulnerable adults above the age of 25.

[26] While the expert evidence is compelling it remains untested in these proceedings and also is insufficient to outweigh the legislators' intent expressed in legislation in each Province/Territory that has already determined the age of majority. The Panel is not convinced by the case law cited by the Caring Society in support of its position and finds it does not trump Provincial/Territorial legislation in that regard.

[27] Of note, some of those same young adults may be parents of young children themselves which is arguably a more significant responsibility than that of administering large sums of money. The Panel has difficulty reconciling the Caring Society's position with the place that young adults aged 18-24 legally and practically occupy in society, which includes many legislated rights and the parenting role that some may hold.

[28] In addition, none of the other parties share the Caring Society's position on this question.

[29] Moreover, siding with the Caring Society on this point may result in engendering liabilities for the trust fund where young adults could potentially allege discrimination on the basis of age. While the Panel concedes that some young adults may experience difficulty handling large sums of money awarded as compensation, the Panel believes that barring **all** 18-24-year-old victims/survivors across

Canada from receiving compensation is unreasonable. The Panel would prefer that vulnerable young adults who need and desire counsel and assistance be able to access it as part of the compensation process.

[30] That said, as part of the Caring Society's significant work on the compensation process, it entered into an agreement with Youth in Care Canada (YICC), a national charitable organization for youth in care and formerly in care, to organize a national consultation with First Nations youth in care and formerly in care regarding the compensation process. Following the consultations, YICC worked independently to produce a report with two main objectives:

1. Provide recommendations to the Caring Society on the process for distributing the funds, with consideration to children in vulnerable circumstances; and
2. Provide recommendations to alleviate risks that providing additional funds to certain primary caregivers may increase the family risk level.

[31] YICC issued a report including a series of recommendations for the compensation process and, while they desire to continue their reflection and work on the compensation process, they did not yet recommend to raise the age of unrestricted access to the compensation funds to 25 years old (See exhibit 11 to Dr. Blackstock's affidavit dated December 2019).

[32] While the YICC did not recommend raising the age of unrestricted access to the compensation funds to 25 years old, it proposed a number of relevant recommendations such as healing circles; support for counselling or therapy; navigational support; mental health supports to help with youth's experiences and challenges; continued support after compensation; mental health supports and navigational assistance to help youth apply for compensation; restitution for children and youth who have died while in care or due to their experiences in the child welfare system; youth's compensation paid to parents, grandparents or to a trust fund; offering non mandatory financial training for youth receiving compensation; and awareness training offered to recipients about predatory banks and financial institutions like those that swindled compensation from residential school survivors.

[33] The Panel generally agrees with those recommendations.

[34] Furthermore, the Panel believes the Draft Framework should include the currently proposed supports for compensation beneficiaries and should consider including additional supports. In sum, adequate support for young adults and all persons receiving compensation, culturally appropriate services, access to financial advisers, mental health supports, guidance from Elders, etc., could alleviate some of the concerns raised by the Caring Society and the Commission. The Panel strongly encourages the parties to maintain or include such provisions in the Draft Framework to ensure the Draft Framework best supports reconciliation between First Nations and Canada.

[35] For the reasons above, the Panel prefers the AFN and the AGC's positions on this question.

H. Order

[36] The provincial/territorial age of majority is determined to be the age for victims/survivors/beneficiaries to gain unrestricted access to the compensation.

III. Question 2) Should compensation be available to children who entered care prior to January 1, 2006 but remained in care as of that date?

[37] **Decision:** Yes

[38] As part of the parties' three questions, another sub-question was also included as part of question 2. It is a request from the Caring Society for compensation for the parents and caregiving grandparents of children who entered care prior to January 1, 2006 but remained in care as of that date. While the

above question 2 wording does not reflect this request, it was considered by this Panel given that all parties had an ample opportunity to make full submissions on this question. The Panel believes that it is appropriate to also include its reasons and determination on this point as part of this present ruling.

A. The First Nations Child and Family Caring Society of Canada's Position

[39] The Caring Society argues that an interpretation of the *Compensation Decision* which includes children in care as of January 1, 2006 (but who were removed earlier) and their caregivers is supported by the Tribunal's reasons in both *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and the *Compensation Decision*.

[40] In doing so, the Caring Society points to the Tribunal's repeated emphasis on the harms associated with apprehension, removals and family/community separation. Put plainly, the Caring Society suggests that the question to be answered is: As of January 1, 2006, "which children were being harmed by Canada's discriminatory practices?" The answer put forward by the Caring Society is that it was children **in care** as of that date, as well as those taken into care thereafter. The Caring Society advances that discrimination experienced by those children, and their caregivers, is virtually identical and rooted in the very same set of facts which led the Tribunal to find discrimination.

B. The Assembly of First Nations' Position

[41] The AFN shares the Caring Society's view that if a child was in care as of January 1, 2006, the date of removal should be immaterial. The AFN asserts that those children experienced the same harms and discrimination as children who came into care on or after January 1, 2006.

C. The Canadian Human Rights Commission's Position

[42] The Commission advances that while, as pointed out by Canada, the temporal scope of the order is relatively clear on its face, the underlying goals of the compensation order should be considered for cases of children who were removed from home before January 1, 2006 but remained in care as of that date.

[43] The Commission also points to para. 270 of the *Compensation Decision*, where the Panel explicitly retained jurisdiction over a number of issues, welcoming "any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added." This, the Commission argues, is indicative of a clear retention of jurisdiction and thereby the Panel is not *functus officio* on those matters.

D. The Chiefs of Ontario's Position

[44] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[45] The NAN adopts and relies on the Caring Society's position on this question. The NAN submits that children in care prior to January 1, 2006 and as of January 1, 2006, who were removed from their homes for compensable reasons per the Tribunal's compensation entitlement order should be entitled to compensation. According to the NAN, these children and their primary caregivers, were deprived of the opportunity to be reunited with their families in a timely manner during the eligibility period set out by the Tribunal.

F. Canada's Position

[46] The AGC argues that compensation should be payable only to those who entered care **after** the complaint was instituted. The AGC claims that the complaint itself, the *Compensation Decision*, and an analysis of the Tribunal's statutory jurisdiction are supportive of this position.

[47] The AGC points out in particular the following excerpt, from para. 245 of the *Compensation Decision*, where the Panel ordered Canada to pay... "\$20,000 to each First Nation child removed from its home, family and community between **January 1, 2006** [and a date to be determined]" [Emphasis in original]. It points out two other instances in the decision where exact dates were listed and bolded as being further indicative of a clear intent by the Panel to provide exact dates in exercising its remedial powers under s. 53 of the *CHRA* (see paras 249 and 251). The Panel could not have been clearer, the AGC argues, that based on its assessment of the evidence, January 1, 2006 was that date on which the discrimination was found to have begun, and to extend the scope for compensation to any time period predating that date would be to re-write the judgment.

[48] With respect to compensation under Jordan's Principle, the AGC submits that the Panel was also clear. At para. 251, compensation was also for a defined period, Dec. 12, 2007-November 2, 2017. These dates were also placed in bold in the judgment.

[49] The AGC further argues that it is apparent that the Panel carefully considered the matter of when discrimination occurred for the purposes of exercising its jurisdiction under s. 53 of the *CHRA*.

[50] The AGC further suggests that such potential beneficiaries would be able to access compensation via one of the two as-yet-uncertified class actions which have been filed in Federal Court seeking compensation for those who fall outside of the timelines established by the Tribunal's *Compensation Decision*. The AGC says that it has announced that it would compensate children affected by the discrimination found in the *Merit Decision* even where they fall outside of the terms of the complaint. According to the AGC, a class action, would be an appropriate vehicle to do so.

G. Analysis

[51] The Panel in its *Compensation Decision*, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of victims/survivors or wording amendments to the ruling similar to the process related to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35. While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders.

[52] The Panel explicitly retained jurisdiction over compensation (see *Compensation Decision* at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see *Compensation Decision* at para. 270).

[53] This is a clear indication that the Panel was open to suggestions for possible modifications of the *Compensation Decision* Order, welcoming comments and suggestions from any party. The Panel originally chose the January 1, 2006 and December 2007 cut-off dates following the Caring Society's requests in its last compensation submissions with the understanding that the evidence before the Tribunal supported those dates and also supported earlier dates as well. Considering this, instead of making orders above what was requested, the Panel opted for an order including the possibility of making amendments or further compensation orders. The Panel was mindful that parties upon discussion of the compensation orders and process may wish to add or further specify categories of compensation beneficiaries. This process is complex and requires flexibility.

[54] Furthermore, the Federal Court in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 80 FTR 256, 28 Admin LR (2d) 231 (F.C.) [*Grover*], a case that this Panel relied on in previous decisions in this case (see for example, 2017 CHRT 14, at para. 32, see also 2018 CHRT 4 at para. 39), an application for judicial review of a Tribunal decision had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. *Grover* is summarized as follows in *Berberi v. Attorney General of Canada*, 2011 CHRT 23 [*Berberi*]:

[13] ...The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the *Act* does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

[14] It is clear that the *Act* compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler, supra*. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)

[15] Similarly, in *Canada (Attorney General) v. Moore*, 1998 CanLII 9085 (FC), [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

[16] The reasoning in these cases supports the conclusion that the Tribunal has broad discretion to return to a matter and I find that it had discretion in the circumstances here. Whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case. That is consistent with the principle set out in *Chandler v. Alberta Association of Architects*, relied upon by the applicant, which dealt with the decision of a board other than the Canadian Human Rights Tribunal. (*Moore* at para. 49)

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal Court concluded that subsection 53(2) of the *Act* empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

[18] The Tribunal jurisprudence that has considered the *functus officio* principle and interpreted *Grover* and *Moore*, has generally found that absent a reservation of jurisdiction from the Tribunal on an issue, the Tribunal's decision is final unless an exception to the

functus officio principle can be established (see *Douglas v. SLH Transport Inc.*, 2010 CHRT 25; *Walden v. Canada (Social Development)*, 2010 CHRT 19; *Warman v. Beaumont*, 2009 CHRT 32; and, *Goyette v. Voyageur Colonial Ltée*, (November 16, 2001), TD 14/01 (CHRT)). However, recent Federal Court jurisprudence, decided several years after *Grover* and *Moore* and which examined the authority of the Commission to reconsider its decisions, provides further guidance on the application of the *functus officio* principle to administrative tribunals and commissions.

(*Berberi* at paras. 13-18, emphasis ours)

[21] The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and change a remedial order, the Federal Court expanded on the reasoning in *Grover* and stated that “the Tribunal has broad discretion to return to a matter...” (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether “there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation” (*Chandler* at para. 22). This method of analyzing the Tribunal’s discretion to return to a matter is consistent with the Federal Court’s reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?

[22] The primary focus of the *Act* is to “...identify and eliminate discrimination” (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the *Act* grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, “subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination” (*Grover* at para. 32). The *Act* does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: “The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy” (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to “...be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose” (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44).

(*Berberi*, at paras. 21-22)

[55] The Panel agrees with the above reasoning outlined in *Berberi* on the retention of jurisdiction over remedial orders to ensure that they are effectively implemented and has adopted and followed this approach from the *Merit Decision* and onward.

[56] Additionally, the Tribunal used a similar approach to remedies in *Grant v. Manitoba Telecom Services Inc.*, 2013 CHRT 35 [*Grant*] once the decision on the merits was rendered:

[3] The Tribunal retained jurisdiction on many of the remedies requested by the Complainant, including the missed pension contributions, in order to get further submissions and clarification from the parties.

[4] Both parties were given the opportunity to provide additional submissions on the Complainant's outstanding remedial requests from *Grant* (decision) on a conference call on July 10, 2012.

(*Grant* at paras. 3-4, emphasis ours).

[7] In *Grant* (remedies), the Tribunal again retained jurisdiction in the event the parties were unable to reach an agreement on the pension remedy, among others.

[8] The parties have been unable to work out the details of the Complainant's lost pension and disagree on what remedy the Tribunal ordered with respect thereof.

(*Grant*, 2013 CHRT 35 at paras 7-8, emphasis ours).

[57] The Tribunal in *Grant* provided further direction on the remedy in that subsequent ruling. Of interest, this case was challenged at the Federal Court after the decision on the merits while the Tribunal was deciding further remedies. The application for judicial review was ultimately discontinued.

[58] Furthermore, the Panel does not agree with the AGC's position, mentioned above, that the complaint itself, the Panel's *Compensation Decision*, and an analysis of the Tribunal's statutory jurisdiction all support that compensation should be payable only to those who entered care after the complaint was instituted.

[59] Additionally, the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para.64 [*Moore*] stated that the remedy must flow from the claim. Moreover, the Tribunal in the *Compensation Decision* analyzed the claim and found that the claim consists of the complaint, the Statement of Particulars, and the specific facts of the case (see *Compensation Decision* at para. 103).

[60] It is useful here to do a review of the complaint, the Caring Society's Statement of Particulars and the Panel's rulings to understand the claim on this point. Relevant extracts are reproduced below:

[...] This review, known as the *Joint National Policy Review on First Nations Child and Family Services* (NPR MacDonald & Ladd) provides some insight into the reasons why there has been such an increase in the numbers of Registered Indian children entering into care. The review found that INAC provides funding for child welfare services only to Registered Indian children who are deemed to be "eligible children" pursuant to the Directive. An eligible child is normally characterized as a child of parents who are normally resident on reserve. Importantly, the preamble to the Directive indicates that the formula is intended to ensure that First Nations children receive a "comparable level" of service to the other children in similar circumstances [...] Overall, the Directive was found to provide 22% less funding per child to FNCFCSA's than the average province. A key area of inadequate funding is a statutory range of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment [...] The NPR also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for FNCFCSA's since 1995. Economic analysis conducted last year indicates that the compounded inflation losses to FNCFCSA's from 1999-2005 amount to \$112 million nationally.

[...] It has been over 6 years since the completion of NPR and the Federal government has failed to implement any of the recommendations which would have directly benefited First Nation children on reserve. As INAC documents obtained [...] in 2002 demonstrate, the lack

of action by the Federal government was not due to lack of awareness of the problem or the solution. Documents sent between senior INAC officials confirm the level of funding in the Directive is insufficient for FNCFCSA's to meet their statutory obligations under Provincial child welfare laws- particularly with regard to least disruptive measures resulting in higher numbers of First Nations children entering child welfare care (INAC, 2002).

[...] Despite having apparently been convinced of the merits of the problem and the need for the least disruptive measures INAC maintained that additional evidence was needed to rectify the inequitable levels of funding documented in the NPR. [...]

[...] Additionally, as Canada redresses the impacts of residential schools it must take steps to ensure that old funding policies which only supported children being removed from their homes are addressed.

[...] INAC has been aware of this problem for a number of years and was presented with an evidence base of this discrimination in June 2000 with the two *Wen:de* reports being delivered in August and October of 2005 respectively. These reports were followed by the Canadian Incidence Study Report [...] in June of 2006.

[61] In light of the complaint reproduced above, the Panel finds that the complaint clearly mentions that INAC was aware of the alleged discrimination, which has now been proven, as early as the 2000 Joint National Policy Review (2000 NPR).

[62] The Caring Society's Statement of Particulars also specifically mentions the 2000 NPR at paras.14-15 and 20-21, reproduced below:

14. Furthermore, this Tribunal will have the opportunity of hearing from the Complainants' witnesses in support of each of the following facts:

(i) The Complainants, together with Canada, participated in a series of expert studies designed to examine the nature of the differential treatment in the provision of statutory child welfare and child protection services on and off reserve and to provide recommendations on the improvement to Canada's current funding structures, policies and formulas;

(ii) The findings contained in the expert studies substantiate the differential treatment arising from the current funding structures, policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve;

(iii) Canada's response, without supporting expert analysis and opinion, included strategies that did not redress the inequities. Separate and independent reports from the Auditor General of Canada and British Columbia in May of 2008, and the recent March 2009 Report of the Standing Committee on Public Accounts found that Canada's response did not redress the inequities;

(iv) Canada independently commissioned studies that came to the same conclusion as that of the Complainants in respect of the inequities;

(v) Canada did not provide the Canadian Human Rights Commission with any factual material to contradict the assertions of discriminatory practices in the Complaint; and

(vi) Canada has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in First Nations Child and Family Services Agencies being unable to meet their statutorily mandated responsibilities.

15. The Canadian Human Rights Commission requested an inquiry. An inquiry is necessary because findings of fact are required for a determination of the legal issues.

The studies include the "Joint National Policy Review-Final Report" of June 2000 and a series of three reports: "Bridging Econometrics and First Nations Child and Family Service Agency Funding" (2004); "Wen:de We Are Coming to the Light of Day" (2005) and "Wen de The Journey Continues" (2005)

[...]

20. The evidence will demonstrate that the needs of First Nations Child and Family Services Agencies and the needs of the children and families that they serve are certainly not less than those of children and families off reserve and the agencies that serve them, and thus the remedy sought.

The Complainants rely upon the Royal Commission on Aboriginal Peoples.

Relief Requested

21. The purpose of the tribunal hearing is to achieve a substantiation of the complaint to the Commission and for an order against the federal authorities:

(1) Pursuant to section 53 (2)(a) of the CHRA requiring the immediate cessation of disparate funding, as described above;

(2) Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:

(a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17;

(b) The adoption of all of the funding formula (updated to 2009 values) and policy recommendations contained in "Wen:de The Journey Continues [:] The National Policy Review on First Nations Child and Family Services Research Project Phase 3" and which implementation shall also be approved by the Canadian Human Rights Commission in accordance with section 17; and

[...]

(a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

As the evidence at the hearing will reveal, in 1989, Canada introduced the funding formula known as "Directive 20-1, Chapter 5,"

[63] The NPR is part of the evidence before the Tribunal (see Joint National Policy review, Exhibit HR-1, Tab 3: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy Review Final Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)). Likewise, the findings before the Tribunal discuss the 2000 NPR numerous times, (see for example *Merit Decision* at paras 150-154, 216, 224, 257, 260, 262 and 264). More specifically, the Panel found the NPR and Wen:de reports to be highly relevant and reliable evidence in this case:

They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

(*Merit Decision* at para. 257)

[64] Additionally, in the *Compensation Decision* the Panel found that:

Canada was aware of the discrimination and some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

(*Compensation Decision* at para. 231, emphasis added see also, paras. 156, 162 and 170)

[65] The above excerpts support that the claim, the evidence and the findings clearly establish that the discrimination was ongoing as early as the year 2000.

[66] What is more, the evidence before the Tribunal established that Canada was already cognizant of the discrimination in 1996 in light of the findings of the 1996 report of the Royal Commission on Aboriginal Peoples (RCAP), part of the Tribunal's evidentiary record that forms part of the claim and also forms part of the Tribunal's evidence and findings (see complaint extracts above and *Compensation Decision* at paras. 1 and 168-169).

[67] Additionally, the AGC's argument that the two class actions filed at the Federal Court could potentially provide compensation to children who were in care prior to January 1, 2006 is speculative and not convincing. The class actions have not yet been certified and it is unclear if Canada will support the certification. Given the early stages of the filed class actions, this argument is concerning as it involves further delays for victims of Canada's racial discrimination.

[68] In addition, a compensation process under the *CHRA* is different than that of a Court where a class action may be filed.

[69] Additionally, this Panel indicated in the *Compensation Decision* at para. 188 the following:

The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA*

[70] Moreover, the Panel already voiced the crucial context of this case namely, the mass removal of children from their respective First Nations along with “the impracticalities and the risk of revictimizing children which outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community.” (*Compensation Decision* at para. 189).

[71] Finally, on this point, all the above support an order providing compensation to First Nations children living on reserve and in the Yukon Territory, who were taken into care prior to or on January 1, 2006 and remained in care on January 1, 2006 and to their parents or caregiving grandparents. The Panel agrees with the Caring Society and the AFN that the discrimination experienced by those children and their caregivers, as they experienced the same harms rooted in the very same set of facts which led the Tribunal to find discrimination, was the same as that experienced by the children who came into care after January 1, 2006.

[72] Finally, the AGC advances that it has announced it would compensate the children affected by the discriminatory underfunding found in the *Merit Decision*, even where the children affected fall outside the terms of the complaint and that a class action, would be an appropriate vehicle to do so. The Panel believes this important acknowledgment that First Nations children will be compensated supports the Caring Society and the AFN’s request. Also, the Panel notes that the Caring Society’s submissions at page 3, para.11 refer to the December 11, 2019 House of Commons motion, passed unanimously and reproduced below:

That the House call on the government to comply with the historic ruling of the Canadian Human Rights Tribunal ordering the end of discrimination against First Nations children, including by:

- (a) fully complying with all orders made by the Canadian Human Rights Tribunal as well as in ensuring the children and their families don’t have to testify their trauma in court; and
- (b) establishing a legislated funding plan for future years that will end the systemic shortfalls in First Nations child welfare.

(Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279 [*Motion 296*])

[73] Given the above, it is surprising that the AGC now opposes this.

H. Orders

[74] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further orders:

[75] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal’s *Compensation Decision* Order.

[76] Canada is also ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to First Nations parents or caregiving grandparents living on reserve and in the Yukon Territory of First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and were taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal’s *Compensation Decision* Order.

IV. Question 3) Should compensation be paid to the estates of deceased individuals who otherwise would have been eligible?

[77] **Decision:** Yes

A. The First Nations Child and Family Caring Society of Canada's Position

[78] The Caring Society submits that the AGC's litigation strategy has caused significant procedural delays in this case. Moreover, to deny payment to the estates of any since-deceased victims of discrimination would be, to allow Canada to benefit improperly from these delays. More importantly, the Caring Society submits that hundreds of child victims have died in care since the Complaint was commenced.

[79] Significantly, Canada ought not benefit from a financial windfall simply because children, youth and family members have died waiting for Canada's discrimination to end. This is particularly so given the Tribunal's findings that Canada's discrimination is wilful and reckless and ongoing in the case of the First Nations Child and Family Service Program. Additionally, the Caring Society contends that one of the purposes of compensation pursuant to the *CHRA* is to remove the economic incentive for discrimination by ensuring that some measure of the cost savings respondents achieve by discriminating are returned to victims. Indeed, allowing Canada to financially benefit due to its own delays in having this case resolved could set a dangerous precedent and entice other respondents to delay cases in the future where a particularly vulnerable group or individual brings a case forward.

[80] In addition to caselaw cited by the Commission and some other provincial decisions, the Caring Society raises the 2003 Ontario case of *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27. In that decision, the Ontario Human Rights Tribunal adopted a similar principled analysis to that of this Tribunal in *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) [*Stevenson*], ruling that the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant.

[81] Furthermore, on March 3, 2020, the Panel provided the parties with a case on this matter (*Commission des droits de la personne c. Bradette Gauthier*, 2010 QCTDP 10 (*Gauthier*)) and requested feedback. In *Gauthier*, the Quebec Human Rights Tribunal awarded discrimination remedies to the children of a complainant who died prior to the issuance of a decision in his case.

[82] The Caring Society adopts the submissions of the Commission on *Gauthier*.

[83] Regarding *Canada (Attorney General) v. Hislop*, 2007 SCC 10 [*Hislop*], the Caring Society acknowledges that s. 15 Charter damages generally do not survive the death of a claimant. However, they argue that it does not follow that this approach should be carried over to *CHRA* cases, pointing to the different language in s. 24(1) of the *Charter* as compared to ss. 53(2)(e) and 53 (3) of the *CHRA*, as well as the differing overarching legislative objectives. To support its position, the Caring Society points to academic commentary which argues that cross-fertilization between constitutional equality rights and statutory human rights regimes should only happen to enrich equality jurisprudence and not when doing so would undermine either's statutory objectives.

[84] The Caring Society raises several cases of individuals who otherwise would have qualified for compensation pursuant to the *Compensation Decision* but have since died. According to the Caring Society, these cases demonstrate the unfairness that would result from allowing Canada to effectively benefit (via cost savings) from their deaths.

[85] Finally, the Caring Society also makes an "in the alternative" argument that the Tribunal possesses the statutory authority as master of its own house to retroactively backdate its orders, and provides a variety of possible dates to do so. The prospective dates to which the order could be backdated include the date the Commission referred the complaint to the Tribunal, the originally-scheduled final hearing date on the merits, the actual final hearing date on the merits, the release date of the decision on the merits, the final date of the hearing on compensation or the release date of the compensation decision.

[86] The Caring Society submits that, in a scenario where the Tribunal opts to craft a *Hislop*-type rule, the earliest possible date would be the most just.

B. The Assembly of First Nations' Position

[87] The AFN's position on this matter is also that an otherwise-eligible individual who died prior to receiving compensation should see the compensation awarded to their estate. They rely on the same cases cited by the Commission and the Caring Society, pointing out that while *Hislop*, *British Columbia v. Gregoire*, 2005 BCCA 585 [*Gregoire*] and *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346 [*Giacomelli*] have been applied in several contexts, they are not determinative of the issue at hand. The AFN raises several contemporary cases including the recent case of *Pankoff v. St. Thomas (City)*, 2019 HRTO 993, an interim decision on a matter with a deceased complainant who was alleging discrimination in the context of government services, to support the argument that this issue is not settled law.

[88] The AFN provided extensive submissions on the Ontario case of *Morrison v. Ontario Speed Skating Association*, 2010 HRTO 1058 [*Morrison*], also raised by the Commission. In that case, a complainant filed an employment discrimination complaint but died shortly thereafter. The respondent brought a motion to dismiss, citing *Gregoire*, *Hislop* and *Giacomelli*. The Ontario Human Rights Tribunal (HRTO) found that common-law principles about abatement on death did not apply to statutory claims under the Ontario *Human Rights Code*, RSO 1990, c H.19. The AFN argues that the HRTO distinguished the *Gregoire* and *Charter* cases from the case before it, being a private employment relationship, but expressly left the question of its precedential value to similar cases of government services in the human rights context open, at para 31:

The *Gregoire* decision itself is also distinguishable. Although both *Gregoire* and the present Application involve claims of breaches of provincial human rights statutes, *Gregoire* involved an allegation that the provincial government had breached the applicant's right to be free from discrimination on the basis of disability under the *British Columbia Human Rights Code* by failing to provide appropriate supervision, treatment and counselling services. It was a claim against the government with respect to the provision of government services or benefits. In contrast, the Application before me involves an allegation of discrimination by a private employer. It is unnecessary for me to decide in this case whether *Gregoire* is a compelling precedent in the situation of a claim for government benefits and services, as this Application does not involve such a claim.

[89] The AFN also adopts the submissions of the Commission on *Gauthier*; while adding several additional submissions of their own. First, they point out that the Quebec *Charter* contains no language which would suggest the victim of discrimination must be alive to be compensated. Second, they suggest that there are parallels in terms of vulnerability and exploitation as between the victims of discrimination in *Gauthier* (nursing home residents) and here (First Nations children). Additionally, they argue that the payment of an award to the victim's children in *Gauthier* was appropriate in the given context. As many of the victims in this case were children themselves and may not yet have produced heirs, an award to their estates would be more appropriate.

[90] Finally, the AFN submits that an individual who became deceased should still be able to pass on the compensation award to their estate.

C. The Canadian Human Rights Commission's Position

[91] The Commission provided extensive submissions on the issue of payments to estates. They are prefaced by a reminder that, in the view of the Commission, the progress of this case was stalled by multiple lengthy delays, often caused by Canada, and that it was sadly inevitable that some individuals will have died while awaiting the remedies stage.

[92] The Commission argues that the Tribunal's own caselaw is supportive of paying awards to estates, as is a purposive reading of the Tribunal's statutory remedial powers. The Tribunal's ruling in *Stevenson*, is put forward as the only occasion on which the Tribunal has dealt with the question of a complainant's death.

[93] In that case, a matter was settled in principle but the complainant died before the settlement was finalized. While the Tribunal ruled in *Stevenson* that the complaint could continue, there was no explicit ruling as to whether remedies for pain and suffering or wilful and reckless discrimination could also flow to the complainant's estate. The Commission notes that in its ruling in *Stevenson* the Tribunal cited *Barber v. Sears Inc (No. 2)*, (1993) 1993 CanLII 16505 (ON HRT), 22 C.H.R.R. D/409 (Ont. Bd. Inq.) [*Barber*]. The *Barber* case was also a preliminary ruling where the Board found that it could continue with a complaint, even though the complainant had died after filing. In the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages to the complainant's estate. The Commission points out that two other provincial cases from the same time period similarly awarded remedies to estates, being *Allum v. Hollyburn Properties Management Inc.* (1991), 1991 CanLII 13159 (BC HRT), 15 C.H.R.R. D/171 and *Baptiste v. Napanee and District Rod and Gun Club* (1993), 19 C.H.R.R. D/24.

[94] Furthermore, the Commission adds that two additional policy considerations militate in favour of paying estates. First, disallowing payments to estates could create perverse incentives for respondents to delay cases, contrary to the requirement in 48.9(1) of the *CHRA* that hearings be conducted "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow". Second, the Commission stresses that family separations often have intergenerational impacts, making it ever more important that payments should flow through estates to benefit the heirs to the victims of discriminatory practices.

[95] In addition to the above analysis of the Tribunal's own statute and jurisprudence, the Commission provided submissions on cases from other jurisdictions where human rights adjudicators have considered the impact of a complainant's death on the survival of proceedings/remedies.

[96] In *Gregoire*, the British Columbia Court of Appeal distinguished the CHRT's decision in *Stevenson* and held that the estate of a deceased complainant was not a "person" within the meaning of the BC Code (which, the Commission notes, is worded differently than the federal legislation). This case can and should be distinguished, the Commission argues.

[97] Regarding *Hislop*, the Commission stresses that it should be read contextually and was never meant to lay down a blanket rule. This is echoed by the Manitoba Court of Appeal, who noted that the Supreme Court declined to lay down a clear broad declaration that the right to redress for *Charter* violations ends on death (see *Grant v. Winnipeg Regional Health Authority et al*, 2015 MBCA 44). The Commission stresses that *Hislop* was decided on different facts: there, the individuals whose estates were looking to pursue equality claims had died prior to the passage of the legislation from which they alleged they were discriminatorily excluded. They were not alive at the time of the rights infringements, in contrast to the case at hand. Consequently, the Commission argues that *Hislop* should be distinguished, on the basis of the factual matrix as well as the language found in the differing statutory regimes.

[98] The Commission also cites provincial human rights jurisprudence (from Manitoba, Nova Scotia, Alberta and Ontario), where results on the issue differ. While not binding on the Tribunal, these cases are somewhat persuasive. Of note is *Morrison* where *Stevenson* is followed and *Gregoire* and *Hislop* are distinguished.

[99] With respect to the *Gauthier* case provided by the Panel, generally, the Commission finds the decision supportive of its proposed approach to compensating estates in this case. However, they do point out that there, payments were made to the complainant's successors rather than his estate. Payments to estates would be more appropriate in this case where it may not be possible to determine

the proper beneficiaries at the outset of an awards process. The decision is further distinguishable on the basis that the respondents did not attend the hearing or make submissions about remedy. Furthermore, it is unclear when exactly the complainant died, which complicates assessing it in light of *Hislop*. And ultimately, it is persuasive rather than binding, being from a provincial body under a different piece of legislation.

D. The Chiefs of Ontario's Position

[100] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[101] NAN adopted the submissions of the Caring Society on this question.

F. Canada's Position

[102] The AGC points to the case of *Hislop* for the proposition that the estate of an individual is not a legal entity capable of experiencing discrimination (see paras. 72-73). *Hislop* was a *Charter* case concerning discrimination against same-sex partners under survivorship rules for the Canada Pension Plan. In *Hislop*, the Court crafted an approach whereby any members of the class who were alive at the time that the first hearing and arguments had concluded could take advantage of the judgement.

[103] The AGC's position is that the estates of individuals who were alive as of the time that the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation. Conversely, the AGC argues, those of any individuals who passed away after that date ought not to be. The AGC notes that such a determination by the Tribunal would not necessarily preclude potential class actions from including such estates in any settlement negotiated between those parties.

[104] Canada does not believe that *Gauthier* provides any assistance to the Tribunal. They point out that it is from a different jurisdiction, under different legislation, and conflicts with more persuasive approaches from guiding courts (namely *Hislop*).

G. Analysis

[105] The specific facts and context of this case and the *CHRA*'s objective and purpose are the starting point in the Panel's analysis (*Compensation Decision* at paras. 94-97 and 132): "The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. [...] [O]ne should not search for ways and means to minimize those rights and to enfeeble their proper impact." (*Compensation Decision* at para.135).

[106] Furthermore, in the *Compensation Decision*, the Panel relied on this specific quote from the Supreme Court in *CN v. Canada (Canadian Human Rights Commission)*:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13)

(*Compensation Decision* at para. 133)

[107] The Panel also adopts the reasoning in *Canada (Attorney General) v. Morgan*, 1991 CanLII 13184 (FCA), [1992] 2 FC 401(FCA) at para. 49 where MacGuinan J.A (dissenting on other grounds) wrote “A strict tort or contract analogy should not be employed, since what is in question is not a common law action but a statutory remedy of a unique nature”.

[108] Moreover, the Panel agrees with the Caring Society’s position that compensating estates is consistent with the remedial purposes of the *CHRA*, and that human rights legislation is not, according to the Supreme Court of Canada, to be limited or ‘read down’ in anything but the clearest cases of express legislative intent.

[109] On this point, the Supreme Court of Canada, ruled that human rights tribunals and courts cannot limit the meaning of terms in human rights legislation that are meant to advance the quasi-constitutional purposes of the *CHRA*: “the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81).

[110] What is more, the issue of the Tribunal’s ability under the *CHRA* to deal with a complaint after a complainant’s death was discussed by the former Tribunal Vice-Chair Grant Sinclair, as he then was, in *Stevenson*. There, the Tribunal emphasized that prohibiting a victim’s estate from proceeding with a claim would extinguish all interests of said victim, including the important public interest (see *Stevenson* at para 32). The Tribunal also found in *Stevenson* at paras. 23-35 as follows:

[23] The core of CN’s argument is that this common law principle applies so that the complaint terminates with the death of the Complainant. No provision in the *Act* or any other relevant legislation, nor a liberal interpretation of the *Act* allows for an Estate or Estate representative to continue the complaint before the Tribunal.

[24] The starting point is the *Act*, which must be read in light of its nature and purpose. The purpose of the *Act* as set out in section 2, is to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination. That task should not be approached in a narrow, literal fashion. Rather the *Act* is to be given a large and liberal interpretation that will best obtain the objectives of the *Act* .

[25] Reference to section 2 and other relevant provisions of the *Act* demonstrates that the *Act* extends beyond just individual rights and engages the broader public interest of freedom from discrimination.

[26] Section 40 of the *Act* permits an individual or group of individuals alleging discrimination to file a complaint with the Commission. These persons need not be the victims of the alleged discrimination. The Commission itself may initiate a complaint under Section 40(3) of the *Act*.

[27] As well, section 50(1) recognizes there may be “interested parties” to the complaint. The Tribunal has on many occasions given intervenor status to such parties in the hearing of the complaint.

[28] The Commission is a party in the hearing of a complaint. In such case the Commission does not appear as the representative of the individual Complainant but is there to represent the public interest (section 51).

[29] The Commission also exercises a screening role by way of the discretion given to it under sections 40(2) and Section 41 of the *Act*. In the exercise of this discretion, the Commission can determine whether or not a complaint goes forward to a hearing.

[30] The remedies provided by the *Act* are corroborative of the broader reach of the *Act*, beyond the interests of an individual complainant. Thus, under section 53(2), in addition to compensating the complainant, the Tribunal can:

- issue a cease and desist order against the person who committed the discriminatory practice;
- order such person to take or adopt practices in consultation with the Commission to redress the discriminatory practice, including the adoption of a special program under section 16(1) of the *Act* or the making of an application under section 17 of the *Act*.

[31] In my opinion, having regard to the regime of the *Act*, one must conclude that a human rights complaint filed under the *Act* is not in the nature of and does not have the character of an "action" as referenced in the *actio personalis* principle of law. The *Act* is aimed at the removal of discrimination in Canada, not redressing a grievance between two private individuals.

[32] If CN has its way, the death of the complainant would extinguish not only the interests of that complainant, but also all the other interests involved in the complaint, including the very significant public interest.

[33] Should the maxim *actio personalis*, a maxim that has its origins in medieval common law, a maxim whose anachronism is illustrated by the fact that in England and all common law jurisdictions in Canada the rule has been abolished, be allowed to override the purpose and objectives of the *Canadian Human Rights Act*? I think not.

[34] Counsel cited a number of authorities. In my opinion, the most relevant case on this issue is *Barber v. Sears Canada Inc. (No.2)*. This case supports the conclusion that, taking into account public interest considerations, a human rights complaint should not be stayed because of the death of the Complainant.

[35] Accordingly, for the above reasons, I have concluded that the *actio personalis* maxim does not and should not apply to a human rights complaint under the *Act* and this proceeding should not be stayed on that ground.

[111] The Panel agrees with the Tribunal's reasoning in *Stevenson* above and finds it is applicable to this case.

[112] Furthermore, the HRTO, adopted a similar principled analysis to that of this Tribunal in *Stevenson*, ruling that the death of a complainant does not terminate a proceeding under the Ontario *Human Rights Code* and does not abolish the HRTO's jurisdiction to hear the complaint. In fact, the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant. (see *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27 at paras. 13-14).

[113] Although it is not bound by the HRTO decision, given the nature of the HRTO's analysis, the Tribunal finds the HRTO's reasoning persuasive in this case.

[114] However, in *Stevenson*, the issue of awards of compensation payments to the estates of complainants or victims for pain and suffering or for wilful and reckless conduct under the *CHRA* was not decided.

[115] Nevertheless, the Tribunal in *Stevenson* relied on an interesting case from the Ontario Board of Inquiry (the “Board”) in *Barber* where the Board determined there is certainly a public interest affected immediately by the resolution of this case. This interest does not expire with the death of the complainant.

[116] More importantly here, in the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages of \$1,000 to the complainant’s estate, “...as compensation for the loss to Mrs. Barber’s dignity arising out of the infringement.” (see *Barber* at para. 18 (ON BOI), and *Barber v. Sears Canada Inc. (No. 3)*, (1994), 1994 CanLII 18417 (ON HRT), 22 C.H.R.R. D/415 at para. 98 (ON BOI)). While this case is also not binding on this Tribunal, the Panel agrees with its reasoning. The reasoning is consistent with the objective and purpose of the *CHRA* and is also applicable to this case.

[117] The Panel believes, in the event that a question arises concerning the *CHRA*, the best reference is the *Act* itself, case law interpreting the *Act* and case law that is similar to the case at hand.

[118] The AGC relies on *Hislop* to support its position that only estates of individuals who were alive at the time the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation.

[119] Moreover, the AGC submits that the Supreme Court of Canada decided that an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed.

[120] While the AGC’s assertion is true, a closer look at the Supreme Court’s analysis and selected wording is helpful. Moreover, the Court reiterates a paramount principle to be used in every case: the importance of the specific context of the case. In *Hislop*, this specific context is, as aptly argued by the Commission, that one of the issues was whether a limitation period under the Canada Pension Plan had a discriminatory effect by effectively blocking the estates of deceased same sex survivors from benefitting from remedial legislation that was passed after their deaths. The Supreme Court’s statements were made in a context where the deceased survivors whose estates sought to pursue equality claims had died before the passage of the remedial legislation from which they were being excluded. Consequently, the claims were not based on alleged infringements that took place while the survivors were still alive. It was in this particular context that the Supreme Court held that estates do not have standing to “commence” s. 15(1) *Charter* claims:

[...] in the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term “individual” in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the person

(see *Hislop* at para. 73)

[121] The Panel agrees with the Commission’s position on *Hislop* above and finds that the context of the claim analysed in *Hislop* differs considerably from the case at hand.

[122] Additionally, the Panel distinguishes the Supreme Court of Canada’s reasoning in *Hislop*, which is made on specific facts involving persons who desire to commence actions on behalf of alleged victims who are now deceased, and the case at hand, where the complainants [who have standing] are First Nations organizations representing First Nations children and families, the victims in the present case. Of note, in this case, the victims’ suffering was already established in the evidence and explained in the findings and reasons of the Tribunal’s decisions and rulings. Given the above, the two cases are completely different given the facts, the context, the evidence and the Panel’s findings in the present case.

[123] Also, on this point, the Panel agrees with the Manitoba Court of Appeal who has stressed the importance of context when considering the Supreme Court's decision in *Hislop*. As Mainella J.A. stated for a unanimous Court of Appeal:

I do not read such careful language [from *Hislop*] as endorsement for the broad proposition that redress for a violation of a *Charter* right ends on death, regardless of the context. The court could have easily made such a broad declaration, but chose instead to keep its remarks tailored to the context of claims on behalf of persons who were already deceased at the time the change to the CPP occurred.

(*Grant v. Winnipeg Regional Health Authority et al.*, 2015 MBCA 44 at para. 66).

[124] On the facts that were before it, the Court of Appeal went on to dismiss a motion to strike a *Charter* claim that had been brought in circumstances where the alleged infringement was said to have contributed to the death of the claimant.

[125] Furthermore, the Panel agrees with the Complainants and the Commission that, in any event, while s. 15(1) *Charter* jurisprudence may be of assistance when interpreting analogous human rights statutes such as the *CHRA*, the two regimes are separate and distinct. What is more, the wording of s. 53 of the *CHRA* is more prescriptive than the very general remedial language used in s. 24(1) of the *Charter*. The *CHRA* language arguably creates a stronger presumption that meaningful remedies will flow where it has been found that a victim has experienced a discriminatory practice in his or her lifetime.

[126] Moreover, there is no explicit wording or language in the *CHRA* barring payment of compensation to estates for pain and suffering or wilful and reckless discrimination. In fact, the Panel finds it would be unfair to the victims who have died to deny them and their estates the compensation that they are entitled to.

[127] The Panel finds that misapplying the *Hislop* reasoning to victims may seriously thwart the victims' human rights. While estates may not have standing to commence *Charter* actions, this in no way abolishes the victims' rights to receive compensation for the discrimination found by this Panel. In this instance, one of the worst cases of racial discrimination and suffering was found.

[128] Furthermore, cases before this Tribunal and the case at hand, involve the very important public interest namely, to protect human rights and to deter those who violate those fundamental rights and discriminate on the basis of those fundamental rights.

[129] This important public interest forms part of the Panel's analysis in this case.

[130] Moreover, paying compensation to victims who have suffered discrimination but died before a compensation order is made is consistent with the objectives of the *CHRA*. Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.

[131] Taking all this into account, it is by no means obvious that the reasoning from *Hislop* should be directly carried over into the present context. Unlike *Hislop*, there is no doubt here that any deceased beneficiaries under the *Compensation Decision* Order actually experienced discriminatory impacts during their lives.

[132] For all these reasons, the Panel does not apply *Hislop* directly to this case and rejects the AGC's argument to only pay compensation to the estates of individuals who were alive at the time the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014). The Panel disagrees with the AGC's argument that any individuals who passed away after that date ought not to receive compensation.

[133] In *Gregoire*, the B.C. Court of Appeal found that the *B.C. Human Rights Code* allows claims to be made by an individual "person" or group of "persons," and that the estate of a deceased complainant was not a "person" within the meaning of the statute.

[134] The Panel finds that the *Gregoire* decision can be distinguished from the case at hand. The two cases have a very different factual matrix. In the case at hand, we are dealing with a complaint filed by representative organisations on behalf of children and families who are victims as opposed to the case in *Gregoire* of a single representative of an individual complainant who had passed before the hearing occurred.

[135] Moreover, the B.C. Court of Appeal itself distinguished a complaint on behalf of a group or class of persons alleging a human rights violation against them and a complaint on behalf of an individual:

CNR v. Canada (Human Rights Commission), 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 is cited for the proposition that a complaint can be heard absent any allegations of individual violations. The complaint in that case was lodged by a public interest group about what was alleged to be systemic discrimination of women in respect of employment by the Railway without any one of them being specifically named. But the case is of no particular assistance here. The complaint filed by Ms. Gregoire was not filed on behalf of a group or class of persons alleging a human rights violation against them. It was filed on behalf of an individual. I see nothing in the CNR case that is at odds with the judge's conclusion that Mr. Goodwin's rights abated with his death. The question raised here did not arise in that case.

(*Gregoire* at para. 10).

[136] What is more, the Tribunal already analysed the word "victim" in the *CHRA* and the wording on remedies in the *CHRA* in its recent *Compensation Decision* (see paras. 112-124 and 129-155). The Panel continues to rely on this interpretation of "victim" in the *CHRA*. This Panel found that victims of discrimination in this case have suffered. The fact that some have died and some have not should not be determinative of who receives compensation remedies for the racial discrimination and the pain and suffering that Canada caused or for Canada's wilful and reckless conduct.

[137] Furthermore, the Panel finds there are compelling public interest arguments in favour of awarding compensation to estates of children who have died in care.

[138] The Panel agrees with the Caring Society that Canada should not benefit financially because children, youth and family members have died waiting for Canada's racial discrimination to end. The Panel must not encourage incentives for respondents to delay the resolution of discrimination complaints. Even more so, when the victims are children.

[139] Moreover, the Panel agrees with the Commission that this would be of particular concern in the case of victims who were discriminated against in connection with a terminal illness or advanced old age, where it could be anticipated that death might occur before a hearing can be concluded.

[140] The Panel also agrees with the Commission that in the context of this particular case, it must be remembered that many of the discriminatory practices at stake involved the forced separation of families and communities, and could therefore have intergenerational impacts. In these circumstances,

it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[141] The Panel rejects the AGC's argument on class actions for the same reasons mentioned above in question 2.

[142] Finally, the Panel notes that no party has raised or discussed the important question of what needs to be done if an estate has been closed under Provincial statutes.

[143] The *Indian Act* governs estates for registered "Indians" however, not all First Nations children in care were registered or have kept their status.

[144] This prompts the question as to what should be the guidelines if a First Nations child was adopted in a Non-First Nations' family and lost status or if a First Nations child was not registered?

[145] For example, if there is a need to petition the Superior Court for the appointment of an administrator of the estate in case of intestacy (absence of a will) should funding and assistance be provided to avoid placing burdens on beneficiaries?

[146] The Panel believes this should be addressed in the parties' discussions on the compensation process especially given the possibility that numerous victims who have died did not have wills.

[147] Additionally, in deciding which date should be considered for compensation payments to estates of victims, the Tribunal must consider the claim, the specific facts of the case, the evidence and the *CHRA*. In this case, representatives of complainant organizations successfully proved that First Nations children and their families were harmed by Canada's discriminatory practices and have suffered before and after the original cut-off date of January 1, 2006 found in the *Compensation Decision*. This is demonstrated as early as the year 2000, as explained above. The Panel already found in the *Compensation Decision* that the complainant organizations were speaking on behalf of a group of victims in this case. The fact that some victims in the group were alive and others deceased at the time the complaint was filed does not change the fact that all victims of Canada's discriminatory practices found in this case have suffered. Moreover, all victims should be compensated or have their estates compensated. The Panel finds that the fact that some victims have suffered and died prior to and during these proceedings should not preclude them from receiving some form of vindication in having their suffering recognized and their estates compensated. This reasoning becomes even more important if victims have died as a result of the discriminatory practices. A technical argument distinguishing living victims and deceased victims in this case does not advance the remedial purposes of the *CHRA*.

[148] There is no doubt that the Tribunal has the ability under the *CHRA* to make compensation orders considering the discriminatory practices that took place prior to the filing of the complaint. The Tribunal has already explained above and, in the *Compensation Decision*, that the claim is broader than the complaint form.

[149] Furthermore, the Panel agrees with the Commission that Canada should pay compensation in respect of all the victims of its discriminatory practices, including those who passed away after experiencing suffering that would make them eligible under the *Compensation Decision* Order. The Panel also finds it should also include the further orders contained within this ruling. Paying compensation awards for pain and suffering (s. 53(2)(e)) and special compensation (s. 53(3)) to the victims' estates will further the remedial purposes of the quasi-constitutional *CHRA*.

[150] Finally, for those reasons, the Panel's chosen temporal scope for compensation to estates of victims of Canada's discriminatory practices is the same as for all victims/survivors in the *Compensation Decision* and this ruling. Consequently, the Panel sets aside the other alternative proposed dates of 2008 (filing of the complaint), 2014 (final arguments) and 2016 (*Merit Decision*).

H. Order

[151] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further order:

[152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision* Order, including the referenced period in the Order above mentioned in Question 2.

I. Other Important Considerations

[153] The AGC made arguments on the issue of the temporal scope for the compensation order under Jordan's Principle (see para.48 above). For the Panel, this raises an important point concerning victims who have experienced discrimination found in these proceedings prior to December 12, 2007 or on December 12, 2007. The Panel strongly believes that in light of the above reasons and further orders, the parties should now consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and, First Nations peoples in similar situations, should be paid as part of this Tribunal's compensation process. While the Panel is not making a final determination on this issue, the evidence and findings in this case may support it and Jordan River Anderson is the reason why Jordan's Principle exists. While *Motion 296* on Jordan's Principle did not yet exist, the life story of Jordan River Anderson and his family and the discrimination that they have experienced prior to December 12, 2007 birthed Jordan's Principle. This is the very reason why *Motion 296* was brought forward and adopted. This forms part of the Tribunal's evidence. The Panel also believes that Jordan River Anderson's father should also be considered for compensation in a similar fashion as the parents/grandparents discussed in question 2.

[154] Furthermore, the Panel requests submissions on this point and, on whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The Panel also requests submissions on whether First Nations children living on reserve or off-reserve who were not removed from the home but experienced a gap, delay and/or denial of services, were deprived of essential services as a result of the discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.

[155] The Panel will establish a schedule for parties to make submissions on the questions and comments identified in the two preceding paragraphs.

[156] Additionally, the interested parties, the Chiefs of Ontario and the Nishnawbe Aski Nation have requested further amendments to the compensation orders to broaden the compensation orders to include off-reserve First Nations children and to include a broader class of caregivers reflecting caregiving practices in many First Nations communities including aunts, uncles, cousins, older siblings, or other family members/kin who were acting in a primary caregiving role, amongst other things. The Panel has questions for the interested parties and parties on these issues. The Panel will establish a schedule for parties to make submissions on the Panel's questions and will make a determination once the questions are fully answered. Depending on the outcome, the Panel may further amend the compensation orders.

V. Retention of Jurisdiction

[157] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

April 16, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: April 16, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne , counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Max Binnie , counsel for the Respondent

Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Schedule A

In 2023 CHRT 44, the Tribunal clarified ruling 2020 CHRT 7.

Pursuant to section 53(2) of the CHRA, the Tribunal issues the clarified order in 2020 CHRT 7:

D) The Tribunal makes an order varying 2020 CHRT 7, providing that compensation of \$40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under 2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent.

TAB 21

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 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2020-07-17

File number: T1340/7008

Citation:

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 (CanLII), <<https://canlii.ca/t/j8nss>>, retrieved on 2026-01-02

**Most recent
unfavourable
mention**

Tribunal
canadien
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2020 CHRT 20

Date: July 17, 2020

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

I. Context 1

II. Position of the Parties 14

A. The Caring Society's Position 14

B. The Assembly of First Nations' Position 17

C. The Chiefs of Ontario's Position 20

D. The Nishnawbe Aski Nation's Position 21

E. The Congress of Aboriginal Peoples' Position 22

F. The Canadian Human Rights Commission's Position 22

G. Amnesty International's Position 24

H. Canada's Position 25

I. Post-Hearing Developments 28

III. General Considerations in Jordan's Principle Eligibility 29

A. Considerations only apply for the purpose of Jordan's Principle 29

B. Jordan's Principle's objective and context for eligibility 30

C. Use of the term "All First Nations children" by the Panel 34

D. Objective of Panel's Retention of Jurisdiction 38

E. Structure 38

IV. Issue I 39

A. Introduction 39

B. First Nations identity versus First Nations categories of who is eligible under Jordan's Principle 41

C. First Nations Rights to Self-Determination 41

D. International Law 43

E. An Act respecting First Nations, Inuit and Métis children, youth and families 51

F. Indian Act 55

G. Treaties and Section 35 of the of the Constitution Act, 1982 58

H. Scope of Complaint 67

I. Conclusion 70

J. Order 75

V. Issue II 76

A. Legal framework 76

B. The discriminatory impact of section 6(2) of the Indian Act and its adverse effects on First Nations children 83

C. S-3 and Enfranchisement provisions 88

D. Order 89

VI. Issue III 89

A. Structure 89

B. Analysis 90

VII. Orders 102

VIII. Retention of jurisdiction 103

I. Context

[1] The Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *CHRA*).

[2] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Merit Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA*.

[3] In the *Merit Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, Aboriginal Affairs and Northern Development Canada (AANDC), now Indigenous Services Canada (ISC), was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Merit Decision* at paras. 379-382, 458 and 481).

[4] Three months following the *Merit Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[5] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. The Panel noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34).

[6] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[7] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[8] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In the 2016 CHRT 16 ruling, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC was ordered to provide all First Nations and First Nations Child and Family Services Agencies (FNCFS Agencies) with the names and contact information of the Jordan's Principle focal points in all regions.

[9] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120).

[10] In May 2017, the Panel made additional findings in light of the new evidence before it and has partially reproduced some of them below for ease of reference:

Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the [Merit] Decision and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the [Merit] Decision and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

(see 2017 CHRT 14 at para. 67).

Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the Decision with respect to substantive equality and the need for culturally appropriate services (see [Merit] Decision at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see [Merit] Decision at paras. 399-427),

(see 2017 CHRT 14 at para. 69).

However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

(see 2017 CHRT 14 at para. 71, addition to quotation in original).

This potential gap in services was highlighted in the Pictou Landing [Band Council v. Canada (Attorney General), 2013 FC 342] case and in the [Merit] Decision. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see Pictou Landing at paras. 96-97).

Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the [Merit] Decision at paragraphs 421-422:

[421] In her own recent comprehensive research assessing the health and wellbeing of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also Transcript Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

(see 2017 CHRT 14 at para. 72)

[11] Also, in the 2017 CHRT 14 ruling the Panel made additional findings that are relevant to the questions before us as part of this ruling:

Therefore, the fact that it is considered an “exception” to go beyond the normative standard of care is concerning given the findings in the *[Merit] Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *[Merit] Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *[Merit] Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

(see 2017 CHRT 14 at para. 73, emphasis added).

Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families [...] along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

(see 2017 CHRT 14 at para. 74).

Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

(see 2017 CHRT 14 at para. 75).

[12] Further in the ruling, the Panel wrote:

Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *[Merit] Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *[Merit] Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *[Merit] Decision* at para. 356)

(see 2017 CHRT 14, at para. 78).

Despite this, nearly one year since the April 2016 ruling and over a year since the *[Merit] Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada.

(see 2017 CHRT 14 at para. 80).

The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *[Merit] Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

(see 2017 CHRT 14 at para. 133).

[13] Akin to what was said in 2019 CHRT 7 at para. 16, the above will also inform some of the reasons in this ruling.

[14] The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

[15] Canada challenged some aspects of the 2017 CHRT 14 ruling by way of a judicial review which was subsequently discontinued following a consent order from this Tribunal essentially amending, on the consent of the parties, some aspects of the orders pertaining to timelines and clinical case conferencing. No part of this judicial review questioned or challenged the Tribunal's order that Canada's definition and application of Jordan's Principle must apply equally to all First Nations children, whether resident on or off reserve.

[16] In 2017 CHRT 35, the Tribunal amended its orders to reflect some wording changes suggested by the parties. The Jordan's Principle definition ordered by the Panel and accepted by the parties is reproduced in bold below:

B. As of the date of this ruling, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.

iii. When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative

procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government.

v. While Jordan’s Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan’s Principle.

C. Canada shall not use or distribute a definition of Jordan’s Principle that in any way restricts or narrows the principles enunciated in order 1(b).

[17] The Panel found that while it is accurate to say the Tribunal did not provide a definition of a “First Nation child” in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring its remedies are efficient and effective in light of the evidence before it and in the best interests of children more than on Canada’s compliance (see 2019 CHRT 7 at para. 20).

[18] The parties have been discussing the issue outside the Tribunal process but have not yet reached a consensus on this issue. Therefore, the Caring Society requested adjudication of whether Canada’s definition of “First Nations child” for the purposes of implementing Jordan’s Principle complies with this Tribunal’s orders.

[19] In an interim ruling, the Panel determined the issue of a “First Nations child” definition was best addressed by way of a full hearing. The Panel Chair requested the parties to make arguments on international law including the United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*); the recent UN Human Rights Committee’s *McIvor* [*McIvor UNHRC*] decision findings that sex discrimination continued in the *Indian Act*, RSC 1985, c I-5; Aboriginal law; human rights and substantive equality; constitutional law and other aspects, in order to allow the Panel to make an informed decision on the issue of the “First Nation child” definition following the upcoming hearing. Doing this analysis through a multi-faceted lens is paramount given the probable incompatibilities between the *UNDRIP* and the *Indian Act* (see 2019 CHRT 7 at para. 22).

[20] The Panel further wrote that:

[...] if the current version of the *Indian Act* discriminates and excludes segments of women and children, it is possible that but for the sex discrimination, the children excluded would be considered eligible to be registered under the *Indian Act*.

(2019 CHRT 7 at para. 22).

[21] It further wrote that:

In those circumstances the child would be considered by Canada under Canada’s Jordan’s Principle eligibility for registration criteria for First Nations children who are not ordinarily resident on-reserve and, who do not have *Indian Act* status. While this should not be read as

a final determination on Canada's current policy under Jordan's Principle, the Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies. Hence, the need for a full and complete hearing on this issue where the above would be addressed by all parties.

(2019 CHRT 7 at para. 22).

During the January 9, 2019 motion hearing, Panel Chair Marchildon expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only recognizes these rights as inherent to Indigenous Peoples, they are also human rights of paramount importance. The Panel in its [*Merit*] *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children are respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.

(see 2019 CHRT 7 at para. 23).

This Panel continues to supervise Indigenous and Northern Affairs Canada, now Indigenous Services Canada's, implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA* (see the [*Merit*] *Decision*).

(see 2019 CHRT 7 at para. 24)

At the October 30-31, 2019 hearing (October hearing), Canada's witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, **over 165,000 Jordan's Principle approved services** have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel. In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified

that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle

Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle [...] There cannot be any break in Canada's response to the full implementation of Jordan's Principle. [Emphasis added]

(see 2019 CHRT 7 at para. 25)

The Panel is delighted to hear that thousands of services have been approved since it issued its orders. It is now proven that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope. **We would like to honor Jordan River Anderson and his family for their legacy.** We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children.

(see 2019 CHRT 7 at para. 26).

[22] On February 21, 2019, the Tribunal issued an interim ruling on Jordan's Principle (see 2019 CHRT 7) and found:

[85] Furthermore, the Panel believes it would be in the best interests of non-status off-reserve children to make a temporary order with parameters that would apply until the "First Nation child" definition has been resolved, so as to avoid situations like the one that occurred in S.J.'s case. Especially that it may take a few months before the issue is resolved.

[86] Finally, the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:

The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the *Indian Act* by creating seven new registration categories, in response to the decision in *Descheneaux c. Canada* rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada **re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision.** (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).

Additional amendments to the definition under the *Indian Act* will be developed subsequent to a period of consultation with First Nations. When part B of Bill S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para. 16).

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

[88] This order will be informed by the following principles:

[89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the *UNDRIP* and the Convention on the Rights of the Child guide all decisions concerning First Nations children.

[90] The Panel is not deciding the issue of Jordan's Principle eligibility based on status versus non-status. This issue will be further explored at a full hearing on the merits of this issue.

[91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

[92] This interim relief order only applies until a full hearing on the issue of the definition of a "First Nation child" under Jordan's Principle and a final order is issued.

[23] The present ruling deals with the issue on its merits.

II. Position of the Parties

A. The Caring Society's Position

[24] The Caring Society argues that Canada is impermissibly narrowing the scope of "all First Nations children" in the context of Jordan's Principle, as set out in the Panel's Order in paragraph 135(1)(B)(i) of 2017 CHRT 14. In particular, the Caring Society contends that Canada's interpretation does not comply with the Order in paragraph 135(1)(c) of the same ruling that "Canada shall not use [...] a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(B)."

[25] The Caring Society identifies three categories of First Nations children it indicates Canada has agreed are within the scope of the order:

- A. A child, whether resident on or off reserve, with *Indian Act* status;
- B. A child, whether resident on or off reserve, who is eligible for *Indian Act* status; and
- C. A child, residing on or off reserve, covered under a First Nations self-government agreement or

arrangement.

[26] The Caring Society presents three additional categories of First Nations children that it argues Canada is improperly excluding, and who are the focus of its submissions:

- A. Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;
- B. First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and
- C. First Nations children, residing on or off reserve, who do not have Indian Act status and who are not eligible for Indian Act status, but have a parent/guardian with, or who is eligible for, Indian Act status.

[27] The Caring Society does not seek to expand Jordan's Principle beyond the categories it identifies. In particular, it does not seek relief for individuals who self-identify as First Nations but lack one of the three objective markers, nor does it seek relief for Inuit and Métis children through this complaint.

[28] The Caring Society submits that the Tribunal's Orders have consistently referred to "all First Nations children" without any limitation based on *Indian Act* status or on-reserve residency. The Caring Society asserts that *Indian Act* status or residence on a reserve do not correspond with the discrimination in this case that is "on the basis of race and/or national or ethnic origin" (2016 CHRT 2 at paras 6, 23, 395-396, 459, and 473). The Caring Society contends that applying Jordan's Principle to all First Nations children is consistent with human rights principles that focus on the needs of the children. Failing to consider requests from First Nations children living off-reserve without *Indian Act* status introduces discrimination on the basis of reserve residency. The Caring Society suggests the focus should be on the best interests and individual needs of each First Nations child and that *Indian Act* status and on-reserve residency will not identify all First Nations children in need. The Caring Society notes that Jordan's Principle does not mean every child will be granted services. Rather, Jordan's Principle requires the individual needs of all First Nations children to be considered on the merits.

[29] The Caring Society asserts that Canada's definition of First Nations children does not acknowledge First Nations children recognized by a First Nation as belonging to the First Nation. The Caring Society highlighted the Panel Chair's remarks earlier in the case that children are at the heart of First Nations communities. The Caring Society claims that Canada's definition fails to recognize that "[c]ultural and ethnic labels do not lend themselves to neat boundaries" (*Daniels v. Canada (Indian and Northern Affairs Development)*, 2016 SCC 12, at para 17 [*Daniels*]). In a Nation-to-Nation relationship, it is appropriate to recognize First Nations communities' views of First Nations identity. This is consistent with the position of the Chiefs-in-Assembly and self-determination principles underlying s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The Caring Society also invokes Canada's fiduciary duty to First Nations children as a reason Canada must provide Jordan's Principle services to First Nations children who are recognized by their community.

[30] The Caring Society suggests that Canada's criteria for Jordan's Principle eligibility exclude First Nations children who have lost their connection to their community due to the Indian Residential Schools System, the Sixties Scoop, or discrimination within the First Nation Child and Family Services Program. The Caring Society refers to Panel's finding in 2018 CHRT 4, at para. 452, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence". The Caring Society argues that First Nations children face historical disadvantage regardless of *Indian Act* status or on-reserve residency. This broad disadvantage is recognized in other contexts such as the criminal justice system (see *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688; *R. v. Ipeelee*, 2012 SCC 13). Specifically, inter-generational trauma from cultural displacements creates particular disadvantages for First Nations children (see *Daniels*).

[31] The Caring Society submits that First Nations children with one parent with s. 6(2) *Indian Act* status and who are not eligible for *Indian Act* status themselves ought to benefit from Jordan's Principle. [1]¹ Parents and guardians have significant responsibility for securing services for their children and their *Indian Act* status may cause obstacles in accessing services for their children. Treating two First Nations children differently based on whether their parent has s. 6(1) or s. 6(2) *Indian Act* status is discrimination on the basis of family status. The Caring Society advances that children who may gain status from the implementation of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25 [Bill S-3] should not be required to wait until the implementation of the Act to receive services under Jordan's Principle.

[32] The Caring Society agrees with Amnesty International's submissions on Canada's international legal obligations.

[33] The Caring Society rejects Canada's argument that Jordan's Principle was not within the scope of the complaint. The Caring Society identifies references to Jordan's Principle in both its own Statement of Particulars and Canada's. Further, the Caring Society relies on *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 for the assertion that in a case such as this, the Tribunal ought to take a "functional approach" to pleadings. Similarly, the Caring Society rejects Canada's argument that the Tribunal's supervisory powers are limited to First Nations children and families ordinarily resident on reserve, noting that Canada did not judicially review the Tribunal's orders relating to Jordan's Principle.

B. The Assembly of First Nations' Position

[34] The AFN submits that Canada's interpretation of "all First Nations children" fails to appropriately consider First Nations jurisdiction over citizenship and self-government rights of First Nations to determine who should be viewed as a "First Nations child". The AFN advances that "all First Nations children" includes children who are recognized by their First Nation as being a member. The AFN highlights that First Nations children who have lost *Indian Act* status and a connection to their First Nations community through discriminatory practices such as the Indian Residential School System and the Sixties Scoop require specific consideration from this Panel. The AFN contends that the scope of this complaint does not include other off reserve non-status, Métis, or Inuit children.

[35] The AFN specifically requests an order that Jordan's Principle applies to the following groups:

- A. A registered Status Indian;
- B. A person entitled to be registered as a Status Indian;
- C. Individuals who are recognized by their First Nation as a member; and
- D. Individuals covered under a self-government agreement.

[36] The AFN takes no position on whether First Nations children who are not eligible for status but have a parent with s. 6(2) *Indian Act* status should be included in the scope of the order.

[37] The AFN maintains that the *Indian Act* does not recognize First Nations right to self-determination or Canada's commitment to reconciliation and a Nation-to-Nation relationship with First Nations. The AFN represents that Canada's use of the *Indian Act* to determine First Nation membership and to identify First Nations children is a continuation of colonial, oppressive and racist policies. Canada should transition responsibility for determining First Nations membership to First Nations. This is further supported by international and domestic law, including s. 35(1) of the *Constitution Act, 1982* and treaties with First Nations. In particular, many of the treaties grant all the descendants of the treaty signatories access to government services and restrictions based on *Indian Act* status breach those

1. A child who has one parent with s. 6(1) *Indian Act* status and one parent without *Indian Act* status is entitled to s. 6(2) *Indian Act* status. On the other hand, a child who has one parent with s. 6(2) *Indian Act* status and one parent without *Indian Act* status is not eligible for *Indian Act* status.

treaty provisions. The treaty relationships, especially the Numbered Treaties, are very important for many First Nations communities and individuals' identities. The treaties should be considered in the determination of a First Nations child.

[38] The AFN submits that both First Nations children who are recognized by their community and those entitled to *Indian Act* status should be included within a definition of First Nations child. Despite the *Indian Act*'s flaws, including discrimination on the basis of sex such as found in *McIvor (UNHRC)*, it is the only legislation available to determine registered status. For non-registered First Nations children residing off reserve, the AFN argues that a connection to a First Nation's community is required. The AFN argues that defining a "First Nations child" affects First Nations jurisdiction over citizenship even though the definition is in the context of a specific program.

[39] The AFN contends that the Honour of the Crown requires Canada to ensure full participation of First Nations in recognizing who is a First Nations child. Recognizing First Nations rights to determine their citizenship in this manner is consistent with the honourable dealing required from the Crown.

[40] The AFN argues that while the focus of Jordan's Principle eligibility has been on rights of the child and the best interests of the child, the communally held First Nations rights to self-determination and self-government are also affected. Further, the AFN is concerned that First Nations might face legal challenges from individuals a First Nation refuses to recognize as belonging to the community. The AFN is also concerned that broadening eligibility criteria will drain financial resources and deprive already recognized First Nations children of services. The AFN notes that First Nations that have self-government agreements often do not receive funding for First Nations members who do not have *Indian Act* status. The AFN contends that a child who does not have *Indian Act* status and resides off reserve would ordinarily have access to provincial or territorial services that a child with status living on reserve does not have access to. The AFN acknowledges that the Tribunal can order Canada to provide additional resources to maintain the availability of Jordan's Principle services for First Nations children already recognized as eligible.

[41] The AFN asserts that defining who is "First Nations" is difficult because the term describes over 63 organic political/cultural groups of people rather than a race from particular areas. First Nations are distinct peoples under customary international law, which creates unique questions of group identity in a human rights context. The definition of "First Nations" is also continuing to evolve as First Nations exercise their self-determination. Given this difficulty in defining a "First Nations child", any definition should not be imposed on First Nations using a top down approach but rather it should incorporate the viewpoints of First Nations communities.

[42] The AFN maintains that it would be inappropriate to adopt tests related to Indigenous identity developed in other circumstances. For example, it would not be appropriate to rely on the *R. v. Powley*, 2003 SCC 43 test for Métis identity or the *R. v. Ipeelee*, 2012 SCC 13 test for Aboriginal identity under the *Criminal Code*, RSC 1985 c. C-46.

[43] The AFN recognizes that Métis, Inuit or non-status Indigenous children may suffer discrimination on the basis of race, national or ethnic origin but argues that such discrimination should be addressed under a different complaint and evidentiary record. Most of the evidence in this complaint has been specific to First Nations with *Indian Act* status and First Nations children on reserve have been identified by the Panel as particularly vulnerable.

[44] The AFN proposes that a validation method similar to that in Part X of Ontario's *Child and Family Services Act*, R.S.O. 1990, c. C.11 for consulting with First Nations would be appropriate to determine whether an applicant under Jordan's Principle is a member of the First Nations community. The application ought to proceed under the presumption that there is a connection to the First Nations community. If the First Nations community responds denying the applicant's membership in the community, Canada ought to make a determination about whether the applicant is eligible. The AFN also identifies that entitlement to *Indian Act* status is currently changing and argues that this ongoing

change should be considered by the Panel. Finally, the AFN submits that if First Nations are involved in the validation process, this method may alleviate concerns raised by the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN).

C. The Chiefs of Ontario's Position

[45] The COO submissions sought to provide practical considerations for an order that “all First Nations children” includes children recognized by their First Nation as being a member. In particular, the COO seeks to assist in crafting an order that can be implemented without causing delays to children receiving Jordan’s Principle services and which respects First Nations’ jurisdiction over citizenship. In particular, the COO requests that no duty of care or other legal duty be placed on First Nations to confirm citizenship, that First Nations in no way be required to recognize individuals in a way that is inconsistent with their traditions, laws or customs, that First Nations not be required to undertake new processes or systems, that recognition by a First Nation that a child is a member can be done through email, letter, or phone, and that Canada should provide First Nations and relevant organisations funding to educate First Nations about the Tribunal’s order and to develop capacity to recognize citizenship when Jordan’s Principle requests are made.

[46] The COO takes no position on the Caring Society’s requested relief for children who have lost contact with their First Nations group, community or peoples.

[47] The COO supports First Nations right to determine their own citizenship through their own laws, traditions and customs. Any practical challenges do not mean the COO endorses or accepts the *Indian Act*, nor does it seek to perpetuate the *status quo* in Jordan’s Principle cases.

[48] The COO identifies barriers to First Nations exercising jurisdiction over citizenship from the imposition of the *Indian Act*, Canada’s failure to provide resources for First Nations individuals recognized through custom membership codes, disruptions to citizenship laws through the Indian Residential Schools System, forced disenfranchisement, the Sixties Scoop, and the First Nations Child and Family Services program. Most First Nations do not have a custom membership code and those that do not do not necessarily have codified or agreed upon citizenship laws, customs or traditions.

[49] The COO asserts that any order regarding recognition of a child by a First Nation should be directed only at the mechanism of evidencing that recognition and not direct First Nations when or how to exercise jurisdiction over citizenship.

[50] The COO highlights that while First Nations should be given an opportunity to voice their perspective on a child’s citizenship, First Nations will not necessarily have the capacity to respond. This is particularly true given the 12-48 hour Jordan’s Principle timelines. The COO argues First Nations require funding to have the capacity to respond to Jordan’s Principle membership questions and that First Nations should ideally be given an opportunity and capacity to develop their own citizenship or membership codes.

D. The Nishnawbe Aski Nation's Position

[51] The NAN supports the Caring Society’s position. The NAN submits that Jordan’s Principle must be implemented in a non-discriminatory manner that respects First Nations inherent jurisdiction over citizenship and does not impose administrative burdens or legal liability on First Nations. The NAN supports the Caring Society and Amnesty International’s submissions, subject to concerns about the best interest of the child. The NAN supports the submissions of the COO regarding First Nations jurisdiction and capacity. The NAN supports the Caring Society and Commission’s submissions that Jordan’s Principle has always been part of the complaint.

[52] The NAN advances that it is discriminatory and contrary to First Nations self-determination to exclude First Nations children recognized by a First Nation from Jordan's Principle. For Canada to continue to use *Indian Act* status and on-reserve residency as criteria for Jordan's Principle eligibility is inconsistent with the *UNDRIP*, Canada's commitment to reconciliation, and human rights principles that prohibit discrimination on the grounds of race, national or ethnic origin, and reserve residency.

[53] The NAN highlights that any discussion of the "best interest of the child" must consider how the principle has been used to support harmful practices such as the Indian Residential Schools System, the Sixties Scoop, and the child welfare system.

E. The Congress of Aboriginal Peoples' Position

[54] The Congress of Aboriginal Peoples (CAP) generally supports the Caring Society's position. The CAP submits that, in order to promote substantive equality, the definition of "First Nations child" should be based on the Honour of the Crown and, consistent with the principles in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, ought to adopt inclusion over exclusion. The CAP requests that consultations be part of the remedy ordered.

[55] The CAP represents off-reserve status and non-status Indians, Métis, and Southern Inuit Indigenous Peoples. The CAP identifies various socio-economic disadvantages suffered by its members in Canadian society. The CAP identifies Canada's policies as a key reason many of its members lack connections to their Indigenous families and communities. The CAP advances that its members are particularly disadvantaged and ought to be included in a remedial process seeking substantive equality.

[56] The CAP contends that the Honour of the Crown is a constitutional principle that affects how the Crown must fulfil its obligations to Indigenous Peoples. The Honour of the Crown requires negotiation in good faith and must be liberally and generously construed.

[57] The CAP advances that *Daniels* requires an inclusive definition of First Nations child in order to be constitutionally sound.

F. The Canadian Human Rights Commission's Position

[58] The Commission does not take a position on the definition of a "First Nations child" motion, instead providing submissions on the Tribunal's jurisdiction and identifying substantive evidence the Commission believes is relevant to the Panel's decision.

[59] The Commission represents that Jordan's Principle has always been within the scope of the complaint, noting that complaints should not be read as pleadings. The Statements of Particulars did not limit the Jordan's Principle relief requested to individuals with *Indian Act* status or living on reserve. The Panel has already addressed the scope of Jordan's Principle, including that it applied both on and off reserve, which Canada should not now be entitled to challenge through a collateral attack.

[60] The Commission notes that there is uncertainty on whether Canada currently applies Jordan's Principle to First Nations children who do not have *Indian Act* status but are included in the membership code of a First Nation with a self-government agreement or self-government legislation. The Commission indicates that ISC staff have recently indicated these children are eligible while Canada's submissions on this motion appear to exclude this group.

[61] The Commission identifies concepts and sources of law that may relate to First Nations citizenship. *Indian Act* status is one recognition, although it has been found to be discriminatory. Custom membership codes, recognized under the *Indian Act*, may be more or less extensive than *Indian Act* status. First Nations with self-government agreements often have provisions to determine their membership. First Nations may have traditional laws with respect to citizenship. Section 35(1) of the *Constitution Act, 1982* and *UNDRIP* both recognize principles of self-determination.

[62] The Commission submits that there is a two-step framework, established in *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 SCR 566, typically used to determine whether eligibility criteria for benefits are having a discriminatory impact. The first step is to determine the purpose of the benefit plan at issue. The second step is to determine whether the benefits criteria appropriately provide the benefit to individuals with the needs and circumstances the benefit program is intended to address.

[63] The Commission contends that previous decisions from the Panel have identified the purposes of Jordan's Principle as ensuring services to First Nations children are not delayed due to jurisdictional gaps and promoting substantive equality by providing services that may go beyond the normative standard of care and respond to the actual needs of First Nations children. The Commission argues the Panel ought to consider whether Canada's criteria are appropriate proxies for identifying the First Nations children with the sorts of needs identified by Jordan's Principle. The Commission is unable to identify evidence in the record that First Nations children living off reserve without *Indian Act* status face jurisdictional gaps in accessing services but the Panel should consider any evidence that these First Nations children have actual needs that go beyond the normative standard of care and are rooted in historical and contemporary disadvantage that underlies a substantive equality analysis. The Commission identifies passages from the Supreme Court of Canada in *Daniels* and *Lovelace v. Ontario*, 2000 SCC 37 on the circumstances of off reserve First Nations individuals who do not have *Indian Act* status.

[64] The Commission opposes including a limitation of liability or indemnity in the final order for First Nations asked to confirm whether a child seeking Jordan's Principle services is a member of the First Nation. The Commission submits an order negating future duties of care or liabilities or ordering Canada to indemnify First Nations is outside the scope of the Tribunal's statutory powers. The Commission argues that such a case can be appropriately addressed if and when it arises.

G. Amnesty International's Position

[65] Amnesty International submits that Canada's interpretation of a "First Nations child" is too narrow to comply with Canada's obligations under international human rights law. The presumption of conformity, per *R. v. Hape*, 2007 SCC 26, indicates that courts should favour an interpretation of domestic law that conforms with international law. Amnesty International asserts that the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 and the *UNDRIP* are particularly applicable.

[66] Amnesty International advances that international law protects the right to culture and cultural identity, which would be infringed if Canada's definition of a First Nations child were imposed on First Nations communities. Amnesty International notes that international human rights organisations have declined to adopt a formal definition of "Indigenous Peoples" in light of the harm caused by externally imposed definitions of membership. The *UNDRIP* specifically identifies an obligation to maintain cultural connections for children living outside their communities.

[67] Amnesty International highlights that Indigenous Peoples right to self-determination is protected in international law such as *UNDRIP*. The right to self-determination includes Indigenous groups' right to determine their own membership in accordance with their customs and traditions.

[68] Amnesty International contends that the best interests of the child test applies here. The best interests of the child emphasizes eliminating barriers for children receiving services and obliges Canada not to create barriers limiting vulnerable children's ability to access services.

[69] Amnesty International argues that international law, including *UNDRIP*, requires states to take special measures to eradicate discrimination. That includes measures to redress actions that deprived Indigenous Peoples of their culture and identity. Special measures, aimed at ensuring substantive equality, must be applied in a non-discriminatory manner.

[70] Amnesty International asserts that budgetary considerations should not impact the scope of Canada's human rights obligations, as states must pursue rights fulfilment to the full extent of the nation's available resources.

H. Canada's Position

[71] Canada submits that the eligibility criteria it applies for Jordan's Principle are compliant with the Panel's orders and not only avoids jurisdictional disputes but provides substantive equality by funding services not provided to all other children. In particular, Canada argues that it complies with the orders by providing Jordan's Principle eligibility to:

- A. Registered First Nations, living on or off reserve;
- B. First Nations children who are entitled to be registered; and
- C. Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve.

[72] Canada advances that it is not appropriate to extend the scope of Jordan's Principle to cover the three categories of First Nations children requested by the Caring Society. Canada suggests that the lack of consensus between the parties reflects that the Caring Society seeks an order extending Jordan's Principle beyond the limits of the litigation as reflected in the complaint, the particulars and the evidence and beyond the Tribunal's jurisdiction. While Canada notes some agreement among the other parties to include First Nations children recognized by a First Nation as belonging to that group, community or people, Canada identifies that there is little agreement on how that recognition might occur. Canada represents that the Tribunal lacks the jurisdiction to require First Nations who are not part of this proceeding to participate in any process for recognizing Jordan's Principle applicants.

[73] Canada contends that it has expanded its definition of Jordan's Principle eligibility to remedy the funding gap identified by the Panel and complies with the direction to apply Jordan's Principle "equally to all First Nations children on and off reserve" (2017 CHRT 14, para. 135 1.B.i). Canada submits that "all First Nations children on and off reserve" must be understood in the context of the complaint and the evidence heard, which focused on children subject to Canada's funding regime rather than every child in Canada who identifies as First Nation. Canada asserts that coverage for children with *Indian Act* status living off reserve recognizes potential service gaps for children perceived by provinces to fall under federal jurisdiction. Coverage for Indigenous children living on reserve who do not have *Indian Act* status recognizes that most federal programs are residency based and that failing to cover these individuals could cause a gap in coverage. Canada argues that its Jordan's Principle eligibility criteria satisfy the two step test proposed by the Commission for determining if a benefits program is under-inclusive.

[74] Canada submits that the Caring Society's request to expand coverage to additional First Nations children is beyond the scope of the complaint and the evidence. The Jordan's Principle complaint was about how Canada's funding regime caused gaps in the provision of services to First Nations children and families on reserve. Canada advances that the Panel has identified that the complaint against Canada is in relation to funding child welfare programs on reserve, which constitute providing a service under section 5 of the *CHRA*. First Nations children without *Indian Act* status who reside off reserve do not receive a service from Canada as they fall exclusively under provincial jurisdiction. Canada argues that the initial complaint, the Statements of Particulars, and key sections of the Panel's reasons refer to First Nations children on reserve. Canada asserts that the Panel has not heard any evidence that First Nations children without *Indian Act* status who reside off reserve face the sorts of jurisdictional barriers or gaps in services that Jordan's Principle addresses. Canada maintains that the Panel has not been presented with any evidence about the services that First Nations children living off reserve receive from provincial or territorial government, nor that children living off reserve face jurisdictional gaps in accessing services. Regardless of the needs of those children, their needs fall outside the scope of this complaint. Canada asserts that the broad and complex issues of First Nations identity and self-determination should engage broader consultation beyond the scope of this complaint.

[75] Canada advances that its interpretation of Jordan's Principle is consistent with *UNDRIP* and other international human rights obligations as Canada ensures First Nations children subject to federal funding do not face discrimination. Canada suggests that *McIvor (UNHRC)* does not support a broader approach to defining a First Nations child for Jordan's Principle eligibility as the changes to *Indian Act* status will not increase the number of First Nations eligible for *Indian Act* status nor will it impact any individual's ability to pass on entitlement to *Indian Act* status to their children. Canada disagrees with Amnesty International's argument that international law broadens the definition of a First Nations child beyond the children at the centre of the complaint.

[76] Canada rejects the argument that it has a fiduciary duty to extend Jordan's Principle. Canada maintains that the Panel's earlier analysis of the fiduciary duty in 2016 CHRT 2 was limited to First Nations children and families receiving services on reserve. Canada notes that none of the three branches of the *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 are met for First Nations children without *Indian Act* status living off reserve. Canada does not exercise the required degree of control, discretion or power required to trigger a fiduciary relationship.

[77] Canada submits that the Honour of the Crown is not capable of assisting in the interpretation of a "First Nations child". While Canada acknowledges that the Honour of the Crown requires it to act honourably, the specific obligations that arise in the implementation of a constitutional duty to Indigenous Peoples, fiduciary duties to Indigenous Peoples or treaty making do not apply in this case.

[78] Canada's position is that *Daniels* does not assist in defining Jordan's Principle eligibility. *Daniels* determined that constitutional division of powers enables Canada to enact legislation with respect to Métis and Indigenous Peoples without *Indian Act* status but it does not require Canada to do so. The *Daniels* complainants sought a declaration to address Canada's failure to accept responsibility for Métis and Indigenous Peoples without *Indian Act* status which they argued deprived those groups of programs, benefits and treaty opportunities available to individuals with *Indian Act* status.

[79] Canada asserts that there is no basis to extend Jordan's Principle eligibility beyond the age of majority in the given province or territory. There was no evidence presented during the hearing about services for adults and increasing the age of entitlement has significant implications for other federal, provincial and territorial government programs that have not been canvassed.

I. Post-Hearing Developments

[80] Since the Panel held the hearing on this issue and issued an interim ruling, the Caring Society advised the Tribunal of a development in the factual background to the Caring Society's motion regarding the exclusion of First Nations children living off-reserve who do not have, and are not eligible for, registration under the *Indian Act* from Canada's definition of "First Nations children" under Jordan's Principle.

[81] As was canvassed during the May 9, 2018 cross-examination of Mr. Sony Perron, *Bill S-3* did not fully come into force on Royal Assent. The coming into force of sections 2.1, 3.1, 3.2, and 10.1 were delayed to a date to be fixed by the Governor in Council.

[82] The Caring Society advised the Tribunal that the remaining sections of *Bill S-3* came into force on August 15, 2019, pursuant to Order-in-Council P.C. 2019-116. The Order-in-Council was also filed with the Tribunal by the Caring Society. ISC has advised the Caring Society that it does not have projections for the number of individuals impacted by the coming into force of these provisions as the range of data and assumptions that would have to be made do not allow for accurate estimations.

[83] The Panel enquired with Canada and the other parties to determine if they desired to provide additional submissions on this specific question. Canada and the other parties indicated they had no further submissions to make on this question.

III. General Considerations in Jordan's Principle Eligibility

A. Considerations only apply for the purpose of Jordan's Principle

[84] The Panel has recognized in its interim ruling that there is a “significant difference” between determining who is a “First Nation child” as a citizen of a First Nation and determining who is a “First Nation child” entitled to receive services under Jordan’s Principle and what is the appropriate eligibility criteria to use in the latter case (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan’s Principle services before the Tribunal, but not citizenship, which is the prerogative of First Nations not the Tribunal or Canada. Nevertheless, some First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will address their concerns as part of this ruling as it will be further explained below.

[85] The Panel has already mentioned it recognizes the First Nations human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[86] Moreover,

[d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel’s desire to respect Indigenous Peoples’ inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its *[Merit] Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada’s programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.

(see 2019 CHRT 7 at para. 23, emphasis omitted).

[87] Additionally, in the interim ruling, the Panel stressed “the importance of the First Nations’ self-determination and citizenship issues”, and added that “the interim relief order or any other orders is not intended to override or prejudice First Nations’ rights” (see 2019 CHRT 7 at para. 91, emphasis omitted).

B. Jordan's Principle's objective and context for eligibility

[88] The purpose of this ruling is not to change in any way the Tribunal’s definition ordered in 2017 CHRT 14 and 35 nor is it intended to revisit previous findings leading to those rulings. Rather this ruling, relying on previous orders, aims to further clarify who is eligible to receive services under Jordan’s Principle as per the Tribunal’s orders and to determine who should define, and how to define, who is a First Nations child for the purpose of Jordan’s Principle.

[89] Jordan’s Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal’s definition in 2017 CHRT 14 of providing services “above normative standard” furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations’ specific needs and unique circumstances.

Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the Convention on the Rights of the Child and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[90] The Panel's rulings referred to government services affecting First Nations children including: Federal-Provincial; Federal-Federal; and Federal-Territorial. While the Panel has no jurisdiction over Provinces and Territories, it does have jurisdiction over Canada's Jordan's Principle involvement in all Federal services offered to First Nations children.

[91] Additionally, Jordan's Principle is a broader aspect of the complaint in front of the Tribunal where the Panel found, in the *Merit Decision*, that while Jordan's Principle is not a strict child welfare concept, it is intertwined with child welfare (see *Merit Decision* at para. 362). Therefore, the Panel's general reasoning on child welfare is also relevant to Jordan's Principle cases. However, it does not provide the full answer. For Jordan's Principle, the Panel issued additional rulings and orders that form part of the analysis.

[92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4).

[93] Moreover,

[t]he discrimination found in the [*Merit Decision*] is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,

(2017 CHRT 14 at para. 73).

[94] There is a need to take a closer look at the differences between the FNCFS Program and Jordan's Principle which is not a Program rather it is a legal rule and mechanism meant to enable First Nations children to receive culturally appropriate and safe services and overcome barriers that often arise out of jurisdictional disputes within Canada's own organization of Federal Programs and within Canada's constitutional framework including the division of powers.

[95] Additionally, while the existence of a jurisdictional dispute is not required to obtain Jordan's Principle services, the occurrence of a jurisdictional dispute was recognized and included since Motion 296 (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279) and in the Panel's previous rulings. This also includes disputes between the Federal government and Provinces/Territories.

[96] Moreover, the Panel agrees with Canada that the evidentiary record and findings focus on Federally funded programs, the lack of coordination and gaps within Federal Programs offered to First Nations children and families and that this is also one important aspect of the service analysis under section 5 of the *CHRA* that Canada was ordered to remedy.

[97] Additionally, the Tribunal's Jordan's Principle findings also focus on the lack of surrounding services for First Nations children triggering their parents/caregivers or FNCFS agencies to seek services off-reserves. The Panel found a correlation between the Federal Programs' failure to address gaps in services to on-reserve children and the underfunding of the FNCFS Program driving First Nations children in care or to receive services often off-reserve. The on-reserves-off-reserves jurisdictional wrangling was considered by the Panel to arrive at its findings. For example, as part of the evidentiary record, mental health services gaps for First Nations children placed in care off-reserves was considered. Health Canada provided short-term funding for mental health crisis and the Province of British Columbia provided limited mental health funding for ongoing needs of First Nations children in care. This is a clear Jordan's Principle example where the Province should provide the service and then recover the funds from the Federal Government. This situation occurred off-reserve in the Provincial system.

[98] The same document also refers to first-hand provincial scenarios in the BC region and to different definitions of on-reserve/off-reserve residency in relation to gaps in service delivery (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3; see also *Merit Decision* at para. 372).

[99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.

[100] The focus is on the child and is personalized to the child's specific needs to receive adequate services in a timely fashion without being impacted by jurisdictional disputes or other considerations not in line with what the child requires. First Nations children experience those barriers because of race, national or ethnic origin. This is what causes governments and departments to dispute who pays for the service.

[101] This requires a case-by-case approach considering for example whether a Province or Territory considers a First Nations child a Federal responsibility solely based on *Indian Act* status or whether it considers broader criteria to avoid providing services or to claim repayment from the Federal government. A Jordan's Principle case analysis of this situation would likely reveal this so as to demonstrate if the criteria used by the Province/Territory and the Federal government generate gaps in services.

In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "...taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, 1989 CanLII 98 (SCC), [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433 at para. 60).

(*Merit Decision* at para. 402, emphasis added).

C. Use of the term “All First Nations children” by the Panel

[102] The use of the expression “All First Nations children” used in the Tribunal’s rulings and according to the evidence before the Tribunal was not based on a criterion rooted in the *Indian Act*. None of the Panel’s rulings focus on the *Indian Act* or on status registration under the *Indian Act*. As demonstrated by the *Merit Decision* and subsequent rulings, the Panel understands and considered the historical context and its connection to the discrimination found in this case which also triggered orders to provide culturally appropriate services. This context transcends the *Indian Act* and its colonial perspective on First Nations governments.

[103] This being said, the Tribunal did not provide a definition of who is a “First Nations child” under Jordan’s Principle. Instead it provided a definition of Jordan’s Principle and its applicability, including how to eradicate the discrimination found in this case.

[104] The 2016 CHRT 16 ruling clarified that “all First Nations children” did not only mean on reserve First Nations children. This was especially true given the fact that Canada’s own program was broader and given that the realities experienced by First Nations children as a result of Canada’s racial discrimination drove many First Nations families to bring children in care off-reserve in order to access services. The expression “ordinarily on reserve” captures a portion of this aspect. Another reality in this case is that some First Nations children on reserve may not have *Indian Act* status, yet they live on reserve or ordinarily on reserve and experience the same hardships in accessing services, as all the other children with *Indian Act* status on reserve in their communities given the adverse impacts and the lack of surrounding services found in the *Merit Decision* and subsequent rulings. The rulings also clarified that the health condition of a child should not be driving the definition. In other words, a top-down analysis requiring a child to present specific health issues was not an appropriate objective criterion as it was too narrow.

[105] Furthermore, the Panel used the term “all First Nations children” as referred to in the House of Commons *Motion 296* adopting Jordan’s Principle. Therefore, the Panel did not define who is a “First Nations child” for eligibility purposes under Jordan’s Principle. The Panel relied on the same terminology employed in the House of Commons *Motion 296*. The Panel did not focus on the *Indian Act*, *Indian Act* status or on reserve residency given the application of Jordan’s Principle to federal government departments/programs affecting children (see 2016 CHRT 2 at para. 391-392; 2017 CHRT 14 at paras. 2, 73-74, 98 and 135). The Panel recognized in a past ruling, that was accepted by Canada, Indigenous Peoples’ right to self-government, Canada’s goal to rebuild the Nation-to-Nation relationship and the Truth and Reconciliation Commission’s (TRC) recommendation to use the *UNDRIP* as a framework for reconciliation (see 2018 CHRT 4 at para. 114).

[106] Moreover, the Panel in the same ruling expressed its goal to eliminate the discrimination found in this case and “fully supports Parliament’s intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament’s goal (see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12), and commends it for adopting this approach” (2018 CHRT 4 at para. 66).

[107] Furthermore, the Panel in its *Merit Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada’s programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account (see 2019 CHRT 7 at para. 23).

[108] The Panel did, however, provide some clarification in previous rulings that the term “all First Nations children” is not limited to on reserve children and that it applied to on and off reserve First Nations children. The Panel ordered INAC, now ISC, to immediately apply Jordan’s Principle to all First Nations children, not only to those residing on reserves (see 2016 CHRT 16 at paras. 107 and 117).

[109] Furthermore, the Panel found that

On the issue of the breadth of INAC's new formulation of Jordan's Principle, the Panel notes that the motion unanimously passed by the House of Commons did not restrict the application of the principle solely to First Nations children on reserve, but to all First Nations children: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children" (see [Merit] Decision at para. 353, emphasis added). INAC's formulation of Jordan's Principle is also not in line with the eligibility requirements for its own FNCFS Program, which applies to First Nations "resident on reserve or Ordinarily Resident On Reserve" (see ss. 1.3.2 and 1.3.7 of the 2005 FNCFS National Program Manual and s. 1.1 of the 2012 National Social Programs Manual at paras. 52-53 of the [Merit] Decision). That is, the application of Jordan's Principle only to First Nations children living on reserve is more restrictive than the definition included in INAC's FNCFS Program. This type of restriction will likely create gaps for First Nations children and is not in line with the [Merit] Decision (see paras. 362, 364-382 and 391),

(see 2016 CHRT 16 at para. 117).

[110] Furthermore, in the *Merit Decision*, 2016 CHRT 2 at para. 151:

The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:

First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[111] This is a serious issue that also needs non-pecuniary redress and is justified by the findings and the evidence in this case. The Tribunal ordered Canada in the *Merit Decision* to cease the discriminatory practice.

[112] This being said, in interpreting the Panel's findings and orders, Canada currently considers a First Nations child eligible for services under Jordan's Principle if the child falls in the categories below:

- a) First Nations children registered under the *Indian Act*, living on or off reserve;
- b) First Nations children eligible to be registered under the *Indian Act*, living on or off reserve; and
- c) non-status First Nations children without *Indian Act* status who are ordinarily resident on reserve (the AFN appears to dispute this however, this forms part of the Tribunal's findings in 2016 CHRT 16 at para. 117, quoted above).
- d) First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and who have urgent and/or life-threatening needs as per the Tribunal's interim order in (2019 CHRT 7 at paras. 88-89).

[113] The Panel confirms that all the above categories are eligible to receive services under Jordan's Principle.

[114] The question to be determined here is if Canada's current eligibility criteria under Jordan's Principle remedy the discriminatory practice and are sufficiently responsive to the Panel's reasons, findings and orders.

[115] As mentioned in the interim ruling, the Panel still believes it would be unfair to make a finding of non-compliance of the Tribunal's orders against Canada given that while the Tribunal did not use the *Indian Act* registration provisions as an eligibility criteria and did not limit Jordan's Principle to children on reserve, it did not provide a definition of who is a First Nations child eligible under its Jordan's Principle orders (see 2019 CHRT 7 at para. 20). While it is accurate to say the Tribunal did not provide a definition of a "First Nations child" in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring remedies are responsive to the discriminatory practice in light of the evidence before it and in the best interests of children, rather than on Canada's compliance. On this point, the Panel agrees with the NAN and the AFN that the best interests of children should be interpreted through an Indigenous lens. The Panel considers First Nations perspectives of the best interests of their children in determining the matters in this case.

[116] The Panel believes that Canada has been responsive to the Tribunal's Jordan Principle's orders to a great degree and has worked to remedy the discrimination. Canada has now moved from zero Jordan's Principle cases at the time of the hearing to a few hundred a few months after the *Merit Decision* to thousands of approved requests as of July 2016 to, at the time of this ruling, over **607 000** approved requests for services for First Nations children who otherwise would not have received them since the Tribunal's ruling ordering its definition in 2017 CHRT 14. This is two years after the TRC's final report and one year and a half after the *Merit Decision*. Of note, this was made possible by the Panel's retention of jurisdiction allowing parties to bring evidence and make additional requests.

[117] In light of the above, the Panel does not make a non-compliance finding against Canada here. Rather, it will examine the responsiveness of Canada's eligibility criteria to Jordan's Principle, including to Jordan's Principle's objective previously found by this Panel and already mentioned above and its responsiveness to the Panel's previous orders. The Panel, following its past approach, will also examine if there is a need for further orders to clarify its previous orders so as to ensure their effectiveness.

D. Objective of Panel's Retention of Jurisdiction

[118] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past (see 2018 CHRT 4 at para. 50).

[119] If the past discriminatory practices are not addressed in a meaningful fashion, the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system (see 2018 CHRT 4 at para. 53).

E. Structure

[120] Issue one will address children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

[121] Issue two will be dealing with the issue of First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[122] Issue three will be dealing with the issue of First Nations children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.

IV. Issue I

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

A. Introduction

[123] The Panel views this first part of the ruling as an interpretation exercise of what the Panel meant to cover under Jordan's Principle under previous findings and rulings as opposed to the two other sections which raise new questions where the Panel will not only do an interpretation exercise but also will make findings in light of the evidence or lack thereof before it.

[124] In the *Merit Decision*, the Panel applied the test in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*] and (*Commission des droits de la personne et des droits de la jeunesse*) v. *Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 44-52 [*Bombardier*] (see 2016 CHRT 2 at paras. 22-25).

In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

(see *Merit Decision* at para. 22).

[125] The Panel applied the *Moore* test as follows and found the complaint was substantiated:

It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

(see *Merit Decision* at para. 28).

[126] Additionally, the Panel used an international law framework to support its reasons on substantive equality in the *Merit Decision* and subsequent rulings.

[127] The Panel finds it is not necessary to redo the same analysis for this first section of this ruling given that the First Nations complainants have met their burden of proof and discrimination was established. Moreover, denials, delays and adverse impacts were all demonstrated and formed part of the Panel's analysis under Jordan's Principle. Jordan's Principle is a separate part of the complaint and is broader than the on-reserve FNCFS Program and applies to all Federal Programs concerning First Nations children. The Panel will be clarifying the use of the terms "all First Nations children" in the legal and evidentiary context that led to previous findings and orders in this case.

[128] The applicable human rights framework will be further discussed under issues two and three of this ruling. In light of the Panel's past findings, reasons, rulings and orders and, for the reasons outlined below, the Panel clarifies that "All First Nations children" also includes on and off-reserve First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations whether under agreements, treaties or First Nations' customs, traditions and laws who experience the same barriers as on-reserve First Nations children with *Indian Act* status or who are eligible for *Indian Act* status. These First Nations children are eligible to be considered on a case-by-case basis using a substantive equality analysis under the Tribunal's Jordan's Principle orders.

B. First Nations identity versus First Nations categories of who is eligible under Jordan's Principle

[129] The Panel has recognized in its interim ruling that there is a "significant difference" between determining who is a "First Nation child" as a citizen of a First Nation and determining who is a "First Nation child" entitled to receive services under Jordan's Principle and what is the appropriate eligibility criteria to use in the latter (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan's Principle services before the Tribunal, but not citizenship which is the prerogative of First Nations not the Tribunal or Canada. Moreover, the AFN, the COO and the NAN all made arguments to this effect and those arguments need to be addressed. First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will consider their concerns as part of this ruling. In that regard, the Panel will use the terminology "eligibility criteria under Jordan's Principle" to distinguish it from the terms "definition of a First Nation child" purposely to avoid any misunderstanding that the Panel is attempting to define who is a First Nations child for any purpose but the eligibility to access Jordan's Principle services.

C. First Nations Rights to Self-Determination

[130] The Panel already mentioned it recognizes First Nations' human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[131] Moreover,

[d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies to respect Indigenous Peoples' inherent rights of self-determination and of self-governance including their right to determine who their citizens are. Another important point is that the Panel not only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its Decision and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.

(see 2019 CHRT 7 at para 23, emphasis omitted).

[132] Additionally, in the interim ruling, the Panel stressed “the importance of the First Nations’ self-determination and citizenship issues”, and added that the “interim relief order or any other orders is not intended to override or prejudice First Nations’ rights” (see 2019 CHRT 7 at para. 91, emphasis omitted).

[133] In 2018 CHRT 4, the Panel found that:

national human rights legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada’s commitments expressed in international law including the *UNDRIP*.

(see 2018 CHRT 4 at para. 81).

[134] The Panel also recognized “the Indigenous Peoples’ right to self-government and Canada’s goal to rebuild the Nation-to-Nation relationship and the TRC’s recommendation to use the *UNDRIP* as a framework for reconciliation” (see 2018 CHRT 4 at para. 114).

[135] Finally, on this point, the Panel finds that the various domestic and international legal instruments discussed above all support the inherent self-determination right of First Nations to identify their citizens and members outside the narrow lens of the *Indian Act*. In particular, this approach is consistent with protecting First Nations individual and collective human rights as articulated in the *UNDRIP* and other relevant international instruments, section 35 of the *Constitution Act, 1982*, and the quasi-constitutional *CHRA*. It is consistent with Canada’s public commitment to implement the TRC recommendations, rebuild a Nation-to-Nation relation with First Nations, and advance reconciliation. And it is consistent with the Tribunal’s previous approach, in particular as applied in the *Merit Decision* and in the 2018 CHRT 4 ruling.

D. International Law

[136] Canada has accepted the *UNDRIP* without reservation, but has not yet enacted it into domestic law. However, Canada has fully endorsed the *UNDRIP*, and committed to implementing it through the review of laws and policies, as well as other collaborative initiatives and actions. Further, and importantly, this Tribunal has already provided an analysis of the *UNDRIP* and its relevance to this proceeding.

[137] In 2018 CHRT 4, The Panel also reiterated its findings made in the *Merit Decision* that the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Merit Decision* at paras. 437-439 and 2018 CHRT 4 at para. 69).

[138] Furthermore, the Panel made findings that

[...] Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under *UNDRIP*, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the [*Merit*] *Decision*.

(see 2018 CHRT 4 at para. 131).

[139] As already mentioned in the *Merit Decision*,

in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker’s Canadian born children, the Supreme Court held procedural fairness required the

decision-maker to consider international law and conventions, including the *United Nations' Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.

(see 2018 CHRT 4 at para. 70).

As described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances.

(see 2018 CHRT 4 at para. 71).

[140] The Panel also found that

the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*) is of particular significance especially in this case. It outlines the individual and collective rights of Indigenous Peoples. In May 2016, Canada endorsed the *UNDRIP* stating that "Canada is now a full supporter of the Declaration, without qualification.

(see 2018 CHRT 4 at para. 72).

Moreover, the *UNDRIP* at Articles 3, 4, 5, 14, 15, 18, 21 support the rights of equal and just services and programs for Indigenous, with consultation on their social, economic and political institutions.

(2018 CHRT 4 at para. 73).

Additionally, the *UNDRIP* Articles 7, 21 (2), 22 (1) (2), state that Indigenous Peoples have the right to live in freedom and shall not be subject to violence including the forceful removal of their children; that Indigenous People have the right to the improvement of their economic and social conditions; and states will take measures to improve and pay special attention to the rights and special needs of children.

(see 2018 CHRT 4 at para. 74, emphasis omitted).

Furthermore, the *UNDRIP* Articles (Article 2, 7, 22) relate directly to the protection of Indigenous children and their right to be free from any kind of discrimination

(see 2018 CHRT 4 at para. 75).

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

(see *UNDRIP*)

[141] Moreover,

Article 8 of *UNDRIP* reminds governments of their responsibility to ensure that forced assimilation does not occur and that effective mechanisms are put into place to prevent depriving Indigenous Peoples of their cultural identities and distinctive traits, disposing them of their lands, territories or resources, population transfer which violates or undermines Indigenous rights, forced assimilation or integration, and discriminatory propaganda.

(see 2018 CHRT 4 at para. 76).

[142] As such, self-determination is codified by article 3 of the *UNDRIP* which states:

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[143] Furthermore, self-government is codified under article 4, *UNDRIP*, which states,

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

[144] While the *UNDRIP* is to be read as a whole with the understanding that all the rights enunciated are interdependent, Articles 5, 9, 15, 18-19, 23, 33-34 and 37 of the *UNDRIP* are of particular significance:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

[145] The rights and the Tribunal's approach mentioned above support a departure from the *Indian Act* criteria as a sole means to determine who is eligible to receive Jordan's Principle services.

[146] In addition, in 2015, Canada accepted to fully implement the 94 TRC calls for action. Child welfare and Jordan's Principle are first to fifth calls to action.

[147] Of significance, the TRC called for cooperation and coordination between all levels of government and civil society to implement its calls to action, and for government to fully adopt and implement the *UNDRIP* as the framework for reconciliation.

[148] In 2018, the Panel found that the TRC calls to action and the *UNDRIP* informed the Panel's reasons and orders in this ruling (see 2018 CHRT 4 at para. 83). Of note, this specific ruling led to a consultation protocol signed by all parties and included Canada's commitment to comply with all of the Panel's orders including those found in 2018 CHRT 4. This same ruling and orders acknowledged the Nation-to-Nation relationship and the recognition that this relationship meant that First Nations can choose to govern their own child welfare services. As such, Canada accepted this ruling in its entirety which was informed by the *UNDRIP*.

[149] Of note, the Panel Chair's final remarks in that same ruling mentioned that

[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence,

The building of a Nation-to-Nation relationship cannot be more significant than by stopping the unnecessary removal of Indigenous children from their respective Nations. Reforming the practice of removing children to shift it to a practice of keeping children in their homes and Nations will create a channel of reconciliation [...]

(see 2018 CHRT 4 at paras. 452-453, emphasis omitted).

[150] Furthermore, when interpreting Canadian law, Parliament is presumed to act in compliance with its international obligations and to respect the values and principles enshrined in international law through the presumption of conformity. Moreover, the Supreme Court in interpreting the scope of the application of the *Charter*, stated in *R. v. Hape*, 2007 SCC 26 that:

...the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.

(see *R. v. Hape*, 2007 SCC 26 at para. 56).

[151] Therefore, international instruments such as *UNDRIP*, should inform the contextual approach to statutory interpretation.

[152] Consequently,

International law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88, [1987] 1 SCR 313.

(see also 2016 CHRT 2 at para. 431).

That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).

(see also 2016 CHRT 2 at para. 432).

This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).

(see 2016 CHRT 2 at para. 433).

[153] The Supreme Court of Canada in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, at p. 1056-7, discussed the importance of international law as an important interpretative tool in applying human rights law such as the *Charter*:

As was said in *Oakes*, *supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*, I had occasion to say at p. 349:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, **the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.**

(emphasis ours).

In recent years, the Supreme Court expanded the relevance of international law to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.

(see *Merit Decision* at para. 434).

[154] Moreover, in *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45 at paragraph 175 citing *R. Sullivan, Driedger on the Construction of Statutes* (3rd Ed. 1994) at p. 330 the Court stated,

... the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

[155] Furthermore, the Panel wrote in the *Merit Decision* that:

[t]he ICESCR [*International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3] is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR [Committee on Economic, Social and Cultural Rights] stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the ICESCR (see paras. 5 and 7). The CESCR also affirmed that the **aim of the ICESCR is to achieve substantive equality by “...paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations” (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person’s place of residence** (see at para. 34).

(2016 CHRT 2 at para. 442), (emphasis ours).

In addition to the covenants that protect human rights in general, the Panel wrote that Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195 (the ICERD), ratified in 1970. The ICERD clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.

(2016 CHRT 2 at para. 444, emphasis ours).

[156] The Panel in the *Merit Decision* wrote that “Canada’s statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric,” (see 2016 CHRT 2 at para. 454).

[157] While the Panel is not making findings of violation of international law as Canada argued the Tribunal lacks jurisdiction to do so, the Panel does have jurisdiction to rely on international law in interpreting the CHRA and domestic human rights. Again, it did so in the unchallenged *Merit Decision* and previous unchallenged rulings especially in regards to substantive equality which is at the core of Jordan’s Principle. The Panel in light of the above, finds that Canada’s practice and eligibility criteria under Jordan’s Principle is underinclusive and inconsistent with protected international human rights enshrined in the *UNDRIP*. More importantly, it fails to account for the inherent right to self-determination and to self-governance, both human rights of paramount importance that Canada publicly committed to uphold and also included in the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 which will be discussed below.

E. An Act respecting First Nations, Inuit and Métis children, youth and families

[158] While the AFN indicated that they advocated for the inclusion of a reference to the Tribunal’s decision in *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 which was rejected by Canada, the Panel recognizes similar language used in its 2016 CHRT 2 decision in *An Act respecting First Nations, Inuit and Métis children, youth and families*, especially with regard to substantive equality.

[159] The *Act respecting First Nations, Inuit and Métis children, youth and families*, only came into force on January 1, 2020 after the present motion was argued. However, it was raised by the AFN and other parties were given an opportunity to respond as part of this motion and, at that time, it had undergone second reading. While the Panel recognizes that the legislation was not in force at the time of the hearing and that there is no provision giving the legislation retroactive effect, the Panel believes that it is appropriate to consider Parliament's goal and intentions and its purpose for enacting the legislation. Additionally, the Panel considers the rule of law that is applicable at the time it makes its orders. At the time it renders this ruling, the *Act respecting First Nations, Inuit and Métis children, youth and families* is now law in Canada. The same reasoning applies concerning *Bill S-3* which will be discussed further below. It is appropriate for the Tribunal to consider the current state of the law at the time of its ruling especially, as in this case, where the parties were able to anticipate the change and had an opportunity to make appropriate submissions. The Tribunal will not, however, consider secondary sources on such as public reports that were not addressed by the parties and not available at the time of the hearing.

[160] The Preamble is particularly instructive of Parliament's goal in enacting this important legislation.

Preamble

Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;

Whereas Canada ratified the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination;

Whereas Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices;

Whereas Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage;

Whereas Parliament recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services;

Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children;

Whereas Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services;

Whereas Parliament affirms the need

to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,

to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons,

to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,

[...]

And whereas the Government of Canada acknowledges the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities;

Moreover, according to the *Act respecting First Nations, Inuit and Métis children, youth and families*, an

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Indigenous peoples has the meaning assigned by the definition of aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.

[161] Similar to the language found in section 25 of the *Canadian Charter of Rights and Freedoms*:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The *Act respecting First Nations, Inuit and Métis children, youth and families*, at section 2 stipulates:

This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

[162] Section 7 of the *Act respecting First Nations, Inuit and Métis children, youth and families*, affirms that this “Act is binding on Her Majesty in right of Canada or of a province”.

[163] Section 8 mentions that

[t]he purpose of this Act is to

(a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;

(b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and

(c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

[164] In light of the above, it is Parliament's clear intent to uphold the inherent rights of self-determination and of self-governance of First Nations, Inuit and Métis Nations in the areas of child welfare and to respect substantive equality, an area covered by Jordan's Principle and domestic and international human rights. This is consistent with the Panel's approach in this case and this clear intent from Parliament informs the eligibility criteria under Jordan's Principle and also further supports a departure from the *Indian Act* criteria as the sole means to determine who is eligible to receive Jordan's Principle services.

F. Indian Act

[165] The Panel will now turn to the subject of the *Indian Act*, followed by Section 35 of the *Constitutional Act, 1982* and treaties.

[166] The Supreme Court of Canada recently discussed the *Indian Act* in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paragraph 4:

Since its enactment in 1876, the *Indian Act* has governed the recognition of an individual's status as an "Indian". In its current form, the *Indian Act* creates a registration system under which individuals qualify for status on the basis of an exhaustive list of eligibility criteria. The *Indian Act's* registration entitlements do not necessarily correspond to the customs of Indigenous communities for determining their own membership or reflect an individual's Aboriginal identity or heritage. However, it is incontrovertible that status confers both tangible and intangible benefits.

[167] As Masse J. recognized in *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555 at paragraph 230:

[...] it should also be noted that, according to expert Stewart Clatworthy, the logic of section 6 and its "second generation cut off" dictates that, given the current state of affairs, in about 100 years, no new child will be entitled to have his or her name added to the Register in the plaintiffs' Bands. If there are more people registered under 6(1), this evolution will be slightly slower, but because of the nature of the mechanism in subsection 6(1), there will eventually be no more children born with an entitlement to be entered in the Register. There is no evidence on other Indian Bands specifically, but it should be noted that the same mechanism is at work.

[168] The recent amendments to section 6(1) of the *Indian Act* will be discussed below. However, the issue remains that Registered "Indians" under section 6(2) are unable to transmit status to their children which will inevitably result in the situation Masse J. identifies above.

[169] The AFN's Chiefs-in-Assembly passed significant resolutions pertaining to the *Indian Act* and its effects on First Nations. For instance, Resolutions 30/2017, 71/2016, and 53/2015 provide:

Resolution Provisions 30/2017

WHEREAS:

[...]

B. There is a long history of hardship and discrimination imposed on Indigenous peoples by the *Indian Act's* Indian status provisions.

C. Federal legislation enacted in the past and implemented still today was designed to assimilate and erode First Nations citizenship.

[...]

E. Indian children lose Indian status after two generations of out-marriage, and with the current rate of out-marriage many First Nations communities will disappear within a few generations due to rapid decline in numbers of Status Indians with their citizenship.

F. First Nations have always asserted their jurisdiction to determine and define their citizenship, regardless of Canada's unilateral imposition of the *Indian Act* that determines that status.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Affirm the authority of First Nations to determine their own citizenship and eligibility for registration.

71/2016

[...]

THEREFORE BE IT RESOLVED THAT the Chiefs-in-Assembly:

[...]

3. Call on Canada to repeal the impugned provision in its entirety and to transfer the authority of citizenship and identity to the First Nations.

53/2015

WHEREAS

[...]

B. First Nations peoples always governed themselves according to their customs, laws, and traditions, which included the determination of their individual and collective identities. The federal government has unilaterally interfered with Indigenous peoples and violated our inherent rights by determining who is a registered Indian under the registration provisions of the *Indian Act*.

[...]

F. The federal government must stop interfering with the right of First Nations to determine their individual and collective identities and recognize the people accepted by First Nations as belonging to them on the basis of their own customs, laws, and traditions.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

3. Direct the federal government to immediately cease imposing *Indian Act* criteria for registration upon First Nations and recognize citizens as defined by First Nations.

[...]

6. Direct the federal government to provide resources to First Nations to support their exercise of jurisdiction over citizenship.

(see Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit “E”, Tab 2 of the Jan 9 CSMR).

[170] In the case of *Indian Act* band councils (which are not institutions of Indigenous design), extensive authority to review and intervene in the decisions of their institutions remains vested in the Minister of Indian Affairs (see for example *Indian Act*, sections 66, 67, 79 and 83).

[171] As demonstrated above, the *Indian Act* was designed to assimilate First Nations Peoples and does not reflect First Nations’ definitions of themselves as Nations.

[172] In light of the above, the AFN and the Caring Society argue it cannot be the case that a legislative regime that will eventually result in a generation of First Nations children born without any *Indian Act* status can be the only measure for determining the First Nations children who require the protection of Jordan’s Principle. The Panel agrees with this assertion.

G. Treaties and Section 35 of the of the *Constitution Act, 1982*

[173] Section 35 of the of the *Constitution Act, 1982* recognizes and affirms aboriginal and treaty rights of Aboriginal Peoples meaning, First Nations, Inuit and Métis peoples in Canada:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[174] The Panel agrees with the AFN that the issue of citizenship is an Aboriginal right and treaty right, constitutionally protected by virtue of s. 35(1) of the *Constitution Act, 1982*. Moreover, as demonstrated above, an even greater protection of Indigenous rights exists under the *UNDRIP* and other international instruments that Canada has ratified (see *Merit Decision* at paras.431-455).

[175] Finally, treaties are also of significance in protecting First Nations rights. A treaty is an agreement made between the Government of Canada (or made by the British Crown and inherited by Canada), Indigenous groups and often provinces and territories that defines ongoing rights and obligations on all sides. These agreements set out continuing treaty rights and benefits for each group. Treaty rights and Aboriginal rights (commonly referred to as Indigenous rights) are recognized and affirmed in section 35 of the *Constitution Act, 1982* and are also a key part of the *UNDRIP* which the Government of Canada has committed to adopt. Treaties with Indigenous Peoples include both historic treaties with First Nations and modern treaties (also called comprehensive land claim agreements) with Indigenous groups. The various treaties between First Nations and Canada, the Constitution, the *UNDRIP* and the *CHRA* all have primacy over the *Indian Act*.

[176] This important analysis above is employed by the Panel when it is asked by Canada to respect the fact that the *Indian Act* is law in Canada and that the Panel has to apply it. When asked to apply non-quasi-constitutional Federal legislation, the Panel must consider the legislation’s effect on the quasi-constitutional human rights it is being asked to adjudicate. The Panel agrees with Canada that the Panel’s role here is not to find sections of the *Indian Act* inoperative. While the *Charter* was referred to by some parties, a proper *Charter* challenge is not before the Tribunal as part of this motion.

[177] This being said, the Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring.

[178] This reasoning also supports the Panel's response to Canada's argument that the Panel cannot draft policy. The Panel's goal is to eliminate the discrimination found in this case which includes Jordan's Principle and did not focus on the *Indian Act* in the provision of services. The Panel's interpretation is through a human rights lens and a focus to ensure that its orders are effectively implemented in a non-discriminatory manner and not drafting policy. The Tribunal is not attempting to draft policy. It analyzes the responsiveness of the governmental approach taken to implement the Panel's orders to cease the discriminatory practice and, if warranted, provides guidance to eradicate residual discrimination.

[179] The Tribunal has jurisdiction to consider this motion and corresponding request for further orders given that the Tribunal remained seized of all its orders to monitor their implementation with a focus to ensure their effectiveness and to eliminate the discrimination found. This mechanism is broad enough to allow the Panel to consider this issue and make clarification orders if needed and supported by the evidence.

[180] The Panel rejects Canada's argument that this interpretation exercise is expanding the complaint. Firstly, the complaint is part of the claim but is not its entirety. Secondly, Jordan's Principle is a broader aspect of the claim as it encompasses all government services offered to First Nations children and has an interplay with the Provinces and Territories. The Complainants who were successful in this case and the evidence they presented does not support a finding that Jordan's Principle eligibility criteria was limited to the *Indian Act*.

[181] Finally, on this point, the evidence and legal framework discussed as part of this motion support the Tribunal's jurisdiction and clarification orders that will be discussed below.

[182] Returning to the subject of treaties, the Royal Commission on Aboriginal Peoples identified citizenship as an Aboriginal Right protected by s. 35 of the *Constitution Act, 1982* in its recommendations, when it stated that:

In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

[183] Furthermore, in *R. v. Sioui*, 1990 CanLII 103, [1990] 1 SCR 1025, Lamer J. noted that the Royal Proclamation recognized the authority of Indigenous nations to continue to exercise autonomy over their internal affairs (see p. 1052-3). Similarly, in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [Delgamuukw] at paragraph 145, the Supreme Court of Canada affirmed that the assertion of British sovereignty over Indigenous lands did not displace the pre-existing Indigenous legal orders, but protected them.

[184] The AFN submits that attempts at limiting the scope of a "First Nations child" on the basis of colonially derived preconceptions of *Indian Act* status, instead of deferring to First Nations concepts of citizenship and membership, flies in the face of First Nations jurisdiction over this area. Section 91 of

the *Constitution Act, 1867* did not only delineate that individuals with *Indian Act* status or those resident on reserves were under the jurisdiction of Canada, and therefore entitled to the benefit of federal services, but in fact more broadly confirmed “Indians, and Lands reserved for Indians” fell under federal jurisdiction.

[185] The AFN also submits the Supreme Court of Canada in *Daniels* explained that section 35’s purpose is to protect First Nations communities’ rights, while subsection 91(24)’s purpose is about the federal government’s relationship with Aboriginal Peoples in Canada. (see *Daniels* at para. 49).

[186] Furthermore, the AFN adds that Dr. Gideon confirmed in her May 24, 2018 affidavit that for the 11 self-governing First Nations who are subject to a Self-Government Agreement, the eligibility for Jordan’s Principle is determined based on whether the child is included in the self-governing First Nation’s membership code. This practice is confirmed in a January 9, 2019 email from the Acting Regional Director, Operations of ISC’s Northern Region. As such, Canada has agreed that membership in a self-governing First Nation has been confirmed as an eligibility criterion that can be implemented.

[187] In *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507 [*Van der Peet*], one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive [A]boriginal societies with the assertion of Crown sovereignty (see para. 49; see also para. 50 on the importance of taking account of the Aboriginal perspective to achieve reconciliation).

[188] Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at para. 20).

[189] The Supreme Court of Canada in decisions such as *Van der Peet* at paragraph 42 and *Delgamuukw* at paragraph 112 defined Aboriginal rights as “intersocietal” law, with their source in the interaction of pre-existing Indigenous legal systems with the common law system. The Court has also recognized Indigenous nations as holding pre-existing sovereignty, in particular in *Haida Nation* at paragraph 20. The Supreme Court of Canada has implied the existence of a right to self-government, for example by acknowledging in *Delgamuukw* that Aboriginal title is held communally, a state of affairs that would require some form of self-government to regulate the community’s use of its lands. (see *Delgamuukw* at para. 115).

[190] Moreover, in *Reference re. Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 [*Secession Reference*] at paragraph 114, the Supreme Court of Canada analyzed the right to self-determination of peoples in international law:

The existence of the right of a people to self-determination is now so widely recognized in conventions that the principle has acquired a status beyond “convention” and is considered a general principle of international law. (see A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171-72; K. Doebring, “Self-Determination” in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.)

[191] If one understands the reconciliation of the pre-existing sovereignty of Indigenous Peoples and the de facto sovereignty of the Crown to be a fundamental principle of our constitutional order, the Constitution, both written and unwritten, must be interpreted in the context of the principle of reconciliation. This is so because, as the Supreme Court said in its *Secession Reference* judgment at paragraph 50, “[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.”

[192] It is important, in undertaking this task, that one keeps in mind that the Constitution is not simply the texts of the constitutional statutes listed in the Schedule to the *Constitution Act, 1982*. As the Supreme Court of Canada said in the *Secession Reference*,

although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference* [1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3]. Finally, as was said in the *Patriation Reference*, [1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753], at p. 874, the Constitution of Canada includes

the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules...are a necessary part of our *Constitution* because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning

(see *Secession Reference* at para. 32).

[193] The British Columbia Supreme Court in *Campbell v. British Columbia (Attorney General)*, 2001 BCSC 1400 found that Indigenous self-government is an existing right and that Indigenous jurisdiction existed outside the division of powers between the federal and provincial governments in the *Constitution Act, 1867*. See, for example, *R. v. Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 S.C.R. 821. Likely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell*, though this case was never appealed to a higher court. These cases suggest that the courts may be returning to an earlier understanding of the relationship between the Crown and Indigenous peoples as being between self-governing co-creators of the Canadian constitutional order, rather than as sovereign and subject. The treaties provide evidence of the Crown's view of Indigenous nations as sufficiently independent and self-governing to warrant a treaty process, which implies a longstanding recognition of Indigenous authority to exercise self-government; these principles have never been entirely abrogated and they therefore continue to underpin Canada's legal structure. (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173, at 197).

[194] In *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 SCR 387, the Supreme Court addressed the interaction between the Treaty of 1752 between the Mi'kmaq and the Crown and s. 88 of the *Indian Act*, RSC 1985, c I-5 that provides that the general applicability of provincial law to Indians is "[s]ubject to the terms of any treaty". The decision confirms that Treaty Rights should be given "a fair, large and liberal construction" (para. 27).

[195] The Panel finds that the law on treaties is aptly summarized in Ian Peach's "More than a Section 35 Right: Indigenous Self-Government as Inherent in Canada's Constitutional Structure" [2] ². The Panel entirely agrees with Ian Peach and authors John Borrows, Patrick Macklem and James Tully's characterisation of treaties in Canada's historical context and finds they concisely summarize the applicable law and context. The references below translate the Panel's views on this question. This also supports the AFN's position on treaties between First Nations and Canada.

Probably the strongest source for the authority of Indigenous peoples to exercise self-determination in the Canadian constitutional order, however, is in the confirmation and recognition by the Crown of the pre-existing and continuing sovereignty of the Indigenous peoples of Canada through the negotiation of treaties. As John Borrows comments, one of the best examples of the governance powers of Indigenous peoples is their power to make treaties with the Crown, over 350 of which were made prior to Confederation. [3] ³ The legitimacy of

2. Canadian Political Science Association, <https://www.cpsa-acsp.ca/papers-2011/Peach.pdf>.

3. John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285, at 296.

Indigenous government in Canada is based not simply on the prior occupancy of the territory by Indigenous peoples, but on their prior sovereignty; as Patrick Macklem describes it, this sovereignty and Crown sovereignty were distributed, or shared, through a series of acts of mutual recognition, in the form of treaty-making. [4] ⁴ The treaties manifestly considered Indigenous nations as distinct political communities with territorial boundaries within which their authority was exclusive, so that they and European settler nations were recognized one another as equal and co-existing nations, each with their own forms of government, traditions, and ways of living, and agreed to cooperate in various ways. [5] ⁵ There are numerous examples of treaties between European nations and Indigenous peoples in North America that used Indigenous legal forms. These were part of a larger set of intersocietal encounters through which Indigenous and non-Indigenous participants generated norms of conduct and recognition that structured their ongoing relationships. Throughout, the Indigenous understandings of the treaties were relatively uniform, as a means by which Indigenous nations sought to retain their traditional authority over their territories and govern their communities in the face of colonial expansion. [6] ⁶

Once this form of mutual recognition was worked out, the only way the Crown could acquire land and establish sovereignty in North America was to gain the consent of the Indigenous nations, consistent with what Tully describes as the most fundamental constitutional convention, that of consent of the people. [7] ⁷

Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians today appreciate that treaties, through which this mutual recognition and consent were worked out, are an important part of the foundation of the Canadian state. [8] ⁸

Crown-Indigenous treaties were regarded by both sides as constitutive of normative arrangements, a conclusion confirmed by the customary practice of renewing past commitments and redefining acceptable political conduct, for example through the annual practice of “brightening” the covenant chain in nation-to-nation councils. [9] ⁹ As Mark Walters comments, the British officials involved knew perfectly well how Indigenous peoples interpreted British conduct in brightening the covenant chain, so there can be no question about whether or not there was a shared understanding or “meeting of minds”. [10] ¹⁰

Indeed, The Treaty of Niagara of 1764, which confirmed and extended a nation-to-nation relationship between the Crown and Indigenous peoples and affirmed the covenant chain relationship, is a prime example of the British understanding of the meaning of Indigenous forms. [11] ¹¹ This, the first legal act that the Crown undertook after the Royal Proclamation, expressed their mutual aspiration to live together, but also to respect one another’s autonomy. [12] ¹² At this event, presents were exchanged and covenant chains and wampum belts were presented to the British to establish a treaty of alliance and peace. [13] ¹³ One of the

4. Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 *Stanford L. Rev.* 1311 [“Distributing Sovereignty”], at 1333.

5. *Ibid.* at 124.

6. John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 *Wash. U. J. L. & Pol’y* 167, at 179 [“Indigenous Legal Traditions in Canada”] and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Indigenous Difference], at 137, 152-3 for a discussion of these matters.

7. James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), at, 122.

8. J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), at 3.

9. Mark Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall” (2001) 24 *Dalhousie L.J.* 75, at 129.

10. *Ibid.* at 130.

11. John Borrows, “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 *U.B.C. L. Rev.* 1 [“Constitutional Law From a First Nation Perspective”], at 20.

12. John Borrows, “Creating an Indigenous Legal Community” (2005) 50 *McGill L.J.* 153, at 163.

13. John Borrows, “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 *U.B.C. L. Rev.* 1 [“Constitutional Law From a First Nation Perspective”], at, 23.

belts exchanged here, the two-row wampum belt, was used by Indigenous nations to reflect their understanding of the Royal Proclamation and the Treaty as one of peace, friendship, respect, and non-interference in one another's internal affairs. [14]¹⁴ A second belt exchanged represented an offer of mutual support and assistance, but also respected the independence of each party. [15]¹⁵

As Barsh and Henderson describe it, the treaty process produced a consensual distribution of constitutional power and established a compact between the treaty parties, thus securing to the treaties the status of constitutional documents. [16]¹⁶ The acceptance of a shared normative meaning for the treaties from what both sides said and did results in the conclusion that Indigenous sovereignty and Crown sovereignty really were linked together in a genuine sense. Over time, the linkages were implicitly increased and strengthened with each present-giving ceremony until, on the eve of Confederation, it was understood that Indigenous nations enjoyed an inherent right of self-government, at least as a matter of internal sovereignty, under the protective umbrella of Crown sovereignty, in a manner consistent with Binnie J.'s conception in *Mitchell*. [17]¹⁷

Tully refers to this as "treaty constitutionalism", in which Indigenous peoples participate in the creation of constitutional norms to govern their relationship with the Crown, thereby taking an active role in the production of the basic legal norms governing the distribution of authority in North America. [18]¹⁸

[196] While the Panel's reasons and present ruling do not turn on the supporting doctrine referred to above, it does find it instructive and consistent with the Panel's views on the law in regards to treaties and their important status in Canada's constitutional framework. This supports the primacy of treaties over the *Indian Act*.

[197] Furthermore, in *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30, Parliament recognized the importance of giving due regard to First Nations customary laws and legal traditions in applying the *CHRA* and when applying the *Indian Act*:

Aboriginal rights

1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

Regard to legal traditions and customary laws

1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

14. John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at 24.

15. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [*Recovering Canada*], at 127.

16. Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley and Los Angeles: University of California Press, 1980) at 270-1; see also Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*], at 154.

17. *Ibid.* at 137-8.

18. James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), at, 117.

[198] All the above justify a broader interpretation of Jordan's Principle eligibility criteria that goes beyond the narrow parameters of the *Indian Act*.

H. Scope of Complaint

[199] As summarized earlier in this decision, Canada argued that the relief requested in this motion was beyond the scope of the complaint currently before the Tribunal. Again, the Panel disagrees with this assertion.

[200] The Panel already addressed the scope of the claim (complaint, Statement of Particulars, evidence, arguments, etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras. 99-102):

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para. 4, translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

"Complaint forms are not to be perused in the same manner as criminal indictments". (Translation, see *Canada (Procureur général) c. Robinson*, 1994 CanLII 3490 (FCA), [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para. 22).

« Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,

(a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada* 2013 CHRT 7 at para. 3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway*, 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

...[I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the Act. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin*, see also, *First Nation* 2017 CHRT 34 at paras. 34 and 36).

[201] This question was already asked and answered. The only other question to be answered on the Tribunal's jurisdiction here is if this motion goes beyond the claim or not. The Panel's response is that for issues I and II of this ruling it does not.

[202] Furthermore, the case in front of the Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations. In fact, the Panel in a ruling adding the NAN as an interested party wrote the following:

The Assembly of First Nations and the Chiefs of Ontario represent the various First Nations communities across Canada and Ontario. The interests of First Nations children, youth and families, along with the agencies that serve them, are represented by the First Nations Child and Family Caring Society of Canada. Furthermore, the Canadian Human Rights Commission (the Commission) represents the public interest and has led the majority of the evidence in this matter, including the evidence relied upon by the Panel to make the findings in the Decision identified above about remote Ontario communities.

With the assistance of these parties and interested parties, along with the NAN and INAC, the Panel believes it will have more than enough submissions to craft a meaningful and effective order in response to the [Merit] Decision,

(see 2016 CHRT 11 at paras. 16-17).

[203] This demonstrates that the focus of the claim revolved around First Nations representatives who had standing in this case and who were part of this complaint. Any clarification exercise on the terms "all First Nations children" is not unfair or outside this claim. Additionally, the Panel referred to the term communities over a hundred times in the Merit Decision and always believed First Nations communities should define themselves. This transpired in the Panel's rulings especially in 2018 CHRT 4.

[204] Moreover, the Complainants' Statement of Particulars alleged that underfunding of the FNCFS Program infringed Jordan's Principle, and sought very broad relief to redress discriminatory practices in "...the application of Jordan's Principle to federal government programs affecting children...". The prayer for relief thus was not limited to the FNCFS program, or tied to *Indian Act* status or reserve residency.

[205] The issues pleaded are thus broad enough to encompass the clarification now being sought regarding eligibility under Jordan's Principle.

[206] Furthermore, the Tribunal has already made rulings dealing with the scope and meaning of Jordan's Principle, clarifying that it is not restricted to the resolution of jurisdictional disputes and that it applies to a broad range of services both on and off reserve. The Tribunal has retained jurisdiction over the implementation of its rulings and orders and the current motion simply seeks clarification of a matter that was not specifically addressed in those previous rulings – namely, who is eligible to receive the benefits that the Tribunal has already identified and described.

[207] The current motion asks the Tribunal for clarification intended to assist with such implementation and is squarely within the scope of the Tribunal's retained jurisdiction.

[208] In the interim ruling, new evidence filed as part of the interim motion for further relief was considered by the Panel to arrive at its findings and order. The Caring Society had recently intervened to pay for medical transportation for a young First Nations child living off-reserve and without *Indian Act* status who required a medical diagnostic service, an essential scan, to address a life-threatening condition because Canada would not pay due to the child's off reserve residence and lack of *Indian Act* status.

[209] The Panel found that the lack of *Indian Act* status was the primary reason for the refusal to cover the medical transportation costs:

The fact that the child is not covered under Jordan's Principle for lack of status is the focus of the refusal,

(see 2019 CHRT 7 at para. 69).

[210] The Panel found Canada's denial to be unreasonable:

[...] the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child as being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *[Merit] Decision* (see at paras. 365-382 and 391).

(see 2019 CHRT 7 at para. 73).

I. Conclusion

[211] The question is two-fold. The first part is the following:

Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?

[212] The Panel, in light of the reasons outlined above, answers yes to this question. A mechanism ordered to eradicate discrimination must, in order to be effective in eradicating discrimination, be responsive to the entirety of the discrimination and apply a human rights framework. If services are offered, they must be offered in a manner respecting substantive equality and, in this case, inherent Indigenous human rights including self-determination. An eligibility criteria under Jordan's Principle ought to respect the protected rights discussed above such as First Nations Self-government agreements, treaties, customs, laws, traditions, the *UNDRIP*.

[213] The second part is the following:

If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?

[214] The Panel believes that it is the latter. Moreover, ensuring that First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations are not excluded automatically from Jordan's Principle does not necessarily mean that they receive services under Jordan's Principle because there is a need to achieve a case-by-case analysis. Nothing prevents the analysis to assess what services are required, if the province provides them, whether the child needs services above the normative standard, etc.

[215] Instead of excluding children based on assumptions, an effective approach in line with human rights and substantive equality and consistent with the Panel's previous rulings which did not focus on the *Indian Act* or on-reserve residency would be to include them in Jordan's Principle, get them "through the door" and do the verification of the particular case to see if the child is a citizen and/or a member of a First Nation according to a process proposed by First Nations that is also reasonably workable for Canada.

[216] Consequently, in light of the above and the Panel's Jordan's Principle definition, Canada's history of discrimination, the current rule of law, evolving case law and the need to craft effective remedies that do not condone other forms of discrimination, "all First Nations children" also includes First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations regardless of where they live, whether on or off-reserve.

[217] The Panel clarifies that in the spirit of its past findings, reasons, analysis, *Merit Decision* and previous rulings and orders and human rights laws namely the *CHRA* and the *UNDRIP*, it is appropriate for Canada to consider First Nations children who do not have *Indian Act* status but are recognized as citizens and/or members of their respective Nations in accordance with their customs, laws, traditions, treaties and Self-government agreements to be considered eligible for services under Jordan's Principle.

[218] The Panel disagrees with Canada's position on this point and does not view this issue as outside its jurisdiction or outside the scope of the present claim given the historical and legal context forming part of this claim including Canada's acceptance of the *Merit Decision* and subsequent rulings especially 2018 CHRT 4 where Canada signed and confirmed its full acceptance of the Panel's reasons and orders. Again, this ruling also dealt with the importance of aligning human rights protected by the *CHRA* with the *UNDRIP* as explained above. Moreover, as already mentioned, the Panel did not narrow its view of Jordan's Principle services to First Nations children within the confinements of the *Indian Act*.

[219] Given the Panel's clarification above, the next step for this section is to address the meaning of "All First Nations children" for Jordan's Principle purposes. In considering the First Nations parties' requests in this case, the Panel opts to request the parties to discuss and generate potential eligibility criteria under Jordan's Principle only and in considering the Panel's clarification reasons outlined above.

[220] Additionally, contentious views arose from the interim order (2019 CHRT 7) and in discussions surrounding the process to allow First Nations to identify their citizens and/or members without placing a burden on First Nations who may not have capacity to address those requests in the short timeframe prescribed under Jordan's Principle. The Panel sought the parties' views to ensure that Canada has an effective way to verify if a First Nations child without *Indian Act* status is recognized by a First Nation. The COO brought many concerns and suggestions on the issue of potential liability for First Nations who, given they lack capacity, may not respond in time or may not respond at all to requests for identification of their citizens or members. The COO suggested that the Tribunal declare that this ruling does not impose any duty of care or responsibility on First Nations, and/or order Canada to indemnify First Nations for any liability they may incur.

[221] In sum, the Commission submits that with respect to negating future duties of care or liability, it must be remembered that the Tribunal is a creature of statute. Its mandate is to conduct hearings into alleged violations of the *CHRA*, and where infringements are found, to determine appropriate remedies under s. 53. The Tribunal does not have jurisdiction to make rulings that would purport to negate any private law duties of care that First Nations might owe as a matter of common or civil law. Further, even in the context of the *CHRA*, one panel of the Tribunal does not have the power to make a ruling that would compel the Commission (as gate-keeper) or future panels (as quasi-judicial decision-makers) to reach particular results, regardless of the facts and arguments that may be before them. This would unduly fetter future decision-making, and unfairly restrict the rights of any parties to those hypothetical future cases.

[222] The Commission also does not feel it would be appropriate at this point to order that Canada always indemnify First Nations for liabilities incurred in connection with requests for recognition. Such an order would likely be outside the Tribunal's jurisdiction, to the extent it sought to impose requirements to indemnify First Nations for liability incurred at common or civil law. Even within the *CHRA* scheme, one can imagine situations where discriminatory practices within a First Nation might make it more appropriate for the First Nation, rather than Canada, to bear responsibility for any infringements. Overall, the better approach would be to leave such matters to be determined in the context of future cases, using mechanisms and principles that already exist as a matter of human rights law.

[223] The Panel entirely agrees with the Commission's submissions above and believes it is the correct legal interpretation to apply in this case.

[224] The Panel finds the AFN's suggestion below to be helpful and a potential solution in identifying First Nations children under Jordan's Principle that addresses some of the concerns raised by the COO and Canada:

With respect to verifying applicants under Jordan's Principle who are non-registered Indians without status, and residing or ordinarily resident off reserve, the AFN submits a solution exists in providing written notice and/or consulting the appropriate First Nations community. This is already an established practice regarding family and child matters under provincial child welfare legislation, such as Part X under Ontario's *Child and Family Services Act*. [19] ¹⁹ It is also part of the Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, for example, under the current ss. 12, 13 and 20. [20] ²⁰

(see AFN submissions at para. 66).

The AFN submits that by providing written notice and/or consultation, that could come in the form of a standardized letter which does not contain personal information, it offers the First Nations community *the opportunity* to confirm or deny, if it chooses, whether an applicant is indeed a member of the community. To be clear, the applicant ought to identify a connection with a particular First Nations community, and Canada ought to notify and/or consult that First Nations about the request to access services under Jordan's Principle.

(see AFN submissions at para. 67).

The application ought to proceed on the presumption that there is a connection to a First Nations community, so if the First Nations community does not respond, then the application is undisturbed. Under this presumption, Canada's logistical and operational concerns about "recognition as a member by their nation" are sufficiently addressed. [21] ²¹ However, if the First Nations community responds, and denies there is a connection between the applicant and community, then Canada ought to make a determination whether the applicant is indeed eligible and whether the services ought to be offered.

[225] The Panel agrees with Canada that it cannot order First Nations who are not parties to do anything. The Panel does not impose the verification of the identity of the First Nations child on the First Nation but on Canada who is a party to these proceedings. The obligation is on Canada to provide all First Nations an opportunity to participate in identifying First Nations children for the purposes of Jordan's Principle eligibility. Additionally, the elaboration of the identification process as per the Panel's orders concerns First Nations who are parties to these proceedings and recognizes their expertise and valuable input in determining an identification process.

19. *Child and Family Services Act*, R.S.O. 1990, c. C.11, Part X (Indian and Native Child and Family Services).

20. Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st Session, 42nd Parliament, Canada, December 3, 2015, ss. 12, 13, 20, House of Commons Second Reading.

21. Affidavit of Leila Gillis, affirmed March 7, 2019, paras 5-9.

[226] Moreover, a process seeking the First Nations' viewpoints on the First Nations child's citizenship and/or membership is in line with their inherent right of self-determination and aims to recognize their right to determine who their citizens/members are. It also moves away from the issue of self-identification alone determining First Nations identity. The Panel finds that the AFN's suggestion for a recognition process potentially addresses Canada's concerns.

[227] Finally, on Canada's argument that the Tribunal must respect the division of powers between the Federal and Provincial governments and that off-reserve services are outside the purview of this claim preventing the Panel to make the orders requested, the Panel relies on the Supreme Court of Canada decision in *Daniels*:

Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (CanLII), [2010] 2 S.C.R. 696, at para. 3.

(see *Daniels* at para. 51).

[228] The Panel finds the issue discussed in this section falls squarely within the core of the Indian power and forms part of this claim.

J. Order

[229] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above and
2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[230] The parties will return to the Tribunal with their potential eligibility criteria and mechanism by **October 19, 2020**.

V. Issue II

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

A. Legal framework

[231] As mentioned above, the Panel in the *Merit Decision*, applied the tests found in *Moore* and *Bombardier*, (see 2016 CHRT 2 at paras. 22-25). The Panel finds it is still applicable and will apply the same tests again for issues two and three of this ruling.

[232] Furthermore, the majority in *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 SCR 566 [*Gibbs*] articulated a two-stage framework to determine claims for discrimination in an insurance benefits plan. The first step is to determine the true character of or

underlying rationale of the benefits plan in this case, Jordan's Principle, which was already explained above. The second step is to consider whether benefits differ as a result of protected characteristics that are not relevant to the stated purpose. This analysis has subsequently been applied to other ameliorative programs (e.g. an employment policy in *Lavoie v. Treasury Board of Canada*, 2008 CHRT 27 at para. 136).

[233] *Gibbs* predates the establishment of the current three-part *prima facie* test for discrimination articulated in *Moore* at paragraph 33 and affirmed subsequently in *Bombardier* at paragraph. 35-54 and *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 24. The test requires that a complainant have a characteristic protected from discrimination under the *CHRA*; that they experienced a denial and/or an adverse impact with respect to the service; and that the protected characteristic was a factor in the denial and/or adverse impact.

[234] In *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 [*Skinner*], the Nova Scotia Court of Appeal persuasively articulated how the *Gibbs* test could be applied within the *prima facie* test for discrimination articulated in *Moore*. In particular, the Court used *Gibbs* to analyze whether the protected characteristic was a factor in the adverse impact (*Skinner* at paras. 52-70). This approach is consistent with the approach taken by Member Bélanger in *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20, aff'd *Canada (Attorney General) v. Hicks*, 2015 FC 599 where he first determined that the complainant had a protected characteristic and suffered an adverse treatment before applying *Gibbs*.

[235] In summary, in alleging an ameliorative program is under inclusive, the burden remains with the complainant to establish a *prima facie* case of discrimination. The complainant must establish that they have a characteristic protected from discrimination under the *CHRA*, that they were denied and/or experienced an adverse impact with respect to the service, and that the protected characteristic was a factor in the denial and/or adverse impact. In order to demonstrate that the protected characteristic was a factor in the denial and/or adverse impact, it is open to the complainant to use the *Gibbs* framework in which the first step is to identify the true character or underlying rationale of the ameliorative program. The second step is to consider whether program benefits differ as a result of protected characteristics that are not relevant to the stated purpose.

[236] The Panel described Jordan's Principle as a substantive equality mechanism to ensure that First Nations children access governmental services, they need without experiencing gaps, delays or denials. For clarity, Jordan's Principle is not a program, it is considered a legal rule by Canada. This was already established in the past (see 2019 CHRT 7 at para. 25). However, the Panel finds the *Gibbs* test applicable and useful in analyzing eligibility for services under Jordan's Principle.

[237] Canada's position appears to be that it considers Indigenous children, including those without *Indian Act* status, who are ordinarily resident on reserve to be within the scope of Jordan's Principle. This includes the First Nations children in this issue ordinarily resident on reserve. Therefore, the central dispute here is with respect to First Nations children residing off-reserve who are not eligible for *Indian Act* status but have a parent who is.

[238] The Panel believes that it does have jurisdiction to examine this category of children as part of this claim without unduly expanding the scope of the complaint in any way. The Jordan's Principle distinction based on the *Indian Act* was made by Canada and raised after the *Merit Decision*. As already explained above, the Panel did not focus its *Merit Decision* on considerations under the *Indian Act*. Additionally, Jordan's Principle applies on and off-reserve given its substantive equality nature and its goal to enable First Nations children to access services that are culturally appropriate and safe and account for intergenerational trauma and other relevant specific needs that may only be addressed in providing services that could be considered above normative standards. While Jordan's Principle can include FNCFS, it is broader than the part of the complaint addressing on-reserve FNCFS services. The Panel clearly made this distinction in its *Merit Decision* and subsequent rulings providing clarification based on the evidence in front of the Tribunal.

[239] In light of the Panel's past findings and rulings and its reasons on issue I, the Panel considered if any off-reserve First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status and have actual needs for services that (i) go beyond normative standards of care, and (ii) are rooted in the kinds of historical and contemporary disadvantages that breathes life into the substantive equality analysis – such as the legacies of stereotyping, prejudice, colonialism, displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop – is eligible for Jordan's Principle services. For the reasons outlined below, the Panel finds there is an evidentiary and legal basis that off-reserve children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status share the same characteristics and have similar needs as the other First Nations children eligible for Jordan's Principle services but these children are denied the benefit of those services because of *Indian Act* status distinctions based in whole or in part on the prohibited ground of race and/or national or ethnic origin.

[240] The first element in the *prima facie* discrimination test is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics. The Supreme Court decision in *Daniels* determined that First Nations without *Indian Act* status, and regardless of their parents' *Indian Act* status, are "Indians" for the purposes of 91(24) of the *Constitution Act* of 1867. Therefore, a First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* status possesses the same characteristics as registered or eligible to be registered First Nations children namely race and national or ethnic origin protected under the *CHRA*. Moreover, the Panel never made this distinction in the *Merit Decision* since it viewed First Nations and the protected ground of race and national or ethnic origin in a broader sense given the reasons explained above.

[241] The second element in the *prima facie* discrimination test is that the First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* must experience a denial and/or adverse impact in the services provided by Canada under Jordan's Principle.

[242] Based on the findings made in the interim ruling, it is clear that a First Nations child living off-reserve who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* status is denied services by not being considered eligible to receive Jordan's Principle services, with some exceptions, since Canada considers those children to be receiving provincial services. Under the Panel's substantive equality mandatory definition in 2017 CHRT 14 at paragraph 135, Canada must also provide culturally appropriate and safe services that may be considered above normative standards to all First Nations children on and off-reserve.

[243] However, Canada's eligibility criteria exclude First Nations children without *Indian Act* status even if one of their parents has status or is eligible for status under 6(2) of the *Indian Act*. The reason behind this is because a parent that has 6(2) *Indian Act* status cannot transmit it to their children. This is what the AFN resolution above described as the erosion of First Nations. The issue here in the provision of services is that because Canada unilaterally imposes the *Indian Act* as the criteria for access to services under Jordan's Principle a situation may arise of two siblings sharing only one parent registered under 6(2) of the *Indian Act* being treated differently for Jordan's Principle eligibility. The child whose second parent is registered under 6(1) of the *Indian Act* may be considered eligible for Jordan's Principle services. On the other hand, the child whose second parent is not eligible for registration under the *Indian Act* may not be eligible for Jordan's Principle services. The Panel finds that benefits to First Nations children differ as a result of protected characteristics that are not relevant to Jordan's Principle's stated purpose of substantive equality for First Nations children. There is no doubt that this outcome is discriminatory and should not be the criteria used to remedy the discrimination found in this case.

[244] We are not discussing a self-identified First Nations person who had a First Nations ancestor twelve generations ago here. We are discussing First Nations children who, but for the discriminatory way in which the *Indian Act* categorizes them, are denied services under Jordan's Principle meant to address substantive equality. Jordan's Principle accounts for these children's specific needs as well as the legacies of stereotyping, prejudice, colonialism and displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop. Moreover, the Panel already found that

AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see 2009 *MOU on Jordan's Principle* at pp. 1-2),

(see 2016 CHRT 2 at para. 355).

[245] Additionally, Health Canada and Aboriginal Affairs and Northern Development Canada (AANDC), now ISC, has "a role to play in supporting improved integration and linkages between federal and provincial health and social services" (2013 *MOU on Jordan's Principle* at p. 1), (see 2016 CHRT 2 at para. 358).

[246] As already noted, the evidence before the Tribunal and findings indicated that a child who was living off reserve, was not recognized as being ordinarily resident on reserve, and was not eligible for *Indian Act* status registration was denied a service above normative standards. The child, who was an infant, was waiting for an essential scan prescribed by a physician in order to assist in determining the appropriate treatment and operation for a rare and serious medical condition (see 2019 CHRT 7 at paras. 64 and 72). The Panel found that the fact that the child was not covered under Jordan's Principle for lack of status was the focus of the refusal (see 2019 CHRT 7 at para. 69).

[247] Moreover, in the interim ruling the Panel found the outcome of the child's case unreasonable. The coverage under Jordan's Principle was denied because the child's mother is registered under 6(2) of the *Indian Act* and could not transmit status to her child in light of the second-generation cut-off rule. This is the main reason why the child's travel costs were refused (see 2019 CHRT 7 at para. 73).

[248] Thirdly, as demonstrated above, race and national or ethnic origin is a factor in the denial of services namely above normative standard and culturally appropriate and safe under Jordan's Principle. A child with a parent who is registered under 6(2) of the *Indian Act* and with a parent with no status or eligibility to status will be treated differently than a child who has a parent registered under 6(1) of the *Indian Act*. No other children in Canada will be categorized in this manner, only First Nations children. Therefore, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison" (see *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 59). Moreover, the same reasons and findings in the *Merit Decision* in terms of substantive equality and race and/or national or ethnic origin apply to this unilaterally created by Canada category of eligible First Nations children, (see for example 2016 CHRT 2 at paras. 395-467).

In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the ICCPR should be understood to imply:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Moreover, the Panel relied on General Comment No. 18 of the UNHRC's stating "that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures" (see at paras. 5, 8, and 12-13).

(see *Merit Decision* at para. 440, emphasis added).

[249] The Panel found in the *Merit Decision* the narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children again, while it did include on-reserve First Nations children in Jordan's Principle, it did not restrict it to only those on-reserve or on any reliance on the *Indian Act* criteria (see 2016 CHRT at paras. 351-355, 360-381 and 458).

[250] Furthermore, the Panel relied on General Comment No. 20 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*) that stated that

[t]he *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESR* (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by "...paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence (see at para. 34),

(see 2016 CHRT 2 at para. 442, emphasis added).

[251] Moreover, the Panel already found that

[c]oordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need

(see 2016 CHRT 2 at para. 381, emphasis added).

More importantly, Jordan's Principle is meant to apply to all First Nations children

(see 2016 CHRT 2 at para. 382, emphasis added).

[252] Furthermore, Canada itself admitted that Federal Programs are more residency based than *Indian Act* based. Additionally, while Jordan's Principle is meant to address jurisdictional disputes amongst Federal Departments it also addresses jurisdictional disputes amongst the Federal government and Provincial and Territorial governments which clearly indicates that off-reserve considerations also form part of Jordan's Principle's process.

B. The discriminatory impact of section 6(2) of the *Indian Act* and its adverse effects on First Nations children

[253] On this point the parties have argued that the unanimous Supreme Court of Canada decision *Canadian Human Rights Commission v. Canada (Attorney General)*, 2018 SCC 31 to support their respective positions. This decision was a combined appeal from the judicial review of two decisions before the Tribunal: *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 [*Matson*] and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21 [*Andrews*].

[254] The two Tribunal decisions were first affirmed by the Federal Court and the Federal Court of Appeal and finally affirmed by a unanimous Supreme Court of Canada decision. The *Matson* and *Andrews* decisions are well known by the Panel given that each Panel Member rendered one of the two decisions.

[255] Section 6 of the *Indian Act* defines the various persons who are entitled to be registered as “Indian”. In *Matson*, the complainants claimed that, due to their matrilineal Indian heritage, they are treated differently in their registration under subsection 6(2) of the *Indian Act*, when compared to those whose lineage is paternal and are registered under subsection 6(1). Namely, registration under subsection 6(2) does not allow the complainants to pass on their status to their children. In *Andrews*, the issue was the previous enfranchisement provisions of the *Indian Act*. According to the complainant, had his father not enfranchised, he would have been entitled to registration under section 6(1), as opposed to his current status under 6(2). With subsection 6(1) status, the complainant would then be able to pass 6(2) status along to his daughter.

[256] Both complaints were argued under section 5 of the *CHRA* as discriminatory practices in the provision of a “service”. That is, Indian registration was argued to be a “service” within the meaning of section 5 of the *CHRA*. The Tribunal disagreed. While the processing of registration applications by the then INAC could be viewed as a service, the Tribunal found that the resulting status or lack thereof could not. INAC did not, and ISC now does not, have any involvement in determining the criteria for entitlement to be registered, or not registered, as an Indian under section 6 of the *Indian Act*. Nor does it have any discretion in determining entitlement to be registered, or not registered, as an Indian pursuant to the criteria in section 6 of the *Indian Act*. Entitlement was determined by Parliament, not INAC, through section 6 of the *Indian Act*; and INAC was obliged to follow this section in processing applications for registration.

[257] Therefore, the Tribunal was of the view that the complaints were challenges to section 6 of the *Indian Act* and nothing else. Pursuant to the Federal Court of Appeal’s decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 [*Murphy*], the Tribunal determined that complaints aimed at legislation per se, and nothing else, fall outside the scope of the *CHRA*. An attempt to counter the application of legislation based solely on its alleged discriminatory impact would better be addressed by a constitutional challenge. The Tribunal also rejected additional arguments, i.e. (1) that *Murphy* was superseded by other Supreme Court of Canada authorities regarding the primacy of human rights legislation; (2) that provincial human rights bodies had accepted that human rights legislation could render legislation inoperable; and, (3) that current and former provisions of the *CHRA* (including the former s. 67) indicated Parliament’s intent to allow challenges to legislation under the *Act*.

[258] With the repeal of section 67 of the *CHRA*, the Tribunal now has the jurisdiction to consider discrimination complaints emanating from the application of the *Indian Act*.

[259] In these two decisions, the Tribunal provides analysis and interpretation of the *CHRA*. Some examples of the Tribunal’s analysis include the Tribunal’s determination that the complaint could be dismissed as a challenge to legislation, interpretation of the term “service” as used in s. 5, and a determination regarding the primacy of human rights legislation.

[260] However, the case at hand can absolutely be distinguished from the *Matson* and *Andrews* cases given that the Panel found in the *Merit Decision* and subsequent rulings there are discriminatory practices that need to be eradicated. In *Andrews*, the Panel Chair Sophie Marchildon in this case chairing the *Andrews* case, wrote on the *Indian Act*’s purpose. The following comments in particular are relevant for this ruling:

Indian status is a legal construct created by the federal government. Through various provisions of the *Indian Act*, R.S.C., 1985, c. I-5 [the *Indian Act*] and its prior enactments, the federal government has defined the persons who are entitled to registration as “Indian”. The statutory concept of “Indian” from early colonialism to the present day does not reflect the

traditional or current customs of First Nations peoples for defining their social organization and its membership (see *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at paras. 8-12 [*McIvor*]),

(see *Andrews* at para.1).

[261] Additionally, in *Andrews*, the issue of the need to establish the existence of a discriminatory practice was discussed and is particularly helpful in this case:

I do not read these cases as foregoing the jurisdictional requirement for the Tribunal to find the existence of a “discriminatory practice” within the meaning of the *Act*

(see *Andrews* at para. 78)

This only further confirms the conclusion which I have already made, namely that while the Supreme Court has affirmed the primacy of human rights legislation, this principle applies to a “discriminatory practice” under the Act

(see *Andrews* at para. 85, emphasis added).

While my reasoning precludes challenges of decisions and/or actions which emanate directly from the *Indian Act*, decisions and/or actions which constitute a “discriminatory practice” pursuant to sections 5 to 25 of the Act and which would have previously been made “under the authority” of the Indian Act now fall within the Tribunal’s jurisdiction. The fact that the Tribunal has already started to see cases of this kind is further evidence of this (See for example *Louie and Beattie v. Indian and Northern Affairs Canada*, 2011 CHRT 2),

(see *Andrews* at para. 107, emphasis added).

[262] This case at hand is not a challenge to the *Indian Act* legislation. This case deals with discriminatory services and the use of a discretionary discriminatory criteria for eligibility purposes under Jordan’s Principle. Furthermore, this ruling does not propose to strike down section 6(2) of the *Indian Act* as this was not properly brought before the Panel and this is not the appropriate way to do so. However, insofar as it conflicts with the *CHRA* and human rights protected under the *CHRA* in the presence of discrimination that the Tribunal is seeking to eliminate, the quasi-constitutional *CHRA* supersedes the *Indian Act*.

[263] Furthermore, the Panel finds that Canada uses its discretion to establish *Indian Act* registration or entitlement to registration eligibility criteria to restrict access and therefore deny Jordan’s Principle services to First Nations children residing off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status. Relying on the discriminatory criteria of the *Indian Act* adversely differentiates between siblings or other family members because of a second-generation cut-off rule that is meant to assimilate and erode First Nations citizenship. This amounts to discrimination and runs counter to what the Panel is aiming to achieve in this case, namely to ensure Canada ceases the discriminatory practice and takes measures to redress the practice or to prevent the same or a similar practice from occurring in future (see section 53 (2) a of the *CHRA*). The Panel chair in her final remarks in a previous ruling wrote that “[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation’s very existence”, (see 2018 CHRT 4 at para. 452).

[264] To arrive to its conclusion, the Panel follows a similar analysis and approach to that taken by Member Lustig in *Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1. In that case, the Tribunal addressed whether AANDC discriminated against Joyce Beattie in relation to her entitlement for *Indian Act* registration. Shortly after birth, Ms. Beattie was adopted through a custom adoption by parents who had *Indian Act* status in a different *Indian Act* Band than her birth mother.

Once the *Gender Equity in Indian Registration Act*, S.C. 2010 c. 18 amended the *Indian Act*, Ms. Beattie's grandchildren became eligible for *Indian Act* status if Ms. Beattie had s. 6(1)(c) *Indian Act* status through her adopted parents but not if she had s. 6(1)(f) through her birth parents. AANDC refused, for a period of about two and a half years, to recognize Ms. Beattie's custom adoption and registered her under s. 6(1)(f). AANDC similarly refused to allow Ms. Beattie to have her name removed from her birth mother's Band list.

[265] The Tribunal found that the complaint was substantiated. The Tribunal found that processing an application for *Indian Act* registration constituted a service under s. 5 of the *CHRA*. *Indian Act* registration is work done by government employees on behalf of an applicant so that benefits may flow to that individual. The Tribunal found that AANDC's decisions were discretionary decisions within the scope of the *CHRA*. The complaint was not a disguised attack on the *Indian Act* itself. AANDC's eventual recognition of Ms. Beattie's entitlement to registration through her adoptive parents and eventual removal from her birth mother's Band list confirmed that AANDC had discretion in how it interpreted the *Indian Act*. As such, AANDC had an obligation to choose a broad, liberal and purposive interpretation of the *Indian Act* that was consistent with human rights principles and did not discriminate on the basis of family status.

[266] Similarly, ISC has confirmed it uses its discretion in determining who is eligible to receive Jordan's Principle services:

When a request is submitted on behalf of a non-status child, the Jordan's Principle Focal Point works with the requestor to understand if the child would be eligible for registration by learning about the parents' status, potential status under *Bill S-3*, as well as with the Office of the Indian Registrar. If there is uncertainty as to the eligibility of the child, the Focal Point can err on the side of caution and approve the request within the domain of "best interests of the child", particularly where there are concerns about meeting the ordered timeframes (see Dr. Valerie Gideon's affidavit, dated December 21, 2018, at paras. 35-39)

(see 2019 CHRT 7 at para. 42).

[267] Additionally, this Panel has already indicated its desire to ensure remedies do not condone another form of discrimination:

The Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies

(2019 CHRT 7 at para. 22).

[268] The interim relief order informs the required analysis under Jordan's Principle:

1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. **Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the UNDRIP and the Convention on the Rights of the Child guide all decisions concerning First Nations children.**

(2019 CHRT 7 at paras. 89, original emphasis omitted and new emphasis added).

C. S-3 and Enfranchisement provisions

[269] The Panel sees no reason why First Nations children who will inevitably become eligible to receive services under Jordan's Principle because of their eligibility for registration and obtaining status under the *Indian Act* following S-3 amendments should wait for Canada's process to implement the changes before they can obtain services such as above normative standards and culturally appropriate and safe services. Otherwise, those soon-to-have *Indian Act* status children will experience unnecessary delays and may, where applicable, ask for retroactive services once they obtain *Indian Act* status. Following substantive equality principles and given the history and discriminatory impacts found in the *Merit Decision* and subsequent rulings and of the *Indian Act*, Canada is ordered pursuant to section 53 (2) of the *CHRA* to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation. The same reasoning applies to parents who will become eligible to obtain registration/status under S-3 implementation.

[270] Finally, on this point, the same reasoning should apply to those parents of First Nations children in need of Jordan's Principle services above normative standards and culturally appropriate and safe services who were enfranchised and are now eligible for registration under the *Indian Act*.

[271] It appears that Canada is raising a *bona fide* cost defence under section 15(1)(g) and 15(2) of the *CHRA* when Canada submits that an inclusive definition of a "First Nations child" would "risk leaving the needs of those children who are properly the subject of the complaint, unmet." While the argument that Canada's resources are not unlimited has merit, aside from this assertion no sufficient evidence was brought forward to support such a statement. Therefore, the Panel finds this argument unconvincing.

D. Order

[272] The Panel pursuant to section 53 (2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[273] Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

VI. Issue III

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

A. Structure

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

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

[275] As already discussed under the previous issue, the Panel understands Canada's position to be that it already considers Indigenous children living on reserve to be within the scope of Jordan's Principle and the Panel anticipates that would apply to the First Nations children under this heading who are living on reserve.

[276] The Panel made numerous findings, rulings and orders under Jordan's Principle all accepted by Canada. The Panel continues to retain jurisdiction concerning those orders to monitor the implementation and in ensuring that the discrimination found in this case is eliminated. Therefore, the Panel has jurisdiction to deal with these requests in determining the effectiveness of its orders in light of the evidence it has before it and the discrimination found in this case.

B. Analysis

[277] There is no doubt that the Tribunal has jurisdiction to analyze this request given that Jordan's Principle is within this claim and the Panel has retained jurisdiction over its orders. The Panel therefore has jurisdiction to clarify its orders and make further orders when necessary when supported by the evidence before it.

[278] The Panel will address the two categories referred to above interchangeably given the fact that the legal framework discussed below applies to both categories.

[279] Despite the lack of evidence referred to and relied upon by the parties in support of this issue three request, the Panel extensively reviewed the evidence before it. In reviewing the record, the Panel reviewed the Parties' Statements of Particulars, the Parties' final arguments, the evidence the Parties relied on in their arguments, and the evidence as part of the interim motion.

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

[281] What the Panel found in the *Merit Decision* was that First Nation children of Residential School and of Sixties Scoop survivors have suffered, may have higher needs often as a result of intergenerational trauma, colonialism, systemic racism and other historical wrongs done by Canada. As already explained above, this forms part of the substantive equality analysis under Jordan's Principle. The Panel in making those findings did so without any focus on *Indian Act* status or on-reserve residency.

[282] Additionally, the same can be said for all First Nations children who were discriminated against by Canada in the provision of federally funded services which are covered by Jordan's Principle. Since the 2017 CHRT 14 and 35 orders that provided clarification on Jordan's Principle, a federal service also includes a service above normative standard which aims to remedy the discrimination found in this case and rightfully accounts for substantive equality and the specific and distinct needs of First Nations children.

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

[284] The Panel did not prevent the parties from bringing evidence as part of this motion. Of note, evidence was brought by the Caring Society and Canada to support the interim motion and was relied upon by the Panel in section two of this ruling.

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

[286] Furthermore, the Panel agrees with the Commission and Canada that there is insufficient evidence in the record to make fact findings concerning off-reserves First Nations children without *Indian Act* status who have lost connections with their First Nations or who have parents that self-

identify as First Nations. Again, the claim and arguments were not brought, argued or proven before this Panel, (see for example the Caring Society's 2014 final arguments for the hearing on the Merits at paras. 368-369; 374; 394-396; 398; 400-401; 403; 407; 424-425; 439; and 453-456).

[287] Additionally, the legal tests developed in *Moore* and *Gibbs* are not meant to simply stand-alone absent evidence; rather they find their meaning when applied to the facts and evidence presented. If there is insufficient evidence the onus is not met and no remedy is ordered.

[288] Furthermore,

[a]s the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial. (see 2017 CHRT 14 at para. 30),

(see also interim order 2019 CHRT 7 at, para.47).

[289] In this specific section, the Panel cannot make this finding of fact other than find those First Nations children are denied access to Jordan's Principle services. This denial is clear from Canada's submissions and the evidence in the record:

the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:

The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the Indian Act by creating seven new registration categories, in response to the decision in *Descheneaux c. Canada* rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision. (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).

Additional amendments to the definition under the Indian Act will be developed subsequent to a period of consultation with First Nations. When part B of Bill S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.16).

(see 2019 CHRT 7 at para. 86, emphasis omitted).

[290] Nevertheless, the tests must be applied to the proven facts and are intimately linked to the evidence in front of the Tribunal. This is what justifies a remedy. As opposed to the first two issues, the Panel was not provided much to work with to make findings that will have considerable impacts involving rights holders outside this case.

[291] The CAP's intervention is an example of this. The CAP was not allowed to bring evidence before the Tribunal as parties raised expeditiousness concerns. The Panel after considering the matter has a better understanding of the bigger picture here. Essentially the CAP desires to be part of the consultations surrounding off-reserve First Nations children without *Indian Act* status, including those who have lost connection with their First Nations and who self-identify as First Nations.

[292] Additionally, the AFN is very concerned that this could include false claims by self-declared First Nations and take away resources meant for vulnerable First Nations children who need services. The Panel finds this to be a serious issue that needs important considerations that are beyond the evidence before it at this time. The AFN argued that the above normative standards services under Jordan's Principle are enticing to many. The AFN further submits that recognizing them and others who have First Nations identity but have lost connection with a First Nation would result in depleting resources that are meant to address the discrimination in federal services and programs found in this case for First Nations children.

[293] While the Panel agrees with the Caring Society and the NAN that absent a proven section 15 of the *CHRA* defence when the complainants onus has been met, there is no reason to limit access to services to some children, the Panel also understands the social impacts the AFN is bringing to our attention and the broader context requiring supporting evidence, as Canada advances, discussions outside the Tribunal. For Canada, at this time this type of order would be unworkable given the need to have much broader consultations with First Nations, Inuit and Metis Nations, Provinces and organizations to name a few. The Panel agrees and believes those broader consultations would be more beneficial in order to consider all circumstances affecting those children if the consultations are organized, planned and actually occur in a reasonable timeframe.

[294] This being said, for those who have First Nations identity without *Indian Act* status or eligibility to receive *Indian Act* status and who have no connection with their First Nation and who have experienced cultural displacements as a result of Residential Schools, Sixties Scoop and the FNFCs program, the Panel believes they should be considered for Jordan's Principle services against the backdrop of Justice Phelan's findings and the Supreme Court of Canada's findings.

[295] The Supreme Court of Canada decision in *Daniels* determined that Métis and non-Status Indians fall under federal jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. The Court effectively described a situation whereby the term "Indians" was broadly defined when it served Canada's needs, but construed narrowly when doing otherwise would require something of the federal government. At the same time, provincial governments typically refused entreaties for help from Métis and non-status Indians as well, claiming that these were federal responsibilities.

[296] Moreover, the Court ruled that delineating and assigning constitutional authority between the federal and provincial governments, "will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution." (*Daniels* at para. 12).

[297] The Court described this as a "jurisdictional wasteland" that has left Métis and non-status Indians with "no one to hold accountable for an inadequate status quo." (*Daniels* at para. 15).

[298] Despite acknowledging that there is no consensus on who is considered Métis or non-status Indian, the Supreme Court wrote:

These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.

(*Daniels* at para. 19).

[299] The Supreme Court went on to say:

Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the “grand purpose” of s. 35 is “[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship”: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 10. And in *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: para. 62, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 S.C.R. 623, at para. 69.

(see *Daniels* at para. 34).

The term “Indian” or “Indians” in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term “aboriginal peoples of Canada” used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples.

(see *Daniels* at para. 35).

[300] The Supreme Court was explicit that the decision was meant to advance reconciliation in terms of the relationship between Canada and Indigenous Peoples. Justice Abella determined that reconciliation with all of Canada’s Aboriginal peoples is Parliament’s goal, drawing on

[t]he constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final report of the Truth and Reconciliation Commission of Canada*.

(*Daniels* at para. 37).

[301] The preponderance of the reasons for the SCC’s findings deal with the Métis aspect of the question, as the Crown conceded in oral argument that non-status Indians were “Indians” under s. 91(24). Based on its analysis, the Court held that the declaration should be granted.

[302] The Court acknowledged that there is no consensus on who is considered Métis or non-status Indian, but did not believe this was a bar to issuing the declaration. The Court declined to establish definitional criteria for Métis and non-status Indians, stating broadly instead that “Determining whether particular individuals or communities are non-status Indians or Métis and therefore “Indians” under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future...” (*Daniels* at para. 47).

[303] The Supreme Court distinguished the different purposes between Section 91(24): ““Indians” in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis” (see *Daniels* at para.19) and section 35: “The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. ... Section 91(24) serves a very different constitutional purpose,” (see *Daniels* at para. 49).

The third criterion — community acceptance — raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government’s relationship with Canada’s Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were

separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.

(*Daniels* at para. 49).

But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (CanLII), [2010] 2 S.C.R. 696, at para. 3.

(see *Daniels* at para. 51).

Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.

(see *Daniels* at para. 13).

This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

One of the results of the positions taken by the federal and provincial governments and the "political football — buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. . . .

. . . the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]

See also *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950, at para. 70.

(*Daniels* at para. 14).

With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A

declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

(see *Daniels* at para.15).

Should a person possess “sufficient” racial and social characteristics to be considered a “native person”, that individual will be regarded as an “Indian” . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p.43]

(see *Daniels* para. 33).

[304] The following words from Justice Phelan’s Federal Court decision are instructive in this context:

[84] The circumstances which the Plaintiffs claim to have given rise to this litigation is well described in a memorandum to Cabinet from the Secretary of State dated July 6, 1972:

The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.

(see *Daniels v. Canada*, 2013 FC 6 at para. 84).

[305] The Panel addressed section 91(24) of the Constitution, the double aspect rule, the living tree doctrine, federalism, fiduciary relationship and the Honor of the Crown in the *Merit Decision* and does not propose to repeat the findings here other than finding it is consistent with the Supreme Court Decision in *Daniels* and read together the reasoning is also applicable here. Additionally, *Daniels* confirms that Non-Status First Nations are in a similar situation of “jurisdictional tug-of-war” that can trigger a Jordan’s Principle case and that the spirit of Jordan’s Principle is meant to address.

[306] A case-by-case approach based on needs and the specific situation of the child still needs to occur. This is consistent with the approach taken by this Tribunal and the direction from the Supreme Court in *Daniels*.

[307] Furthermore, the Supreme Court in *Daniels* confirmed the Federal government’s power to legislate on issues related to Métis and Non-Status Indians. Of note, section 2 of the CHRA stipulates:

The purpose of this *Act* is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (emphasis added).

[308] The Supreme Court of Canada decisions are binding and provide valuable information relevant to the case at hand. Additionally, section 50 (3) (c) of the CHRA allows the Tribunal to consider and accept any evidence and other information. However, the Panel finds this is insufficient to make such requested orders without supporting evidence. Additionally, as explained above, the case in front of the

Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations persons. While the Panel believes that all children in Canada should receive the services they need, the case in front of the Panel is focused on First Nations. Consequently, the Panel does not make orders for this section, rather it provides some guidance relying on the case law and on Jordan's Principle's mechanism and purpose.

[309] This being said, in light of the above and international instruments that Canada has accepted, signed, signed and ratified, Canada has positive obligations towards all First Nations children whether they have *Indian Act* status or not and therefore, Canada must implement specific measures to protect children regardless of status. The Panel believes that the use of the term Indigenous Peoples is more reflective of the Principles protected by international law. Canada's domestic and international obligations are to ensure that all First Nations children have access to culturally appropriate and safe services and that the principle of substantive equality is upheld for all First Nations children regardless of status. Canada also has a domestic and international duty to its children wherever they live in Canada. The fact that other actors, including provincial actors, may be involved in the provision of the service is not a shield that Canada can use to avoid its own responsibilities to First Nations children under section 91(24) (see 2016 CHRT 2 at para.39). The Supreme Court of Canada also considered this historic disadvantage in the context of First Nations adults without *Indian Act* status in the criminal justice system in *R. v. Gladue* and *R. v. Ipeelee*. The Supreme Court of Canada supported the inference that, as compared to Canada's settler population, First Nations persons without *Indian Act* status also have greater needs.

[310] For the categories of children who lost *Indian Act* status or never received it due to Canada's discrimination, the Panel understands Canada's argument that they are presumably served by the provinces and territories and may not experience the same gaps, delays and denials as those children on reserve if they are not considered to have *Indian Act* status.

[311] The difficulty here is that many First Nations have been deprived of eligibility for *Indian Act* status as a result of the discrimination found in this case. Some of them are parents who have lost connection with their First Nation, and have no *Indian Act* status. Their children are not eligible for *Indian Act* status. Those First Nations children possibly have the same higher needs, often above provincial normative standards, as on-reserve First Nations in terms of mental health, special needs education, Fetal Alcohol Syndrome, loss of connection, loss of culture, language etc. The intergenerational trauma was recognized by this Panel and forms part of the findings in this case. The Panel did find that intergenerational trauma experienced by First Nations children often causes those children to have higher needs.

[312] It is helpful to consider a hypothetical but plausible example given the evidence heard in this case and referred to above. This example involves a child without *Indian Act* status and who is not eligible for *Indian Act* status. However, this child is a First Nations child (for example, removed as a result of discrimination, third or fourth generation, etc.) who lost any connection to a First Nation. This child suffers mental health issues as a result of intergenerational trauma and racial discrimination. The province's normative standard is to offer children who suffer similar health issues 10 and exceptionally 12-15 sessions with a child psychologist. If the child requires 50 sessions instead of 15 because the trauma is linked to intergenerational trauma and being a First Nations child, an appropriate substantive equality analysis would result in the child receiving all 50 mental health sessions as recommended by professionals. Because the normative standard is 15 sessions, the province may require the parents of that child to seek the extra mental health through alternate means. The province may refer the child to the Federal Government for those extra services. The Federal Government under its current eligibility criteria may respond that the child does not have *Indian Act* status, there is no emergency and no life-threatening issue and, therefore, the child should obtain the services via the provincial system. This type of bouncing back and forth is precisely what Jordan's Principle aims to rectify. A lot of the service needs required by First Nations children regardless of *Indian Act* status are connected to them being First Nations and requiring an Indigenous lens, culturally safe and appropriate services under a substantive

equality analysis. If the service required is above normative standard because of intergenerational trauma for example, this service need cannot be disassociated from the nationality of the child regardless of how the government defines it.

[313] Moreover, Canada accepted the TRC report and committed to implement the 94 calls to action. The TRC report was filed in evidence as part of this claim and relied upon by the Panel on multiple occasions. Call to action number 20 is particularly instructive:

In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.

[314] Further, the Panel find the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* to be relevant. Given that it was not released, and therefore not argued by the parties, at the time of the hearing, the Panel did not rely on it to make its findings. This being said, Canada publicly accepted the report therefore, the Panel simply highlights the report's call to justice 12.10:

Adopt the Canadian Human Rights Tribunal 2017 CHRT 14 standards regarding the implementation of Jordan's Principle in relation to all First Nations (status and non-status), Métis, and Inuit children.

[315] Those standards include the definition and the substantive equality analysis that may require Canada to provide services above the normative standard when necessary to respond to the child's needs.

[316] The Panel agrees with the Caring Society that an exclusive focus on whether a First Nations child without *Indian Act* status lives off-reserve, as opposed to why that child lives off-reserve fails to recognize that the off-reserve residence of a First Nations child without *Indian Act* status may well be related to Canada's past discriminatory provision of services on-reserve. The Panel also agrees with the Caring Society that chronic and perpetual discrimination within the FNCFS Program also raises the spectre of cultural displacement and the Caring Society's appropriate characterization of the Panel Chair's observation at the conclusion of the Panel's February 1, 2018 decision, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence," (see 2018 CHRT 4 at para. 452).

[317] Accordingly, First Nations children who have lost their connection to their communities, or who may not even know to which community they belong, due to the operation of colonial or discriminatory policies such as Indian Residential Schools, the Sixties Scoop, or the discrimination within the FNCFS Program should not be excluded from Jordan's Principle's reach. Indeed, given the inter-generational trauma of such experiences, these individuals risk facing disadvantage on the basis of their "race and/or national or ethnic origin" that non-Indigenous Canadians do not face.

[318] The Panel finds that based on the above, Canada has a positive obligation towards "all First Nations children" regardless of *Indian Act* status or eligibility to *Indian Act* status.

[319] This may require additional funding and other resources to ensure the First Nations children protected by the Panel's orders, including those in this ruling which were based on the evidence in the record, continue to receive Jordan's Principle services in a sustainable manner for years to come.

[320] The Panel encourages Canada to implement specific measures and to be proactive and have those discussions in a timely manner to ensure all First Nations children in Canada have access to substantive equality.

VII. Orders

[321] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above in sections I and II and
2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[322] The parties will return to the Tribunal with their potential Jordan's Principle eligibility criteria and mechanism as ordered above by **October 19, 2020**. Until such time and until a final order (on consent or otherwise) is made by this Panel on this issue, the 2019 CHRT 7 interim ruling remains in effect.

[323] The Panel pursuant to section 53 (2) of the *CHRA* Canada is ordered

3. to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for Indian Act registration/status under S-3 implementation.

VIII. Retention of jurisdiction

[324] The Panel retains jurisdiction on all its Jordan's Principle orders including the orders above. Once the parties have drafted a potential Jordan's Principle eligibility criteria and mechanism as ordered above and returned to the Tribunal, the Panel will then revisit the need for further retention of jurisdiction on the issue of Jordan's Principle. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

July 17, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: July 17, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

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Robert Bertrand, National Chief for the Congress of Aboriginal Peoples, Interested Party

TAB 22

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 24 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2020-08-11

File number: T1340/7008

Citation:

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 24 (CanLII), <<https://canlii.ca/t/jd65v>>, retrieved on 2026-01-02

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Citation: 2020 CHRT 24

Date: August 11, 2020

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

Band Representative Services in Ontario Motion 1

I. Context 1

II. Positions of the Parties 3

A. The Chiefs of Ontario 3

B. Canada 5

C. Other Parties 6

III. Analysis 6

IV. Order 13

V. Retention of jurisdiction 13

Band Representative Services in Ontario Motion

I. Context

[1] This motion for funding Band Representative and Mental Health Services arises in the context of the Tribunal's retained jurisdiction of the implementation of the remedy in a complaint brought by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) against Canada on behalf of First Nations children.

[2] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Merit Decision*), the Tribunal found that Canada engaged in discriminatory practices contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *CHRA*) in its provision of services to First Nations children. In the *Merit Decision*, at paragraphs 392, 425 and 426, the Tribunal identified the

discrepancy where Ontario appropriately funded Band Representative Services while Canada took the position that it was not required to do so as it was not included in the *Memorandum of Agreement Respecting Welfare Programs for Indians (the 1965 Agreement)*. This failure to fund Band Representative Services denied First Nations children access to culturally appropriate services.

[3] In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4 at paragraphs 324-337, the Tribunal found that Canada had yet to take steps to rectify the failure to fund Band Representative Services. The Tribunal reiterated its findings from the *Merit Decision* that the failure to fund Band Representative Services was “one of the main adverse impacts of Canada’s discrimination” (2018 CHRT 4 at para. 324). The Tribunal ordered Canada to provide immediate funding for Band Representative Services rather than wait to complete a broader national review first. The Tribunal ordered Canada to provide this funding at the actual cost of the services and without deducting it from other funding. The funding was subject to review based on a further order from the Tribunal or upon completion of appropriate funding studies.

[4] In particular, the order from 2018 CHRT 4 at paragraphs 336 and 426-427 addressing Band Representative and Mental Health Services read as follows:

[336] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 by February 15, 2018 or within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.

[...]

[426] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund actual costs of mental health services to First Nations children and youth from Ontario, including as provided by First Nations, Tribal Councils, First Nations Child and Family Services Agencies, parents/guardians or other representative entities retroactively to January 26, 2016, by February 15, 2018, or within 15 business days after receipt of the documentation of expenses.

[427] The Panel agrees with the Caring Society and the Commission’s comments on the appropriate interpretation of the words “documentation of expenses”. The Panel directs that the words “documentation of expenses”, should not be applied in a legalistic and narrow manner stripping the order of its significance. Therefore, it should also include where invoices/receipts are unobtainable and the service provider is not able to provide documentation that the service was rendered, Canada is prepared to reimburse expenses incurred between January 26, 2016 and February 1, 2018 where the requestor declares that the expenses were incurred and the invoice/receipt is unobtainable.

[5] In this motion, the Chiefs of Ontario (COO), an interested party in the case at hand, argues that Canada failed to comply with this order and seek further direction from the Tribunal on Canada’s implementation of funding for Band Representative and Mental Health Services in Ontario.

II. Positions of the Parties

A. The Chiefs of Ontario

[6] The COO argues that it is inappropriate for Canada to impose a deadline for the submission of claims for retroactive reimbursement of Band Representative Services and current-year claims for Band Representative Services.

[7] The COO requests an order that:

Canada's imposition of a deadline for the submission of Band Representative Services reimbursement is not compliant with the Panel's orders in 2018 CHRT 4;

Canada continue to accept submissions and make reimbursements for Band Representative Services and Children and Youth's mental health services in conformity with the previous orders of the Panel and without imposing a deadline;

Canada cooperate with the COO and those parties designated by the COO (such as provincial-territorial organisations such as the Nishnawbe Aski Nation) in a communications plan to communicate to First Nations or their recipients that the previously stated deadline no longer applies; and

Canada pay the COO's costs of this motion.

[8] The COO argues that any proposed deadline is inconsistent with the Panel's order in 2018 CHRT 4 to provide retroactive reimbursement. A deadline is inconsistent with the order that the actual costs of Band Representative Services be funded. The deadline for current-year claims denies First Nations that have not yet established Band Representative Services the opportunity to do so and to receive funds to which they are entitled during the current-year. Canada postponing the deadline does not change the fact that the deadline, even postponed, will deny reimbursement for expenses not filed by the deadline.

[9] The COO submits that imposing a deadline conflicts with the Panel's order to fund Band Representative Services at actual cost until studies have been completed or the Panel orders otherwise. As of the date the motion was brought, the COO asserts that Canada's deadlines would deprive the majority of First Nations in Ontario of the funding to which they would be entitled. Some of the reasons First Nations have not yet accessed these funds relate to the long-standing discrimination that occurred in First Nations child welfare funding.

[10] Denying funding to First Nations who do not comply with the deadline is both contrary to the Panel's orders and perpetuates the conditions the Panel found to be discriminatory in the first instance. Canada's intention to impose a deadline, and to deny funding to First Nations who do not meet it, is an announced intention to subject those First Nations to discrimination. The Panel is not required to wait until a First Nation is actually denied funding from failing to meet the deadline to find non-compliance as it is the intention of a deadline to deny funding. The COO argues that the deadline violates the *CHRA*, section 12 that states "[i]t is a discriminatory practice to publish ... any notice ... that (a) expresses or implies ... an intention to discriminate".

[11] Canada's intention to work with First Nations who have trouble meeting the deadline does not negate the discriminatory nature of a deadline as it relies on Canada's discretion for the affected First Nations to receive their entitled funding.

[12] The COO emphasizes that First Nations in Ontario are in the process of moving towards self-determination over the children and families of their Nations. Band Representative Services are a part of achieving self-determination. The timeline for this step, originally thirteen months when the motion was filed, is brief.

[13] The COO argues that Canada is in essence arguing that not imposing a deadline would constitute an undue hardship for Canada. The COO implies that Canada must establish that it would constitute an undue hardship to justify imposing a deadline.

[14] The COO responds to Canada's concerns about the scope of the Tribunal's ongoing retention of jurisdiction by suggesting it is inappropriate for Canada to seek to extend the deadline beyond the Tribunal's jurisdiction while asserting the discrimination can only manifest after the deadline. The COO also submits that this motion is not raising a new issue.

B. Canada

[15] Canada requests that the COO's motion be dismissed. Canada submits that it has implemented the Panel's orders regarding Band Representative Services in Ontario. Canada has ceased the discriminatory practice. The reimbursement process has redressed past discriminatory underfunding and the funding going forward will prevent a repetition.

[16] Canada summarized its efforts to provide reimbursement for Band Representative Services and to provide ongoing funding. Canada documents a number of efforts it made to communicate relevant information to First Nations. Canada indicates that it has provided funding to cover the costs of submitting claims. Canada submits that, on a going forward basis, it reimburses First Nations, Tribal Councils and Agencies for Band Representative Services costs in the year those costs are incurred. Canada notes that it extended the deadlines it provided at the request of parties engaged in the process. Canada indicates that its deadlines allow Indigenous Services Canada (ISC) to work within the Government's Estimates/Supply process to Parliament in order to access additional funding for Band Representative Services if that is needed.

[17] Canada argues that ISC did not establish irrevocable deadlines but instead tried to be flexible and support First Nations in making claims. Canada highlights that the Panel has not directed a specific administrative process to follow in making reimbursements. Canada submits that the COO has not demonstrated any negative consequences flowing from ISC's implementation process. The Tribunal cannot find Canada non-compliant with the Panel's earlier order or find that Canada's implementation of the order is discriminatory given the lack of clear and cogent evidence to substantiate the COO's claims.

[18] Canada asserts that it has implemented the Panel's orders in a manner that complies with the *Financial Administration Act*, RSC 1985, c F-11 (*FAA*), satisfies the need for Parliamentary control of spending, and ensures the efficient, economic and prudent use of public resources.

[19] Canada submits that the Tribunal does not have the remedial power to dictate the specifics of Canada's replacement policy for funding Band Representative Services. Nor can the Tribunal remain seized of the matter indefinitely to monitor the implementation of remedies. Canada relies on the Panel's earlier indication that the remedial phase should not be an opportunity "to add anything and everything and new issues that would be unmanageable" (2018 CHRT 4, para. 384).

C. Other Parties

[20] The remaining parties, being the Caring Society, the AFN, the Canadian Human Rights Commission, the Nishnawbe Aski Nation, and Amnesty International, did not provide submissions on this matter.

III. Analysis

[21] The Panel issued orders in 2018 CHRT 4 and remained seized of the implementation of those orders. The Panel has jurisdiction to answer requests for clarification of those orders, especially if the parties disagree on their interpretation. The Panel does not view this motion as a new issue. Rather, it is an issue of interpretation and implementation of the order and is one of the reasons why the Panel remained seized of its orders.

[22] The spirit of the 2018 CHRT 4 ruling is to remain seized of the implementation of the orders and to amend those orders if subsequent studies and/or new information show additional details on best practices and specific needs that were not accounted for given the lack of data. This was always part of the Panel's goal for long-term relief and has not changed.

[23] The Panel does not believe it should remain seized indefinitely past the long-term relief phase nor does it need to constantly hear new issues. However, this issue falls squarely within the scope of its orders and monitoring in order to eliminate discrimination and prevent it from reoccurring. In fact, in 2018 CHRT 4 at paragraph 444, the Panel wrote:

The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented, and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **December 10, 2018** when it will revisit the need to retain jurisdiction beyond that date. Given the ongoing nature of the Panel's orders, and given that the Panel still needs to rule upon other outstanding remedial requests such as mid-to long term and compensation, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by Canada.

[24] The Panel understands why Canada adopted administrative measures to distribute retroactive payments for Band Representatives as per the Tribunal's orders. The Panel also finds that Canada was flexible to some extent and worked with First Nations in regards to this order.

[25] The Panel agrees with Canada it did not impose an administrative process on Canada dictating how to comply with its orders. The Panel also agrees with the COO that it did not order a cut-off date for entitlement to retroactive actual costs or current-year claims for Band Representatives.

[26] Canada contends it complies with the Panel's orders and the Panel has no reason to doubt that Canada is not complying with this Band Representative order. The issue here is to determine if Canada's elected administrative cut-off date for reimbursements of actual costs for Band Representatives responds to First Nations specific needs as per the Tribunal's orders following a substantive equality approach.

[27] The Panel disagrees with Canada that no evidence was presented as part of this motion to support the COO's position. The COO filed affidavit evidence in support of its motion. While the affidavit evidence is untested, the Panel finds this issue goes to weight and is considered alongside Canada's position and supporting materials on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 [Bombardier]).

[28] Moreover, the reasons that not all First Nations have accessed the funds are deposed to by Ms. Diane Maracle-Nadjiwon, in her affidavit affirmed March 14, 2019, at paragraph 6.

[29] In Ms. Joanne Wilkinson's affidavit referred to in Canada's submissions for this motion, it appears that Canada has set a deadline:

29. To continue to support this flexible approach for agencies and communities submitting claims, Canada has further extended its dates for submission of retroactive and actual claims costs. Correspondence was sent to agencies on March 29, 2019 to communicate the change. A sample of this correspondence (also shared with the CCCW) is attached as Exhibit 13. Retroactive claims for actual costs for Prevention and Operations and Band Representative Services for the period of January 26, 2016 to March 31, 2018 will now be accepted until 8 December 31, 2019. The deadline for current year actual costs claims (fiscal year 2018-2019) for Prevention and Operations and Band Representative Services is now September 30, 2019.

[30] However, in Ms. Vanessa Follon's email dated January 31, 2019, found at Exhibit D to the Affidavit of Glykeria Prokos, Ms. Follon wrote that there was no deadline *per se*. The department is accepting claims on an ongoing basis given that they were under the Tribunal's jurisdiction and the Child First initiative and, until that changed, they were accepting applications.

[31] According to Mr. Stelio Grigorakis' email named: Deadline for Retro and Current-Year claims-BRS (CHRT Order 427), dated February 22, 2019, filed in evidence as Exhibit A to the Affidavit of Glykeria Prokos, two interpretations are possible.

[32] The wording used in the email suggests that an extension could be granted if First Nations are unable to meet the deadline and need more time. This supports Canada's assertion (see first paragraph of the email reproduced below). At the same time, the email states that retroactive funds may not be reimbursed past the deadline set by Canada. This supports the COO's assertion.

We would like to remind you of the deadline of March 01, 2019 to submit 2018-2019 CHRT claims as it has been indicated in the guidelines communicated by the ISC head office on November 09, 2018. You are advised to confirm submission of any such claim by March 01, 2019. You are also advised to communicate ISC Ontario office before March 01, 2019 if you will need additional time to submit your 2018-2019 CHRT claims.

Please also note that:

- a. New 2018-2019 CHRT claims submitted after March 01, 2019 may not be considered by ISC Ontario region for processing;
- b. CHRT retroactive (January 26, 2016 – March 31, 2018) reimbursement claims submitted after March 31, 2019 may not be considered by ISC Ontario region for processing;
- c. 2018-2019 CHRT claims left incomplete with ISC beyond March 31, 2019 may not be considered by ISC Ontario region for processing;
- d. CHRT retroactive (January 26, 2016 – March 31, 2018) reimbursement claims left incomplete with ISC beyond March 31, 2019 may not be considered by ISC Ontario region for processing;

[33] The information above suggests both an extension and a denial of extension are possible. This explains why the parties disagree on this issue. Moreover, the COO's clarification request of the Panel's order for Band Representatives is reasonable given their reasonable interpretation that, past Canada's deadline, First Nations in Ontario may not receive the retroactive or current-year funds ordered by the Panel.

[34] After careful consideration of all the materials before the Tribunal, the Panel finds it is more probable than not that despite Canada giving some flexibility concerning the deadlines, a cut-off date was established by Canada in order for First Nations in Ontario to request and receive their retroactive and current-year funds for Band Representatives and Mental Health services as per the Tribunal's 2018 CHRT 4 orders. The Panel also finds it is more probable than not that some First Nations in Ontario were unaware or did not have the capacity to meet Canada's deadlines.

[35] Furthermore, the undue hardship defence advanced by Canada was not established here. In fact, the Panel finds the administrative process established by Canada may unduly burden some First Nations who did not have the capacity to respond by Canada's deadlines. The Panel finds there is a need to clarify its orders to ensure that First Nations in Ontario receive their retroactive and current-year funds and will do so below.

[36] While the Panel sees no issue in Canada adopting a deadline for management and administrative purposes, it does see an issue when the cut-off date results in Canada keeping the funds that are owed to First Nations who were discriminated against by Canada. Moreover, the Panel consistently ordered Canada to provide funding according to the specific needs of children, families and communities. This flexible approach should guide Canada in its dealings with First Nations. If some First Nations' specific needs include the need to account for the lack of capacity to respond by a given deadline, Canada should take this into consideration and set aside the estimated funds owed to those First Nations until it is claimed. This would respect a substantive equality approach and is in line with the Panel's orders in the *Merit Decision* and all of its rulings.

[37] Further, the relationship between the *FAA* and the *CHRA* was considered and determined in previous rulings. The *FAA* does not trump the quasi-constitutional status of the *CHRA*. The *FAA* cannot override the Panel's orders to cease the discriminatory practices identified in the *Merit Decision* and subsequent orders accepted by Canada.

[38] The repeated arguments surrounding the *FAA* as a justification to limit the Panel's orders and jurisdiction may result in a pattern of perpetuating the systemic discrimination found in this case and does not prevent the practice from reoccurring. It could also indicate a lack of systemic change within Canada. Furthermore, the *FAA* and Canada's interpretation of the *FAA* is not a replacement for a recourse of judicial review.

[39] The 2018 CHRT 4 ruling was not judicially reviewed. It also led to a consultation protocol signed by Canada's Ministers accompanied by a commitment to abide by all of the Panel's orders. This engagement was significant and should not be taken lightly. The Panel directed that the words "documentation of expenses", should not be applied in a legalistic and narrow manner stripping the order of its significance. The same reasoning applies here.

[40] In past rulings, the Panel found Canada's funding formulas and authorities to be discriminatory, and ordered a complete reform of the First Nations Child and Family Services (FNCFS) Program. For example, in the *Merit Decision*, the Panel wrote as follows:

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC [now ISC] maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[...]

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child

and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA [Enhanced Prevention Focused Approach]. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a **REFORM** of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances - in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[41] The core of the discrimination found in the *Merit Decision* is systemic and was caused by Canada's structure and funding methodology which was focused on financial considerations and not the best interests of children or their specific needs. The Panel's orders intend to eliminate this racial systemic discrimination.

[42] Additionally, the reason to include studies in the 2018 CHRT 4 order was to ensure the funding was appropriate to the Ontario First Nations' needs. The studies were a contemporary tool to indicate what those needs are and if the orders needed to be amended to reflect those needs.

[43] In 2018 CHRT 4, at paragraph 415, the Panel recognized "that in light of its orders, and the fact that data collection will be further improved in the future and the [National Advisory Committee's] work will progress, more adjustments will need to be made as the quality of information increases."

[44] Finally, on COO's cost request, it is unclear if the COO is seeking costs for obstruction of process as per the Panel's ruling in 2019 CHRT 1 or legal costs. Moreover, insufficient argument or supporting evidence was advanced to justify an award of costs for obstruction of process. Furthermore, the Supreme Court of Canada, made it clear in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, that the Tribunal does not have the jurisdiction to award legal costs. The Panel addressed the distinction between costs for an obstruction of process and legal costs in its past ruling (see 2019 CHRT 1). Therefore, the COO's unspecified cost request is denied.

IV. Order

[45] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, reiterates its order that Canada fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.

[46] The Panel, pursuant to its previous orders that consistently account for the specific needs of First Nations children, families and communities and Section 53(2)(a) and (b) of the *CHRA*, orders Canada

- A. to continue to accept submissions and make reimbursements for Band Representative Services and Children and Youth's mental health services on an ongoing basis, in conformity with the reasons explained above and previous orders of the Panel and, without imposing an inflexible deadline; and
- B. to cooperate with the COO and those parties designated by the COO (such as provincial-territorial organisations such as the Nishnawbe Aski Nation) in a clear communications plan to communicate to First Nations or their recipients that the previously stated deadline no longer firmly applies.

V. Retention of jurisdiction

[47] The Panel retains jurisdiction on all its 2018 CHRT 4 orders including the clarification orders in this decision until all the outstanding issues before the Tribunal in this case have been resolved by the parties or ruled upon by the Panel. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

August 11, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: August 11, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne , counsel for Assembly of First Nations, the Complainant

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Julian Falconer and Akosua Matthews counsel for the Nishnawbe Aski Nation, Interested Party

TAB 23

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 41 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2021-11-16

File number: T1340/7008

Citation:

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 41 (CanLII), <<https://canlii.ca/t/jpcp8>>, retrieved on 2026-01-02

**Most recent
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mention**

Tribunal
canadien
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2021 CHRT 41

Date: November 16, 2021

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon

Edward P. Lustig

Table of Contents

Major Capital and Small Agencies Reimbursement Motion 1

I. General Context 1

A. The Tribunal's Approach 3

II. Major Capital Context 20

III. Major Capital Party Submissions 23

A. The Caring Society 23

B. The Chiefs of Ontario 26

C. Assembly of First Nations 26

D. Nishnawbe Aski Nation 27

E. Commission 27

F. Canada 29

IV. Major Capital Analysis 34

A. Prior Major Capital Analysis 34

B. FNCFS Major Capital Analysis 52

C. Capital to Support the Implementation of Jordan's Principle Analysis 94

V. Supplementary Financial Administration Act Party Submissions 108

A. The Caring Society 108

B. The Chiefs of Ontario	110
C. Assembly of First Nations	110
D. Nishnawbe Aski Nation	111
E. Commission	111
F. Canada	113
VI. Financial Administration Act Analysis	115
VII. Reallocation Party Submissions	126
A. The Caring Society	126
B. Canada	127
VIII. Reallocation Analysis	128
IX. Capital for Band Representative Services and Prevention Services in Ontario Party Submissions	130
A. The Chiefs of Ontario	130
B. Nishnawbe Aski Nation	132
C. Canada	134
X. Capital for Band Representative Services and Prevention Services in Ontario Analysis	136
XI. Small Agency Reimbursement Context	153
XII. Small Agency Reimbursement Party Submissions	156
A. The Caring Society	156
B. Commission	158
C. Assembly of First Nations	159
D. The Chiefs of Ontario	159
E. Nishnawbe Aski Nation	159
F. Canada	159
XIII. Small Agencies Analysis	161
XIV. Proposal to Parties and Retention of Jurisdiction	164
XV. Order	165

Acknowledgement

The Tribunal is releasing this ruling in painful times in Canada where over a thousand unmarked graves of First Nations children who attended residential schools have been discovered and more continue to be discovered. Long before the heart wrenching discovery in Kamloops, the Truth and Reconciliation Commission called upon the Canadian government to provide funding to locate the children who died in residential schools. This call to action was published in 2015.

Many of the children who attended residential schools were forcibly removed from their homes, families and communities. The Tribunal heard evidence on residential schools and made numerous findings in that regard in 2016. It found there was a transformation of Residential Schools into an aspect of the child welfare system. The primary role of many Residential Schools changed from a focus on “education” to a focus on “child welfare”. Despite this, many children were not sent home, because their parents were assessed as not being able to assume responsibility for the care of their children. The Tribunal found that Indian Residential Schools are one example of a collective trauma that is part of a larger traumatic history that Indigenous Peoples have already been exposed to. The history of Residential Schools and the intergenerational trauma they have caused is another reason - on top of some of the other underlying risk factors affecting Indigenous children and families such as poverty and poor infrastructure - that exemplifies the heightened need of First Nations People to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate. The Tribunal found the evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC’s FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

The Tribunal found there are approximately three times as many First Nations children in state care as there were at the height of Residential Schools.

The Panel recognizes the incommensurable pain of families, communities and Nations and honors their courage on their healing journey and quest for justice. It is time for a true paradigm shift in Canada so that we do not repeat history.

The mass removal of children from their homes, families, communities and Nations found in this case must stop now.

The helpline for residential school survivors can be reached at: 1-866-925-4419.

* While the Panel recognizes this broader context of the suffering Indigenous Peoples experience in Canada, the Panel can only address the legal dispute before it.

Major Capital and Small Agencies Reimbursement Motion

I. General Context

[1] This ruling addresses a number of related motions brought in the context of the Tribunal’s retained jurisdiction of the implementation of remedies in a complaint brought by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) against Canada on behalf of First Nations children and families. The first motion relates to Major Capital funding to support service delivery to First Nations children. The second relates to the scope of reimbursement for small First Nation Family and Child Services Agencies (FNCFS Agencies). Another issue addressed in this ruling is an Ontario-specific request for Capital funding for Band representatives and prevention services.

[2] The Tribunal found in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [the *Merit Decision*] that Canada engaged in discriminatory practices contrary to the *Canadian Human Rights Act*,

RSC 1985, c H-6 (the *CHRA*) in its provision of services to First Nations children and families. In particular, the Tribunal found that the management and funding of the First Nation Child and Family Services Program (FNCFS Program) resulted in systemic racial discrimination and “resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves” (para. 458). The assumptions in the funding formulas resulted “in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes)” (para. 458, emphasis added). In other words, the systemic racial discrimination resulted in the mass removal of First Nations children from their homes, communities and Nations.

[3] The Panel also found Canada’s definition and implementation of Jordan’s Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children.

[4] The Tribunal has issued a number of subsequent rulings providing direction and guidance to establish substantive equality remedies to not only eliminate the discrimination already experienced by First Nations children but also to ensure that similar discriminatory practices do not occur in the future. The specific decisions that relate to each of the requests for remedies are discussed in the relevant sections. The Tribunal has retained jurisdiction over the determination of appropriate remedies to ensure, in particular, that the ultimate long-term remedies will be effective at eliminating the discrimination found and in preventing similar discrimination in the future.

[5] In an effort to promote reconciliation and recognizing the grassroot knowledge and expertise of First Nations, the Tribunal encouraged the parties to resolve as many of the remedial issues as possible through consultation. The parties have done so through the Collaborative Committee on Child Welfare (CCCW) and have been effective at resolving a number of issues. Some of the issues in this ruling arise from discussions that occurred at the CCCW but on which the parties were unable to reach an agreement.

[6] In light of the parties’ reference to the *Financial Administration Act*, RSC 1985, c F-11 in their submissions on funding of Major Capital to provide the infrastructure to support service delivery to First Nations children, the Panel requested further argument on the role of Canada’s financial legislation and policies. The parties’ further submissions addressed the role of the *Financial Administration Act* in general and beyond the confines of the Major Capital issue. The Panel has also addressed the outstanding dispute between the parties on reallocation of budgeted funds as that also relates to the *Financial Administration Act* issue.

[7] The Panel also requested the parties to confirm which submissions they were relying on to address the outstanding issues in this motion, which the parties did through correspondence dated September 1, 2020.

[8] In the interest of supporting the parties in moving forward with their discussions and negotiations, the Panel issued its ruling in a brief letter-decision dated August 26, 2021 with reasons to follow. This decision provides the Panel’s reasons in support of its orders.

A. The Tribunal’s Approach

[9] The Panel reviewed the scope of the *CHRA* remedies and the purpose of the legislation in earlier decisions. The Panel continues to rely on the approach it set out in these previous decisions. This section summarizes some of the salient points from those decisions.

[10] Throughout those decisions, the Panel consistently cited sections 2, 53(2) and 53(3) of the *CHRA*. Those provisions are as follows:

Purpose

2 The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Complaint substantiated

53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

53 (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[11] In addition, the Panel relied on subsection 16(1) which is referenced in section 53(2)(a):

Special programs

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

[12] The Panel considered the appropriate approach to interpreting the *CHRA* in 2015 CHRT 14 in order to determine how to assess a retaliation issue (paras. 12-30). The Panel relied on the modern approach to statutory interpretation that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (para. 12). Further, it is incumbent on adjudicators to consider the special nature of human rights legislation in applying the *CHRA*, as noted in cases such as *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 [*Action Travail des femmes*] and *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66. The Panel also elaborated on *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC) and *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 [*O’Malley*] that the purpose of the *CHRA* is to eliminate discrimination and that it is not necessary that the behaviour intends to discriminate.

[13] In the *Merit Decision*, the Panel determined that funding was a service (paras. 40-45). In reaching this conclusion, the Panel relied on both prior cases relating to funding and the quasi-constitutional nature of the *CHRA* that required that the statute “be interpreted in a broad, liberal, and purposive manner” appropriate to its special status (para. 43).

[14] Similarly, in the *Merit Decision*, the Panel reviewed the objective of the *CHRA* to promote substantive equality (paras. 399-404). As stated in section 2 of the *CHRA*, “all individuals should have **an opportunity equal with other individuals** to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society” (emphasis from *Merit Decision* at para. 399). Achieving substantive equality will often require making distinctions to ensure that disadvantaged groups can benefit equally from services offered to the general public. Assessing substantive equality requires consideration of the full social, political and legal context of the claim. For First Nations, that includes Canada’s colonial attitude and resulting stereotyping and prejudice. It also involves the specific example of the Indian Residential Schools System and the Sixties Scoop. The *CHRA* requires that Canada not perpetuate these historical harms and disadvantages through the provision of its services.

[15] The Panel reviewed the Tribunal’s remedial powers (*Merit Decision* at paras. 474-490). The Panel reviewed sections 53(2)(a) and 53(2)(b) of the *CHRA* that collectively allow the Tribunal to order a respondent found to engage in a discriminatory practice to cease the discrimination, redress the discrimination so similar discrimination does not occur in the future, and provide to the victims the opportunities they were denied. The Panel recognized that the requests for immediate relief were consistent with the purpose of the *CHRA* but also acknowledged the need for balance espoused by AANDC. Accordingly, the Panel ordered Canada to cease its discriminatory practices and reform the FNCFS Program and *Memorandum of Agreement Respecting Welfare Programs for Indians [1965 Agreement]* to reflect the findings in the *Merit Decision* and to immediately implement the full meaning and scope of Jordan’s Principle rather than apply its narrow definition. However, achieving substantive equality requires refocusing policy to respect human rights principles and appropriate social work practices. It requires more than funding reforms. The Panel recognized the complexity of an effective remedy in this case. Accordingly, the Panel indicated it would require further submissions to ensure its remedial orders were fair, practical, meaningful and effective.

[16] The Panel retained jurisdiction after the *Merit Decision* until the outstanding remedial issues were addressed (paras. 493-494). The Panel continued in its subsequent rulings to retain jurisdiction until the remedial issues are resolved.

[17] In 2016 CHRT 10, the Panel set out in more detail the various remedial issues (paras. 1-5). The Panel identified that the remedial process involved determining compensation and implementing program reform in the immediate, medium and long-term.

[18] The Panel reiterated the remedial principles of the *CHRA* that it would use to craft an effective and meaningful remedial order (2016 CHRT 10 at paras. 10-19). The quasi-constitutional nature of the *CHRA* required a broad, liberal and purposive reading. The remedial powers under section 53 of the *CHRA* must be interpreted to achieve the equality objective and purpose articulated as the purpose in section 2 of the *CHRA*. The purpose of an order is not to punish a person but to eliminate and prevent discrimination. The Tribunal must ensure its remedial orders effectively promote the rights protected under the *CHRA* and vindicate the losses suffered by victims of discrimination. In doing so, the Tribunal must take a principled and reasoned approach that considers the particular circumstances of the case and the evidence presented. Constructing an effective remedy in a complex case such as this one often demands innovation and flexibility. Section 53(2)(a) and (b) of the *CHRA* provide for this flexibility. Those provisions can override an organization's right to manage its own affairs and can support a remedy of specific performance. They support provisions educating individuals about human rights. Section 53(2)(a) is designed to address systemic discrimination which requires addressing discriminatory practices and attitudes which requires considering historical patterns of discrimination.

[19] In retaining jurisdiction, the Panel cited *Grover v. Canada (National Research Council)*, 1994 CanLII 18487 (FC), 24 CHRR D/390 at paras. 32-33 for the proposition that retaining jurisdiction on complicated orders designed to address systemic discrimination ensures discrimination is effectively remedied.

[20] In 2016 CHRT 16, the Panel noted that it is Indigenous Services Canada (ISC) and the federal government's responsibility to implement the Tribunal's orders and remedy the discrimination found in the case. ISC must also communicate its response to the other parties and the Tribunal so they can ensure the discrimination has been remedied (para. 9). The Panel also indicated that while it shared the desire to implement a remedy quickly, this is a complex matter and the Panel is committed to ensuring all parties have an opportunity to fully present their positions (para. 13).

[21] In 2017 CHRT 14, the Panel considered the burden of proof on parties at the remedial stage (paras. 27-30). Section 53(2) of the *CHRA* requires the Tribunal to consider whether a remedy is appropriate if discrimination is established. To do so, the Tribunal must assess the evidence available to it but may request additional information and submissions from the parties if required. The process is focused on gathering the necessary information to craft effective orders. Accordingly, the question of the burden of proof is not material unless there is a gap in the evidentiary record.

[22] Similarly, the Panel's focus is not on making orders determining whether Canada has complied with previous orders (2017 CHRT 14 at para. 31). Instead, the focus of the retained jurisdiction is to ensure the Panel's orders are effective and rectify the adverse effects of the discriminatory practices identified in the *Merit Decision*. Furthermore, the Panel's objective is to ensure that Canada's implementation of its orders is sufficiently responsive to the systemic discrimination detailed in the Tribunal's findings. That process will take time and it is valuable to address as many issues as possible immediately while awaiting the evidence to support long-term reform.

[23] Furthermore, the Panel's approach has been to provide guidelines to encourage the parties to work out between themselves the details of the remedy (2017 CHRT 14 at para. 32).

[24] The Panel set out why the unique circumstances of this case required Canada to consult with the other parties in the remedial stage (2017 CHRT 14 at paras. 113-120). Section 53(2)(a) sets out the authority to order consultation with the Commission. The Panel distinguished the current case from *Canada (Attorney General) v. Johnstone*, 2013 FC 113 that found that ordering consultation with other parties was not appropriate. The other parties' expertise in this case is invaluable. Furthermore, the Crown has a trust-like relationship with Indigenous peoples which requires Canada to act honourably in

its dealings with First Nations and to treat them fairly. This relationship also manifests as a fiduciary relationship and in the duty to consult. Section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30 confirms that the *CHRA* does not derogate from this relationship. In addition, the best interests of the child are central to this case. The other parties in this case include professionals with specific expertise in First Nations child and family services. These organizations have the knowledge to make recommendations to improve the cultural appropriateness of Canada's response. Finally, consultation with First Nations is consistent with Canada's stated remedial approach in this case.

[25] In 2018 CHRT 4, the Panel already considered Canada's arguments about how the separation of powers limited the Tribunal's remedial jurisdiction under the *CHRA*. The Panel has already answered Canada's argument and continues to rely on those findings (paras. 21-83). Without repeating all those findings, it is helpful to reiterate that in making its orders the Tribunal does not seek to usurp the powers of other branches of government. It is operating under its quasi-constitutional Statute that permits it to address past discriminatory practices and prevent future ones from occurring. This is provided for in the *Act* under section 53 (2) (a).

[26] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease-and-desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]).

[27] Consequently, any order made by the Tribunal, especially in systemic cases, has some level of impact on policy or spending of funds. To deny this power to the Tribunal by way of decisions from the executive would actually prevent the Tribunal from doing its duty under the *Act* which is quasi-constitutional in nature. Throughout its existence, the Tribunal has made orders on numerous occasions that affect spending of funds. Sometimes orders amounting to millions of dollars are made (see for example *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para.1023 affirmed by the Supreme Court of Canada, see *Public Service Alliance of Canada v. Canada Post Corp.*, [2011] 3 SCR 572, 2011 SCC 57).

[28] In addition, specific remedies impacting policy are often made to remedy discrimination. This is particularly true of systemic cases. These remedies have been confirmed in *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)*, 1997 CanLII 1433 (CHRT), 28 CHRR 179 and *Action Travail des femmes*. Moreover, remedial orders may impose positive obligations on a party. Further, the orders must flow from the Tribunal's findings and must be responsive to those findings.

[29] The Tribunal also discussed section 16 of the *CHRA* relating to the adoption of a special program, plan or arrangement and prevention of future discrimination by relying on *National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare)*, 1997 CanLII 1433 (CHRT) in 2018 CHRT 4 at para. 34:

Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease-and-desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]). In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he **held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future.....** (at page 1141).

(emphasis added)

[30] The Panel rejected Canada's argument that the separation of powers prevented the Tribunal from issuing orders affecting policy or public spending that would remedy the discrimination in this case. This is not a case where the Panel has made an order directing a specific amount of funding to prevent future discrimination. Exempting Canada from the remedial scope of the *CHRA* on the basis of the separation of powers is not consistent with the purpose of the *CHRA* and would reduce the Tribunal's adjudicative role to an advisory one. Human rights law recognizes cost constraints through the *bona fide* justification defence but Canada has not made that argument (2018 CHRT 4 at paras. 45-46).

[31] In crafting its orders, the Panel is not interested in becoming involved in the details of program or policy design by for example choosing between policies as long as systemic discrimination is eliminated. The Panel's objective in the remedial orders is to ensure that discriminatory policies cease to be used and the discrimination is remedied. The Panel is willing to make further orders if the discriminatory practices continue. Not to do so would be unfair to the successful parties. It is important to distinguish policy choices made by Canada that satisfactorily address the discrimination, in which the Panel refrains from intervening, from policy choices made by Canada that do not prevent the practice from reoccurring. To explain this, if the Panel finds that Canada is repeating history and choosing similar or identical ways to provide child welfare services that amounted to discrimination, the Panel has justification to intervene. While the Panel is willing to make further orders if Canada implements policies that fail to address the discrimination, it will not intervene if Canada implements policies that address the discrimination (2018 CHRT 4 at paras. 48-54).

[32] In particular, the Panel highlights the following passages from 2018 CHRT 4:

[51] Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question:

[52] Despite occasional disagreements over the appropriate means of redress, the case law of this Court, (...), stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights (...) Thus, in the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the Quebec Charter. (see at para. 26),(emphasis ours),

[53] If the past discriminatory practices are not addressed in a meaningful fashion, the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of Courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system.

[54] It is important to distinguish policy choices made by Canada that satisfactorily address the discrimination, in which the Panel refrains from intervening, from policy choices made by Canada that do not prevent the practice from reoccurring. To explain this, if the Panel finds that Canada is repeating history and choosing similar or identical ways to provide child welfare services that amounted to discrimination, the Panel has justification to intervene.

(2018 CHRT 4 at paras 51-54).

[33] The Panel previously distinguished immediate relief orders from long term reform:

Finally on this point, while Canada advances that it needs to consult with all First Nations' communities, which in our view remains paramount for long term reform, the Panel does not think consultation prevents Canada from implementing immediate relief. In so far as Canada's position is that it cannot unilaterally make decisions, the Panel finds Canada has done so: namely to maintain the status quo in some areas even when the needs of specific communities or groups have been clearly identified and expressed in numerous reports filed in evidence in this case and, referred to, in the *[Merit] Decision's* findings.

(2018 CHRT 4 at para. 55).

[34] The Panel recognized the value of Canada engaging in broad consultation with First Nations' communities as part of its reforms of child and family services. However, the Panel did not find that consultation could delay immediate reform (2018 CHRT 4 at para. 55).

[35] The Panel reiterated the objectives of the *CHRA* at multiple points in its reasons, including in 2018 CHRT 4 at para. 165:

... the *CHRA's* objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.

(2018 CHRT 4 at para. 165).

[36] The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then mid-term and long-term relief, and complete reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now. It may be necessary for the Panel to remain seized to ensure both that discriminatory practices are addressed and that there is an appropriate plan in place to ensure they will not reoccur (2018 CHRT 4 at paras. 384-389).

[37] In 2019 CHRT 7, the Panel described the remedial provisions of section 53(2)(a) of the *CHRA* as an injunction-like power to order that a discriminatory practice cease (paras. 45-55).

[38] The Panel discussed the purpose of individual financial compensation as a remedy in 2019 CHRT 39 [the *Compensation Decision*]. Individual remedies both validate the victims' suffering and deter future discrimination (para. 14). Damages for wilful and reckless conduct in particular send a message that human rights are to be respected (para. 15). These remedies contrast with the other remedies aimed at preventing discrimination (para. 229). More generally in the *Compensation Decision*, the Panel reiterated its earlier comments on the remedial purpose of the *CHRA*, including noting that the Panel was obliged to consider the specific circumstances of the case, including as set out in the Statement of Particulars, the submissions and the evidence (para. 94-111).

[39] The Panel reviewed the appropriate approach to the Tribunal's retention of jurisdiction in 2020 CHRT 7 at paragraphs 51 to 57. The Panel indicated that the retention of jurisdiction in this case allowed the parties to request amendments to the Panel's orders if their expertise and experience identified a means to improve the orders' effectiveness. The Panel recognized that implementing remedies in this case would involve discussion and negotiation between the parties. That is a complex process which

requires flexibility. The Panel reviewed prior caselaw that concluded that it may be appropriate, in particular in the case of complex remedial orders, for the Tribunal to retain jurisdiction while the order is implemented.

[40] One of those cases the Panel reviewed was *Berberi v. Attorney General of Canada*, 2011 CHRT 23:

... the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36).

(2020 CHRT 7 at para. 54 citing *Berberi v. Attorney General of Canada*, 2011 CHRT 23 at para. 13).

[41] In 2020 CHRT 24, the Panel also noted that it should not remain seized with the case indefinitely once long-term remedies are addressed and that it should not constantly address new issues. However, the Band Representative Services issue falls squarely within the scope of its orders and monitoring in order to eliminate discrimination and prevent it from reoccurring. (para. 23).

[42] Further, the Panel notes its comments at paras. 21-23:

[21] The Panel issued orders in 2018 CHRT 4 and remained seized of the implementation of those orders. The Panel has jurisdiction to answer requests for clarification of those orders, especially if the parties disagree on their interpretation. The Panel does not view this motion as a new issue. Rather, it is an issue of interpretation and implementation of the order and is one of the reasons why the Panel remained seized of its orders.

[22] The spirit of the 2018 CHRT 4 ruling is to remain seized of the implementation of the orders and to amend those orders if subsequent studies and/or new information show additional details on best practices and specific needs that were not accounted for given the lack of data. This was always part of the Panel's goal for long-term relief and has not changed.

[23] ... In fact, in 2018 CHRT 4 at paragraph 444, the Panel wrote:

The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented, and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **December 10, 2018** when it will revisit the need to retain jurisdiction beyond that date. Given the ongoing nature of the Panel's orders, and given that the Panel still needs to rule upon other outstanding remedial requests such as mid-to long term and compensation, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by Canada (emphasis added).

[43] In 2021 CHRT 6, the Panel reviewed the scope of the *CHRA* remedial powers (paras. 51-76). The limitations on the *CHRA*'s remedial powers are those set out at section 54 limiting remedies against individuals who secured employment or accommodation in good faith. The Panel confirmed that interpreting the *CHRA* required using the modern approach to statutory interpretation in the context of the special nature of human rights legislation, as the Panel identified in earlier rulings.

[44] The Panel reviewed key case law interpreting the remedial scope of the *CHRA* with a particular focus on *Action Travail des femmes* and *Robichaud* (2021 CHRT 6 at paras. 59-75). These cases indicate that the Tribunal has significant discretion in awarding remedies but that this discretion must be guided by the purpose of the legislation to prevent and remedy discrimination. The remedies must be effective.

It is not to be read narrowly to limit the Tribunal's remedial tools given both general legislative interpretation principles and its quasi-constitutional status. Systemic remedies, such as supported under section 53(2)(a) of the *CHRA* by reference to section 16(1), are often required in cases of systemic discrimination. The main purposes of such a systemic remedy in *Action Travail des femmes* are countering the effects of systemic discrimination including addressing the attitudinal problem of stereotyping.

[45] In 2021 CHRT 12, the Panel reviewed the remedial purpose of the *CHRA* in a consent order (paras. 25-41). The Panel reviewed a number of its prior rulings and findings, which are summarized above. In addition, Panel referred to *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839. In that case, the Divisional Court approved of the Panel's reasoning in this systemic discrimination case that found that "governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated" (*Association of Ontario Midwives* at para. 189).

[46] In addition, the Federal Court's reasons in *Stringer v. Canada (Attorney General)*, 2013 FC 735 inform the Panel's approach to systemic remedies. In that case, the Public Service Labour Relations Board made a factual finding that there was a systemic failure to accommodate by not providing managers with any training about accommodations. Given that finding, it was unreasonable to conclude that training would not be a remedy that would prevent discrimination. In particular, the Court stated that the fact that an employer's policies, if followed, would have prevented the discrimination does not preclude the adjudicator from ordering systemic remedies. A factual finding that would support a systemic remedy required the adjudicator to properly turn their mind to the appropriateness of the systemic remedy (paras. 119-126). Finally, the injunction-like cease and desist order continues to stand and has not been canceled by any subsequent orders.

[47] With the legal principles referred to above, in order to answer the questions below, the Panel has weighted and considered all evidence alongside the parties' positions and supporting materials on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 3).

[48] Has Canada arrived at a current approach to capital and to retroactive redress of the past application of downward adjustments that will fully address the adverse discriminatory impacts identified by the Tribunal?

[49] The Panel finds there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada's current approach does not fully address the adverse discriminatory impacts identified by the Tribunal. Furthermore, *prima facie* discrimination was previously found concerning this issue and Canada had not established a defence under sections 15 or 16 of the *CHRA*. In this motion, Canada's current approach did not convince the Tribunal that Canada is addressing the issue in a timely manner to cease and desist the systemic discrimination identified by the Tribunal.

[50] If not, what further orders (if any) are appropriate?

[51] The Tribunal will address this under each section below.

General Analysis on Canada's Approach

[52] In reviewing the submissions and evidence that relate to each of the distinct issues addressed in this ruling, the Panel has reached some overarching conclusions on Canada's approach. These findings are based on the submissions and evidence relating to all of the issues in this motion and, equally, apply to each of the issues analysed in this ruling. Accordingly, this portion is set out first because it applies to the entirety of the analysis that appears later in these reasons.

[53] Upon review of the evidence, it is obvious that clear efforts are being made by ISC to comply with the Tribunal's orders as ISC interprets them. Of note, Canada's affiant Ms. Johanne Wilkinson, Assistant Deputy Minister for Child and Family Services Reform at ISC, admitted ISC did not have a specific timeframe for a capital plan for agencies (see Cross-examination of Johanne Wilkinson, May 7, 2019 at p.83 lines 6-9). In terms of capital, the evidence shows that Canada places more emphasis on the Tribunal's 2018 CHRT 4 orders that did not order actual costs funding for major capital such as major renovations, space expansions, building purchase and construction. Ms. Wilkinson read the *Merit Decision*, 2016 CHRT 10, and 2016 CHRT 16. Moreover, she testified that the *Merit Decision* "certainly found that there were discriminatory practices in the program and called for a number of reforms to begin and for the discriminatory practices to end and for funding to flow to make up for those gaps" and was aware the Tribunal had stated the rulings should be read together (see Cross-examination of Johanne Wilkinson, May 7, 2019 at pp.16-17). It is also clear that ISC has a process to follow to modify its program authorities and Terms and Conditions. While it does have some flexibility, when its authorities and Terms and Conditions do not include an item even if ordered by the Tribunal such as capital infrastructure that supports the delivery of services forming part of these proceedings, ISC resorts to a number of steps. For example, it will discuss with its partners at different tables and elsewhere and collect information. ISC will use that information in order to make a case to Treasury Board and Cabinet for potential changes as Ms. Wilkinson describes it: "if there is appetite for it". It is also manifest that ISC has to follow legal processes under the *Financial Administration Act* and Treasury Board and seek approval for significant expansion and/or expenses that are not in the FNCFS Program's authorities and Terms and Conditions.

[54] Parliament has the exclusive authority to issue payments out of public funds, as confirmed by section 26 of the *Financial Administration Act*. A government department cannot unilaterally make such a payment. When a Minister determines that a policy change requires increased funding, the Minister must seek approval from Cabinet and prepare a Treasury Board submission. The Treasury Board process requires specific details on how the funding will be used and the justification for the change. "Terms and Conditions" establish the parameters of how the money can be spent. ISC is responsible for ensuring that FNCFS Program funds are used in accordance with the Terms and Conditions as part of the government's stewardship role for the accountability of public funds.

[55] In the end, the decision is made by Treasury Board or Cabinet to accept the inclusion or not of funding for specific items as part of the approved authorities. In other words, as explained above, ISC does not have the final word, Cabinet and Treasury Board do. The parties to the CCCW discussed strategies to increase the capital threshold, accompanied by a directive on capital, so that further changes to the threshold would not require a Treasury Board process. The draft directive on capital would be provided to the CCCW for review. This is a positive plan that may fully address immediate funding needs in some cases and partially do so for others given the funding cap. This will be revisited below.

[56] Nevertheless, it may be less compelling for Cabinet and Treasury Board to approve authorities if there is a belief that other programs may be responsive to needs. However, to date while efforts are made to collect information, the information remains unclear on the elimination of the lack of coordination found that impacts service delivery. There is insufficient evidence about different programs offered to First Nations children and families on-reserve and how each really address the real needs of children and families. In other words, the Tribunal is unaware of the existence of a completed thorough analysis of all programs on-reserve, how they interrelate, intersect and ensure that there are no gaps in services to First Nations children. There is insufficient evidence to date to establish that the gaps in services to First Nations children and families on-reserve or ordinarily on reserve have all been addressed and accounted for by other programs when the FNCFS Program's authorities do not include items or place a funding cap. The Tribunal raises this point to illustrate that referring to other programs when a legitimate request is made for service delivery may not be sufficiently responsive to the Tribunal's orders as it will be explained below.

[57] Further, while the Panel understands the funding processes established in law, little is said about Parliament's goal to eliminate discrimination and the Executive needs to take into account Canada's established liability. The Tribunal found systemic racial discrimination in 2016 and ordered Canada to cease it. Canada did not challenge the Tribunal's orders to cease the discriminatory practices to reflect the findings in the *Merit Decision*.

[58] The Panel believes that both fiscal accountability and remedying systemic discrimination can certainly coexist and be applied together. However, as it will be further explained below, the Panel rejects Canada's argument that if Cabinet and Treasury Board do not adequately fund the FNCFS Program and Jordan's Principle, the Tribunal should accept this because of the separation of powers. The Tribunal already rejected a separation of powers argument in previous unchallenged rulings. Canada did not make an argument under section 15 or 16 of the *CHRA*. Canada was found liable and was ordered to cease the discrimination that is still ongoing until long term reform is implemented.

[59] Moreover, if the Tribunal accepts Canada's argument, this would allow the Executive to be shielded from orders even when found liable in human rights cases. Furthermore, all that Canada would have to advance to shield itself is that it is not the government's goal or priority. The SCC rejected that argument in *Kelso v. The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199, which the Tribunal relied on in the *Merit Decision*. The Tribunal makes clear that Parliament expressed its goal clearly in adopting the quasi-constitutional *CHRA*. Cabinet and Treasury Board are not above the *CHRA*'s application. When found liable for systemic discrimination, they must eliminate it effectively. Lastly, Canada's *Financial Administration Act* arguments advanced in this motion are insufficient to establish a section 15 or 16 of the *CHRA* defence.

[60] This being said, in participating in consultation tables such as the CCCW, the National Advisory Committee on First Nations Child and Family Services Program Reform (NAC) and others, ISC often hears from the parties and other partners on the areas requiring improvement. The evidence demonstrates not only that ISC is present at those meetings but also is making improvements to the FNCFS Program and to Jordan's Principle mechanism and those changes are often informed by those discussions. Some changes are made following discussions with the parties. Real efforts are made by ISC staff to make cases to Treasury Board and/or Cabinet for funding.

[61] The Panel understands that disagreements may occur and is not ordering consensus. While it is ideal, it may not always be possible. The Panel looked at the nature of disagreements in light of its findings. Many approaches may be valid as long as there is evidence that the real needs of First Nations children are being met sooner rather than later. This is the Tribunal's focus.

[62] It is also clear from the evidence that Canada is on board for the development of a new long-term funding formula informed by new studies.

[63] Further, the Tribunal ordered a complete reform of the FNCFS Program to cease and desist from the discriminatory practice found in the decision including to move away from the lack of coordination of federal programs causing gaps, denials and delays in services to First Nations children and families.

[64] The Honourable Jane Philpott, Canada's first Minister of Indigenous Services, began to lead ISC's efforts to start bringing a holistic approach to delivering the social, healthcare, and infrastructure services essential to ensuring healthy children, individuals, families and communities. The First Nations and Inuit Health Branch (FNIHB) has been formally transferred from Health Canada to the new Department of Indigenous Services Canada. She stated that: "Our work will be based on recognition and respect for the right to self-determination" (See affidavit of Lorri Warner, dated March 4, 2020 at exhibit 9).

[65] Canada's expressed its goal to move away from Canada's previous approach to programs that the Tribunal found to be working in silos. Canada stated it is focusing on a holistic, intersectional and First Nation community driven approach which if fully implemented would address the systemic racial discrimination found by the Tribunal and would align with the United Nations Declaration on the Rights of Indigenous Peoples in the long-term. The Panel entirely agrees with this goal if it materializes.

[66] Further, the Panel prefers this Nation-to-Nation approach and has expressed it in its previous rulings especially in 2018 CHRT 4. Therefore, the Panel agrees with Canada on this important goal.

[67] This is the ideal approach as long as the systemic racial discrimination is satisfactorily addressed and communities and agencies are not denied when they express real measurable needs connected to service delivery including during transition as it will be discussed below.

II. Major Capital Context

[68] The moving parties in this motion request that Canada be directed to fund Major Capital for FNCFS Agencies, for Jordan's Principle requests, and for First Nations in Ontario providing Band Representative Services and prevention services. The moving parties request that this funding include related costs such as feasibility studies and administrative costs involved in Major Capital projects.

[69] The Terms and Conditions of the FNCFS Program identify Major Capital as "the purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services".

[70] In the *Merit Decision*, the Tribunal noted that the first Wen:De Report, from 2004, identified a lack of funding for capital costs (*Merit Decision* at para. 157). The Tribunal relied on the second and third Wen:De reports again confirming the lack of capital funding (*Merit Decision* at paras. 162 and 177). The lack of cost-sharing of capital expenditures since 1975 under the *Memorandum of Agreement Respecting Welfare Programs for Indians (the 1965 Agreement)* resulted in children being sent out of communities for treatment due to a lack of facilities in the communities (*Merit Decision* at para. 245). The inadequate funding for capital was found to hinder FNCFS Agencies' ability "to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families" (*Merit Decision* at para. 458). The lack of funding for capital was part of the evidence that substantiated the finding of a discriminatory practice in the *Merit Decision*.

[71] Three months after the *Merit Decision*, the Tribunal issued a ruling directing Canada to implement immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. The ruling emphasised the need to reform the funding structure of the FNCFS Program including as it relates to capital infrastructure (2016 CHRT 10 at para. 20).

[72] The Tribunal reiterated the need for immediate relief including in relation to capital infrastructure in 2016 CHRT 16 at paragraph 36. Of note, at paragraph 18, the Tribunal reminded Canada that the funding did not accurately reflect the real service needs of many on-reserve communities resulting in inadequate fixed funding for operation costs (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services.

[73] The Tribunal recognized, in 2016, that while capital spending for repairs, especially to ensure compliance with appropriate fire, safety and building code standards, could be done immediately while some capital discussions would require longer to ensure an appropriate planning process (2016 CHRT 16 at para. 49).

[74] In 2016 CHRT 16, the Tribunal again recognized that capital infrastructure had not been funded under the *1965 Agreement* since 1975. The Tribunal identified an immediate need for interim capital funding until the long-term capital issues could be addressed (2016 CHRT 16 at para. 97).

[75] Further, at paragraph 160, the Tribunal ordered INAC to determine budgets for each individual FNCFS Agency based on an evaluation of its distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the FNCFS Agency's ability to provide services.

[76] The Tribunal addressed requests for funding the actual costs of a number of items including building repairs in 2018 CHRT 4. The Tribunal engaged in extensive analysis that reiterated that funding was inadequate, including for infrastructure and capital expenditures and that the failure to address these deficiencies amounted to a continuation of the discriminatory practice identified by the Tribunal in the *Merit Decision*. The Tribunal addressed Canada's concerns about funding and noted that Canada's willingness to provide indeterminate funding for First Nations children apprehended into care but not for providing adequate prevention services reflected a system built on a colonial mindset perpetuating historical harm against Indigenous peoples, and all justified under policy. Moreover, it is leading to the mass removal of First Nations children from their homes, families, communities and Nations (2018 CHRT 4 at paras.47, 62, 66 and 114-195). Based on this analysis and the concerns it identified with Canada's practices, the Tribunal ordered Canada to provide immediate funding relief for minor capital expenditures such as building repairs (2018 CHRT 4 at paras. 212-213, 231-237). The Tribunal recognized the need to assess the capital requirements of all FNCFS Agencies to inform immediate, mid and long-term reform and incorporate such directions into its orders (2018 CHRT 4 at para. 374).

[77] Additionally, the Tribunal found that the failure to fund Band Representative Services was discriminatory. In the *Merit Decision*, the Tribunal found that Ontario appropriately funded Band Representative Services while Canada took the position that it was not required to do so (paras. 392, 425 and 426). The Tribunal confirmed the need to rectify the discriminatory practice of not appropriately funding Band Representative Services in the *Merit Decision* at paras. 228-230, 236-238, 389, 392, 425 and 426; 2018 CHRT 4 at paragraphs 324-337 and 2020 CHRT 24.

[78] The Institute for Fiscal Studies and Democracy (IFSD) completed its report, "Enabling First Nations Children to Thrive" on the needs of FNCFS Agencies on December 15, 2018. The report recommended a one-time capital investment of between \$116 and \$175 million based on current service provision with a further budgeted 2% annual recapitalization rate. The report also identified agencies concerns that their current infrastructure was inadequate, including 59% who reported that buildings required repairs.

[79] Finally, on this point it is noteworthy to mention two significant pieces of information. The first one is that the Terms and Conditions of the FNCFS Program, which defines what expenses can be funded under the program, now indicate that both Minor and Major Capital expenses are eligible for funding.

[80] The second one is that, ISC currently has a Capital Directive in relation to capital spending for FNCFS Agencies. This document has undergone a number of revisions and has been discussed at CCCW meetings. The party submissions, summarized below, discuss the adequacy of these measures.

III. Major Capital Party Submissions

A. The Caring Society

[81] The Caring Society requests the following orders:

1. Further to the Tribunal's February 1, 2018 orders in 2018 CHRT 4, Canada shall fund the Major Capital costs of small FNCFS Agencies, and for administration and governance, prevention, intake/investigation, and legal services at their actual cost;
2. In consultation with the CCCW, Canada shall provide funding for FNCFS Agencies to conduct Major Capital needs and feasibility studies;

3. Where such feasibility studies identify a need for Major Capital, Canada shall fund the design, land purchase (if required) and fulfillment of permit and other administrative requirements to facilitate construction;
4. Where projects are ready to proceed, Canada shall fund the Major Capital needs of FNCFS Agencies at actual cost;
5. In order to carry out orders #3 and #4, Canada shall create a long-term capital envelope for FNCFS Agencies to address their Major Capital needs as they continue to arise, with the initial size of the envelope to be guided by the IFSD report.
6. Canada shall write to all First Nations child and family services agencies within 30 days of the order advising them on how to access Major Capital funding; and
7. Canada shall post its policy on Major Capital for FNCFS Agencies on its website.

[82] The Caring Society relies on the Tribunal's findings in the *Merit Decision* for the importance of capital funding. In particular, the Caring Society notes that the Tribunal found that the failure to provide for capital costs hinders "the ability of FNCFS Agencies to provide provincially/territorially mandated services, let alone culturally appropriate services to First Nations children and families" (*Merit Decision* at para. 458). The Caring Society argues that the funding for new staff and programs aimed at addressing the discrimination in this case cannot be effective without adequate space in which to operate. The relief requested is limited to ancillary Major Capital costs of increased programming that accompanies the Tribunal's existing orders.

[83] The Caring Society recognizes that the Tribunal's order in 2018 CHRT 4 concerning repairs address part of the physical infrastructure deficit but contends that it does not address the provision of additional space for new or expanded preventative programming.

[84] The Caring Society further relies on these orders to reject Canada's submission that the requested relief on this motion is outside the scope of the motion. For example, 2016 CHRT 16 at paragraph 158 indicated the items to be addressed immediately "include [...] capital infrastructure [...]". Canada advanced, and lost, a similar argument about scope in its closing submissions on the *Merit Decision*.

[85] While the Caring Society appreciates the Panel's direction to Indigenous and Northern Affairs Canada (INAC), now ISC, to "develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies" (2016 CHRT 16 at para. 97), the Caring Society is not satisfied with Canada's progress to date. While Major Capital has been added to as an eligible expenditure pursuant to FNCFS Program terms and conditions and Canada has recognised infrastructure in its Jordan's Principle costing, Canada has not presented a concrete plan or commitment to provide appropriate funding. While Canada has asserted a need to coordinate with other groups and organizations, the Caring Society is concerned that Canada ought to be proceeding more expeditiously based on available, quality information. The Caring Society notes that the issue of capital has been "under discussion" for a very long time, dating back to the 2000 National Policy Review. The matter was addressed by a number of witnesses during the 2013-2014 hearings.

[86] The Caring Society notes that the IFSD circulated a needs assessment report titled "Enabling First Nations Children to Thrive" to the parties on December 15, 2018 with findings and recommendations including in relation to capital requirements. The report was published on January 14, 2019. The Caring Society contends that this report provides the information Canada requires to meet the Major Capital needs of FNCFS Agencies. The IFSD report indicated that a one-time investment of between \$116 million and \$175 million is required for FNCFS Agency headquarter facilities. The report provides a reference point but need not be the exclusive source of information. The Caring Society advises that it is not seeking an order for a specific amount but, rather, is seeking an order that Canada act on the expert advice produced by the ordered needs assessment. Further, and contrary to Canada's submissions, the

Caring Society is not seeking an order requiring the implementation of the IFSD report. Nor is the Caring Society seeking a certain quantity of funding to be set aside. Rather, the Caring Society seeks an order directing Canada to create a funding envelope and to consider the IFSD report when establishing the structure of the funding envelope and initial funding available.

[87] The Caring Society submits that it is unnecessary to wait for a full new funding model to address these needs. In particular, Major Capital expenditures have not been funded since 1991.

[88] The Caring Society indicates that its requested orders are broadly worded in order to respect First Nations decision-making and existing programs. The Caring Society assumes that feasibility studies would be expected to take First Nations priorities into consideration. The Caring Society is not asking the Tribunal to impose its view of community needs but rather is asking the Tribunal to establish a framework that would allow communities to identify and meet their needs. The Caring Society does not assume the capital funding would be provided outside the Community Infrastructure Branch.

[89] The Caring Society contends that Canada's argument that it has complied with the Panel's capital funding orders to date fails to recognize the specific needs identified by the Panel in its reasons and the Panel's direction not to read the orders in isolation from the reasons. The identified deficiencies in Major Capital funding require proactive steps beyond policy changes.

[90] The Caring Society argues that Canada's submissions demonstrate the *ad hoc* nature of capital funding for FNCFS Agencies relying on surpluses, specific Budget 2018 funding, or Community Well-being and Jurisdiction Initiatives. There is no capital funding program to support Jordan's Principle. Further, Canada has not indicated there is any government mandate to provide capital in order to address, in particular, Jordan's Principle group requests.

B. The Chiefs of Ontario

[91] The Chiefs of Ontario (COO) support the Caring Society's submissions.

C. Assembly of First Nations

[92] The AFN supports the Caring Society's submissions. The AFN submits that an order directing Canada to work with the other parties to develop a long-term solution to address capital infrastructure by a fixed date is both necessary and desirable.

[93] In addition, the AFN indicates that the Panel found, in the *Merit Decision* at paragraph 458, that deficiencies in capital funding hindered "the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families." Little progress has been made on discussions to date. The IFSD report reasserts the need for Canada to provide adequate Major Capital funding.

D. Nishnawbe Aski Nation

[94] Nishnawbe Aski Nation (NAN) supports the position of the Caring Society.

E. Commission

[95] The Canadian Human Rights Commission (Commission) does not seek any particular order. However, the Commission would welcome an enforceable timeline around next steps including Canada's response to the IFSD report.

[96] The Commission starts by providing general comments. This matter relates to the implementation of the Tribunal's previous rulings and arises pursuant to the Tribunal's retained jurisdiction. As the Commission has previously submitted, the previous rulings set out the nature, scope and purpose of the

Tribunal's retained jurisdiction. Further orders may be necessary in order to craft an effective remedy involving complex policy reform. There is likely a need for the Tribunal to receive further information from the parties. The Tribunal encouraged the parties to work collaboratively to implement remedies.

[97] The Commission indicates that section 53 of the *CHRA* provides the Tribunal with broad remedial authority to make victims of discriminatory practices whole and to prevent a recurrence of the discrimination. The Commission rejects the suggestion that the Tribunal does not have the jurisdiction to issue remedial orders that require the allocation of public funds or changes to public policy. The Tribunal rejected a similar argument in 2018 CHRT 4 at paragraphs 31-48 with reasons that continue to apply. Further, section 53 of the *CHRA* provides the Tribunal the statutory authority to impose such a remedy. The *Financial Administration Act* must be read in the context of the quasi-constitutional status of the *CHRA* that is presumed to have primacy over other legislation.

[98] The Commission summarizes the Tribunal's prior rulings on this matter. The Tribunal found that Canada's underfunding of prevention services, failure to fund Band Representative Services in Ontario, and failure to properly implement Jordan's Principle constituted discriminatory practices. The Tribunal ordered Canada to remedy the discrimination including by providing funding to provide these services in a substantively equal and culturally appropriate manner. The Tribunal's orders extended to the provision of adequate capital funding. The finding in the *Merit Decision* that the FNCFS Program funding structure created deficiencies, including through the lack of capital infrastructure, that hindered the ability of FNCFS Agencies to provide mandated, let alone culturally appropriate, services was supported through numerous pieces of evidence. The 2016 CHRT 10 and 2016 CHRT 16 rulings included capital infrastructure as an item to be remedied immediately. In 2018 CHRT 4, the Tribunal found that Canada's proposal to address minor capital was inadequate. The Tribunal directed an assessment of capital needs while providing reimbursement of actual costs pending the implementation of a new funding model.

[99] The Commission summarizes the current state of Major Capital funding. It notes that the terms and conditions of the FNCFS Program identifies that eligible expenses include Major Capital whether provided by FNCFS Agencies or others such as First Nations delivering programs. The IFSD report includes an assessment and quantification of capital needs for FNCFS Agencies. Canada has not conducted a specific survey or assessment on the capital needs of First Nations in Ontario with respect to prevention or Band Representative Services. Jordan's Principle funding has not contained authorizations for capital spending to provide space to deliver the funded services.

[100] The Commission submits that the Tribunal's previous decisions have already identified the need for capital funding to ensure the delivery of appropriate services. Canada has taken steps with the IFSD needs assessment, amending the terms and conditions of the FNCFS Program and discussing capital spending with the parties while paying the actual costs of required repairs on an interim basis. Nonetheless, considerable time has passed since the Tribunal first identified this issue.

[101] The Commission is of the view that Canada has yet to settle on a long-term strategy to meet actual capital needs, nor has it communicated clear directions for FNCFS Agencies, First Nations or other service providers to follow when seeking Major Capital in the interim.

F. Canada

[102] In sum, Canada submits that it has complied with the Tribunal's orders and there are no outstanding issues of compliance. There is no evidence of ongoing discrimination. The motion for non-compliance should be dismissed. Canada should be given time to follow the democratic structures in place to ensure the accountability of public funds. Further, Canada should be provided an opportunity to continue the current system that involves collaboration with Indigenous governing bodies.

[103] In general, Canada has updated the guidance it provides to First Nations and FNCFS Agencies about the FNCFS Program. It has removed Chapter 5 from the *Social Programs National Manual* and instead provides a variety of tools that support making claims based on actual expenses. These documents were developed in consultation with the parties and have been updated as the FNCFS Program's Terms and Conditions changed.

[104] Along with the other parties, Canada established the CCCW for consultations on the implementation of the Tribunal's orders. Canada has been engaging partners beyond the CCCW as well. In addition to existing funding increases and program reforms, Canada is committed to long-term reform of the FNCFS Program that includes a consideration of the *1965 Agreement*, remoteness and long-term options for funding methodologies. This has involved a number of studies.

[105] Canada summarizes its response to various orders issued by the Tribunal. Canada has provided various affidavits to demonstrate that it is paying the actual costs of FNCFS Agencies retroactive to January 26, 2016 while the program is being reformed, it is addressing urgent capital needs, it has approved \$9.4 million in building repairs, that it has consulted with the parties through the CCCW, and it has revised the authority for funding capital in FNCFS Program's Terms and Conditions. They now allow for greater flexibility and expansion on eligibility for expenditures, including expenditures related to capital/building repairs, the purchase or construction of capital assets (e.g., buildings), and the purchase and maintenance of information technology equipment.

[106] As noted in Canada's March 4, 2021 letter, the Terms and Conditions allow budgetary surpluses to be reallocated to cover capital expenditures. Canada has also increased the amount of FNCFS Program funds from \$1.5 million to \$2.5 million for agencies to use their available funds on capital needs, which would help account for inflation and other pressures. Capital funding is also available under the Community Well-being and Jurisdiction Initiatives.

[107] Canada contends that it has demonstrated its commitment to developing a new funding mechanism in consultation with the other parties. Canada recounts its consultation with other parties while developing revisions to the FNCFS Program Terms and Conditions. Canada indicated it would benefit from the IFSD report in order to determine capital requirements. Overall, Canada has almost doubled funding for the FNCFS Program, radically altered how ISC budgets and manages its finances, and implemented long-term reform to ensure that planning is informed by the principle of substantive equality.

[108] Canada reiterates the importance of working collaboratively to reform the FNCFS Program, including as identified by the Tribunal in previous rulings. Reforms require collaboration. There is no quick fix to the FNCFS Program.

[109] Canada frames the requested motion as seeking the following orders:

1. Fund the Major Capital costs of small FNCFS Agencies, and for administration and governance, prevention, intake/investigation, and legal services at their actual cost;
2. Provide funding for FNCFS Agencies to conduct Major Capital needs and feasibility studies;
3. Based on the feasibility needs, to fund the design, land purchase (if required) and fulfillment of permit and other administrative requirements to facilitate construction;
4. Where projects are ready to proceed, Canada shall fund the Major Capital needs of FNCFS Agencies at actual cost; and

5. Based on the above, to create a long-term capital envelope for FNCFS Agencies to address their Major Capital needs as they continue to arise, with the initial size of the envelope to be guided by the IFSD report.

[110] Canada indicates that Parliament has the exclusive authority to issue payments out of public funds, as confirmed by section 26 of the *Financial Administration Act*. A government department cannot unilaterally make such a payment. When a Minister determines that a policy change requires increased funding, the Minister must seek approval from Cabinet and prepare a Treasury Board submission. The Treasury Board process requires specific details on how the funding will be used and the justification for the change. “Terms and Conditions” establish the parameters of how the money can be spent. ISC is responsible for ensuring that FNCFS Program funds are used in accordance with the Terms and Conditions as part of the government’s stewardship role for the accountability of public funds.

[111] Canada argues that there are limits on the Tribunal’s jurisdiction and an order directing the allocation of capital expenditures outside the First Nations child and family services model is beyond the scope of the complaint. Canada sees a material difference between an order to bring buildings up to code and funding Major Capital projects. While appropriate funding for Major Capital is required, it is not ancillary to an order to repair buildings. There is a distinction between ordering remedies with an incidental impact on funding and dictating a specific replacement policy. *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 indicates that courts do not have the jurisdiction to interfere with the allocation of public funds absent statutory authority or a constitutional challenge. Canada expresses concerns that the Tribunal’s exceptional retention of remedial authority should not result in detailed management of the case, as cautioned against in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 74. Similarly, Canada cautions against allowing the scope of remedial issues to expand such that the remedial phase becomes a moving target (*Entrop v. Imperial Oil Ltd.*, 2000 CanLII 16800, 50 OR (3d) 18 (OCA) at para. 58).

[112] Orders that specifically dictate funding would be problematic. Government funding relies on certainty that is not provided by a direction to fund actual costs. Directing a specific remedy risks creating delay by imposing a remedy ill-suited to the government context.

[113] Canada contends that a long-term capital plan requires ongoing consultation and time. Consultation is ongoing on this issue and it is important that the consultation involves First Nation communities. An intervention in this ongoing process would represent a departure from the Tribunal’s role of adjudicating a specific complaint.

[114] Furthermore, Canada submits the requested orders do not consider the need for coordination between First Nations and FNCFS Agencies. The proposed order would ignore ISC’s existing infrastructure program that respects the prioritization process First Nations have undertaken. An order directing specific on-reserve infrastructure without consultation with First Nations would impact other types of on-reserve infrastructure. It is not appropriate to make an infrastructure decision in isolation from the First Nation’s priorities and planning process already in place. The proposed orders would be contrary to the Nation-to-Nation relationship and reconciliation Canada seeks with First Nations.

[115] Canada has previously advised the Tribunal of how the on-reserve infrastructure process is coordinated through the Community Infrastructure Branch of ISC. Canada has indicated how ISC has made significant investments in infrastructure and is working with the AFN to continue to identify needs. Canada explains how First Nation prioritization of needs allows infrastructure to be more effective. The FNCFS Program does not have infrastructure expertise such as knowledge of relevant building codes and health and safety standards. Accordingly, the FNCFS program needs to rely on expertise outside the program in addressing infrastructure needs. Establishing a capital funding program within FNCFS Program would be duplicative of existing programs and complicated First Nations interaction with ISC bureaucracy while interfering with an established First Nations planning process.

[116] Moreover, Canada argues that the FNCFS Program Terms and Conditions do not currently allow it to fund infrastructure off-reserve. The Community Infrastructure Branch would be better positioned to provide such services.

[117] Canada notes that there is no order requiring it to implement the IFSD report. Further, Canada and the parties agree that additional work and research is required. Accordingly, Canada funded additional research of up to \$1.7 million and approved a research proposal by the AFN. It would be inappropriate to rely solely on the IFSD report for an expenditure of such a large sum of money. Canada seeks to work collaboratively with the other parties to enable the FNCFS Program to make the strongest possible case for new funding. Canada has identified a number of factors not considered in the report such as the funding from the 2018 Budget. While helpful, the IFSD report does not provide the requisite comprehensive understanding of the broad needs of all FNCFS Agencies. The uptake on capital funding to-date does not support the magnitude of investment found to be required by the IFSD report. It would also be inappropriate for the Tribunal to impose its estimation of community capital requirements in place of plans developed by First Nations.

[118] Canada contends that Ontario specific requested orders are a significant expansion of the complaint. The requested order would make child and family services the infrastructure priority for all communities which could cause delays for other infrastructure projects identified as a priority by the community. Canada is open to explore changes to the existing process but that requires technical discussion better suited to CCCW meetings with direct consultations with First Nations.

[119] Canada reiterates a commitment to engage in conversations about long-term capital funding including the proposed capital directive it submitted to the parties for discussion. The most recent version of the capital directive reflects feedback that Canada received from the parties. Canada also emphasizes that it has engaged in consultations on issues that go beyond the scope of the complaint.

[120] Furthermore, Canada submits that the other parties' submissions demonstrate that Canada is engaged in good faith discussions to resolve outstanding issues. The parties have yet to reach an agreement on some issues and on other issues there are disagreements between the parties. Canada indicates that it has accepted and incorporated many suggestions received through the CCCW and National Advisory Committee on First Nations Child and Family Services Program Reform (NAC) while acknowledging it has not accepted every recommendation. Canada contends that the Tribunal's intervention is required simply because the parties have not been able to reach a consensus, particularly on an operational question. Canada retains discretion to make program choices that differ from the parties preferred approach. That does not make the decision discriminatory, nor a breach of Canada's duty, should it apply, for consultation to involve good faith discussion.

[121] Canada further submits that it cannot be required to obtain the approval of other parties before implementing responses to the Tribunal's remedial orders. Canada relies on *Canada (Attorney General) v. Johnstone*, 2013 FC 113 in support of this proposition. Canada retains its role as legislative and executive branch of government.

IV. Major Capital Analysis

A. Prior Major Capital Analysis

[122] The Panel commented on issues relating to capital funding in prior decisions. The Panel continues to rely on those findings and analysis. Some of those findings and analysis are set out in what follows.

[123] In the *Merit Decision*, the Panel identified the underfunding of capital requirements through the FNCFS Program contributed to the discrimination identified in the case and the inadequate funding to deliver child and family services, let alone to deliver them in a culturally sensitive manner:

[157] The authors noted that the concerns and challenges expressed by the FNCFS Agencies that it interviewed were in line with the *NPR* findings and recommendations, such as the lack of funding for prevention services, legal services, capital costs, management information systems, culturally based programs, caregivers, staff salaries and training, and costs adjustments for remote and small agencies (see *Wen:De Report One* at pp. 6, 8).

[124] Further comments that informed the Panel's analysis in the *Merit Decision* are found at p. 119 of *Wen:De Report One*:

Capital investments are lacking in First Nations communities. In most First Nations communities, there is also a need for a comprehensive plan relating to the capital requirements that would build up the physical infrastructure. Funding needs to address the ability of agencies to secure buildings and facilities and to have control over them. For example, internally-managed therapeutic foster care treatment units are crucial capital investments that will ensure stability and consistency for long-term placements, such as high needs/high medical needs children in foster care. Maintaining residential programs is essential to ensuring an Aboriginal content to programming

[125] Returning to the *Merit Decision*, the Panel wrote:

[162] Overall, with regard to funding under the FNCFS Program, at page 7, *Wen:De Report Two* found that:

First Nations child and family service agencies are inadequately funded in almost every area of operation ranging from capital costs, prevention programs, standards and evaluation, staff salaries and child in care programs. The disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.

...

[177] *Wen:De Report Three* recommends certain economic reforms to Directive 20-1, along with policy changes to support those reforms. The recommended economic reforms from *Wen:De Report Three*, include: a new funding stream for prevention/least disruptive measures (at pp. 19-21); adjusting the operations budget (at pp. 24-25); reinstating the annual cost of living adjustment on a retroactive basis back to 1995 (at pp. 18-19); providing sufficient funding to cover capital costs (buildings, vehicles and office equipment) (at pp. 28-29); and, funding for the development of culturally based standards by FNCFS Agencies (at p. 30).

...

[184] Total costs of implementing all the reforms recommended in *Wen:De Report Three* were estimated at \$109.3 million, including \$22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment) and insurance premiums; and, \$86.4 million for annual funding needs (see at p. 33).

...

[190] The Auditor General further noted that because the FNCFS Program's expenditures were growing faster than AANDC's overall budget, funds had to be reallocated from other programs, such as community infrastructure and housing. This means spending on housing has not kept pace with growth in population and community infrastructure has deteriorated

at a faster rate. In the Auditor General's view, AANDC's budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs (see *2008 Report of the Auditor General of Canada* at p. 25, ss. 4.72-4.73), (emphasis added).

[191] The Auditor General of Canada made 6 recommendations to address the findings in its report. AANDC agreed with all the recommendations and indicated the actions it has taken or will take to address the recommendations (see *2008 Report of the Auditor General of Canada* at p. 6 and Appendix). AANDC's response to the *2008 Report of the Auditor General of Canada* demonstrates its full awareness of the impacts of its FNCFS Program on First Nations children and families on reserves, including that its funding is not in line with provincial legislation and standards. Furthermore, despite the flaws identified with the new funding formula, AANDC still viewed EPFA as the answer to the problems with the FNCFS Program:

4.67 **Recommendation.** Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.

The Department's response. Indian and Northern Affairs Canada's current approach to Child and Family Services includes reimbursement of actual costs associated with the needs of maintaining a child in care. The Department agrees that as new partnerships are entered into, based on the enhanced prevention approach, funding will be directly linked to activities that better support the needs of children in care and incorporate provincial legislation and practice standards.

(*2008 Report of the Auditor General of Canada* at pp. 23-24, s. 4.67)

...

[244] According to *Child Welfare Report* [from the Ontario Association of Children's Aids Societies (OACAS) found at HR-1, tab 209], the current funding model does not reflect the needs of Aboriginal communities and agencies for several reasons including: insufficient resources for services, where they tend to be crisis driven; shortage of funding for administrative requirements; lack of funding to establish infrastructure necessary to deliver statutory child protection services, while operating within the extraordinary infrastructure deficits of many of the communities they serve; and, insufficient funds to retain qualified staff to deliver culturally appropriate services (at p. 7).

...

[245] In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, *Transcript* Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see *Transcript* Vol. 25 at p. 32).

...

[257] The Panel finds the *NPR* and *Wen:De* reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

...

[275] The [*Indian and Northern Affairs Canada, Evaluation of the First Nations Child and Family Services Program (Departmental Audit and Evaluation Branch, March 2007)* found at HR-4 at tab 32], goes on to state that the first step in improving the FNCFS Program is to change Directive 20-1 by providing FNCFS Agencies with a new funding stream that ensures adequate support for prevention work (see at p. 35). In discussing the costs and benefits of increasing the FNCFS Program's focus on prevention, the cost estimates provided in *Wen:De Report Three* are outlined, including the \$22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment), and insurance premiums; and, the \$86.4 million for annual funding needs for such things as an inflation adjustment to restore funding to 1995 levels, adjusting the funding formula for small and remoteness factors, and increasing the operations base amount from \$143,000 to \$308,751 (see 2007 *Evaluation of the FNCFS Program* at pp. 35-36).

[126] Furthermore, the Panel now adds that this document mentions at page 36 that many agencies do not have the capacity to carry out such preventive initiatives within their existing funding levels.

[127] Continuing with the *Merit Decision*:

[289] The 2012 evaluation found it was unclear whether the EPFA is flexible enough to accommodate provincial funding changes (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). It noted both the Saskatchewan and Atlantic regional offices struggle to effectively perform their work given staffing limitations, including staffing shortages, caseload ratios that exceed the provincial standard, and difficulty recruiting and retaining qualified staff, particularly First Nation staff (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). Capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards, but also as making FNCFS Agencies a more desirable place to work. However, these expenditures were not anticipated when implementing the EPFA and were identified as often being funded through prevention dollars (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 49), (emphasis added).

...

[305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and *Wen:De* reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and,

subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.

...

[344] As indicated above, the provinces' legislation and standards dictate that all alternatives measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets for prevention, AANDC's funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for FNCFS Agencies to keep pace with provincial operational requirements that may include, along with the items just mentioned, costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards, (emphasis added).

...

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

(Merit Decision)

[128] In response to Canada's arguments above, the findings reproduced above demonstrate that capital infrastructure such as buildings that support the delivery of services including prevention services formed part of the evidence before the Tribunal in 2014 which led to the Panel's *Merit Decision* in 2016.

Those findings are broader than just building repairs and are included in the Tribunal's orders to cease the discrimination identified in the *Merit Decision*. This addresses Canada's argument that it sees a material difference between an order to bring buildings up to code and funding Major Capital projects. More reasons on this distinction will be discussed below.

[129] Subsequently, in 2016 CHRT 10, the Panel highlighted the need to take steps to immediately reform the FNCFS Program and related agreements in light of the findings in the *Merit Decision*. This includes references in the *Merit Decision* to capital and infrastructure:

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the Decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

...

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

[5] Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

...

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or

to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

...

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how

they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

(2016 CHRT 10, emphasis in original)

[130] In 2016 CHRT 16, the Panel specifically addressed certain issues relating to infrastructure and capital needs:

[18] One of the main findings in the *Decision* is that INAC's FNCFS Program, which flows funding through formulas, Directive 20-1 and the Enhanced Prevention Focused Approach (EPFA), provides funding based on flawed assumptions about the number of children in care, the number of families in need of services, and population levels that do not accurately reflect the real service needs of many on-reserve communities. This results in inadequate fixed funding for operation costs (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services. Most importantly, inadequate funding for operation and prevention costs provides an incentive to bring children into care because eligible maintenance expenditures to maintain a child in care are reimbursable at cost (see the *Decision* at paras. 384-389 and 458).

[19] In 2016 CHRT 10, the Panel ordered INAC to immediately take measures to address the assumptions and flaws in its funding formulas, including all the underlined items at paragraphs 20 and 23 of that ruling. INAC was to provide a comprehensive report explaining how those flaws and assumptions are being addressed in the short term to provide immediate relief to First Nations on reserve. The Panel's order also required INAC to provide detailed information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision* (see 2016 CHRT 10 at paras. 20-25).

...

[36] The Panel reiterates its immediate relief orders that all items identified in paragraph 20 of 2016 CHRT 10, and not limited to the items that were underlined, must be remedied immediately, including the adverse effects related to:

- The assumptions about children in care, families in need of services and population levels;
- Remote and/or small agencies;
- Inflation/cost of living and for changing service standards; and
- Salaries and benefits, training, legal costs, insurance premiums, travel, multiple offices, capital infrastructure, culturally appropriate programs and services, and least disruptive measures.

...

[43] According to INAC, the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services will be addressed as part of future reform discussions. Addressing some of these issues may require engagement and discussion with First Nations, FNCFS Agencies and provincial/territorial governments. According to INAC, unilateral action in addressing these important issues would be contrary to the federal government's commitment to renew the relationship between Canada and Indigenous peoples. INAC adds that immediate relief investments could be utilized by FNCFS Agencies to respond to individual community needs for culturally based programming and activities.

...

[45] For their part, the CCI Parties do not understand why the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services cannot be addressed at this stage. There are actions that can be taken now to alleviate discrimination that fall entirely within federal jurisdiction and do not depend on corresponding provincial action, including simply adopting and adequately funding applicable provincial/territorial standards regarding these issues.

[49] On the issue of building repairs, the Panel fails to understand why INAC cannot address it now, especially where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations. Again, while the Panel understands the benefit of having discussions on capital infrastructure in the long term, this urgent issue should also be addressed immediately. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is addressing this issue. This will form part of the upcoming in-person case management meeting.

...

[97] As noted in the *Decision*, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 and, as a result, many FNCFS Agencies in Ontario lack funding to establish infrastructure necessary to deliver statutory child protection services (see paras. 244-245). Therefore, as part of INAC's immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, and until the broader issue of infrastructure needs under the *1965 Agreement* can be fully reviewed, INAC should develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

...

[157] In the *Decision*, INAC was ordered to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the Panel's findings and to cease applying its narrow definition of Jordan's Principle and take measures to immediately implement the full meaning and scope of Jordan's Principle (see at para. 481). As mentioned above, the CCI Parties' request to update policies, procedures and agreements is captured by this general order to reform the FNCFS Program and the *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*.

[158] In addition, to address this general order in the short term, INAC was subsequently ordered to immediately take measures to address a number of items. As indicated in 2016 CHRT 10 and reiterated in this ruling, those items were to be addressed immediately. Again, those items include addressing the adverse impacts related to the assumptions about the number of children in care, families in need of services and population levels; remote and/or small FNCFS agencies; inflation/cost of living; changing service standards; salaries and benefits; training; legal costs; insurance premiums; travel; multiple offices; capital infrastructure; culturally appropriate programs and services; and, least disruptive measures. INAC was then ordered to report back to the Panel to explain how those items are being addressed in the short term to provide immediate relief to First Nations children on reserve (see 2016 CHRT 10 at paras. 20 and 23).

...

[160] ...

A. Additional Immediate measures to be taken

- 1.** INAC will not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle (see paras. 121-123 above);
- 2.** INAC will determine budgets for each individual FNCFS Agency based on an evaluation of its distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the FNCFS Agency's ability to provide services (see paras. 33, 37, 40 and 47 above);
- 3.** In determining funding for FNCFS Agencies, INAC is to establish the assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC will not reduce funding to FNCFS Agencies because the number of children in care they serve is below 6% or where the number of families in need of services is below 20% (see para. 38 above);
- 4.** In determining funding for FNCFS Agencies that have more than 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services (see para. 39 above);
- 5.** In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above);
- 6.** INAC is to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and/or operations funding streams (see paras. 56-61 above); and
- 7.** INAC is to immediately apply Jordan's Principle to all First Nations children (not only to those resident on reserve) (see paras. 117-118 above).

(2016 CHRT 16)

[131] In 2018 CHRT 4, the Panel revisited and considered additional evidence in relation to requests to fund actual costs of child and family services. The requests for actual costs specifically included the costs of building repairs and also apply more generally to capital and infrastructure needs:

[109] The Caring Society seeks orders that Canada be required to fund legal fees, building repairs, intake and investigations, and the child service purchase amount based on their actual costs, until the Complainants and Canada have agreed upon the appropriate measures necessary to end the discriminatory practices. Until such time as the FNCFS Program is reformed, the Caring Society submits that funding these expenses based on their actual cost is the only option available to the Tribunal that will ensure that the adverse impact of INAC's funding formulas are not perpetuated. The Caring Society adds that Canada has presented no evidence to demonstrate that funding these items at actuals would be inappropriate or cause it to experience undue hardship.

...

[195] This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately. However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children. The orders are included in the order section below.

...

[212] Canada has advised that the Program authorities include minor capital expenditures. Minor capital expenses may include maintenance and repairs/upgrades/renovations to facilities to include compliance with building codes. If funds are required, Canada will work with agencies on a case-by-case basis to address this issue.

[213] The Panel considers it is unclear if this practice is now implemented or if it will only be implemented in the future. It is also unclear when the funding will be made available to agencies that identify the need for building repairs. Therefore, the Panel finds it is justified to make a further order to this item of immediate relief. The order is included in the order section below.

...

[247] Given that Canada has made submissions it will address this as part of its long term reform. The Panel finds Canada has unilaterally postponed addressing this to the long term even when ordered to immediately address it. While Canada complied to stop reducing the agencies' funding for those who serve less than 251 children, the Panel finds Canada not in full compliance with its previous orders. This Panel ordered Canada to eliminate population thresholds and levels and, to immediately address adverse impacts for small agencies who encounter the greatest challenges especially, if they are isolated. (see at 2016 CHRT 10 at paras. 20 and 23).

[248] At this stage, two years after the *Decision*, the Panel would now be reluctant to order anything linked to the Directive 20-1 given it was found discriminatory.

[249] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA* orders Canada to analyze the needs assessments completed by First Nations agencies in consultation with the Parties, interested parties (see protocol order below), and other experts and to do a cost-analysis of the real needs of small First Nations agencies related to child welfare taking into account travel distances, case load ratios, remoteness, the gaps and/or lack of surrounding services and all particular circumstances they may face.

[250] Canada is ordered to complete this analysis and report to the Tribunal by **May 3, 2018**.

[251] The Panel, pursuant to Section 53 (2) (a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[252] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies' costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs small first nations agencies' for reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.

...

[272] While not all 5 INAC social programs were part of this complaint, and recognizing that the Tribunal has limits in terms of adjudicating the claim that is before it, a number of comments are worth mentioning. Canada's practice of reallocating funds from other programs is negatively impacting housing services on reserve and, as a result, is adversely impacting the child welfare needs of children and families on reserve by leading to apprehensions of children. This perpetuates the discriminatory practices instead of eliminating them.

[273] The Panel addressed this issue as part of its findings in the *Decision* and identified it was part of the adverse impacts on First Nations children and families.

[274] This does not mean the Tribunal can now look at all Programs and make any type of order outside of its findings for this complaint. This was addressed in 2016 CHRT 16 para.61.

[275] However, the Panel can make orders under section 53 (2) (a) and (b) to cease the discriminatory practice and prevent it from reoccurring if it has evidence to that effect. This exercise is based on the evidence at the hearing on the merits and, new evidence before the Tribunal as part of the motions proceedings. Moreover, the current situation in this case is a clear example of policy decision-making repeating historical patterns that lead to discrimination and that warrant intervention to ensure it is eliminated.

[276] It is also in the best interest of First Nations' children and families to eliminate this practice as much as possible. Some reallocations may be inevitable in Federal government.

[277] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to stop unnecessarily reallocating funds from other social programs especially housing if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the *Decision* by **February 15, 2018**.

[278] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities by **February 15, 2018**.

[279] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to evaluate all its Social Programs in order to determine and ensure any reallocation is necessary and does not adversely impact the First Nations children and families by **April 2, 2018**.

...

[299] **The Panel does not question the need for a multi-pronged approach or large and numerous consultations with Canada's partners. The Panel does not dispute that Canada cannot reform the child welfare system alone and that it needs to do it with its partners at tripartite tables and in other forums.**

[300] **The Panel takes issue with the fact that the above was always advanced to justify delay, and denials of equitable services leading to discrimination.** The Panel discussed this at length in the *Decision*, highlighting many politicians and Program Managers saying the same thing over and over: we need the provinces at the table, we need to gather information, we need to work with our partners, we have to seek approvals, other programs may cover this, etc. This has been going on for years, yet the Panel found discrimination, (emphasis added).

[301] Moreover, this was all argued by Canada at the hearing on the merits and the Panel dismissed it. This is precisely one of the reasons why the Panel ordered immediate relief so that the long term reform would not prevent action now for Indigenous children.

[302] Another example is, that Canada has argued in its final submissions on these motions, that it was working on a number of working tables with the AFN, COO and NAN and yet, it is still unclear of what the gaps are.

[303] The Panel wants to make it clear that discussions with no comprehensive plan or specific deadlines attached to it can go on for a very long time and seeing these types of arguments is a source of concern. Also, as already discussed in the *Decision*, a piecemeal approach is to be discouraged. This rationale applies to all the orders in this ruling.

...

[324] The Panel has already found in the *Decision* that the lack of funding for Band Representatives is one of the main adverse impacts of Canada's discrimination, and a way that Canada fails to provide culturally appropriate services to First Nations children and families in Ontario (see at paras 392, 425-426).

...

[336] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, at the actual cost of providing those services retroactive to January 26, 2016 by **February 15, 2018** and until such time as studies have been completed or until a further order of the Panel.

[337] INAC shall not deduct this funding from existing funding or prevention funding, until such time as studies have been completed or until a further order of the Panel.

...

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

[388] Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.

[389] In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination.

...

[410] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders INAC to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families on-reserve and in the Yukon, based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), **by April 2, 2018**, and report back to the Panel **by May 3, 2018**.

[411] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of prevention/least disruptive measures, building repairs, intake and investigations and legal fees. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare to be reimbursed retroactive to January 26, 2016 **by April 2, 2018**. This order complements the order above.

...

[413] Until such time as one of the options below occur:

1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.
2. Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling.

3. Reform is completed in accordance with best practices recommended by the experts including the NAC and the parties and interested parties, and eligibility of reimbursements from prevention/least disruptive measures/, building repairs, intake and investigations and legal fees services is no longer based on discriminatory funding formulas or programs.
4. Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel.

[414] The parameters above will also apply to the orders below.

[415] The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

(2018 CHRT 4, emphasis in original)

B. FNCFS Major Capital Analysis

[132] The Tribunal set out its initial reasoning in the letter-decision. As indicated in the letter-decision, the Tribunal is now providing more detailed reasons.

[133] One of the major unchallenged findings of this claim is Canada's systemic discrimination through underfunding of the FNCFS Program and narrow interpretation of Jordan's Principle resulting in adverse impacts on First Nations children and families. The evidence relied upon by the Panel and that led to this finding included many underfunded items in the Directive 20-1 and Enhanced Prevention Focused Approach (EPFA) formulas including underfunding capital and infrastructure that are necessary to offer culturally appropriate, confidential and safe services to children under provincial laws, which the FNCFS Program requires FNCFS Agencies to follow.

[134] Additionally, the arguments of separation of powers were advanced throughout this claim. The Panel's previous findings on this issue remain unchallenged. While the Panel agrees the Tribunal's role is not that of a policy-decision maker or manager of public funds or to infringe on the roles of the executive and legislative powers, the main aspects of the complaint affect both public funds and policy in FNCFS services that were found to be discriminatory.

[135] When the Panel found the services to be discriminatory and exercised its statutory role to eliminate discrimination and prevent it from reoccurring, one needs to look at the discriminatory practice it is trying to redress. In this particular case, the FNCFS Program's underfunding, program authorities, and the FNCFS Program's formulas were found to be discriminatory. This is an important part of the claim before the Tribunal which the Tribunal is required to adjudicate under the *CHRA*. If Canada offers services, it needs to offer them in a non-discriminatory manner. This means that it cannot underfund services nor perpetuate policies that enable this underfunding including in regard to capital assets. Nor can it permit other adverse impacts such as the lack of prevention services on-reserves including in the Ontario region.

[136] Moreover, when the Tribunal heard the claim, Canada already had tripartite tables in many regions. It already participated in the National Advisory Committee on First Nations Child and Family Services (NAC). It already worked with First Nations including on studies such as Wen:De. It already announced publicly that it needed to discuss with First Nations partners. It already committed to improving the FNCFS Program and increasing the funding. All of this formed part of the evidence before the Tribunal and was carefully considered in arriving at its unchallenged findings of systemic

discrimination. It is understandable that the Panel needs more than a repetition of those same strategies to ensure systemic discrimination is eliminated and does not reoccur. Repeating the same patterns of the past will not generate sustainable and meaningful change.

[137] Further, there is ample evidence in the record that First Nations and FNCFS Agencies repeatedly expressed their needs, plans and priorities and were not listened to (see for example, *Merit Decision* at paras. 73-74). A more recent and tragic example is what happened in Wapekeka First Nation (“Wapekeka”), a NAN community. Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure. The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an “awkward time in the federal funding cycle” (see 2017 CHRT 14 at paras. 88-89).

[138] While this is not a request for funding capital assets, it is a Tribunal finding where the community clearly expressed its priority and was provided a financial consideration argument instead of a substantive equality response based on needs, in this case urgent needs. Therefore, Canada’s argument that it is in discussions to respect the communities’ plans and priorities is not enough to convince the Panel that Canada is sufficiently responsive to its previous findings and orders.

[139] This being said, the Panel believes it is fair to say that Canada has implemented many changes that benefit children. However, Canada’s argument about the *Financial Administration Act* is reminiscent of Canada’s separation of powers argument that the Panel has previously rejected (see 2018 CHRT 4 at paras. 45-46). The constant revisiting of questions already answered does not assist in convincing the Panel that Canada has reformed its old mindset and is implementing real and lasting change for children and families.

[140] Furthermore, the issue of capital is not a surprise for Canada since it was addressed in the *Merit Decision* and formed part of the cease-and-desist orders. Canada keeps reminding the Tribunal of the separation of powers to invite restraint. Such restraint does not mean the Tribunal has its hands tied concerning funding and policy when the findings and discriminatory practices found in this case are precisely the authorities, the underfunding and the discriminatory policies Canada argues the Tribunal cannot review. For clarity, services need to be offered in safe, appropriate and confidential spaces. This was part of the evidence before the Tribunal that led to findings in the *Merit Decision*. This is part of the orders to cease the discriminatory practice and reform the FNCFS Program.

[141] Moreover,

Capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards, but also as making FNCFS Agencies a more desirable place to work. However, these expenditures were not anticipated when implementing the EPFA and were identified as often being funded through prevention dollars (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 49)

(*Merit Decision* at para. 289 and 2018 CHRT 4 at para.139).

[142] Further, the FNCFS Program requires the agencies and communities to deliver services in compliance with provincial standards. For the Tribunal, this means that as long as a standard is non-discriminatory and in the best interest of the child when viewed through an Indigenous, rather than a colonial lens, the provincial standard is appropriate as a floor and not a ceiling. Again, standards should respect substantive equality principles based on need so that all individuals have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have. This has

been the Tribunal's approach from the beginning. At the very least, the services offered should abide by those non-discriminatory provincial standards and allow FNCFS Agencies and First Nations to offer confidential, safe and culturally appropriate services to children and families. If repairs to a building are unable to provide an appropriate space to offer services, an agency and a First Nation community should receive sufficient funding to offer those services in new buildings. Similarly, if a building's location or design precludes providing confidential, safe and culturally sensitive services, the FNCFS Agency and First Nation are entitled to a building capable of providing services in a non-discriminatory manner.

[143] The Panel accepted the evidence and recommendations in the Wen:De reports and said as much in the *Merit Decision*. The Wen:De reports caution against the use of a piecemeal approach to the recommendations. The Panel previously found that Canada took a piecemeal approach to implementing needed change and ruled it created adverse impacts on children and families.

[144] The Panel used the terms Capital and Capital Infrastructure in previous decisions. The terms Major Capital and Minor Capital are terms Canada used to distinguish between the two. Since then, Canada has indicated the FNCFS Program's Terms and Conditions have been amended and this distinction has been removed. For the purposes of this decision the Panel will refer to the recent terminology as amended in the FNCFS Program's Terms and Conditions: "Purchase or construction of capital assets that support the delivery of FNCFS services".

[145] The issue of the purchase or construction of capital assets that support the delivery of FNCFS services was addressed in the Panel's findings from the beginning and forms part of the evidence before it. It is well within the scope of this claim and forms part of the reform the Panel is monitoring. Unchallenged orders were already made on the purchase or construction of capital assets that support the delivery of FNCFS services in previous rulings. The 2018 CHRT 4 orders for building repairs rather than building construction recognized the need for further consultation on needs before issuing further specific orders. This order did not eliminate previous Tribunal orders. Rather, it considered the need for more consultations and this was clearly stated in the ruling (see 2018 CHRT 4 at para. 407).

[146] Additionally, the Panel did not separate services offered from office space or safe, culturally appropriate and confidential buildings in which to offer those services. It is erroneous to conclude the Panel made such a distinction. The Panel's orders always focused on specific needs and keeping with substantive equality using provincial standards as the floor rather than as the ceiling. This reasoning applies to the Panel's overall approach to all aspects of its orders. As discussed in the *Merit Decision* and subsequent rulings, provincial standards require safe, confidential spaces in which to offer services to First Nations children. Furthermore, a piecemeal fragmented approach has been rejected by this Panel from the beginning. Similarly, a one size-fits-all approach was also rejected by this Panel.

[147] While the Tribunal agrees that it is up to Canada to decide with First Nations which policies and funding authorities are appropriate, it is not up to Canada to decide to continue to discriminate in choosing those policies and funding especially if First Nations make legitimate requests under the FNCFS Program and demonstrate those requests are not met. Further, the IFSD report found funding gaps exist in prevention services, capital, salaries and IT infrastructure.

[148] There are statutory requirements to provide child and family services in secure and confidential buildings. Appropriate services are tied to appropriate spaces to receive those services. If those spaces are insufficient, the First Nations agencies and communities are in an untenable situation of being forced to either cut services offered to children or offer services in subpar and illegal environments. Regardless of the funding formulas and policies chosen by Canada, this cannot be the outcome.

[149] Canada was ordered to remedy this and accepted to do so. The Tribunal is not ordering Canada to build offices without consulting First Nations and going through the appropriate processes. The Tribunal is ordering Canada to fund those building purchases or construction once all processes have been completed and the First Nations approve it.

[150] The Panel accepts Canada's argument that orders that require specific infrastructure to be built on-reserve without consultation with First Nations would impact other types of on-reserve infrastructure (e.g., water, roads, electricity etc.). In this context, decisions for building infrastructure on reserve is significantly more complicated than simply funding the construction of a building or repairing an existing one. These decisions cannot be made in isolation and should take into consideration the community's priorities and planning already in place.

[151] In so far as the term the purchase or construction of capital assets that support the delivery of FNCFS services is used in this ruling, it is focusing on building purchase or construction and not infrastructure in a larger sense such as roads and hospitals. Additionally, even if buildings are built, the Panel recognizes that this requires consultation with First Nations.

[152] Canada relies on *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (*Ontario v. Criminal Lawyers*) to support its separation of powers argument. In that case, Karakatsanis J found for the majority that courts do not have the inherent jurisdiction to set compensation for *amiciae curiae* or a friend of the court. At its heart, the case addresses the constitutional relationship between the independence of the judicial branch of government and the administration of justice in the provinces as conducted by the Attorney General on behalf of the executive branch of government.

[153] The majority considered three reasons it was beyond a court's jurisdiction to direct the compensation the Attorney General should pay to *amiciae curiae*. First, the legislature retains authority over the expenditure of funds. While court orders may have ancillary fiscal consequences, setting the rate of compensation goes too far. Second, while courts have the ability to set the terms necessary to ensure orders appointing *amiciae curiae* are effective, that does not require setting compensation. Existing case law demonstrates that it is not necessary for courts to fix the rate of compensation for court-appointed counsel. It is similarly not necessary because the Attorney General has the constitutional competence to administer justice, which it fulfils by, for example, identifying counsel who are prepared to accept the *amiciae curiae* appointment at the rate it proposes to pay. Third and finally, courts directing the expenditure of significant sums by fixing *amiciae curiae* compensation risk imperiling the integrity of the judicial process as these expenditures could only be reviewed by appellate courts and not the public accountability mechanisms inherent in the legislative and executive branches of government.

[154] Given these reasons, the majority concluded that, absent statutory authority or a constitutional challenge, allowing a court to direct the Attorney General as to how to spend funds on the administration of justice exceeded the role of the judicial branch and trespassed on the proper role of the executive and legislative branches of government.

[155] On Canada's argument on the *Ontario v. Criminal Lawyers* case, the Tribunal agrees it is bound by the Supreme Court decision in this case which clarifies the roles of Superior Courts and the need to show restraint in the areas of public spending and policy. The Panel also notes there was no *Charter* or human rights legislation at play in *Ontario v. Criminal Lawyers* as opposed to in *Kelso v. The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199 at page 207, where the Supreme Court stated:

No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act*...

[156] The Panel relied upon *Kelso* in determining the merits of this case (see *Merit Decision* at para. 42).

[157] In Canada's own submissions as part of this motion, Canada acknowledges it has a legal obligation under the *Charter* and the *CHRA* to ensure any federally funded services are provided in a non-discriminatory manner. This is true and precisely what the Panel has ordered and is monitoring. The

case at hand can be distinguished from the *Ontario v. Criminal Lawyers* case. In this case, the scope of the claim that informs the Tribunal's jurisdiction under the *CHRA*, which includes the complaint, the Statement of Particulars, the evidence, and the arguments, places underfunding of the FNCFS Program at the forefront of the case. The underfunding was found to be racial systemic discrimination causing adverse impacts and harms to children and families resulting in mass removal of children from their homes, families and communities.

[158] This case is further distinguishable from *Ontario v. Criminal Lawyers* because of s. 66(1) of the *CHRA*. That section provides that "This Act is binding on Her Majesty in right of Canada". There was no comparable section at issue in *Ontario v. Criminal Lawyers*.

[159] Canada expresses concerns that the Tribunal's exceptional retention of remedial authority should not result in detailed management of the case, as cautioned against in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 74 (*Doucet-Boudreau*). Similarly, Canada cautions against allowing the scope of remedial issues to expand such that the remedial phase becomes a moving target (*Entrop v. Imperial Oil Ltd.*, 2000 CanLII 16800, 50 OR (3d) 18 (OCA) at para. 58).

[160] The Tribunal already answered these arguments in 2018 CHRT 4. In regard to the *Doucet-Boudreau* case, the Tribunal discussed this was in the context of remedies ordered under section 24 of the *Charter*. As the Panel previously noted in 2018 CHRT 4:

[22] ... The Human Rights Tribunal of Ontario (HRTO) in its analysis relies on (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62) which analyzed remedies under section 24 of the *Charter*.

[23] The Panel finds that the case at hand and its factual matrix is far more complex and far more reaching than the *Ball* case and therefore it can distinguish the *Ball* case from this case.

[161] This being said, the Tribunal relied on *Doucet-Boudreau* in previous decisions and believes it applies to this case in many aspects. The Tribunal does not believe its management of the case disregards the SCC's caution in this case. The specific context, evidence and history of this case justified the Panel's supervision until long-term remedies or solutions have been implemented.

[162] The Panel agreed that the remedial phase ought not to become a moving target however, it is not the case here. Capital infrastructure has always formed part of this claim.

[163] Another important finding in the *Merit Decision* that is relevant to this issue here and provides an answer to Canada's argument on the requested orders being outside the scope of the Tribunal's jurisdiction is "[t]he failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families" (see *Merit Decision* at paras. 391 and 458).

[164] The FNCFS Program and also its corresponding funding formulas and other related provincial/territorial agreements were found to be discriminatory. Both funding and policy are at the heart of the findings in this case. The Tribunal has a statutory quasi-judicial role conferred by parliament through quasi-constitutional human rights legislation to eliminate discrimination, namely the discrimination it finds in a given substantiated claim and prevent it from reoccurring. In this case the discrimination found is underfunding and a need for a complete program reform. The Panel has an obligation to parliament, the First Nations children and families, and the parties in this case, to fulfill its mandate to ensure the FNCFS Program is no longer underfunded no matter what policy is preferred by Canada and that the policies and programs fulfill substantive equality standards. The Panel refers to previous findings in its unchallenged *Merit Decision* to summarily illustrate the above:

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

(*Merit Decision* at paras. 461-463).

[165] The Panel previously found that:

Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

(*Merit Decision* at para. 464).

[166] The Panel previously found that:

AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that

“finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison”. This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

(*Merit Decision* at para. 465)

[167] For clarity, the actual costs orders are not the imposition of a particular funding policy. Rather they are a remedy to underfunding found in this case. Canada can opt for any type of policy as long as it does not perpetuate the discriminatory underfunding. The parties in this case apprise the Tribunal on the evolution of the implementation.

[168] The Panel believes it is helpful to define actual cost in the context of actual costs of the purchase or construction of capital assets that support the delivery of FNCFS services and federal policy for procurement.

[169] Actual cost is an accounting term that means the amount of money that was paid to acquire a product or asset. It’s exactly what it sounds like—the actual cost. This cost could be either a historical, past, or present-day cost of product.

[170] Paying less than what the actual costs are to deliver services under the FNCFS Program was found to be discriminatory in unchallenged decisions from the Tribunal. Maintenance costs were reimbursed at actuals while prevention was underfunded leading to the mass removal of children from their homes, families and communities.

[171] The Panel understands from Canada’s position that it is concerned about orders that would essentially amount to unlimited funding of unrelated FNCFS Program costs. The Panel clarifies that this is not the case with its actual costs’ orders.

[172] Furthermore, the Panel is not suggesting that non-discriminatory policies and legal processes should not be followed. But these policies and processes cannot be permitted to condone discrimination against First Nations in need of buildings to offer child and family services including prevention services. Moreover, the term actual costs can be understood as fully funded authorized services.

[173] Moreover, the Panel is not dictating the precise policy or the amount of funds to be distributed. The Panel is saying that services ought to be offered in buildings that respect provincial legal requirements, that are non-discriminatory, to offer services to First Nations children and families as a minimum standard, respect the FNCFS Program authorities that do not perpetuate discrimination and also ensure culturally appropriate and safe services. If there is a lack of offices and rental spaces to offer services on-reserve the option of purchase or construction of buildings to offer those services should be seriously envisioned and fully funded.

[174] The Panel believes the parties in this case should ensure the procurement process respects current federal legal and policy procurement requirements but also substantive equality, First Nations rights and the Tribunal’s orders.

[175] Moreover, the actual costs were ordered in 2018 CHRT 4 for a number of items addressed in the ruling and previous rulings including prevention services to stop the mass removal of First Nations children from their homes, families and communities. This ruling was not challenged. Rather, Canada

made a clear statement that it would abide by it. See also the Consultation protocol signed by Canada's Ministers. An advanced copy of the ruling was provided to the parties and an emergency meeting on FNCFS was held at the same period where Minister Philpott qualified the situation in Canada as a humanitarian crisis. A six-point plan, including implementing the Tribunal's orders, was adopted. This information forms part of the evidence before the Tribunal.

[176] The 2018 CHRT 4 ruling included an order for actual costs for FNCFS retroactive to the *Merit Decision* dated January 26, 2016. Additionally, the 2018 CHRT 4 ruling did not order Canada to pay specifically for the purchase or construction of buildings. The order was more directed at repairs while Canada gathered more information on the purchase or construction of capital assets that support the delivery of FNCFS services (see 2018 CHRT 4 at paras. 213, 231, 233-236, 408, 410-413). The fact that it was not ordered in this 2018 ruling does not negate reform orders and previous findings. However, this ruling did recognize that more time was required to consult and develop a policy for the purchase or construction of capital assets that support the delivery of FNCFS services. The Panel adopted a balanced approach where it accepted the need for more consultation and studies in order to develop options for funding the purchase or construction of capital assets that support the delivery of FNCFS services. This being said, three and a half years have passed since then and the Panel is informed that discussions are ongoing and that no clear deadline has been set for the completion of those consultations and studies aside from a timeline for Phase 3 of the IFSD report. Insufficient explanation has been provided for cases where the First Nation community is exercising its self-government inherent right and requesting the construction of a building to offer child and family services or Jordan's Principle services and where all requirements have been met including Canada's involvement (i.e. a shovel ready project) and have not been given the funding and the green light or sufficient funding to offer those services in new buildings. According to the evidence and Canada's reply submissions, Canada has updated and expanded the FNCFS Program's Terms and Conditions. They now allow for greater flexibility and expansion on eligibility for expenditures, including expenditures related to capital/building repairs, the purchase or construction of capital assets (e.g. buildings), and the purchase and maintenance of information technology equipment.

[177] Therefore, despite previous cross-examinations of Canada's witnesses and their evidence relied upon by Canada and properly put before this Panel, it is no longer accurate to consider the purchase or construction of capital assets that support the delivery of FNCFS services as only forming part of the Community Infrastructure program. The recent updated Terms and Conditions filed in evidence reflect this change.

[178] Furthermore, the administrative structure of Federal programs working in silos within the federal government and within the INAC department, now ISC was already found in the *Merit Decision* to be discriminatory in creating gaps in services to First Nations children and families and the source of numerous disputes between federal departments for Jordan's Principle cases.

[179] This structure is a governmental choice in the way it functions and administers programs. Since the *Merit Decision*, INAC became ISC and a major merger and reorganization was made. While it may have addressed some issues identified in the *Merit Decision*, the Panel is still presented with arguments from Canada that show the silo mindset is still present. In Canada's submissions responding to the purchase or construction of capital assets that support the delivery of FNCFS services motion, a focus is made on the Community Infrastructure Program instead of the FNCFS Program and its Terms and Conditions or the findings made in the *Merit Decision*. The Panel was clear in the *Merit Decision* that reform needed to be informed by the findings in the *Merit Decision*. Major Capital was part of those findings.

[180] The Panel's flexibility should not be viewed as retreating from its original findings but rather as a recognition that Canada maneuvers in a complex situation and should be allowed some flexibility as long as it makes non-discriminatory policy choices in a reasonable timeframe that do not repeat historical patterns that lead to discrimination. Otherwise, the Tribunal may intervene to eliminate the discrimination it has found (see 2018 CHRT 4 at para. 275).

[181] This flexibility is shown in 2018 CHRT 4 when the Panel agreed to postpone specific orders for a funding formula on the purchase or construction of capital assets that support the delivery of FNCFS services to the long-term phase, accepting the need for further consultations and studies. However, the Panel believed that in applying substantive equality principles, Canada would be responsive to specific needs of FNCFS Agencies and First Nations and would approve those funds while it develops a new funding formula in the long term. Further, to get a better understanding of this, one can review the previous rulings and understand that specific needs and substantive equality are central to the Panel's rulings. Additionally, Canada's arguments that were considered for 2018 CHRT 4 gave an impression of momentum given the emergency meeting. The Panel established deadlines to complete the FNCFS specific needs assessments and amended its timeline following Canada's request. Those timelines were to be met in 2018.

[182] As recently expressed in a letter, the Panel notes it has now been over 3 years and this issue is still pending thus the need to have adequate interim processes in place in terms of capital assets. The Panel recognizes and is familiar with the legal and social context in which buildings are built on reserves and the need to respect First Nations inherent rights. No one can act unilaterally, not Canada, not this Tribunal, not the FNCFS Agencies. However, when a project is "shovel ready", which means the consultations and the analysis of all relevant considerations have been completed between the First Nation and Canada, and the First Nation requests construction of a building to enable the First Nation to offer services to their children, there is no reason to delay it. If construction is delayed, it creates a number of negative outcomes: delays or denies services to children that could be offered in a safe, confidential, legal and appropriate space; denies the First Nations inherent right to self-government for the benefit of a unilateral decision imposed by Canada; perpetuates the harms identified in the decision and does not comply with the Tribunal's orders to cease the discriminatory practices identified in the *Merit Decision*.

[183] The Tribunal highlighted these consequences in 2018 CHRT 4 at paras. 272-273:

While not all 5 INAC social programs were part of this complaint, and recognizing that the Tribunal has limits in terms of adjudicating the claim that is before it, a number of comments are worth mentioning. Canada's practice of reallocating funds from other programs is negatively impacting housing services on reserve and, as a result, is adversely impacting the child welfare needs of children and families on reserve by leading to apprehensions of children. This perpetuates the discriminatory practices instead of eliminating them.

The Panel addressed this issue as part of its findings in the [*Merit*] *Decision* and identified it was part of the adverse impacts on First Nations children and families.

(see 2016 CHRT at para. 273).

[184] Keeping with the spirit of 2018 CHRT 4 at paragraphs 294 to 297, the same reasoning applies to any item identified in previous decisions and in need of reform. While studies and data may need to be collected for optimal results, years are going by and important changes are outstanding. The Panel finds that delaying construction projects that are ready to go until all studies have been completed is unhelpful to the communities that welcome change now. This is the equivalent of a one-size-fits-all approach that the Panel has already rejected. Funding based on need respecting substantive equality requires funding shovel ready projects while Canada consults and completes studies. FNCFS and Jordan's Principle spaces should be available to offer services to children. If those spaces are not available, this prevents the services being offered. This is the equivalent of a denial of services to children and this perpetuates the discrimination found in the *Merit Decision*.

[185] The Panel now believes that Canada is attempting to relitigate those previous unchallenged rulings to obtain a different outcome which is unfair to the proper administration of justice and to the complainants and the children and families they represent who were successful in this case.

[186] The Panel shares Canada's need for finality ending with long-term reform settlements or orders, whether on consent or otherwise. This needs to be done in a reasonable timeframe and cannot remain open-ended forever as part of this Tribunal process. However, Canada's assertion that there is no evidence of ongoing discrimination is simply not true. Canada's own affiants admit that they are still gathering information to inform long-term changes. The Panel was clear from the beginning about three necessary phases to reform and eliminate the systemic discrimination found: immediate, mid-term and long-term relief followed by a complete reform until this is done, systemic discrimination harming First Nations children and families continues. The Panel finds there is a need to establish a clear deadline to ensure timely movement forward.

[187] Canada argues that based on recommendations from the CCCW, Canada has also increased the funding threshold within the FNCFS Program from \$1.5 million to \$2.5 million for agencies to use their available funds on the purchase or construction of capital assets that support the delivery of FNCFS services, which would help account for inflation and other pressures. As communicated to the CCCW, agencies can use the increased Budget 2018 funding (ramp-up & remoteness allocations) or any surpluses they may have for capital expenditures. Capital-related expenses are also eligible for communities under the Community Well-being and Jurisdiction Initiatives.

[188] Canada is implementing these immediate relief efforts, and has firmly committed itself to respecting these orders, while working on a long-term capital plan. The Panel recognizes that this may assist some FNCFS Agencies and First Nations in the immediate term, while it may not be sufficient for others. The Panel reiterates the needs-based funding approach. A needs-based analysis will show if Canada's current approach is sufficient for a given First Nation or not and when it is insufficient, funding should reflect the need rather than a model or one-size-fits-all approach. Lorri Warner's March 4, 2020 affidavit at exhibit 7A provides more clarity as to how this cap is to be utilized. The total capital costs of a project cannot exceed \$2.5 million per FNCFS Agency per fiscal year. A FNCFS Agency may incur costs for more than one project per fiscal year; multiple FNCFS Agencies can share the costs of a project and still be eligible for a maximum of \$2.5 million each (i.e. per FNCFS Agency) per year; and FNCFS Agencies may work with other partners that are not eligible recipients under this FNCFS Program and still spend the maximum of \$2.5 million per year. Furthermore, the document provides three examples as to how the cap may be applied. The document also includes minimum Common Program Requirements and other requirements that need to be met in order for any of these listed expenditures to be deemed eligible for funding.

[189] This additional information is favorable to Canada as opposed to a firm \$2.5 million cap with less information. In fact, it may very well be sufficient to address some FNCFS Agencies' needs, especially for some small agencies that need adequate space to support the delivery of services. On this point, the Panel believes it is necessary to make a further order for Canada to be sufficiently responsive to the systemic discrimination and to clarify that small agencies that are ready to proceed ought to be funded at actuals for the purchase or construction of buildings that support the delivery of FNCFS services. The same reasoning applies for all FNCFS Agencies regardless of their size. Some may be able to share space with others and cost-share. The Panel understands the benefit of such an approach but in other cases, it may not be possible. A blanket policy that excludes all small agencies from accessing the purchase or construction of buildings is not respecting substantive equality principles. The good administration of public funds is respected when the real needs are considered and inform the substantive equality analysis. Moreover, the same applies on the issue of funding the actuals costs for administration and governance, prevention, intake/investigation, and legal services at their actual cost, the Panel clarifies this is already covered under the 2018 CHRT 4 orders. The Panel believes that such a clarification is helpful moving forward.

[190] For other FNCFS Agencies the current cap and other flexibility such as the reallocation of surpluses may very well be insufficient. For the latter, the Panel confirms they are covered under previous substantive equality/needs-based orders including the orders in this ruling. This being said, the Panel understands the need for requirements prior to a purchase or construction on-reserve.

[191] In that regard, the exhibit 7A document referred to above, specifies that in alignment with ISC's Capital Facilities and Maintenance Program and First Nation Infrastructure Fund's minimum requirements, any building purchases, new builds, or major renovations of buildings will meet the following requirements: the project will be supported by a Band Council Resolution, Tribal Council Resolution or other documentation indicating support from the governing body of a self-governing First Nation; the project will have a well defined and formally approved scope of work, schedule and budget; a qualified project manager acceptable to the FNCFS Agency (and band or tribal council if a joint project) will be appointed to manage the implementation of the project; a feasibility study will be carried out in advance of construction of the project commencing when deemed necessary by the FNCFS Agency; the project will be designed to meet all the applicable federal, provincial and territorial codes and standards for the design, construction and operation of similar physical assets, and in accordance with departmental level of service standards, as may be amended from time to time; where the total estimate cost of the project exceeds \$50,000 or is not within the competence of a technician/technologist, the design of the project will be approved and so certified by a professional engineer or architect licensed to practice as such in the province/territory where the facility is to be constructed; and the project will be inspected and certified for compliance with applicable regulatory requirements by qualified inspectors at the various stages. Further the document includes additional details that are instructive:

6.3 Other Capital Expenditures - Building-Related Capital Proposals (Excluding Building Repairs)

The Capital Facilities and Maintenance Program (CFMP) within ISC is the main pillar of the Government of Canada's efforts to support community infrastructure for First Nations on reserve. CFMP exists to support the planning, management and building of infrastructure on reserve in a safe manner. While it will be the responsibility of the FNCFS Program to assess the eligibility of capital proposals for FNCFS Program funding, CFMP will be involved in reviewing building-related capital proposals (purchases, new builds and major renovations) from a technical perspective to support ISC's ongoing effort to:

- maximize the life cycle of physical assets;
- mitigate health and safety risks;
- ensure assets meet applicable codes and standards; and
- ensure assets are managed in a cost-effective and efficient manner.

CFMP will pre-approve these capital proposals before the FNCFS Program flows any funding. These projects will have to be submitted using CFMP's formal project proposal template. Once FNCFS receives pre-approval from CFMP, ensuring that all legislative and regulatory, guidelines and codes have been adhered to, FNCFS will approve funding should the project meet all other criteria as stated in this document.

[192] This is an example of what the Panel means when it uses the terms legal processes, requirements or processes in this ruling. The Panel does not propose to bypass those requirements unless their interpretation perpetuate discrimination.

[193] The document specifies that:

* CFMP, if needed, will work with the FNCFS agency to:

- provide expertise in the area of engineering, architecture etc.;
- analyze and/or revise scope of project;

- assist in establishing project management arrangements; and
- update financial information (project quote)

****FNCFS Program and CFMP will work closely throughout the project; however, FNCFS Program officials will remain the final decision maker on all aspects of the project. Note: Departmental employees will provide advice and guidance to FNCFS agencies throughout this process.**

(emphasis ours).

[194] The history in this case and the evidence demonstrate that when Canada applies criteria and uses discretion, it is not necessarily using a substantive equality lens responsive to real needs of First Nations children and families.

[195] Consequently, a needs-based, focused approach is necessary. The Panel recognizes that Canada allows case-by-case requests to come forward which is appropriate in the sense of responding to specific needs. However, there is no indication that once the need is established and all legal requirements for purchase or construction are fulfilled, a higher amount than the funding cap of \$2.5 million will be authorized. The Panel is not convinced that Canada feels legally obligated to fully fund building purchase or construction on reserve over the imposed cap when there are insufficient, if any, funds in the FNCFS Agencies' surpluses, and no possibility to join with another agency. The same reasoning applies to First Nations communities under the Community Well-being and Jurisdiction Initiatives.

[196] However, the exhibit referred to above does not address the Community Well-Being and Jurisdiction Initiative. Simply said, when the needs exceed the current FNCFS Program authorities, Canada points to the infrastructure program as potentially addressing those needs which have been determined to be a priority for the First Nation. There is insufficient evidence to demonstrate that this is fully responsive to eliminate the systemic discrimination found. Moreover, as discussed earlier in this decision, the infrastructure program was reviewed by the Auditor General who found community infrastructure deteriorated at a faster rate. In the Auditor General's view, AANDC's budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs. This approach is problematic.

[197] Canada recognizes that a better understanding of long-term capital needs for First Nations Child and Family Services is needed and notes consultation on this issue is ongoing at the CCCW. Canada argues it is imperative that First Nations communities have a voice in discussions concerning the process for capital planning and expenditures. The Panel agrees. However, this cannot be the reason to delay or deny funding for when a First Nation or FNCFS Agency has followed the requirements and voiced its needs and awaits action.

[198] It is noteworthy to mention that Canada's short submissions mention relying on past affidavits and reports filed with the Tribunal. However, those submissions do not discuss the evidence in great detail even if the Panel provided multiple opportunities to add comments if needed. This is not to say that the evidence before the Tribunal is unhelpful. Rather it is simply that it may have been useful to provide some clarifications. For example, Canada's reply indicates a change in the Terms and Conditions suggesting movement from the original position outlined in their initial submissions. This also corroborates the Caring Society's account of the evolution of the issue, identified gaps and suggested changes discussed at the CCCW and subsequent modifications to the Terms and Conditions (see Lorri Warner's affidavit dated January 29, 2019 at exhibit 1 and Ms. Johanne Wilkinson's affidavit at Exhibit 9) that now include the purchase and construction of buildings for the delivery of services as eligible expenditure under the FNCFS Program and joins those terms and conditions to the materials.

[199] However, on March 4, 2020, Canada filed materials to respond to the Panel's broader requests that expand outside this motion by way of submissions and another affidavit from Lorri Warner. On February 26, 2021, Canada provided a response to the Tribunal's questions on the materials it should consider for the major capital, small agencies and band representatives motions:

On behalf of the parties (as specified in the final paragraph below), we write further to the Tribunal's correspondence of February 18, 2021 ("Correspondence"). In the Correspondence, the Tribunal indicated it was seeking to confirm the submissions and evidence from the parties in relation to the issues of major capital for the FNCFS Program, Jordan's Principle, Band Representative services and downward scaling of funding for small agencies.

Further to the Tribunal's query, Canada confirms its submissions and affidavit from March 4, 2020, were specifically in response to the Tribunal's request for information. While relevant to the issue of major capital, the submissions and evidence filed in September 2020 provide updated reporting in that regard.

In addition to the clarification from Canada above, the Tribunal is seeking a response from the parties in respect of three questions posed - those questions have been reproduced below and the response of the parties follow:

1. Whether the submissions and evidence in the Caring Society's letter and the subsequent submissions and evidence identified [above] accurately reflect the parties' submissions on this issue.

The parties have reviewed their records of submissions and evidence. It is agreed the detailing of the submissions and evidence by the Tribunal in the Correspondence is exhaustive.

2. Whether there are any parties' submission, not already on the list provided by the Caring Society, from around March and April 2020 that are pertinent to this motion. 3. Whether there are any parties' submission, not already on the list provided by the Caring Society, from around March and April 2020 that are pertinent to this motion.

The list of parties' submissions appended to the correspondence of the Caring Society dated September 1, 2020, is complete.

3. Whether there are any outstanding matters related to major capital on which the parties have yet to make submissions.

The parties agree no further submission in relation to major capital are required. Out of an abundance of caution, the parties wish to confirm that they consider that the Institute of Fiscal Studies and Democracy's Phase 2 report, filed by the AFN on September 11, 2020, is properly before the panel and can be considered on this motion. However, the parties do not have additional submissions to make on the IFSD's work in relation to this motion.

[200] At the Panel's request, the parties provided a letter including a chart of the documents they were relying on as part of this motion. The letter is dated September 1, 2020. In the chart, Canada does not indicate it is relying on Lorri Warner's March 4, 2020 affidavit. However, Canada in its April 24, 2020 response to the Panel's questions and the COO's submissions made submissions on capital and relied on Lorri Warner's March 4, 2020 affidavit. Further, the NAN relies on that affidavit for the issue of Band Representative Services which will be addressed below. The Panel has chosen to consider the evidence contained in this affidavit as this information provides additional details and demonstrates somewhat greater scope for funding capital costs than Canada's evidence had previously disclosed. Having reviewed this evidence, the Panel would have reached the same result regardless of whether it

considered this evidence in its analysis. The Panel's full consideration of this evidence will hopefully benefit the parties as they work to remedy the discriminatory practices in this case and comply with the Panel's orders.

[201] Lorri Warner's March 4, 2020 affidavit attached the Programs' Terms and Conditions that are also found in previous affidavits. Moreover, little is said to assist the Panel in interpreting those Terms and Conditions. Some relevant parts are reproduced below for ease of reference.

[202] The Terms and Conditions list a number of the Tribunal's orders in 2016 CHRT 10 concerning multiple offices and capital infrastructure:

funding deficiencies for items such as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives and least disruptive measures.

[203] The reasons for this order are first explained in depth in the *Merit Decision*.

[204] The Terms and conditions also provide the relevant detailed information reproduced here:

The FNCFS program is now intended to emphasize the use of preventive, early intervention and least intrusive measures in order to respond to child maltreatment (abuse or neglect), support for family preservation and well-being, maintenance of family, cultural and linguistic connections for children in care, former children in care (post-majority), and community wellness using a community supported approach. It also promotes a collaborative relationship between communities and agencies. The introduction of a new funding stream within FNCFS for Community Well-being and Jurisdiction Initiatives (CWJI) is designed to enable projects of up to five years in duration to expand the availability of prevention and well-being initiatives that are responsive to community needs, and to support First Nations in developing and implementing jurisdictional models.

With program reform, services under the FNCFS program will be provided on the basis of substantive equality to address the specific needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances – in a manner that accounts for cost drivers related to inflation and increased needs or numbers of children in care and their families. The program also needs to provide paramountcy to the safety and best interest of the child. In order to provide equal opportunity and achieve equitable results and outcomes, the program supports variations in service requirements and methods of service provision.

Fixed and flexible funding approaches through contribution agreements are available for the FNCFS program, as described in the Directive on Transfer Payments (Appendix K: Transfer Payments to Aboriginal Recipients). CWJI projects will also be managed through multi-year contribution agreements. The CWJI is a funding stream of FNCFS, whereas the FVPP is a distinct but complementary program.

FNCFS Agencies:

Eligible Initiatives and Projects

Infrastructure Purchase, Maintenance and Renovations

- Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services;

- Operations, minor maintenance (e.g. general repairs, painting, plumbing, minor electrical);
- Renovations/repairs to the building structure, structural foundations, etc.;
- Repair/replacement of roofing, siding etc.;
- Repairs replacement of Heating system, Cooling system, Ventilation system, Electrical
- system, Water system, Plumbing system, Back-up generators, etc.;
- Repairs/replacement to/of the floors;
- Repairs/repainting to/of the walls, ceiling, etc.;
- Repairs/replacement to/of windows, doors, etc.;
- Repairs/renovations to the toilets, bathrooms;
- Repairs/renovations to the kitchen (including replacement of cupboards, counters, etc.);
- Repairs/renovations to storage space;
- Repairs/renovations related to improved indoor environmental quality including:
 - o Air quality (e.g. vent replacement),
 - o Thermal comfort (e.g. replacement of thermostats),
 - o Acoustics (e.g. wall insulation),

Community Well-being and Jurisdiction Initiatives:

Infrastructure Purchase, Maintenance and Renovations

- Capital costs for:
- Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services;
- Purchase and maintenance of vehicles suitable for the transportation of children and families support the delivery of FNCFS services;
- Purchase and maintenance of information technology equipment and systems that are tailored to child and family services delivery.
- Operations, minor maintenance (e.g. general repairs, painting, plumbing, minor electrical);
- Janitorial and ground maintenance services.

(emphasis added)

FNCFS Agencies

Funding for prevention, protection, maintenance, legal services, child service purchase amounts, intake and investigations, building repairs, as well as for agency operations costs for small FNCFS agencies, is based on the actual needs of the children and families served by FNCFS agencies, as reflected by expenditures in these categories.

Community Well-being and Jurisdiction Initiatives

Funding for CWJI projects is determined at the regional level based on the specific needs, circumstances and goals of the community, as well as on the nature and duration of the activities described in the project proposal.

Notwithstanding the above, for FNCFS, costs for maintenance will continue to be reimbursed based on actual costs incurred. In addition, the Department will reimburse actual costs for the following expenses when agencies have not already received funding through another federal program (including another program of Indigenous Services Canada), or any provincial, territorial, or municipal government funding source for that activity:

- prevention;
- intake and investigations services;
- legal fees;
- building repairs;
- full eligible agency operations costs for small agencies; and,
- child service purchase costs.

The six areas above are those the Tribunal has ordered the program to pay on actuals. A detailed National Recipient Guide detailing how recipients may claim retroactive costs in these areas has been shared with recipients to support them in accessing funds as ordered by the Tribunal.

(emphasis ours).

[205] This indicates that Canada views that the Tribunal has not yet ordered the program to pay actuals for the purchase or construction of buildings to support the delivery of services under the FNCFS Program. This is technically true when relying on 2018 CHRT 4 orders focusing on building repairs and using the term actual costs. The 2018 CHRT 4 ruling allowed more time for studies for capital costs with the emphasis of determining needs for children and families served by FNCFS Agencies without rescinding previous capital infrastructure orders, nor derogating from the need for substantive equality and the need to be responsive to specific needs of children, families and communities on-reserve. This means if a case is made for the purchase or construction of a building to support the delivery of child and family services, the purchase or construction should be fully funded once all legal requirements have been met. Nothing in the Panel's rulings suggest services should be deficient due to a lack of adequate buildings to offer those services. This is not substantive equality or even responsive to provincial or territorial standards. It is Canada that has decided to respond to First Nations children through different programs. The Tribunal found this siloed way of operating forms part of the systemic discrimination experienced by children in light of gaps and a lack of being responsive to the real needs of children and families. If Canada so chooses to divide Indigenous services in different programs and this divide continues to adversely impact children, families, this is far from compliance with the cease-

and-desist orders made by the Tribunal. Children risk being transported outside the reserves to obtain services. This defeats the purpose of the orders. It is for Canada to holistically analyze the First Nations children and families' specific needs as already ordered including lack of spaces to offer services.

[206] Furthermore, if there is a need for additional building purchase or construction that are to offer services under the FNCFS Program on-reserve it should be fully funded once all legal requirements to acquire or build property on-reserve have been met. It is not acceptable for the Tribunal at this stage to receive simple answers such as we are discussing with our partners, other programs may offer this, etc. At this stage, the Panel requests evidence that child and family services are fully funded in line with the best evidence available at this time, that spaces to offer those services are available and, if not, that timely solutions are implemented. If a First Nation or agency is unresponsive after Canada's due diligence to consult them and obtain their needs and supported by evidence, this is not on Canada. If a First Nation or agency is responsive and makes a case for additional space to offer FNCFS and Canada delays this by simply referring to another program such as the infrastructure program or directing the requestor to wait until the completed IFSD study or wait until Canada has discussed with all First Nations, this is inappropriate and it is on Canada. Finally, the latter amounts to non-compliance with the cease-and-desist orders, immediate relief orders, 2018 CHRT 4 needs analysis orders and perpetuates systemic discrimination.

[207] This being said, the Terms and Conditions do include the purchase and construction of buildings. The analysis to use is one of substantive equality:

In this respect, the reasonableness of a particular cost will be established by determining whether the expense was: necessary to ensure substantive equality and the provision of culturally-appropriate services, given the distinct needs and circumstances of the individual child and his or her family, including their cultural, historical and geographical needs and circumstances, for instance, by taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services;

- deemed by the recipient to be necessary for the best interest of the child;
- generally recognized as normal and necessary for the conduct of the activity; and,
- aligned with restraints and requirements of generally accepted accounting principles, arm's length bargaining, federal/provincial/local laws and regulations, and/or Certified Accountant terms.

[208] The lack of agreement on this issue and on the interpretation of the Panel's previous orders resulting in the need for adjudication confirmed by the parties support a clarification order on this issue. Moreover, Canada has not convinced the Tribunal it will fully fund "shovel ready" projects approved by First Nations communities at this time. Canada's evidence and submissions indicate a desire to continue *ad hoc* measures and delays until the IFSD phase 3 is completed at an uncertain time. More importantly, Canada while relying on this study to delay some funding, does not commit to follow the IFSD's recommendations.

[209] Canada submits it would be inappropriate to rely solely on the IFSD report for an expenditure of such a large sum of money. Canada seeks to work collaboratively with the other parties to enable the FNCFS Program to make the strongest possible case for new funding. Canada has identified a number of factors not considered in the report such as the funding from the 2018 Budget. While helpful, the IFSD report does not provide the requisite comprehensive understanding of the broad needs of all FNCFS Agencies. The uptake on capital funding to-date does not support the magnitude of investment found to be required by the IFSD report.

[210] In response to this argument, the Panel clarifies that Canada is not ordered to commit to implement the IFSD reports 1 and 2 or the IFSD's phase 3 final recommendations at this time. Canada can choose to demonstrate an even more comprehensive funding model respecting First Nations children, families, communities and Nations' rights if it develops one in a timely manner. Otherwise, this study's process could very well resemble what has happened with Wen:De that led to this extremely long litigation. For those reasons, the Panel believes it has to intervene to fulfill its quasi-judicial mandate to eliminate the racial and systemic discrimination found.

[211] On August 1, 2018 ISC provided a "Discussion Paper – Addressing Capital Needs" (See Tab 9 of the Caring Society's motion record dated February 4, 2019) that outlined current policy authorities, interim authority under the revised Terms and Conditions, and future policy authorities, including a need to return to Cabinet to support Major Capital projects. A list of expanded minor capital expenditures was attached to the discussion paper.

[212] The discussion paper supports Canada's submissions dated January 29, 2019 on capital indicating that the purchase or construction of capital assets that support the delivery of FNCFS services above \$1.5 million exceed the FNCFS Program authorities and that ISC is paying building repairs in compliance with 2018 CHRT 4 orders.

First Nations Children and Family Services (FNCFS) Program has received requests for minor capital expenditures (e.g. expansions), and major capital projects above \$1.5 million (e.g. building long-houses, community-centres, safe-houses on reserve, creating group homes for keeping children in care close to the community), which are outside of the current FNCFS Program authorities. As of February 1, 2018, Indigenous Services Canada is paying building repairs based on actuals (including reimbursements of expenditures dated back to Jan. 26, 2016).

In the short-term, FNCFS is currently working to clarify and expand the list of eligible expenditures under minor capital through the interim Terms and Conditions. The program is also seeking to learn more from the data collected by the Institute of Fiscal Studies and Democracy (IFSD)'s (July 10, 2018 presentation) on agency capital needs. As the work of IFSD continues towards developing a new funding methodology, the Program is prepared to discuss what capital may be needed by agencies moving forward.

[213] Canada submits it has been and continues to approve requests for building repairs. As of January 11, 2019, Canada has approved \$9.4 million in claims for building repairs. In Canada's reply from May 2019, relying on the affidavit of Joanne Wilkinson dated April 16, 2019, at para. 49, this number had increased to \$15.4 million. Without context this number may look impressive. However, numbers alone without the full context do not satisfy the Tribunal's need to ensure systemic discrimination, including underfunding, is eliminated. Canada has adopted an approach of announcing funding and publicly stating that it is complying with the Tribunal's orders when this is not always the case (see 2018 CHRT 4 at paras. 106-107, 135-158). Moreover, allocating funds without calculating needs first is not sound financial practice. Furthermore, past financial trends emanating from the FNCFS Program informing Treasury Board were found to be discriminatory. In other words, the Panel found that the real needs of children and families and FNCFS Agencies were not fully taken into account, the FNCFS Program funding formulas informing the FNCFS Program authorities were flawed causing adverse impacts to children and families, and FNCFS Agencies amounting to harm. Provincial and territorial standards were not met even if this was a FNCFS Program requirement. Culturally appropriate services were not fully provided. Other social programs supposedly addressed gaps, yet this was also found to be inaccurate given the lack of coordination between departments. It is also reasonable to believe that if ISC did better in other social programs, it would have used this productive method to improve the FNCFS Program and efficiently address the systemic discrimination it was ordered to remedy. Consequently, relying on past financial trends that amount to discrimination is not and should not be the only way to inform Treasury Board and Budget allocations. Therefore, the Panel rejects Canada's argument that funding at actual costs does not work well with government funding that relies on

certainty which is not provided by a direction to fund actual costs. This is precisely why the Panel ordered Canada to determine the real service needs of children and families so as to inform non-discriminatory funding moving forward and ordered Canada to create new funding baselines that have no built-in discrimination and respect substantive equality. This is the reasoning behind actual costs orders. A paradigm shift is needed to balance the need for certainty for government to effectively manage public funds with avoiding the perpetuation of systemic discrimination by basing this certainty on past trends that were significantly flawed.

[214] One approach to such a paradigm shift was suggested at the August 2, 2018 CCCW meeting:

- a. Dr. Blackstock stated that the Discussion Paper failed to address the major issue related to the need for new space for increased staff and prevention programs, and that a firm commitment that authorities would be extended to cover major capital projects was required.
- b. Ms. Isaak advised that ISC required a full grasp of FNCFS Agency capital needs in order to build the best case for adding major capital authorities.
- c. Dr. Blackstock reiterated her concerns that ISC's requirement of a "full grasp" of FNCFS Agency capital needs would forestall projects that were already ready to proceed.

(Tab 9 of the Caring Society's motion record dated February 4, 2019).

[215] The Panel believes ISC's proposed approach at the August 2, 2018 CCCW meeting is an appropriate way to proceed as long as it is not delayed for years for FNCFS Agencies and First Nations communities that are ready to proceed now. Building funding costs were ordered in 2016. The Panel agreed in 2018 with the proposal for timely consultation and discussions. However, the proposed deadline for the Panel's consideration was not 2022 or even later. Nor was a policy contemplated that would similarly delay immediate needs identified by a FNCFS Agency or community in order to build a case for Treasury Board.

[216] Further, the Panel rejects Canada's scope and jurisdiction arguments given that Canada failed to apply the appropriate case-specific and human rights lens and for failing to account for the very core of the claim, the systemic discrimination found and ordered to cease and desist in this case is not conditional to making a case for Treasury Board nor does it allow Canada to hide behind this approval process to avoid the Tribunal's orders. A section 15 or 16 of the *CHRA* defence was not advanced in this case (see *Merit Decision* at para. 27). While the Panel does not deny the need to respect the *Financial Administration Act*, the Treasury board process and discretionary decisions from the executive should be harmonized with Canada's human rights responsibilities and liability.

[217] This being said and as it will be demonstrated below, ISC officials were in active discussions in order to improve their services and did make some significant changes to their authorities to reflect the voiced needs of FNCFS Agencies and communities.

[218] At the September 5, 2018 CCCW meeting:

- a. Dr. Gideon advised that while the First Nations Inuit Health Branch has authority for major capital projects on reserve, those authorities have been narrowed over the years to be specific to health centres.
- b. Ms. Isaak advised that ISC was determining which FNCFS Agencies operate in owned space as opposed to leased space.

c. Ms. Isaak advised that in 2007, Treasury Board rescinded the general requirement that minor capital projects be limited to under \$1.5 million and stated that each program must create their respective authority. The former INAC simply adopted the \$1.5 million threshold for minor capital projects, with some programs having increased it. All parties agreed that the \$1.5 million threshold was insufficient for actual needs for new space.

d. The Caring Society suggested applying an inflation adjustment to the minor capital threshold adopted following the change to the Treasury Board directive in order to restore lost purchasing power.

e. Ms. Isaak raised the possibility of setting an assessment process to ascertain which FNCFS Agencies require significant and imminent work, as well as a capital needs assessment of all FNCFS Agencies to be performed to have a better understanding and comprehensive picture of current and projected costs.

[219] On October 1, 2018, the Caring Society provided feedback to ISC regarding its Capital Options Discussion Paper (Tab 2).

[220] The Panel notes the discussion paper mentions under Eligible Expenses:

- To date based on IFSD and discussions with agencies, new Terms and Conditions could include the purchase, construction or development of capital needed to support program service delivery to keep children out of care and with their families in their communities (e.g. Anishinaabe Child & Family Services new building due to the community being displaced).

[221] At the October 23, 2018 CCCW meeting:

a. Canada advised that the threshold for capital projects under the Terms and Conditions had been increased from \$1.5 million to \$2.5 million to account for inflation, and that the Terms and Conditions had eliminated a reference to major capital projects as opposed to minor capital projects.

b. The increase of the capital threshold from \$1.5 million to \$2.5 million would be accompanied by a directive on capital, so that further changes to the threshold would not require a Treasury Board process. The draft directive on capital would be provided to the CCCW for review.

c. Chiefs of Ontario identified that the August 1, 2018 Discussion Paper regarding capital options was only directed to FNCFS Agencies, which excluded communities that wanted to deliver prevention services themselves, as well as communities with band representative programs.

[222] On October 30, 2018, Ms. Wilkinson (ISC ADM of ESDPP) wrote to Dr. Blackstock explaining the specific information that ISC requires in order to move forward on capital requirements (Tab 3)

[223] At the November 19, 2018 CCCW Meeting:

a. ISC provided a cost estimate development for Jordan's Principle Renewal table that identified \$38.4 million in funds allocated to infrastructure (Tab 4)

[224] At the December 11, 2018 CCCW Meeting:

a. Ms. Wilkinson advised that a communique to FNCFS Agencies regarding the update to the Terms and Conditions on the matter of capital was under development and that a draft would be circulated to the CCCW for comment.

[225] On December 15, 2018, IFSD provided its final report, which concluded that:

- a. Nearly 60% of FNCFS Agencies indicated a need for capital repair and investment;
- b. FNCFS Agency Information Technology needs are funded on average at 1.6% of the FNCFS Agency's budget, which is severely underfunded when compared to the industry standard of approximately 5-6%;
- c. There is a need for a one-time capital investment of \$116 million to \$175 million for FNCFS Agency headquarters facilities, with recommended further budgeting of 2% annual recapitalization rate, for FNCFS Agency headquarters facilities; and
- d. Across the FNCFS Program, pursuant to industry standards, the annual Information Technology expenditure should be \$65 million to \$78 million.

[226] On January 16, 2019, Ms. Wilkinson advised the parties that the FNCFS Program Terms and Conditions would not contain a cap or limit on capital funding, and that the forthcoming directive on capital would set a limit of \$2.5 million for capital infrastructure projects that are outside of the projects that can be claimed through the actuals process.

[227] On January 18, 2019, Ms. Wilkinson provided the parties with the FNCFS Program Terms and Conditions that were approved in December 2018. The Terms and Conditions list "Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services" as an "eligible expenditure" for FNCFS Agencies. On January 21, 2019, an email was sent to all FNCFS agencies noting the updated First Nations Child and Family Services Terms and Conditions, now in effect. A copy of the Terms and Conditions are attached to Ms. Johanne Wilkinson's affidavit as Exhibit 9. This information on Terms and Conditions is also mentioned as part of Canada's reply submissions dated May 30, 2019 and in Ms. Lorri Warner's affidavit dated Marc 4, 2020 at exhibit 6 B.

[228] In her affidavit, dated April 16, 2019, Ms. Joanne Wilkinson at para. 10 (i), mentioned the email exchanges and discussions at the CCCW:

Canada acknowledges the comprehensive survey work undertaken by IFSD with First Nations Child and Family Services agencies across the country. The report is a good starting point for providing valuable information on agencies' needs and key gaps, and is a helpful piece of research to be considered in moving towards a new funding methodology. However, it did not include a full analysis of existing program funding as it only focuses on 2017-2018 financial information of agencies. For example, Budget 2018 investments and actuals are not included in the analysis nor are there any comparisons with other systems/models. The report also did not propose options for a new funding methodology or a funding approach. More work is needed to reflect the impacts of Budget 2018 investments and the payment of actuals for First Nation agencies, and to ensure a comprehensive approach to developing a new funding methodology.

[229] Insofar as Canada relies on Ms. Wilkinson's affidavit to support the need for more work before a new funding methodology is developed, the Panel agrees. However, it does not support refusing to fully fund ready to proceed purchase or building projects under the FNCFS Program. The Panel agrees more work was needed and this informs the reason why an IFSD phase 2 report was initiated. An email from Ms. Wilkinson to Andrea Auger found at tab 9 of the Caring Society's motion material support the idea that Canada relies on the IFSD studies to develop a new funding methodology and update its funding. Moreover, the purpose identified in the IFSD final report is to respond to the CHRT ruling to define and cost need in First Nations Child and Families services.

[230] Canada filed a letter with the Tribunal on October 11, 2018 indicating that on April 9, 2018, Canada outlined IFSD's research which would involve the following four phases/timelines:

- Phase 1, Needs Assessments: analyze existing needs assessments by April 15, 2018 and develop an indicators table to inform needs analysis by July 31, 2018; ·
- Phase 2, Baseline Definition and Gap Analysis: develop a baseline of agency resource inputs, define a detailed costing procedure, and identify missing data by September 30, 2018;
- Phase 3, Cost Analysis: undertake a cost analysis for each type of agency by November 2, 2018; and
- Phase 4, Final Reports: develop a final report and make recommendations to support a new funding approach: **November 15, 2018.**

[231] As of September 2018, agency participation rate increased to 75%. This letter attached Phase 1 and 2 of the IFSD report as Appendixes A and B.

[232] The IFSD report indicates that 3 FNCFS Agencies required a new building. The IFSD report mentions the need for recognition of differences: Agencies come in different sizes, with different mandates, capacities, and experiences. New funding architectures should meet agencies where they are now and support them as they meet their future goals. There is no single approach that can best support agencies (no cookie cutter approach). This is consistent with the Tribunal's previous reasons.

[233] On September 11, 2020 the AFN filed the final IFSD report.

[234] The Panel accepts further analysis is needed for long-term relief and for the development of a new funding methodology. However, this analysis must be completed in a timely manner and not take years. Canada's actions must address the urgency of the humanitarian crisis identified in 2018. For clarity, this does not mean that FNCFS Agencies and communities that have completed all legal and non-discriminatory policy requirements and are ready to proceed and indicate as much must wait for this phase 3 report.

[235] The Panel also understands the need for an open and transparent contracting process, given the scale of funding and that this is an unanticipated new phase in the research (Affidavit of Johanne Wilkinson dated April 15, 2019, at para. 10).

[236] Canada is also moving forward on long-term reform initiatives such as the enacted legislation, an *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, for enabling First Nations to exercise jurisdiction over child and family services. Canada submits this is a critical element of the Government of Canada's six points of action to address the overrepresentation of Indigenous children and youth in care in Canada, (Affidavit of Johanne Wilkinson dated April 15, 2019, at para. 63).

[237] This ruling and orders are necessary given that the *Act respecting First Nations, Inuit and Métis children, youth and families* only refers to funding in the Preamble and does not guarantee adequate funding according to specific needs of Nations. While the legislation refers to substantive equality, no link is made between funding according to need and substantive equality in the obligations. The Panel will possibly revisit this with the parties' assistance as part of the long-term phase and reform implementation. This being said, the Panel believes that if sustainable and adequate funding is provided to First Nations who decide to exercise jurisdiction over child and family services, it is the best possible outcome for those children, families and Nations. This option is included in 2018 CHRT 4 orders.

[238] Six points of action are:

1. Continuing the work to fully implement all orders of the Canadian Human Rights Tribunal, and reforming child and family services including moving to a flexible funding model

2. Shifting the programming focus to prevention and early intervention
3. Supporting communities to exercise jurisdiction and explore the potential for co-developed federal child and family services legislation
4. Accelerating the work of trilateral and technical tables that are in place across the country
5. Supporting Inuit and Métis Nation leadership to advance culturally-appropriate reform
6. Developing a data and reporting strategy with provinces, territories and Indigenous partners.

[239] Progress on point of action 1 as described by Canada and retrieved in August 2021 and reviewed on October 6, 2021:

Canada has begun implementing the orders of the Canadian Human Rights Tribunal (CHRT) issued on February 1, 2018. Canada has:

- been funding First Nations Child and Family Services Agencies for their actual costs in the areas ordered by the CHRT, as part of Canada's ongoing efforts to provide agencies with the funding they need to meet the best interests and needs of First Nations children and families, retroactive to January 2016
- Worked with the Assembly of First Nations to contract the Institute for Fiscal Studies and Democracy (IFSD) at the University of Ottawa to analyze FNCFS agency needs to inform the development of an alternative funding system
- been providing funding to stakeholders in Ontario for the reimbursement of costs related to mental health services for First Nations children and youth retroactive to January 2016
- been providing funding to bands and Ontario for the reimbursement of costs related to the provision of Band Representative Services retroactive to January 2016

Canada has formed a Consultation Committee on Child Welfare (CCCW) Reform. This committee is co-chaired by the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada and is comprised of senior assistants and assistant deputy ministers from Indigenous Services Canada (ISC) and all parties of the tribunal. Early accomplishments of this committee include the development of a protocol to govern consultations between Canada and the CHRT complainants and interested parties with a goal towards eliminating discrimination against First Nations children.

Canada is also working with the Ontario Technical Table on Child and Family Well-Being on an Ontario special study, and with Nishnawbe Aski Nation to develop a remoteness quotient for First Nations delegated agencies in Northern Ontario.

Since 2016, the Government has made available \$679.9 million to Jordan's Principle to help with health, social and education services that are needed right away. Examples of this include mental health supports, medical equipment, speech therapy, educational supports and more.

As of June 19, 2018, the eligibility criteria for Jordan's Principle have been expanded to include non-status Indigenous children ordinarily resident on-reserve. This expansion is an important step towards improving the well-being of Indigenous children, their families and communities.

In 2018, a 24/7 national call centre was established for Jordan's Principle which provides another channel for First Nations children to access the products, services and supports they need. As of November 26, 2018, a total of 2,809 calls have been received, resulting in 849 requests for services.

ISC supported the September 2018 Assembly of First Nations Jordan's Principle Summit in Winnipeg, Manitoba. The summit provided First Nations leadership, families and community members the opportunity to join together with health practitioners and service providers, among others, to share lessons learned and promising practices for the implementation of Jordan's Principle to date, as well as to discuss shared priorities and their vision for the future of Jordan's Principle.

In addition to progress made on Jordan's Principle and reforming First Nations child and family services, on September 10, 2018, Inuit Tapiriit Kanatami and ISC announced that the immediate health, social and education needs of Inuit children would be responded to and addressed through an Inuit-specific Child First Initiative. Meanwhile, the Government of Canada continues to work with Inuit partners, provinces and territories to develop a long-term Inuit-specific approach to better address the unique health, social and education needs of Inuit children.

[240] Canada submits it would be inappropriate and unreasonable for the Tribunal to intervene at this stage. Such an intervention would represent a departure from the Tribunal's statutory role as an adjudicator of a specific complaint. The Panel disagrees with this argument given that capital infrastructure that supports the delivery of FNCFS services including buildings has always formed part of the claim and the Tribunal's findings. Furthermore, at the hearing on the merits, the Panel heard specific evidence on some agencies' service delivery challenges and their desire to save their surpluses to have enough funds to purchase a building that would be appropriate. Moreover, adequate funding for purchase or construction of buildings that support the delivery of services was not included in the FNCFS Program authorities.

[241] Moreover, the Panel ensures it does not infringe on any First Nations inherent rights by requesting Canada to respect their wishes. In other words, the Tribunal does not impose anything on a First Nation. Rather, it emphasizes that when a First Nation has voiced that they need funding to purchase or build space (buildings) to offer services to children under the FNCFS Program or Jordan's Principle, Canada should honor this request and not respond 'we need to consult each and every First Nation before we grant funding for the purchase or construction of capital assets that support the delivery of FNCFS services to a specific First Nation and or agency working with the consent of a First Nation'.

[242] Furthermore, at paragraphs 8 and 9 of Canada's May 30, 2019 submissions confirm the *ad hoc* nature of the *status quo* for requests for the purchase or construction of capital assets that support the delivery of FNCFS services within the FNCFS Program. Where capital requests are not tied to the Tribunal's February 1, 2018 orders regarding funding at actuals, capital requests may only be funded where FNCFS Agencies have surpluses, sufficient remoteness/ramp-up funding from Budget 2018, or where a capital project is approved through the Community Well-being and Jurisdiction Initiatives funding stream (see cross-examination of Joanne Wilkinson, dated May 14, 2019 at pp 76-79).

[243] Paragraphs 10-12 and 16-17 of Canada's May 30, 2019 submissions demonstrate that Canada has no concrete plan to address FNCFS Agencies' purchase or construction needs in the near-term. The submission is similar regarding purchase or construction needs in the near-term for Jordan's Principle which will be discussed further below.

[244] The Panel agrees with the Caring Society's following conclusions that Canada cites the need for further "discussions" on long-term capital needs and for leveraging expertise outside of the FNCFS Program (See Canada's May 30, 2019 submission at paragraphs 6 and 10). This is the same vague response that has been given over and over again since the Caring Society raised the matter of Major Capital at the June 22, 2018 CCCW meeting. In fact, this approach is consistent with Canada's overall approach to capital needs within the FNCFS Program in the 19 years since the National Policy Review recommended action. In 2000, the Joint National Policy Review ("NPR"), concluded as Recommendation #13 that:

DIAND and First Nations need to identify capital requirements for FNCFS agencies with a goal to develop a creative approach to finance First Nation child and family facilities that will enhance holistic service delivery at the community level. (See Summary statement regarding major capital at para 3, see Tab 9 of the Caring Society Motion Record dated February 4, 2019).

[245] Further, the Panel accepted the NPR's report and findings in the *Merit Decision*.

[246] Yet, the First Nations parties to this proceeding have not been calling for more "discussions" with Canada as a precursor to Canada funding the purchase or construction of capital assets that support the delivery of FNCFS services. This is reflective of what has happened in this case and forms part of the discrimination identified in the *Merit Decision* (see *Merit Decision* at para. 157).

[247] The Caring Society is concerned that, without specific orders, progress on meeting FNCFS Agencies' Major Capital needs (which have not been addressed within the FNCFS Program since 1991 and which reflect an area for immediate relief) will continue to be mired in "discussions" and "requests for information". More importantly it imperils the effectiveness of the Tribunal's orders related to the provision of prevention services to communities as absent suitable buildings to house prevention services, these services will be difficult if not impossible to provide. The Panel finds this is precisely the heart of the issue here in need of the Tribunal's intervention to eliminate the discrimination identified in the *Merit Decision* and subsequent rulings absent any consent order proposed by the parties on this point.

[248] The Caring Society submits that given Canada's slow progress on implementing immediate relief measures after the January 26, 2016 decision, progress on the purchase or construction of capital assets that support the delivery of FNCFS services ought to be made alongside progress on long-term reform, and not be required for long-term reform to be fully implemented (see Tab 1 to the Summary statement regarding Major Capital, see Tab 9 of the Caring Society Motion Record dated February 4, 2019).

[249] The Panel shares this concern. The orders proposed by the Caring Society are broadly worded and could be clarified with the parties' assistance. They speak to funding for FNCFS Agencies for feasibility studies, for preparatory work for projects, and for the projects themselves. They do not state who is to be consulted in conducting feasibility work, what sources of funding are to be used to carry out projects, or how projects are to be administered. As such, the Panel agrees that, contrary to Canada's arguments at paragraphs 5, 10-17, 19, 24 and 32 of its May 30, 2019 submissions, nothing in the orders sought by the Caring Society requires existing programs or First Nations decision-making to be bypassed.

[250] Further, when the Panel made general orders to cease the discrimination, leaving some flexibility to Canada or allowed more time for discussions, the history in this case shows that there was insufficient movement to eliminate the systemic discrimination. One example is the FNCFS Program capital assets not forming part of the orders in February 2018 and the need to address this now with orders specific to address this lack of movement.

[251] The Panel also agrees with the Caring Society that it is unclear why Canada's submissions assume that feasibility studies would not take First Nations community priorities and needs into account, in fact that would be one of the main goals or why they allege that the capital envelope

requested by the Caring Society would operate outside of the Community Infrastructure Branch. Moreover, the Tribunal does not intend to impose its own estimation of community needs. On the contrary, the Panel has always requested needs-based and community-informed data to inform reform. This allows for the realization of tailored projects responsive to specific needs of children and families when the Nations are ready instead of a one-size-fits-all top-down approach or a 'wait till all Nations have been considered' approach causing unnecessary delays for those who are ready to move ahead now.

[252] Since the motion on the purchase or construction of capital assets that support the delivery of FNCFS services was brought before the Tribunal, Canada indicated that on September 5, 2018, the CCCW determined a gap existed in the infrastructure authorities, which could be addressed by amending the Terms and Conditions. Canada has since amended the FNCFS Program's Terms and Conditions to include the purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS for First Nations children. Moreover, the purchase or construction of capital assets (e.g. buildings) is now included as an eligible expenditure for FNCFS Agencies.

[253] In addition, the Terms and Conditions also include infrastructure purchase, maintenance and renovations as eligible expenditures under the Community Well-Being and Jurisdiction Initiative. Furthermore, Canada has also advised of the introduction of a new funding stream within FNCFS for Community Well-being and Jurisdiction Initiatives, which is designed to enable projects of up to five years in duration to expand the availability of prevention and well-being initiatives that are responsive to community needs, and to support First Nations in developing and implementing jurisdictional models.

[254] This is a positive step, furthermore, the Panel has no issue with Canada's argument that it should be given time to follow the democratic structures in place to ensure the accountability of public funds. However, time must be balanced with First Nations children's human rights and the obligation to eliminate systemic discrimination. Further, three and a half years have now passed since the 2018 ruling and no concrete plan has been presented to the parties on this issue. The parties did not agree on this issue and required adjudication of the matter. The Panel agrees with Canada that not every disagreement is discrimination. However, especially given the history in this case, there is a need to look at the root cause of the disagreement itself and assess if it is a matter of difference of opinion or approach or if it is linked to the discriminatory practices found in this case that are insufficiently remedied.

[255] The Caring Society, the AFN, the COO and the NAN recently confirmed the need for further orders. Moreover, adverse impacts linked to this issue were identified in the 2016 *Merit Decision* and subsequent rulings. The Tribunal agrees with Canada that finality is needed. However, the Panel reiterates that this is appropriate once long-term reform has been settled or ruled upon, hopefully in the near future. The Panel's statutory role is to ensure the discrimination found is eliminated and does not reoccur. The Panel believes in keeping with its approach in this case (see 2018 CHRT 4 at para. 303) that a further specific order is required to ensure the systemic discrimination is eliminated in a timely fashion.

[256] While this motion's proceedings were ongoing, the parties requested the Tribunal to issue a consent order concerning communities that are not served by a FNCFS Agency and instead receive child and family services through a provincial or territorial agency or service provider. While the FNCFS Agencies are directly funded by ISC for the services they deliver, the provincial or territorial agencies and service providers receive their funding from the provincial government, who in turn seeks reimbursement from the federal government. The Caring Society requested an order that children and families served by these provincial and territorial agencies, rather than a FNCFS agency, were within the scope of the Tribunal's remedial orders. Accordingly, the Panel released the 2021 CHRT 12 consent order on the Caring Society's motion. The orders in this ruling take these communities into

consideration. Additionally, unlike other regions, the First Nations communities in Ontario have requested to receive funding for the support and delivery of FNCFS directly. Canada has agreed with this approach. This also was considered in the crafting of the orders.

[257] Since the Panel released its letter-decision, the Tribunal has received new information concerning the implementation of the plan referred to in the 2021 CHRT 12 consent order. While this was not before the Panel to inform its ruling in August 2021, this information indicates that capital infrastructure funds are included in the funding plan for communities who do not have FNCFS Agencies. As the Panel is providing reasons for its previous decision, it did not request additional submissions from the parties on this issue. Therefore, it does not make a finding as part of this ruling. This being said, the Panel notes that this new implementation plan may be responsive to the Panel's orders in 2021 CHRT 12 and this ruling.

[258] Overall, Canada submits it is in substantial compliance with all existing orders. A substantive amount of work has been completed to achieve compliance and significant resources have been devoted to satisfying the orders now, retroactively, and moving forward (Affidavit of Johanne Wilkinson dated April 15, 2019, at para. 62).

[259] Canada also adds that the Tribunal's adjudication of this matter has had a transformative impact on the lives of Indigenous children in Canada (Affidavit of Johanne Wilkinson dated April 15, 2019, at para. 65). The Panel appreciates this acknowledgment. While much has been done, more work remains to be done for Canada to be sufficiently responsive in eliminating the systemic discrimination found. In 2018, the Panel considered its ruling closed the immediate relief phase unless its orders are not implemented or more adjustments need to be made to its orders as the quality of information increases. The Panel stated it can now move on to the issue of compensation and long-term relief (see 2018 CHRT 4 at para. 385).

[260] Therefore, the Panel finds that a further clarification order is necessary to ensure the purchase and construction of capital assets that support the delivery of FNCFS on-reserve including prevention services are appropriately funded. Furthermore, feasibility studies and needs assessments may assist as a first step in that regard.

Orders for purchase and/or construction of capital assets that support the delivery of FNCFS on-reserve including prevention services.

Order

Pursuant to section 53(2) of the *CHRA* the Tribunal orders Canada to:

Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of this order advising them on how to access this Capital asset funding. Canada will post this information on the ISC website.

For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of this order. Canada shall post this information on the ISC website.

The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of FNCFS services on-reserve. This also includes studies for First Nations that also operate under the Federal FNCFS Program off-reserve such as Ontario.

*The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.

C. Capital to Support the Implementation of Jordan's Principle Analysis

[261] The Tribunal set out its initial reasoning in the letter-decision, which is reproduced as follows:

Funding for Capital assets for the Purchase and/or construction of capital assets that support the delivery of Jordan's Principle services

Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of Jordan's Principle services

Jordan's Principle services are part of this claim and have been the subject of numerous orders by the Tribunal in these proceedings. Divorcing the services from provincial requirements for safe, confidential spaces to offer the services would amount to discrimination. It would also perpetuate gaps, denials and delays in hindering the delivery many services that can only be offered indoors. In other words, denying funding for safe, confidential and culturally appropriate spaces respecting provincial requirements would be the equivalent of refusing services otherwise allowed under Jordan's Principle.

[262] As promised, the Tribunal is now providing more detailed reasons.

[89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[90] The Panel's rulings referred to government services affecting First Nations children including: Federal-Provincial; Federal-Federal; and Federal-Territorial. While the Panel has no jurisdiction over Provinces and Territories, it does have jurisdiction over Canada's Jordan's Principle involvement in all Federal services offered to First Nations children.

[91] Additionally, Jordan's Principle is a broader aspect of the complaint in front of the Tribunal where the Panel found, in the *Merit Decision*, that while Jordan's Principle is not a strict child welfare concept, it is intertwined with child welfare (see *Merit Decision* at para. 362). Therefore, the Panel's general reasoning on child welfare is also relevant to Jordan's Principle cases. However, it does not provide the full answer. For Jordan's Principle, the Panel issued additional rulings and orders that form part of the analysis.

[92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4).

[93] Moreover,

[t]he discrimination found in the [Merit] *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,

(2017 CHRT 14 at para. 73).

(2020 CHRT 20 at paras. 89-93)

[263] The Commission summarizes the current state of funding for the purchase or construction of capital assets. It notes that the Terms and Conditions of the FNCFS Program identify that eligible expenses include the purchase or construction of capital assets that support the delivery of FNCFS services whether provided by FNCFS Agencies or others such as First Nations delivering programs. The IFSD report includes an assessment and quantification of capital needs for FNCFS Agencies. Canada has not conducted a specific survey or assessment on the capital needs of First Nations in Ontario with respect to prevention or Band Representative Services. Jordan's Principle funding has not contained authorizations for capital spending to provide space to deliver the funded services.

[264] The Commission submits that the Tribunal's previous decisions have already identified the need for capital funding to ensure the delivery of appropriate services. The Panel agrees with the Commission's characterization of the Tribunal's previous decisions referred to above.

[265] Furthermore, the Commission indicates that Canada has taken steps with the IFSD needs assessment, amending the Terms and Conditions of the FNCFS Program and discussing capital spending with the parties while paying the actual costs of required repairs on an interim basis. Nonetheless, considerable time has passed since the Tribunal first identified this issue.

[266] The Caring Society submits in its 2019 submissions that, as outlined in the statement regarding capital dated January 21, 2019 and attached to this submission in Appendix A, the parties have been discussing the matter of the purchase or construction of capital assets that support the delivery of FNCFS services for many months. In addition to the deficiencies noted in the Tribunal's *Merit Decision*, major capital pressures go hand-in-hand with the necessary expansion of services available pursuant to Jordan's Principle (particularly through group requests), and increased intake, assessment and

prevention services, Band Representative services, etc. Indeed, increased funding for new staff and new programs cannot be effective if there is not adequate space to house programs and staff in ways that facilitate effective culturally-sensitive service delivery. Ms. Isaak, Canada's affiant agreed there was a possibility that some prevention services could not be rendered if there were a shortage of adequate buildings (see Cross-examination of Ms. Paula Isaak, October 30, 2018 at p. 86, lines 5-10, Tab 41 of the Record of documents).

[267] Moreover, the Caring Society submits that contrary to Canada's argument at paragraph 7 of its submission, the Caring Society is not seeking an order directing the allocation of funds for capital expenditures outside the FNCFS Program and Jordan's Principle. Rather, the Caring Society is seeking an order providing for funding the ancillary costs of the purchase or construction of capital assets of increased programming that accompanies the Tribunal's existing orders.

[268] Moreover, the Caring Society submits that following discussions at the CCCW, the purchase or construction of capital assets has been added as an eligible expenditure pursuant to the FNCFS Program Terms and Conditions. Canada has recognized infrastructure as part of its costing exercise for Jordan's Principle. See Caring Society's Summary statement regarding capital at Tab 4 "ISC Jordan's Principle Cost Estimate Development". This document is undated and the author is unknown but it appears to be Canada's document. It was filed in 2019 as part of the Caring Society's motion record. While this document has little probative value given the lack of context and detail surrounding the term infrastructure, the Panel finds it does support that Canada is turning its mind to the issue. The cost estimate indicates \$38.4 million for infrastructure. Given that Jordan's Principle applies nationally, this cost estimate may very well be insufficient. Real needs must inform the funding and not the other way around. Shift is needed.

[269] However, the Panel believes at this time, it is necessary to act to ensure that needed services to First Nations children and families are met. At the time of this ruling, according to Canada's ISC website, over **1.15 million** services have been approved under Jordan's Principle since the Tribunal's 2016 rulings. Dr. Gideon testified on May 7, 2019 that the large increase in Jordan's Principle approved cases for broader services than just child and family services significantly impacted their team in different areas. The Panel appreciates this and believes that an adjustment period was entirely reasonable.

[270] On this point, the Panel emphasizes the findings of the Tribunal on Jordan's Principle, reproduced above, and reiterates that Jordan's Principle is not a strict child and family services mechanism. It is much broader, covering all services to First Nations children to respond to substantive equality. This is exemplified by the approved cases that are not just child and family services. The Panel is less concerned with the specific amount of funding or on the choice of policy that Canada is choosing. The Panel is focused on ensuring that the approved services are not delayed or denied for lack of adequate buildings to offer those services. Again, this cannot be approached in a piecemeal fashion separating services from environments in which to offer those services. For clarity, the Panel is not referring to the construction of large infrastructure such as hospitals or roads on reserve.

[271] However, despite two and a half years having passed since Dr. Gideon's testimony, Canada has not provided a concrete commitment to meet these building needs or a plan to accomplish it.

[272] The Caring Society is concerned that, without specific orders, progress on meeting FNCFS Agencies' needs for the purchase or construction of capital assets that support the delivery of FNCFS services (which have not been addressed within the FNCFS Program since 1991 and which reflect an area for immediate relief) will continue to be mired in "discussions" and "requests for information". More importantly it imperils the effectiveness of the Tribunal's orders related to the provision of prevention services to communities as absent suitable buildings to house prevention services, these services will be difficult if not impossible to provide. Given Canada's slow progress on implementing

immediate relief measures after the January 26, 2016 decision, progress on the purchase or construction of capital assets ought to be made alongside progress on long-term reform, and not be required for long-term reform to be fully implemented.

[273] The Panel believes that an order including a requirement for adequate buildings for Jordan's Principle may bring clarity and assist ISC in that regard. There is also a necessity for Canada to adequately consult the parties and First Nations and prepare a plan in a reasonable timeframe with specific targets and deadlines to secure adequate implementation of Jordan's Principle orders and services.

[274] The majority of Canada's general arguments on the purchase or construction of capital assets focused on the FNCFS Program without separately addressing Jordan's Principle. However, it is clear from the Caring Society's and the AFN's submissions that the issue of the purchase or construction of capital assets to offer Jordan's Principle services is part of this motion. The Commission understood this as well and provided submissions to that effect. The Commission submits that Jordan's Principle funding has not contained authorizations for capital spending to provide space to deliver the funded services.

[275] Most of Canada's arguments have been addressed in our reasons above, which apply equally here. Some of the Panel's reasons discussing the evidence in this section are specific to Jordan's Principle.

[276] Jordan's Principle services are part of this claim and have been the subject of numerous orders by the Tribunal in these proceedings. Divorcing the services from provincial requirements for safe, confidential spaces to offer the services would not remedy the systemic discrimination found, it would perpetuate it. It would also perpetuate gaps, denials and delays that hinder the delivery of many services that can only be offered indoors. In other words, denying funding for safe, confidential and culturally appropriate spaces respecting provincial requirements would be the equivalent of refusing services otherwise allowed under Jordan's Principle.

[277] As early as 2016, in the *Merit Decision*, the Tribunal found that interdepartmental disputes existed between the federal departments offering programs to First Nations children and families. Those disputes are one of the best examples of the lack of coordination that was found between federal programs and a focus on financial considerations rather than on substantive equality considering the real needs of the children and families it served.

[278] Moreover, the Tribunal previously found that reallocating from housing to fund the FNCFS Program had a negative impact for First Nations children and families. Again, this is illustrative of the disconnect occurring when Canada chooses to spread its programs into departments without having the full picture of the real needs of the communities they serve. The Tribunal found that this way of functioning created gaps, delays and denials for First Nations children and families amounting to systemic discrimination causing harms and adverse impacts. Jordan's Principle is not a program. Jordan's Principle is not confined to the FNCFS Program. It permeates other federal programs and provincial and territorial programs as well. It also ensures First Nations children's unique constitutional position and unique history is taken into account in all services concerning them. No other children in Canada face this jurisdictional ordeal. Only First Nations, Inuit and Métis children experience this because of their race or national origin. In this case we are focusing on First Nations children.

[279] The argument of looking into other programs to delay or deny funding for building purchase or construction does not stand here. Canada ought to look at Nation specific building needs and requests at the time they are made not the time all First Nations have been consulted and have provided their views as this is unfair to First Nations that have pressing needs and are ready to proceed.

[280] For Jordan's Principle, Canada ought to provide a holistic view as to how it will respond to those needs and eliminate barriers, especially if those barriers arise from the administrative divide of federal programs. If building purchase or construction can accommodate social services under the FNCFS

Program, Jordan's Principle services and early childhood intervention and others, this is ideal. This should only be done when it is possible. In the end, the FNCFS Agencies and First Nations communities decide on their plan.

[281] Canada was ordered to cease and desist its discriminatory practices including this one. Multiple arguments pointing to other federal programs that are specialized in community infrastructure or ongoing discussions does not convince the Tribunal that real needs of First Nations children and families are met.

[282] The Tribunal is less concerned on how Canada organizes itself or its departments, the policies or amount of funding it chooses. The Tribunal agrees with Canada's submissions that it has to provide flexibility in Canada's choices. However, when the Tribunal finds the effect of those choices is systemic discrimination the Tribunal is mandated by parliament to not only identify it but to also eliminate it and prevent it from reoccurring.

[283] The Panel agrees with Canada that some disagreement between parties does not make Canada non-compliant with the Tribunal's orders. However, some disagreements that occur as a result of Canada's narrow interpretation of the Tribunal's orders perpetuate systemic discrimination.

[284] The evidence and other information establish that Canada's current approach has not remedied the discrimination found and is not sufficiently responsive to the Tribunal's orders to fix that discrimination, especially: cease and desist, immediate relief, substantive equality and Jordan's Principle orders.

[285] The evidence establishes on a balance of probabilities that ISC is focused on discussions with no specific deadline in order to make a case for Canada to approve funding in terms of real building needs for the FNCFS Program, prevention services and Jordan's Principle. Canada's affiants and arguments support this finding:

So, understanding the full landscape of the capital needs was something that I had indicated would be important for the department to be able to make a submission around capital needs.

(October 30, 2018, Cross-examinations of Ms. Isaak at p. 57 line 5- 8.)

Ms. Clarke for the Caring Society:

Has there been efforts on the part of the department to seek out those communities who are in desperate need of buildings to see whether or not those buildings are required in order to deliver prevention services?

Ms. Isaak for Canada:

So, I think just referring back to my comments before, understanding this issue was raised at the CCCW and we needed to do so more work on that, work did start a survey. I don't mean formally survey, but survey regions to find out what the state of play was in the agencies in the various regions, and I believe the department was in the process of mapping out what that was. I think any information around that I believed would be helpful to understand and build case for any capital needs.

We also understand, at least from the preliminary information, and I think there's been more from IFSD, that they have done some of that actual survey and bringing some of those facts to the ---and will bring those facts to the parties very soon, I think. So, I think the department is anxious to understand what that picture looks like in order to determine what the next steps are.

Ms. Clarke: And who do we need to build that case to?

Ms. Isaak:

The case ---would be likely it would be likely require a funding submission of some kind. A Minister would likely require---be required to take a case forward to her Cabinet colleagues. There may be other ways. I---all of those options I am ---I there are a variety of options of ways to do it, and I don't know the extent to which all options have been pursued, but that is a typical that would likely need to be taken.

(p. 87 | lines 3-24 and p. 88 | lines 1-9, at Tab 41 of the Record of Documents)

[286] Dr. Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at ISC, was cross-examined on her affidavit and testified that she was speaking for herself. She identified that infrastructure can be a barrier to the delivery of services under Jordan's Principle in a community and that they had committed about \$107 million to mental health resources.

[287] Dr. Gideon later confirmed using the term "we" that under Jordan's Principle, there continues to be no funding for requests for the purchase or construction of capital assets for Jordan's Principle.

Ms. Clarke for the Caring Society: (...) And I guess I should ask that the reason you can't approve either a room expansion, or minor capital to change space around, or leasing to fund space is because you don't have the authorities in the approval given in July 2016?

Dr. Gideon: That's correct. Now, where we are building new facilities in communities, we are thinking of excuse me where we have that opportunity now, we are looking at Jordan's Principle in terms of their business planning, or needs assessment. We would encourage them to do that, because it becomes part of the services that they are delivering.

(see May 7, 2019 cross-examination of Valerie Gideon at pp 66-71).

[288] While this is a positive step, more steps are required to eliminate the systemic discrimination and ensure that approved services are also delivered in adequate spaces. Given program authorities' central role in federal programs, the Panel finds the lack of authorities for purchase or construction of capital assets to support the delivery of services under Jordan's Principle to be problematic.

[289] For example, despite ongoing efforts, Dr. Gideon was unsuccessful in obtaining approval from the Privy Council Office to share the decision made by the Prime Minister and indicated that efforts will persist to ensure Jordan's Principle authorities are truly reflective of the orders, (see Affidavit of Lorri Warner dated March 4, 2020, Consultation Committee on Child Welfare Meeting- Draft Record of decisions April 2, 2019 p. 7 of 9 found at exhibit 8).

[290] Of note, Ms. Isaak, Canada's witness acknowledged that for the purchase or construction of capital assets funding is of particular concern to the parties and required attention.

[291] According to Ms. Isaak, Canada's failure to move on this issue was a result of a lack of information regarding FNCFS Agency requirements for the purchase or construction of capital assets rather than an attempt by Canada to thwart the needs of agencies:

[...] So, I don't think the conversation's over on capital. So, I think there is more conversation about exactly those questions that may be undertaken.

My comments at the Consultation Committee were around understanding – we needed to get a full understanding of what the needs were for major capital. Across the country we were mapping – starting the process to map what the actual situation was [for] the agencies. So, whether they were owned or leased or rented. Across the country it varies.

I believe I'd also mentioned there are community capital plans that would come into the equation around building of buildings in communities. So, there would need to be some understanding of that vis-à-vis the agencies. IFSD was also doing work around needs, including capital needs. So, some preliminary information had been made available by them, as we were awaiting – and I believe that's coming up soon – a report from IFSD, which would hopefully provide some helpful information

(see October 30, 2018 cross-examination of Paula Isaak at p. 56 line 13 to p.57 line 4).

[292] The Panel believes the exercise above has commenced and ought to be done in a timely manner. This being said, the Panel understands that some FNCFS Agencies and First Nations were not ready and may need more time. The focus should not be on those needing more time but rather on those who have responded and are ready to proceed. Further, being informed that funding for the purchase and/or construction of capital assets that support the delivery of services including Jordan's Principle is available may incentivize them to signal their needs in that regard.

[293] With respect to Jordan's Principle, Canada has not provided sufficient evidence to convince the Tribunal that there is a comprehensive plan in place to adequately address the adverse discriminatory impacts identified by the Tribunal in the near future. As such, further orders are required in order to ensure that a lack of authority to address building purchase and/or construction to offer Jordan's Principle services, particularly in relation to group requests, does not result in the persistence of service gaps for First Nations children. Moreover, the lack of adequate space in which to offer services constitutes a *de facto* denial of those Jordan's Principle services.

[294] The Panel understands the benefit of combining space on reserve to offer different services to First Nations children and families under different programs and Jordan's Principle and the need to follow appropriate legal processes prior to purchase and construction. The Panel also accepts that other departments have expertise to assist in that regard and that no purchase and construction can be done without the First Nations' agreement. The Panel also does not take issue with the legal process that ISC is using to obtain new authorities and legal requirements as long as it does not create delays, gaps or denials that perpetuate the discrimination Canada was ordered to stop.

[295] None of those considerations prevent Canada from funding the purchase or construction of capital assets for those FNCFS Agencies and First Nations communities that are ready to proceed. Canada has a legal obligation to cease the systemic discrimination and to offer sufficient and sustainable funding for Jordan's Principle services including adequate space to offer those services on reserve.

[296] The issue arises when Canada is not sufficiently responsive to the systemic discrimination identified and unilaterally imposes a delay for those First Nations agencies and communities who are ready to proceed with a feasibility study or the purchase or construction of buildings to offer services to children and families under the FNCFS Program and Jordan's Principle because ISC is building a case to obtain funding and authorities.

[297] In 2016, Canada was found liable for the systemic discrimination and ordered to cease it. Numerous Jordan's Principle orders were made that led First Nations children to obtain eligibility for extensive access to services. The broader definition included in the Tribunal's orders creates an expansion of services requiring adequate space to support their delivery. This is ineffective if there is a lack of sufficient funding for space to offer those services on reserve. The Panel recognizes that Canada is approving hundreds of thousands of cases and is pleased with those results. However, approvals are meaningless if the services cannot be delivered. The Panel does not believe that in the majority of cases

service requests are only approved and not provided. However, when there is a lack of funding for adequate space to offer those services, the services cannot be provided and this results in delays and denials, which are precisely what the Tribunal's orders aim to prevent and rectify.

[298] With respect, the need for sufficient office space to offer services is so intertwined with the actual provision of services and so self explanatory, the Panel did not envision the need for orders in that regard at the time. While there clearly was a timeframe to adapt to a large influx of new cases following the 2017 orders, we are now in the latter part of 2021. Canada continuously submits it should be given latitude to comply to remedy the systemic discrimination. This is a clear example where too much latitude risks perpetuating the unnecessary delays resulting in systemic discrimination. Moreover, the lack of sufficient funding for buildings to offer services on-reserve constitutes denials contravening the Tribunal's orders under Jordan's Principle.

[299] Given that Jordan's Principle applies on and off reserve there is a need to understand provincial, territorial and federal building space available to offer those services to First Nations children off-reserve. Those studies could allow the identification of building space or the lack thereof that is the responsibility of the federal government and the responsibility of the province or territory or a shared responsibility. In other words, while jurisdictional disputes cannot delay services to children and therefore the dispute is to be settled afterwards, the purchase or construction of buildings is an exception. Furthermore, other legal requirements apply for purchase and construction off-reserve.

[300] This is also responsive to Canada's argument that FNCFS Program Terms and Conditions do not currently allow it to fund infrastructure off-reserve. The Community Infrastructure Branch would be better positioned to provide such services. Regardless of which program funds what, especially given the very nature of Jordan's Principle, this argument is unconvincing.

[301] However, the Panel does not intend for Canada to fund buildings that are not Canada's responsibility. Timely studies or assessments could potentially assist in that regard.

[302] While the Panel accepts that Canada has to discuss with First Nations communities on their community plans and priorities and that this process is ongoing, immediate steps can be taken now over 5 years after the *Merit Decision* and 4 years after the huge influx in Jordan's Principle approved cases following the 2017 rulings.

[303] As the Panel held at paragraph 303 of its 2018 CHRT 4 ruling regarding immediate relief:

The Panel wants to make it clear that discussions with no comprehensive plan or specific deadlines attached to it can go on for a very long time and seeing these types of arguments is a source of concern. Also, as already discussed in the *[Merit] Decision*, a piecemeal approach is to be discouraged.

(see 2018 CHRT 4 at para. 303).

[304] Given this concern, the Panel considers that one way that Canada can demonstrate that it is on track to comply with the Tribunal's orders would be for it to expeditiously engage in adequate consultations in regards to building needs for FNCFS Agencies and First Nation communities including with the parties in this case and prepare a plan with specific targets and deadlines to complete those consultations. In the Panel's view, Canada should be in a position to share this plan within three months of today's date or as otherwise agreed by the parties. An appropriate plan would be highly detailed with clear steps and goals. Through these details, the plan would demonstrate how Canada is being responsive to the Tribunal's orders including addressing the lack of coordination between federal programs affecting First Nations children, substantive equality, the challenges faced and solutions envisioned.

[305] The Panel concludes, based on these reasons, that Canada is not implementing an approach to funding the purchase or construction of capital assets for Jordan's Principle that fully addresses the discrimination identified by the Tribunal. Accordingly, the Panel issues the following orders:

Order

Pursuant to section 53 (2) of the *CHRA* the Tribunal orders Canada to:

Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of this order advising them on how to access this Capital asset funding. Canada shall post this information on the ISC website.

For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon for First Nations and FNCFS Agencies that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of this order. Canada shall post this information on the ISC website.

The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of Jordan's Principle on-reserve and in the Yukon and off-reserve where applicable under Jordan's Principle.

The Tribunal orders Canada in consultation with the COO and the NAN, to provide funding for First Nations and FNCFS Agencies to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of Jordan's Principle on-reserve and off-reserve, where applicable under Jordan's Principle in Ontario.

*The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.

V. Supplementary Financial Administration Act Party Submissions

[306] As noted, the Panel requested supplementary submissions on the *Financial Administration Act* in light of the brief references the parties made in their submissions in relation to Major Capital. In particular, the Panel requested the parties to identify whether the *Financial Administration Act* or related policies created a limitation that prevented the effective implementation of the Tribunal's orders. While this issue arose from the Major Capital submissions, the parties' subsequent submissions were not limited to that context.

A. The Caring Society

[307] The Caring Society submits that the role of the *Financial Administration Act* has been addressed in 2018 CHRT 4. In particular, the Tribunal stated that while it will not draft policies, choose between policies, or unnecessarily embark on specific reform, it will intervene when Canada's policy choices result in discrimination in the same manner identified in the *Merit Decision* (2018 CHRT 4 at paras. 48 and 54).

[308] The Caring Society identifies that Canada has raised the role of the *Financial Administration Act* a number of times subsequent to the *Merit Decision*. The Caring Society contends that the issue has been addressed in 2018 CHRT 4 and 2020 CHRT 24. The Caring Society suggests that Canada's position that Tribunal orders that specifically address the content of policy intrude on the role of the legislation branch is an attempt to re-litigate issues that have already been decided.

[309] The Caring Society argues that the *Financial Administration Act* and associated policies do not hinder the implementation of remedies. Rather, it is the mindset of individuals implementing such policies that hinders the ability to implement reform to remedy the discriminatory practices. This will require a plan for long-term independent and effective accountability measures to prevent a recurrence of discrimination.

[310] The Caring Society identifies that Canada's processes for implementing the Tribunal's orders require political will. In particular, public servants at both ISC and in central agencies must support the funding allocation for the program. Further, the proposal must be supported by the Minister of Indigenous Services Canada, the Minister of Finance, Treasury Board, and the Prime Minister. The Caring Society contends that civil servants have not always put forward appropriate policy reforms such as ISC not proposing modifications to the definition of Jordan's Principle during the hearing on the merits. Similarly, in terms of immediate relief, civil servants put forward funding proposals for the 2016 Budget but not for longer term. To be effective, the Tribunal must ensure that individuals beyond ISC civil servants are held accountable for implementing the Tribunal's orders.

[311] The Caring Society contends that the funding process under the *Financial Administration Act* support the "old mindset" that favours process over substance. This mindset, for example, gives greater emphasis to the FNCFS Program's Terms and Conditions than the Tribunal's orders. Similarly, Canada often differs issues rather than resolve them. There is no proposed mechanism to resolve future disputes about the implementation of the Tribunal's orders other than returning to the Tribunal. The Caring Society maintains that ongoing supervision of the Tribunal orders is required.

B. The Chiefs of Ontario

[312] The COO adopts the submissions of the Caring Society that the *Financial Administration Act* and related policies are not themselves a barrier to implementing the Tribunal's orders and raises a few additional points.

[313] The COO agrees with Canada's submissions on the relationship between the *Financial Administration Act* and the *CHRA* including the primacy of the *CHRA* and the process for the expenditure of public funds.

[314] The COO relies on evidence that it may be necessary to seek new spending authorities if the Tribunal's orders cannot be satisfied within the existing authorities. The COO also notes that the parties sometime disagree with Canada on whether it complies with the Tribunal's orders. The COO indicates that the Panel's assistance in resolving these disputes is effective. Ultimately, the Tribunal's orders will be best implemented by long-term reform that occurs as soon as possible through good faith negotiations.

C. Assembly of First Nations

[315] The AFN indicates that nothing in the *Financial Administration Act* or related policies hinder the implementation of the Tribunal's orders. Any barriers are a result of a lack of bureaucratic or political will. Canada is required to implement the orders and cannot attempt to relitigate them by suggesting that implementing program reform falls to legislative and executive branches of government.

[316] The AFN reviews the process for securing funding for ISC and the programs at issue in the case. The AFN recognizes Canada's position that the Tribunal's orders are compatible with the *Financial Administration Act* but disagrees with Canada's suggestion that the *Financial Administration Act* limits the Tribunal's ability to direct program reform. The AFN asserts that the Tribunal has previously addressed this issue in 2018 CHRT 4 at paras. 32-33 and 2020 CHRT 24 at paras. 37-38. The AFN further submits that s. 53(2)(a) and (b) provides broad remedial authority to the Tribunal. This is quasi-constitutional legislation that, in the event of a conflict with other legislation or policies, the *CHRA* remedy prevails.

D. Nishnawbe Aski Nation

[317] NAN submits that Canada has allowed the *Financial Administration Act* and related policies to act as a roadblock to program reform.

[318] NAN reviews the Tribunal's prior findings on the quasi-constitutional nature of the *CHRA* (e.g. *Merit Decision* at para. 43 and 2018 CHRT 4 at para. 28) and that Canada must allocate resources in a manner that complies with the *CHRA* (*Merit Decision* at paras. 42 and 44). Further, Canada must implement the *Financial Administration Act* in a manner consistent with the *CHRA*.

[319] NAN argues the issue is not simply whether the *Financial Administration Act* and related policies are discriminatory but whether Canada is implementing them in a non-discriminatory manner. NAN submits that Canada is interpreting policies in a discriminatory manner. For example, Canada did not see the Terms and Conditions as an implementation to paying capital expenses for Band Representative services but subsequently changed its position. What Canada ought to have done on coming to that conclusion was amend the Terms and Conditions to permit compliance with the Tribunal's order.

E. Commission

[320] The Commission submits that Canada's legislative scheme and policies do not hinder the implementation of the Tribunal's orders as long as the necessary bureaucratic and political will is brought to bear. If there were to be a conflict, the barrier, the Tribunal's targeted systemic remedies would take priority given the *CHRA*'s primacy. The Tribunal has previously found that targeted systemic remedies are appropriate where the evidence so warrants.

[321] The Commission indicates that Canada has previously raised the argument that the Tribunal should be cautious in its remedial orders based on considerations such as the *Financial Administration Act*, the Treasury Board authorities, institutional capacity, parliamentary appropriations and the prudent use of public funds. The Tribunal has previously rejected these arguments.

[322] The Commission has previously made extensive submissions about the effective implementation of systemic remedies. It reiterates a few key points. Section 53(2)(a) provides the Tribunal with broad discretion to redress a discriminatory practice. The Tribunal may issue further orders to ensure its orders are effectively implemented. Where there are multiple possible approaches to implement an order, the Tribunal should leave the government to choose an effective option. Where the evidence indicates specific steps are required, the Tribunal may appropriately make more detailed orders or targeted systemic remedies. If there is an operational conflict between a targeted systemic remedy and other government law or policy, the targeted systemic remedy must take priority under the quasi-constitutional *CHRA*.

[323] The Commission raises a number of points in response to Canada's submissions. The Commission disagrees that the Tribunal is purely part of the judicial branch of government given that the Tribunal is created by statute. The Tribunal's adjudication, including through targeted systemic remedies that affect other government programs, is consistent with legislative intent. Human rights tribunal remedies assist the executive and legislative branches of government in implementing human rights policy. And while it is the responsibility of the legislative and executive branch to reform the policies found to be discriminatory in this case, it is their obligation to bring government policies into compliance with the Tribunal's orders. The responsibility of the legislative and executive branches does not negate the Tribunal's ability to make orders.

[324] Further, the Commission disagrees with any suggestion that *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 requires an explicit primacy clause for human rights legislation. The Commission notes the issue is not material to this case as Canada acknowledges that the current case is about government services rather than legislation.

[325] The Commission maintains that *Canada (Attorney General) v. Green*, 2000 CanLII 17146 (FC), [2000] 4 FC 629 [Green] recognizes the primacy of the CHRA remedies over other legislation. *Green* is best understood to support the proposition that the Tribunal should avoid interfering with the operation of other legislation where lesser means are equally capable of achieving the remedial purpose.

[326] The Commission does not believe it is appropriate to address the nature of long-term orders at this point. However, to the extent that Canada is arguing that unlimited expenses based on actual costs constitute financial hardship, Canada is obliged to more specific and concrete evidence to support claims of undue hardship under ss. 15(1)(g) and 15(2) of the CHRA.

F. Canada

[327] Canada submits that the *Financial Administration Act* and Canada's Treasury Board policies support the effective implementation of the Tribunal's orders. These authorities ensure that public funds are spent in a constitutional manner. More generally, the Tribunal should permit Canada the flexibility to address systemic discrimination in a manner of its choosing that accords with its obligations for spending public funds.

[328] There is no issue of primacy between the *Financial Administration Act* and the CHRA as Canada has complied with the Tribunal's orders, the *Financial Administration Act*, and Treasury Board policies. Canada relies on the *Financial Administration Act* to highlight that while the Tribunal has broad discretion on crafting remedial orders, Canada retains discretion in how it rectifies identified discrimination. The requirement to comply with appropriate procedures, including the *Financial Administration Act*, for spending money is an illustration of why Canada ought to be permitted the flexibility of developing policies to remedy the identified discriminatory practices.

[329] The *Constitution Act, 1867* sets out the framework for raising and spending public funds. The *Financial Administration Act* elaborates on these obligations and binds government officials. It reflects parliamentary supremacy and fulfills the constitutional obligation of holding the expenditure of funds by the executive responsible to Parliament.

[330] Canada contends that there is no issue of primacy in this case. While it may be possible that the CHRA has primacy over the *Financial Administration Act*, it is not necessary to conduct that analysis as no actual conflict arises in this case. Canada notes that cases that addressed the primacy of human rights legislation, such as *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 SCR 145 and *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 SCR 150 did not involve direct challenges to legislation. While *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 involved a direct challenge to legislation, the Ontario legislation had a clear supremacy clause that does not appear in the CHRA.

[331] Canada does not assert that the *Financial Administration Act* trumps the *CHRA* and disagrees with prior Tribunal decisions that suggest Canada makes that assertion. Rather, Canada argues that the Tribunal should provide Canada appropriate discretion in how it chooses to remedy the discriminatory practices identified by the Tribunal. This is particularly the case with systemic remedies involving broad policy reform.

[332] Reforming the programs at issue in this case to prevent discrimination going forward appropriately falls to the executive and legislative branches of government. These branches of government are best placed to ensure all of Canada's legal obligations are met, which includes appropriate legal oversight of public spending. Tribunal orders that specifically direct the content of policy intrude on the separation of powers. Canada has demonstrated its ability to follow these processes in enacting *An Act respecting First Nations, Inuit and Métis children, youth and families*.

[333] The requirement to respect Canada's ability to craft appropriate policy responses is confirmed in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; and *Canada (Attorney General) v. Green*, 2000 CanLII 17146 (FC), [2000] 4 FC 629. The Tribunal's ability to direct the implementation, review or amendment of policy should not be extended to dictate the contents of the policy. Nor should the Tribunal order that specific funds be spent in specific ways involving specific amounts.

[334] The case of *Swan v. Canadian Armed Forces*, 1994 CanLII 10252 (CHRT) is distinguishable because a draft policy was before the Tribunal. It would, for example, inappropriately intrude on the policy making process for the Tribunal to issue a final order that funding must be made on the basis of actual costs. The order would oblige Canada to implement a practice where costs are unlimited. That impedes Canada's ability to forecast expenditures, set priorities and secure appropriations from Parliament in accordance with the *Financial Administration Act*. This would intrude on the legislative branch's responsibilities in relation to the content of policy.

VI. Financial Administration Act Analysis

[335] *The Financial Administration Act* analysis is intimately connected with the reasoning on the separation of powers. The Tribunal set out its initial reasoning in the letter-decision. As promised, the Tribunal is now providing more detailed reasons.

[336] The issue here is not a challenge to the *Financial Administration Act* legislation such as in the *Matson v. Canada (Indian and Northern Affairs)*, 2013 CHRT 13 [*Matson*] and *Andrews v. Canada (Indian and Northern Affairs)*, 2013 CHRT 21 [*Andrews*] decisions. The Panel is not attempting to limit the *Financial Administration Act*'s goal or application as part of this ruling. The Panel's question arises from a need for clarification given the repeated submissions from Canada on the issue of separation of powers and the *Financial Administration Act*.

[337] Furthermore, the question aims to determine if Canada in implementing the Tribunal's orders while abiding by the *Financial Administration Act*'s is applying its discretion in the *Financial Administration Act*'s interpretation to facilitate the implementation of the Tribunal's orders or if it is interpreted in a way that hinders the Panel's quasi-judicial statutory role under the *CHRA*. Moreover, the *CHRA* is quasi-constitutional and fulfills Parliament's paramount goal in regard to human rights in Canada (see section 2 of the *CHRA*).

[338] Canada's liability was established and orders to cease the discriminatory practices and reform were accepted by Canada. The Tribunal's findings addressed the FNCFS Program authorities at length in the *Merit Decision*. The FNCFS Program authorities formed part of the Tribunal's reform orders.

[339] Further, the *Financial Administration Act* is law in Canada and the Panel accepts Canada's assertion that the administration and management of public monies is set out in the *Financial Administration Act* and is used by all Government of Canada departments. "In performing their duties, public servants must be guided by that legislation and the policies established to implement it." (Affidavit of Paul Thoppil dated April 16, 2019 at paragraph 6).

[340] Canada's affiant Mr. Thoppil testified that:

Program funding is originally approved by the Government through the Federal Budget process and subsequently approved by Treasury Board. Departmental funding appropriations are provided to Departments on a yearly basis in the Estimates process and voted by Parliament. The main estimates outline spending for departments, agencies and programs, and contain the proposed wording of the conditions governing spending that Parliament will be asked to approve.

(Affidavit of Paul Thoppil dated April 16, 2019 at paragraph 7, Emphasis ours).

Budgets within ISC are determined based on anticipated needs, which are normally established through historical trends and forecasting. To support senior management within the Department in meeting their responsibilities under the *FAA* and supporting policies (such as the Management Accountability Framework). ISC continually monitors and forecasts program demand to meet program funding needs and legal obligations.

(Affidavit of Paul Thoppil dated April 16, 2019 at paragraph 8, emphasis ours).

[341] On this point, the Panel accepts Mr. Thoppil's evidence reproduced above, however, the Panel finds that the evidence, including the evidence discussed above, demonstrates that Canada's interpretation of the funding process under the *Financial Administration Act* supports the old mindset that favours process over substance (see the tragic illustration of this in the Wapekeka case described above). This mindset often gives greater emphasis to the FNCFS Program's authorities and Terms and Conditions than the Tribunal's orders. In retrospect, in light of the evidence in these proceedings over the last decade this is one of the main problems in need of change.

[342] In 2018, at the time Canada was declaring child welfare on reserves a humanitarian crisis the Panel released a ruling and made similar findings, a ruling accepted by Canada and with which Canada pledged to fully comply:

Canada has taken a step in the right direction by increasing prevention money in its budget. However, it also admitted it left some immediate relief items for mid to long term, thus creating again a piecemeal approach to responding to the Decision's findings, and orders. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 112, lines 19-25 [Transcript of Cross-Examination of Ms. Lang]).

(see 2018 CHRT 4 at para. 151).

Canada admits it lacks data to address some of the Panel's immediate relief orders so it unilaterally decided they were best left to mid-term or long term without seeking leave from the Tribunal. It has treated some of the orders as recommendations rather than orders.

(see 2018 CHRT 4 at para. 171).

While it is true that Canada needs to work with its partners including the provinces, the Nations and the parties, this cannot be used as an excuse to avoid funding in a meaningful way to eliminate the most discriminatory aspects of the National First Nations Child and Family Services Program (FNCFS).

(see 2018 CHRT 4 at para. 172).

[343] As explained earlier, some well meaning ISC employees attempted different strategies to avoid seeking new authorities in every case but this is not always possible. Moreover, obtaining new funding authorities, funding and Terms and Conditions should not be an issue when Canada sets it as a priority and is able to show it is necessary to eliminate systemic racial discrimination of First Nations children and families and comply with the Tribunal's legal orders.

[344] The *Merit Decision* found systemic racial discrimination of children. The *Merit Decision* was detailed and provided a road map in terms of what needed to be eliminated to cease the systemic discrimination. This unchallenged decision and subsequent rulings are not recommendations. They are legally binding. Any funding process must comply with existing orders.

[345] The Tribunal relies on its numerous findings of underfunding, adverse impacts and systemic discrimination in previous rulings. The Panel is also concerned that Canada's focus is that budgets are determined based on anticipated needs established through historical trends and forecasting. The FNCFS Program was found to be discriminatory in not addressing the real needs of the children and families served by the FNCFS Program. The flawed assumptions in forecasting were a factor that led to underfunding in the past and systemic discrimination causing many adverse impacts to First Nations children, the process in itself contributed to the systemic discrimination found and this process must be reformed (see *Merit Decision* at paras. 388-392). Canada must analyze its interpretation and its process and how this can be improved as part of the ordered reform.

[346] However, the *Financial Administration Act* is not the issue *per se* here as the Panel does not dispute its goal or application. Rather, the issue is whether Canada's interpretation of the process under the *Financial Administration Act* sufficiently addresses the systemic discrimination found. The Panel finds it does not.

[347] There is great need for a shift in mindset on how things are done. This is what reform means. If trends and forecasts are informed by the past discriminatory practices the adverse impacts and harms will not be addressed. The Panel recognizes that Canada made efforts to move past this mindset in some aspects in order to comply with some of the Tribunal's orders. The question here is whether Canada's arguments attempt to return to its old ways when it says that the actual costs orders cannot be made long-term and/or permanent. The Panel will hear everyone on this issue as part of the long-term reform phase unless the parties achieve the ideal outcome of settling this matter.

[348] Further, it is important to look at the facts. The FNCFS Program was found to be underfunded, not responsive to the real needs of children, incentivizing the removal of children from their homes, families and communities contributing to the erosion of Nations, and departments were uncoordinated and caused gaps and delays. Those findings remain unchallenged and are not up for debate. Canada was ordered to eliminate the above and, to do so, it cannot underfund or choose other discriminatory policies. If Canada has a new way of funding in the long term it needs to demonstrate that it is addressing all the systemic discrimination found, is more advantageous than immediate relief orders and proves to be adequate, culturally appropriate, children, families and Nation specific needs based and sustainable.

[349] The Panel agrees that the separation of powers is to be followed. However, it is Canada's interpretation that the Panel rejected in 2018 CHRT 4. The Panel addressed cases such as *Action Travail des Femmes, Doucet-Boudreau* in past rulings.

[350] Furthermore, the Panel agrees with Canada that in *Canada (Attorney General) v. Green*, 2000 CanLII 17146 (FC), [2000] 4 FC 629, the Federal Court recognized the broad discretion of the Tribunal to craft remedies within limits. The Federal Court found that in remedying the discrimination, the Tribunal did not have jurisdiction to order destruction of documentation as to do so would be contrary to subsection 5(1) of the *National Archives of Canada Act*, RSC 1985, c 1 (3rd Supp). The Court

acknowledged the importance of the remedy the Tribunal wanted to achieve, but implicitly held that there was no conflict and therefore no basis to override the *National Archives Act* as a confidentiality order would be a sufficient remedy.

[351] The Panel reiterates that it is always important to look at the specific facts of the case and in this case the discriminatory practice includes underfunding and this is one important aspect that the Panel is trying to remedy.

[352] Furthermore, the Panel does not desire to choose between adequate policies and will only do so if Canada's chosen policy is not eliminating systemic discrimination, perpetuates inequalities and underfunding and permits ongoing discrimination (see previous rulings).

[353] However, the Panel partially agrees with Canada's argument in that directing a specific remedy risks creating delay by imposing a remedy ill-suited to the government context. This is why the Panel's remedies are based on the evidence, the First Nations parties before the Tribunal and Canada and other parties' views. Moreover, consistent with its past approach (2017 CHRT 35, 2018 CHRT 4), the Panel remains flexible to amend its orders when informed that a clarification or modification would best serve the interests and specific needs of First Nations children and families.

[354] Moreover, the Tribunal's meaning of actual costs of services orders was explained earlier. The Tribunal's goal with actual costs orders proposed by the First Nations parties in this case and accepted by the Tribunal is that until a new and adequate funding formula is developed, Canada must address the central issues to eliminate the systemic discrimination: cease the underfunding; reverse the mass removal of First Nations children from their homes, families and communities; respect non-discriminatory provincial laws as the floor not the ceiling; apply substantive equality based on the real needs of children taking into account the historical trauma of residential schools, the sixties scoop and colonisation; eliminate gaps in services caused by numerous factors such as the lack of coordination between federal departments, a top-down approach disconnected from the realities on the ground, a lack of understanding of First Nations real needs and responding to those needs instead of budget announcements disconnected from those real needs, lack of plans with deadlines, and using the expression discussing with our First Nations partners to justify the *status quo* when some First Nations are past discussions and ready to move forward. All this forms part of the Tribunal's unchallenged findings (see previous rulings) and cannot be challenged again at this time.

[355] The Panel's orders flow from the claim and the systemic discrimination found and as previously said in the unchallenged 2018 CHRT 4 ruling, it has to remedy the systemic discrimination found. Any remedy impacting funding is a remedy entirely consistent with the claim and findings. The Panel has a quasi-judicial mandate determined by Parliament's quasi-constitutional goal to ensure discrimination is eliminated. If Canada is opting to remedy the systemic discrimination by using another policy option in the long-term, the Panel agrees it is Canada's prerogative so far as it respects First Nations inherent and human rights, does not repeat the past and abides by the *CHRA*, the Tribunal's orders to reform the FNCFS Program, and Canada's commitments in this case, which include substantive equality principles. It goes without saying that this cannot be done without the necessary knowledge and participation of First Nations.

[356] Any perpetuation of the past discriminatory practice could mean that Canada continues to discriminate in a systemic way and negatively impacts children, which warrants the Tribunal's intervention.

[357] Further, funding at actual costs respecting substantive equality based on needs was already ordered by the Tribunal and adhered to by Canada's Ministers in the Consultation Protocol. Performing studies may assist in reversing the historical trends and forecasting to reflect the real needs of First Nations children and families in order to eliminate the systemic discrimination found until a new and adequate non-discriminatory funding formula is developed.

[358] Canada argues that in the present case, the Tribunal's orders that funding be made based on actual costs pending long-term reform would, in the context of a more permanent order, exceed the role of the judicial branch as the Tribunal would be specifically directing the creation of policy. Given that this ruling addresses a clarification of previous immediate orders and midterm reform, this argument can be revisited should Canada wish to do so in the submissions and arguments for long-term reform. Simply put, actual costs of services mean Canada must cease and desist from the discriminatory practices including the underfunding and infringing on substantive equality.

[359] However, the Panel wishes to reiterate that all its orders are grounded in and focused on substantive equality and the real needs of First Nations children and families served by the FNCFS Program and Jordan's Principle. The real service needs and substantive equality ought to inform the historical trends and forecasting and not Canada's uncoordinated and top-down approach that led to discrimination. Not only were those findings and orders unchallenged, Canada's Ministers committed to implement them (see Consultation Protocol following 2018 CHRT 4). Canada also included substantive equality in *An Act Respecting First Nations, Inuit and Métis children, youth and families*.

[360] Mr. Thoppil also testified that:

In performing his duties, I must be guided by [the FAA] legislation and the policies established to implement it. This includes policy requirements for transfer payment programs such as the funding agreements ISC enters into with First Nations child welfare agencies (...).

Government-wide policy requirements for transfer payment programs are established by Treasury Board Secretariat in the Policy on Transfer Payments (PTP) and the Directive on Transfer Payments ("the Directive"). The objective of the PTP and the Directive is to ensure that transfer payment programs are managed with integrity, transparency and accountability in a manner that is sensitive to risks; are citizen- and recipient-focused; and are designed and delivered to address government priorities in achieving results for Canadians.

(See Affidavit of Paul Thoppil dated April 16, 2019 at paragraphs 36-37).

[361] The Panel also accepts Mr. Thoppil's evidence on this point.

[362] Further, the Panel notes that in Canada's submissions, Canada asserts it has successfully implemented the Tribunal's remedial orders regarding the FNCFS Program, corresponding funding formulas, and other related provincial/territorial agreements (the "Program"), and has done so in accordance with the *Financial Administration Act* and Treasury Board policies.

[363] Canada also argues the *Constitution Act, 1867*, sets out key constitutional norms regarding the manner in which moneys may be lawfully levied and spent. The *Financial Administration Act* sets out the core legal framework that governs the acquisition and spending of public funds for federal institutions and guides the work of public servants.

[364] Canada also makes a number of submissions that the Panel accepts and are worth mentioning here.

[365] Canada's policies and priorities must adhere to this legal framework while also responding to its legal obligations. In reforming the FNCFS Program, Canada must develop policy and mandates that effectively respond to the Tribunal's orders to reform the FNCFS Program while ensuring adherence to the financial framework that governs the spending of public funds.

[366] While the *CHRA*'s mandate focuses on addressing discriminatory practices, which does not include challenges solely to legislation, it will take primacy wherever another law interferes with the fulfilment of its object and purpose. For example, where a complaint is properly before the Tribunal, and a provision of a federal law conflicts with the Tribunal's remedial powers, the provision may be

treated as inoperative in order to allow the Tribunal to fulfill its mandate to prevent discrimination. The Tribunal has applied the primacy principle in this manner on numerous occasions, where it has found the existence of a discriminatory practice. This reading is consistent with the principles stated in *Heerspink, Craton and Tranchemontagne. Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 the Supreme Court of Canada affirmed this analysis conducted by the Tribunal in both the *Matson* and *Andrews* complaints.

[367] Given the above submissions recognizing the primacy of the *CHRA* when in conflict with legislation, the Panel does not understand the reasoning behind Canada's argument on *Tranchemontagne* and the lack of a privacy clause in the *CHRA*. Canada submits *Tranchemontagne* can only be understood as affirming primacy in the context of the very different statutory mandate that Ontario has assigned to the Human Rights Tribunal of Ontario. The Court's conclusion that legislation conflicting with the Code's anti-discrimination protections may be rendered inoperative is entirely in line with legislative intent.

[368] In the unchallenged *Merit Decision* at paragraph 42, the Panel relied on *Kelso v. The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199 at page 207, where the Supreme Court stated:

No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act*.

[369] Furthermore, the *CHRA*'s primacy was also addressed in the Panel's previous rulings notably in 2018 CHRT 4 that was followed by a consultation protocol signed by Canada's Ministers.

[370] On Canada's argument of separation of powers, the Panel has already addressed this in previous rulings including 2018 CHRT 4. The Panel has held that while it will not draft policies, choose between policies, supervise the policy drafting process, or unnecessarily embark on the specifics of reform, it will intervene if it finds that Canada's policy choices are resulting in discrimination in the same or similar ways found in the January 2016 *Merit Decision*.

[371] Parliament's priorities in regard to human rights are stated in the quasi-constitutional *CHRA* which gives the Tribunal jurisdiction for broad remedial powers to eliminate discrimination. Furthermore, the consultation protocol signed by Minister Philpott and Minister Bennett express government priorities in this case. Moreover, at paragraph 3 of the ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds, section 3.3.2 clearly outlines a government priority to comply with all CHRT orders on child and family services and the need to review the policy to update it according to the Tribunal orders.

ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds

3. Effective Date

3.1. This policy takes effect on February 8, 2018.

3.2. This is an evergreen policy that will be reviewed and updated to ensure on-going compliance with all Canadian Human Rights Tribunal orders on child welfare.

[372] The Policy on transfer payments' objective filed in evidence and attached to Paul Thoppil's affidavit dated April 16, 2019, provides considerable discretion to Treasury Board President and Secretary, Ministers and Deputy heads in the delivery and management of transfer payment programs (See section 3.8).

3.8 This policy sets out clear roles and responsibilities for the Treasury Board, the President of the Treasury Board, the Secretary of the Treasury Board, ministers and deputy heads in the design, delivery and management of transfer payment programs.

The objective of this policy is to ensure that transfer payment programs are managed with integrity, transparency and accountability in a manner that is sensitive to risks; are citizen- and recipient-focused; and are designed and delivered to address government priorities in achieving results for Canadians.

(emphasis added).

[373] It is clear that if a federal department is found to engage in systemic discrimination and ordered to remedy it, especially when underfunding and authorities associated with this underfunding are one of the main elements found to have caused systemic discrimination, the policy on transfer payments allows considerable discretion to the government to remedy the underfunding and eliminate the systemic discrimination. It is reasonable to conclude that if the *Financial Administration Act* or the policy is cited as a roadblock to eliminate systemic discrimination in funding and FNCFS Program authorities, it is not the *Financial Administration Act* or the policy on transfer payments *per se* that fosters *status quo* and perpetuates systemic discrimination but rather a restrictive interpretation of the *Financial Administration Act* or the policy on transfer payments made by those who were ordered to remedy it.

[374] Moreover, the objective of the policy can be interpreted in a manner that is consistent with the *CHRA* and the Tribunal's orders and the engagements made by Ministers Philpott and Bennett in the consultation protocol.

[375] Given that we are looking at potentially discretionary decisions under a policy, this is not a question of an attack solely to legislation such as in *Matson* and *Andrews* but rather it is the case where the interpretation of the *Financial Administration Act* and relevant policies can either perpetuate or eliminate systemic discrimination.

[376] The *Financial Administration Act* should be interpreted harmoniously with quasi-constitutional legislation such as the *CHRA* including orders made under the *CHRA*. Canada confirms it is doing as much. The Panel has found a more nuanced view of Canada's approach and provided guidance above. In light of this, the Panel sees no need to make orders on this issue at this time.

[377] Further, the Tribunal's orders are to be read harmoniously with the *Financial Administration Act* and, in the event of conflict, the orders made under the *CHRA* have primacy over an interpretation of the *Financial Administration Act* that limits the Tribunal's remedial authority.

[I]n *Franke v. Canada (Canadian Armed Forces)*, [1998] C.H.R.D. No. 3 (Can. Human Rights Trib.) [Franke], the Respondent argued that, pursuant to section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 [CLPA] and section 111 of the *Pension Act*, R.S.C. 1985 c. P-6 [PA], the Tribunal was precluded from awarding damages for economic loss to the Complainant because she was receiving a pension from Veterans Affairs in respect of this loss. The Tribunal found that there was a conflict between those provisions and the remedies provisions of the *Act*. Relying on *Heerspink*, *Craton*, *Action Travail des Femmes*, *Druken* and *Uzoaba*, the Tribunal dismissed the Respondent's argument and affirmed the primacy of the *Act* noting that, as the legislature had not spoken to the contrary, the *Act* superseded the provisions of the *CLPA* and the *PA* and therefore damages for economic loss could be awarded: *Franke* at paras. 644 - 678.

(*Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21 at para. 87, emphasis ours).

VII. Reallocation Party Submissions

A. The Caring Society

[378] The Caring Society seeks four orders in relation to the reallocation of budgeted funds between different social programs:

In consultation with the CCCW, Canada will amend the “adverse impact” screen regarding temporary reallocations to ensure it meets the Tribunal’s orders and post the final result on the home page of the ISC website within 30 days of the order.

The “adverse impact” screen established by the policy for temporary reallocations from programs listed in the policy should also apply to permanent reallocations out of non-listed programs.

Funds that are temporarily reallocated from a program listed in the policy shall be returned to the program in question within 30 days.

Officials determining whether a reallocation (whether labelled as “permanent” or “temporary/cash management”) will have an adverse impact on First Nations children and families shall have training to familiarize them with the factors leading to the over-representation of First Nations children in care.

[379] The Caring Society relies on the Tribunal’s order in 2018 CHRT 4 that Canada cease unnecessarily reallocating funds from social programs that contributes to the detrimental effects on children identified in the *Merit Decision* (para. 422). Canada developed a policy on reallocation. While the Caring Society provided some comments on the draft policy, the Caring Society is not satisfied with the finalized reallocation policy. In particular, the Caring Society is concerned that it is unclear which programs are exempted from the reallocation policy and can still be subject to reallocations; the Infrastructure program is subject to reallocation which could undermine services that would prevent the removal of children; temporary reallocations are not defined and can span more than one fiscal year; and a the policy does not establish a mechanism for determining what constitutes an adverse impact on First Nations children.

[380] While the Caring Society is optimistic that ongoing dialogue between the parties can address this issue, the Caring Society is concerned that dialogue will be used to avoid binding orders from the Tribunal.

[381] In reply, the Caring Society submits that Canada has not provided evidence about how ISC will assess whether a reallocation will adversely affect First Nations children.

B. Canada

[382] Canada submits that it is compliant with the Tribunal’s existing orders, including in relation to reallocation.

[383] Canada notes the Tribunal’s finding that not all of ISC’s social programs form part of the complaint and the Tribunal’s jurisdiction. The Tribunal ordered Canada to evaluate its reallocation practices.

[384] Canada documents its efforts to comply with the Tribunal’s orders. ISC has secured increased and stable funding to obviate the prior need for reallocation. Canada documents some of the correspondence to implement the changes to the allocations policy and the fact that Canada has not made permanent reallocations since February 15, 2018. The draft Reallocation Policy, circulated to the CCCW, was part of the reform process. Canada only received feedback from the Caring Society. ISC incorporated most of the Caring Society’s recommendations but was unable to incorporate certain suggestions such as a suggestion that the policy apply more broadly and that reallocations be limited to 30 days. Limiting

reallocations to 30 days would hinder internal fiscal management, and would for example prevent using funds for a delayed project for another purpose with the funds being repaid once the original project can proceed. ISC will share further documents on reallocations with the parties in order to continue to work collaboratively with the parties on this issue.

[385] Canada submits that this evidence demonstrates that it is complying with the Tribunal's orders. ISC has implemented procedures that respond to the Tribunal's concerns and, in fact, appropriately respond to the spirit of the Tribunal's orders by including health and education programs not specifically identified in the orders. This demonstrates Canada's efforts to prevent adverse impacts on First Nations children. The Caring Society's complaints in this motion arise from a respectful disagreement on two issues and should not be conflated with non-compliance with the Tribunal's orders.

VIII. Reallocation Analysis

[386] In the letter-decision dated August 26, 2021, the Panel wrote that it has already ruled on this issue in 2018 CHRT 4 and would clarify what it meant in the reasons to follow. There was no further order made on reallocation as part of the letter-decision.

[387] In 2018 CHRT 4, the Panel made the orders below in terms of reallocation while weighing the evidence as a whole and understanding Canada's need for flexibility in managing public funds. To that effect, the Panel wrote at paragraph 276 that some reallocations may be inevitable in the federal government. However, it is also in the best interest of First Nations' children and families to eliminate this practice as much as possible. The rationale for the orders, which should never be separated from the orders themselves, was explained at paragraphs 269-276 in clear terms.

[388] The findings in this case based in the evidence established that neglect is the primary reason for unnecessary apprehensions and removal of children from their homes, families and communities. The damaging effect of not applying a substantive equality lens to services offered to First Nations children and families results in unnecessarily removing children from their homes, families and communities as a result of one of factors such as: poor housing, poverty or substance abuse. These factors can intersect and can be identified to as socio-economic determinants of health.

[389] The Panel also addressed the issue of federal departments working in silos and causing adverse impacts to First Nations children and families in previous rulings. Canada chose to create social programs and divide them into branches. This is Canada's choice. The branches are attached to the tree of social programs and one of those programs is FNCFS Program. Another is the Housing Program. It is Canada's responsibility to assess all its programs offered to children and families on-reserve or ordinarily on reserve to ensure they respond to specific needs and do not create gaps that negatively impact First Nations children and families. The Panel ordered Canada in 2018 to look into all its social programs to avoid adverse impacts namely apprehensions or other negative impacts to children. Inequalities should not be created in an attempt to correct inequalities in the FNCFS Program. Safe housing is intertwined with keeping children at home, in their families and in their communities. This was established in 2016. Responsible reallocation should take this into consideration and the best way to do so is in applying the principle of substantive equality based on needs. To do so, Canada ought to assess needs, gaps, and inequalities in all its programs to ensure its programs do not perpetuate systemic discrimination to First Nations children and families. First Nations children's social needs are not administratively divided in silos. More importantly, as already explained in the *Merit Decision*, Canada cannot effectively create appropriate programs with a top-down approach. Canada needs to start from the child, the family, the community and the Nation and respond to their specific needs with its social programs and other programs. This will look different from one child to another, one family to another, one community to another and one Nation to another. The common denominator here is to keep the children in their homes, families, communities and Nations. The Panel has insufficient evidence and submissions to determine if the orders below have been fully implemented.

[390] This being said, while there is a plan in place for First Nations communities covered under the 2021 CHRT 12 consent order, for those not covered under the consent order, there is no specific plan to this date. The Panel reiterates its previous orders reproduced below and request all the parties to the consultation protocol to follow-up with a plan on their implementation by **February 17, 2022**. The parties should take the Panel's clarification above, especially the assessment of specific needs, gaps, inequalities in all its programs into consideration in the preparation of this plan.

[391] For reference, the 2018 CHRT 4 orders are the following:

The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to stop unnecessarily reallocating funds from other social programs especially housing if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the [*Merit Decision*] by February 15, 2018 (see 2018 CHRT 4, at para. 277).

The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities by February 15, 2018 (see 2018 CHRT 4, at para. 278).

The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to evaluate all its Social Programs in order to determine and ensure any reallocation is necessary and does not adversely impact the First Nations children and families by April 2, 2018 (see 2018 CHRT 4, at para. 279).

IX. Capital for Band Representative Services and Prevention Services in Ontario Party Submissions

A. The Chiefs of Ontario

[392] The COO seeks additional orders to address the needs of First Nations in Ontario that are engaged in providing Band Representative Services and prevention services. As such, the COO requests the following additional orders:

1. Canada shall fund the Major and Minor Capital costs of First Nations in Ontario for the provision of prevention and Band Representative services, including, but not limited to, those related to program administration and governance, prevention, intake, and legal services;
2. In consultation with COO, Canada shall provide funding for Ontario First Nations to conduct Major Capital/infrastructure needs and feasibility studies related to prevention and Band Representative services;
3. Where such feasibility studies identify a need for Major Capital, Canada shall fund the design, land purchase, infrastructure, and other administrative requirements to facilitate construction; and
4. Where projects are ready to proceed, Canada shall fund the Major Capital needs of Ontario First Nations at actual cost.

[393] The COO submits that First Nations in Ontario are unique in the delivery of Band Representative Services and are actively pursuing a model of preventative funding.

[394] Prevention initiatives for First Nations in Ontario have been funded through limited immediate relief allocations without access to funding "at actuals". As capacity to deliver programs has expanded, so has the demand for space. ISC recognizes the different context in Ontario where funding is going through communities while in much of the rest of the country the funding flows through FNCFS Agencies. While further study is required to determine the Major Capital needs of First Nations in

Ontario, it is clear that adequate space is required to appropriately deliver prevention and Band Representative Services. What funding is available through the “fixed pot” approach under the Community Well-being and Jurisdiction Initiatives is insufficient to meet substantive equality needs and causes divisions between First Nations.

[395] While the Panel has previously awarded capital funding to FNCFS Agencies to appropriately deliver prevention services, First Nations in Ontario have determined that prevention services are most appropriately provided by, and within, the First Nation. The COO submits that First Nations delivering prevention and Band Representative Services should have similar access to capital as FNCFS Agencies in order to meet the substantive equality needs of these communities.

[396] The COO argues that the record demonstrates that Canada has taken the position that it will not fund capital for Band Representative Services. This record was confirmed by the parties in September 1, 2020 correspondence to the Tribunal. In particular pursuant to this record, the COO identifies that none of the Capital Directive, the draft document on reimbursing actual costs of Band Representative Services pursuant to the Tribunal’s orders, or the FNCFS Terms and Conditions include Band Representative Services. The COO also refers to CCCW discussions of the topic and examples of Wabaseemoong Independent Nations and Asubpeeschoseewagong Netum Anishinabek seeking capital funding for Band Representative Services being denied despite their inadequate facilities to, for example, be able to maintain client confidentiality.

[397] The COO contends that the failure to fund capital expenses for Band Representative Services is inconsistent with Canada’s obligation to fund actual costs under the orders from 2018 CHRT 4 as well as Canada’s obligation to provide First Nations children substantive equality in child and family services, as identified throughout this case and in *An Act respecting First Nations, Inuit and Métis children, youth and families*; leaves First Nations unable to exercise their rights or fulfill their duties under the *Child, Youth and Family Services Act, 2017*, SO 2017 c 14, Schedule 1 (*CYFSA*); and leaves First Nations unable to comply with legal and best practice privacy requirements in providing child and family services, let alone provide culturally appropriate services.

[398] The COO provides an overview of the new legislative scheme under the *CYFSA* and emphasizes the scope of First Nations’ participatory and consulting rights through a Band Representative. The COO argues that First Nations require adequate space in order to exercise the full scope of their rights under the *CYFSA*. While space is required in order to be physically able to provide services, appropriate space is required to ensure client confidentiality and privacy in accordance with legal and professional norms. For example, the Information and Privacy Commissioner of Ontario identified that records containing personal information must be locked cabinets in a space with controlled access through access cards and keys and where any visitors are identified, screened and supervised. The COO also refers to standards for social works that require privacy for any discussions related to clients.

B. Nishnawbe Aski Nation

[399] NAN First Nations are providing prevention and Band Representative Services without funding for capital and infrastructure in a context of a chronic infrastructure deficit felt particularly strongly in remote and Northern communities. The lack of infrastructure includes a lack of housing which hinders the ability to find suitable foster homes in the community and the ability to hire staff from outside the community. NAN adds that in many of its communities, the issue is not simply inadequate buildings hindering program delivery, but often a complete absence of available buildings.

[400] NAN identifies some specific concerns about the capital directive: a lack of clarity for assessing the criteria that a capital project “clearly contribute towards the achievement of the intended outcome of the Program”; limiting capital costs to prevention services and repair costs for Band Representative facilities; and lack of clarity in the relationship with the Capital Facilities and Maintenance Program. NAN is not satisfied with the changes Canada has made in response to its concerns.

[401] NAN contends that the \$2.5 million limit in the Draft Capital Directive does not adequately reflect challenges related to remoteness and does not believe Canada has appropriately addressed remoteness concerns.

[402] NAN maintains that reimbursement for Band Representative Services requires capital funding. NAN is concerned that Canada has yet to provide clear guidance on the extent to which capital funding will be available and is particularly concerned that Canada may not have provisions for providing funding for capital where the absence of infrastructure is a factor preventing the establishment of a Band Representative program.

[403] In subsequent submissions, NAN argues that Canada has narrowed the scope of the Tribunal's order to reimburse the actual costs of providing Band Representative Services and the scope of the FNCFS Program's Terms and Conditions as they relate to Band Representative Services. In particular, Canada limits each First Nation to a one-time capital claim of \$1.5 million for Band Representative Services.

[404] NAN points to evidence from Canada's witnesses that suggests that they initially accepted that capital expenditures for Band Representative Services was within the scope of the Tribunal's orders. For example, NAN relies on the cross-examination of Assistant Deputy Minister Joanne Wilkinson on June 4, 2019 that, while capital expenses were not listed as eligible expenses, ISC was looking into eligibility and was prepared to consider capital claims for Band Representative Services on a case-by-case basis. The subsequent modification of the Terms and Conditions to limit each First Nation to a one-time claim for capital expenditures for Band Representative Services, capped at \$1.5 million, represents a narrowing of eligibility from the Tribunal's orders.

[405] NAN has specific concerns about capital expenditures for Band Representative Services being limited to \$1.5 million. The fixed amount, regardless of First Nations' circumstances, disadvantageous remote and northern First Nations who face added costs in, for example, transporting construction materials to their communities. ISC has developed a Cost Reference Manual that addresses increased costs for remote First Nations but has not factored that into its reimbursement limit.

[406] Remote community reliance on winter roads to transport construction materials further increases the need for prompt approvals from ISC. Delays in approvals can increase costs of transportation must be done by air instead of winter road. The limit of \$1.5 million means First Nations may be unable to be reimbursed for unanticipated and unbudgeted added costs.

[407] NAN indicates that there is no evidence to support the limit of \$1.5 million for capital expenditures related to Band Representative Services. NAN points to evidence that the limit is an old presumed limit for minor capital expenditures that is agreed to be out of date. Further, it does not correspond with the increase to \$2.5 million capital limit for FNCFS Agencies. The limit of \$1.5 million represents an inappropriate reversion to old policy based on assumptions instead of based on actual need.

[408] NAN similarly supports the orders requested by the COO, with the minor change to the second order such that consultation be directed to occur with both the COO and NAN.

C. Canada

[409] Canada responds specifically to NAN's arguments relating to capital for Band Representative Service. Canada submits that NAN misrepresents that the Tribunal has ordered the capital payments NAN seeks, misrepresents that ISC has been inconsistent in its interpretation of the Tribunal's orders in relation to Band Representative Services capital, and misrepresents that ISC has failed to address remoteness issues. Canada contends that it has gone beyond what the Tribunal ordered.

[410] Canada also relies on a number of its past submissions on Band Representative Services. Those submissions maintain that Canada has addressed the Tribunal's orders in relation to Band Representative Services. These submissions also describe Canada's process for reimbursing costs paid for Band Representative Services. These issues and submissions are more fully described in 2020 CHRT 24 and 2018 CHRT 4 where the Panel made specific orders relating to Band Representative Services.

[411] In addition, Canada submits these submissions demonstrate that it worked with claimants, established guides to assist in making claims, showed flexibility on deadlines, and worked with the parties to identify and address capital needs. Further, the submissions show that capital needs can be addressed through other existing programs for capital funding. Capital needs cannot be addressed in isolation and require broader community consultation. Canada submits it has been taking a community-centred approach to capital funding to address a community's entire capital needs.

[412] Canada submits the evidence demonstrates that ISC has been transparent with recipients on its implementation of the Tribunal's orders and has engaged in dialogue to address capital needs. Further, Canada submits it is paying actual costs for aspects of Band Representative Services that are non-medical such as the expansion of office spaces and family support meeting spaces. Canada is paying actual costs which already reflects costs related to remoteness. The average claim is less than a quarter of the \$1.5 million limit.

[413] As Canada is paying actual costs, it is already required to pay any increase in costs due to remoteness. The dispute is properly characterized as a dispute about the scope of the Tribunal's orders rather than an issue relating to remoteness. Nonetheless, the evidence demonstrates Canada has appropriately considered remoteness issues.

[414] Canada submits that the order in 2018 CHRT 4 related to building repairs, with further context at paragraphs 212-213 of the decision. The orders do not require Canada to fund all costs tangentially related to Band Representative Services. Canada has generously interpreted the orders to support Band Representative Services in fulfilling their statutory functions.

[415] Canada indicates that Ms. Wilkinson's evidence, cited by NAN, demonstrates that building renovations and new buildings may not be eligible for funding under the Terms and Conditions but that they may nevertheless be considered on a case-by-case basis. Similarly, the letter NAN cites from Catherine Thai demonstrates Canada interpreted building repairs broadly to include expansions of space and vehicles. Canada declined funding for requests such as recreational and athletic facilities, cultural centres, and road maintenance. These reflect reasonable and rational distinctions.

[416] Finally, Canada objects to NAN filing contested evidence through an affiant who lacks direct knowledge of the material as this undermines Canada's ability to cross-examine on the matter.

[417] In sum, Canada submits that it has implemented the Panel's orders in a manner that complies with the *Financial Administration Act*, satisfies the need for Parliamentary control of spending, and ensures the efficient, economic and prudent use of public resources.

[418] Canada also submits that the Tribunal does not have the remedial power to dictate the specifics of Canada's replacement policy for funding Band Representative Services.

[419] Moreover, Canada contends that Ontario-specific orders are a significant expansion of the complaint.

X. Capital for Band Representative Services and Prevention Services in Ontario Analysis

[420] The Tribunal set out its initial reasoning in the letter-decision. The Tribunal is now providing the further analysis indicated in the letter-decision.

[421] Given Canada's concern about the manner in which the NAN filed contested evidence and the resulting prejudice Canada alleges from an inability to cross-examine an affiant with direct knowledge of pertinent evidence, the Panel declined to rely on the NAN's evidence to inform the letter-decision and these subsequent reasons. The Panel took this approach out of an abundance of caution and because there was sufficient other evidence on which it could rely. The Panel nonetheless appreciates the NAN's efforts to collect and submit this evidence, as this is the sort of precise evidence based on specific examples that demonstrates the effect of Canada's policies and policy changes on individual First Nations children, families and communities. Nevertheless, there is sufficient evidence before the Tribunal to make findings for Ontario.

[422] In particular, the order from 2018 CHRT 4 at paragraphs 336 and 426-427 addressing Band Representative and Mental Health Services read as follows:

[336] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 by **February 15, 2018** or within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.

[...]

[426] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund actual costs of mental health services to First Nations children and youth from Ontario, including as provided by First Nations, Tribal Councils, First Nations Child and Family Services Agencies, parents/guardians or other representative entities retroactively to January 26, 2016, by **February 15, 2018**, or within 15 business days after receipt of the documentation of expenses.

[427] The Panel, pursuant to Section 53 (2) (a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, at the actual cost of providing those services retroactively to January 26, 2016 by **February 15, 2018** and until such time as studies have been completed or until a further order of the Panel.

[423] The Ontario child and family services, the *1965 Agreement* and Band Representatives Services have always formed part of this claim. The Panel rejects Canada's argument that Ontario-specific orders are a significant expansion of the complaint.

[424] The 2018 CHRT 4 orders did not exclude actual costs for prevention for Band Representatives Services. The orders targeted Band Representative Services as a whole. Band Representatives are also part of the broader prevention efforts made by First Nations communities in Ontario to keep First Nations children in their homes, families and communities. Their actual costs should be funded by Canada, which includes the purchase or construction of capital assets that support prevention services and Band Representatives.

[425] While the Panel never intended to exclude capital funding for Band Representatives and for prevention services which would go against the spirit of the *Merit Decision*, the Panel believes further clarification to its previous orders is required to make clear that prevention services and Band Representative Services on-reserve in Ontario are fully funded at actual costs including funding at actual costs for the purchase and/or construction of buildings for the delivery of services under the FNCFS Program. The funding should also include building repairs and/or expansion. This would be more responsive to the Tribunal's goal to eliminate the systemic discrimination found while a long-term approach is developed.

[426] Canada has not successfully established a statutory exception under section 15 or 16 of the *CHRA*, moreover, such a defence was not part of these proceedings that led to the *Merit Decision* and subsequent orders (see para. 460).

[427] Furthermore, the Panel is not convinced that fully funding at actual costs prevention services and capital for the purchase and/or construction of buildings to support the delivery of Band Representatives goes against the *Financial Administration Act*, satisfying the need for parliamentary control of spending, and ensuring the efficient, economic and prudent use of public resources. In the 2016 *Merit Decision*, Canada was ordered to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the findings in the *Merit Decision*.

[428] The same reasoning applies for fully funding the feasibility studies and needs-assessments:

The core of the discrimination found in the *Merit Decision* is systemic and was caused by Canada's structure and funding methodology which was focused on financial considerations and not the best interests of children or their specific needs. The Panel's orders intend to eliminate this racial systemic discrimination

(see 2020 CHRT 24 at para. 41).

[429] Timely interim positive measures are necessary while long-term reform is implemented.

[430] The Panel agrees with the COO that there is a participatory or consultative role for Band Representatives in virtually all proceedings or actions under the *CYFSA*. If properly resourced, the *CYFSA* enables Band Representatives to be involved in almost every step of the child and family services agency's intervention in a First Nations family, and by extension in the First Nation community. Band Representatives are not secondary to the child and family services system for First Nations children: they are central.

[431] Further, the Tribunal has been presented with insufficient evidence to find that the discriminatory practices identified in the *Merit Decision* relating to the *1965 Agreement* have been eliminated through reforms, amendments, or a replacement to the *1965 Agreement*.

[432] In the *Merit Decision*, the Panel found that:

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

(...) The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with *Ontario's Child and Family Services Act*. Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998.

(...) AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision (...).

[433] While the Panel appreciates that this process takes time and thorough consultations for an optimal long-term approach, during this time best efforts need to be made to avoid gaps, lesser services or denials. Services have to be provided somewhere and not ensuring that this is the case is insufficiently responsive to address the discrimination in the immediate to mid-term.

[434] Unlike FNCFS Agencies, First Nations in Ontario have not had access to funding “at actuals” for prevention services or related building repairs. First Nations in Ontario have funded prevention initiatives through Canada’s limited “immediate relief” allocations.

[435] As First Nations in Ontario have expanded their capacity to deliver prevention and Band Representative Services to their citizens, a concomitant demand for space within which to deliver, manage, and govern these services has arisen.

[436] The Panel finds that there is sufficient evidence to establish that the current approach results in insufficient funding for prevention services and space to offer Band Representative Services on-reserves. Without adequate space, First Nations cannot provide prevention services and Band Representative Services that meet the legal or ethical standards respecting client confidentiality and record security, or in some cases, provide any services at all. This results in either a lesser service or a denial of service to First Nations children. Canada’s conduct is contrary to the principle of substantive equality and the best interests of the child.

[437] Furthermore, the Panel agrees with the COO that the Capital Directive demonstrates the process for access to funding for capital for FNCFS Agencies but Band Representative Services programs are not included in this Directive, (see Exhibit 7A to the Affidavit of Lorri Warner, sworn March 4, 2020 (First Nations Child and Family Services Program Directive: Agencies Funding Stream – Capital Expenditures)).

[438] The Panel also agrees the funding guide shows that capital for Band Representative programs is not included as an eligible expense and is to be dealt with in the FNCFS Terms and Conditions, but it is not in fact dealt with in the FNCFS Terms and Conditions (see Ontario Region Guide (Draft) for Reimbursement of 2019-2020 First Nations Child and Family Services (FNCFS) Band Representative Services Actual Costs Resulting from the Canadian Human Rights Tribunal Orders. Exhibit 7A to the Affidavit of Lorri Warner, sworn March 4, 2020 (First Nations Child and Family Services Program Directive: Agencies Funding Stream – Capital Expenditures)).

[439] The Panel accepts the NAN’s argument that First Nations are providing prevention and Band Representative Services without sufficient funding for capital and infrastructure in a context of a chronic infrastructure deficit felt particularly strongly in remote and Northern communities. The lack of infrastructure includes a lack of housing which hinders the ability to find suitable foster homes in the community and the ability to hire staff from outside the community. NAN adds that in many of its communities, the issue is not simply inadequate buildings hindering program delivery, but often a complete absence of available buildings.

[440] Canada submits in paying actual costs this already reflects costs related to remoteness. The Panel accepts this assertion. Nevertheless, the Panel values the remoteness quotient developed with the NAN’s expertise and believes it will be very useful in different ways including developing a new equitable funding formula for the Northern and remote communities in Ontario. However, the Panel finds the issue here is related to insufficient and capped funding for capital assets and prevention services because of Canada’s policies including its interpretation of the Tribunal’s orders.

[441] Moreover,

the CCCW was keen on finding practical solutions to address the growing frustration among leadership in remote communities that arises when claims are categorized as complex or are denied. It was requested that ISC notes where Terms and Conditions influence or constrain objectives and this be revisited in light of them being operation guidelines that may not align with CHRT orders or that Act. ISC reminded the Committee of their obligation to adhere to the Terms and Conditions set forth by the Treasury Board,

(see CCCW draft record of decisions January 14, 2020 exhibit “A” to the Record of Documents of the Chiefs of Ontario and the Attorney General of Canada dated April 9, 2020 tab 1).

[442] The Panel agrees with the COO that Canada’s failure to adequately fund capital for Band Representative programs means that First Nations are unable to take full advantage of their rights or exercise their duties under the *CYFSA*, such that the discrimination the Tribunal sought to correct is perpetuated.

[443] Moreover, Canada’s failure to adequately fund the capital needs of Band Representative programs inhibits the delivery of community-based, culturally appropriate child and family services to First Nations children.

[444] Canada also submits that a process for First Nations to prioritize their capital needs within the Department exists. The Panel accepts Ms. Wilkinson's evidence that Canada is engaging with First Nations on their priorities (see Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 155, lines. 1-20). Again, the Panel believes that Canada is discussing with First Nations to identify their long-term needs and this is essential. As explained above, First Nation driven changes, priorities, plans and holistic approach is ideal if it materializes. The Panel believes that it does in some cases.

[445] In the same vein, Canada submits the requested order would put First Nations Child and Family Services at the front of the line for funds on every reserve, which would fail to respect the prioritization identified by individual communities. This could cause delays to other important projects identified as a priority by the community. ISC is open to and willing to explore changes to the process as it currently stands, but that requires technical conversations that ought to take place during meetings of the CCCW as well as direct consultations with First Nations communities. The Panel understands this and agrees.

[446] However, in the interim, the orders in this ruling taking into account the need for the First Nations approval will assist in ensuring that the real needs of First Nations and First Nations children and families on reserve are addressed expeditiously to respond to gaps and avoid delays in service delivery.

[447] Moreover, in the event that a First Nations’ priority is to gain more space to offer Band Representative and prevention services, the Panel finds in light of the evidence, an order should clarify this ought to be fully funded at actual costs until such time as a new non-discriminatory and adequate funding formula is developed.

[448] The Panel finds that reliable evidence before the Tribunal also demonstrates that when some specific rights-holders. First Nations expressed their specific needs and requested assistance for non-trivial things to support the delivery of services, some of those reasonable requests were denied.

[449] Wabaseemoong Independent Nations and Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation) illustrate the capital and infrastructure issues facing some Band Representative programs. Both of these First Nations sought reasonable amounts of funding to meet the capital needs of their programs. Canada denied both claims.

[450] The Panel believes these two First Nations are unable to operate their Band Representative programs in a manner consistent with the governing legal and ethical standards. Without adequate space, Band Representatives cannot ensure that client confidentiality is protected, or that records of personal information are collected, retained, and disposed of properly. Yet the programs in these two First Nations continue to operate, despite the inability to meet legislated and ethical confidentiality standards, to provide community-based, culturally safe child and family services that offer children a connection to their land, kin networks, language and culture, and a voice within the child protection system.

[451] ISC did not apply a substantive equality lens or provide a holistic response that referred to Jordan's Principle, possibly because there are no capital funds available for Jordan's Principle. Similarly, no information was provided on how to access funds elsewhere. More importantly, the First Nations provided detailed information about their specific needs and those did not trigger a comprehensive substantive equality analysis.

[452] The funding requests were handled by the Child and Family Services Reform and Transformation branch, Ontario Region, ISC and went to ISC's headquarters. Of note, ISC was ordered to eliminate the lack of coordination that affect First Nations children and Canada previously argued the ISC merge was also to respond to the lack of coordination identified in the *Merit Decision* amongst other goals.

[453] The evidence is found at Tab 3 of the COO's record of documents dated April 9, 2020.

Child and Family Services Program

Denied Claim for Payment of Actual Costs – Interim Appeal Process

An appeal can be initiated by a First Nations child and family services (FNCFS) agency funding recipient or other requester (e.g., Band for Band Representative funds) once a claim for reimbursement or advance funding for actuals has been denied or partially denied by the Assistant Deputy Minister, Children and Family Services Reform, Indigenous Services Canada, pursuant to the escalation protocol.

...

In rendering a determination on appeal, the following factors may be considered:

- Substantive equality and the provision of culturally appropriate services, including the distinct needs and circumstances of children and families living on reserve (e.g., cultural, historical, and geographical needs and circumstances);
- The best interests of the children;
- Whether the cost, if retroactive, was actually incurred before the claim for reimbursement was submitted;
- Whether the cost has been covered by another government or funder;
- Whether the cost is eligible for reimbursement (e.g., whether the request can be authorized under the existing Terms and Conditions of the program); and
- Whether the claimant is eligible for funding, as per the existing Terms and Conditions.

[454] Wabaseemoong's request was denied. Therefore, it followed the appeals process and submitted a detailed response. Portions of its rationale are provided below:

Wabaseemoong Independent Nations' Band Representative program is called Nigonigawbow, which means "the person that stands ahead" in Anishinaabemowin. Nigonigawbow describes the protector of children and is derived from Wabaseemoong's traditional customary care practices.

Wabaseemoong submitted two claims for Band Representative services for fiscal year 2019-2020: one claim for staff and program needs, which was approved, and one for a modular trailer in which *Nigonigawbow* would operate, which was denied. Wabaseemoong appeals the denial of funding for the modular trailer.

As detailed in Wabaseemoong's initial and amended submissions for the trailer, *Nigonigawbow* requires the following space: offices for the two Band Representatives, the Social Director, the Secretary, and Human Resources; a room for records storage; a room for Indigenous dispute resolution circles; a room for repatriation workers; an Elders' room; and a larger space for community consultation and gatherings.

The claim for the trailer was submitted to Indigenous Services Canada (ISC) on August 8, 2019. The initial submission for the trailer was for \$1,196,355; this amount was later reduced to \$898,250 on September 3, 2019, based on discussions between Wabaseemoong staff and ISC (please see the related email thread attached as Appendix A). After numerous emails and phone calls between Wabaseemoong and ISC, the *Nigonigawbow* submission for the trailer was ultimately denied by ISC on November 15, 2019, 99 days after the initial submission. This is 84 days over the 15 day time for processing Band Representative Services claims prescribed by the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada et al v Canada*, 2018 CHRT 4 (para 427).

ISC's reason for denying funding for the trailer was "expenditures listed in your payment request for BRS extend beyond the CHRT Order 427" (see enclosed denial email addressed to Chief Scott). ISC also stated in the denial email to Chief Scott that "Canada is required to reimburse or fund BRS for Ontario First Nations based on actual costs and needs to support eligible activities funded under the Program".

...

As detailed in Wabaseemoong's submissions for the trailer, there is no office or program space at all in the community for *Nigonigawbow*. Wabaseemoong is a semi-remote First Nation in Northwestern Ontario. The community has severely limited infrastructure; all buildings – residential and business – are filled beyond capacity. *Nigonigawbow* staff currently offer programming out of a corner of the community hall. This is a public space with no washrooms or kitchen. It is not wheelchair accessible. There is no fire safety equipment. The doors are broken making the space extremely cold. It is entirely unsuitable for child welfare programming involving children and families. The *Nigonigawbow* office space is in a public shared hallway in the Council chambers, with many of the same limitations as the programming space. There is no privacy for client meetings, phone calls, or to receive faxes and materials from Children's Aid Societies, nor is there a secure place to store confidential records. There is nowhere for the Elder to keep medicines and store ceremonial items. All of these challenges raise serious issues for staff health and safety and the Nations' potential exposure to liability due to the lack of confidential office or record storage space.

There is no alternative space on the reserve (either to rent or purchase) for *Nigonigawbow*'s operations. The only alternative would be for the program to relocate *off-reserve* which would inhibit the Nations' ability to offer culturally-appropriate services, result in gaps in child welfare services for on-reserve families, and is not in line with the Nations' priorities.

...ISC's denial of funding for a trailer for *Nigonigawbow* is also inconsistent with the principle of substantive equality, a principle to which the government is bound pursuant to Section 11 of *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (the *Act*). Section 11 of the *Act* provides that "child and family services provided in relation to an Indigenous child are to be provided in a manner that [...] promotes

substantive equality between the child and other children”. Funding of a program is a service as per *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2. Accordingly, Band Representative Services funding, as a service provided by Canada, must be provided in a manner that promotes substantive equality.

Nigonigawbow requires physical space in which to deliver Band Representative Services and programming. Mainstream and Indigenous child welfare agencies are provided with funding to meet their capital needs, yet Wabaseemoong, as a First Nation seeking to deliver its own Band Representative Services, is being denied funding to meet its capital needs. This constitutes differential treatment in the provision of child and family services to the Indigenous children of Wabaseemoong and is contrary to the principle of substantive equality and the best interests of the child.

In its decision on the merits, *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2, the Tribunal held the following regarding Band Representative Services:

Not only does the Band Representative address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together and is directly provided for in Ontario’s Child and Family Services Act. (Footnote 1: January 2016 Decision at para 348).

[...]

If funding does not correspond to the actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity. (Footnote 2: January 2016 Decision at para 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (Footnote 3: January 2016 Decision at para 426).

By denying funding for the capital needs associated with *Nigonigawbow* ISC is continuing to discriminate against Wabaseemoong and inhibiting the delivery of culturally-appropriate community-based Band Representative Services to Indigenous children. The First Nation cannot deliver Band Representative Services without a safe, secure, confidential space. The continued delivery of services without a safe, secure, confidential space is contrary to social work practices and risks contravening the *CYFSA*. Canada was ordered to remedy its discrimination against First Nations children in Ontario by funding Band Representative Services at the “actual cost”; for Wabaseemoong, this includes a modular building. This is a legal prerogative Canada must respect.

...

We also understand that Canada's staff may not be aware of the range of services provided by *Nigonigawbow*, and may not understand the infrastructure conditions in Wabaseemoong. As such, as part of your decision-making process we invite you to visit our community to experience the challenges we face in program and service delivery.

[455] The original denial email was included in the appeals form and reads as follows:

Dear Chief Scott:

This email is in response to the 2019-20 advance request submitted on September 11, 2019, by Wabaseemoong Independent Nations seeking a reimbursement based on actual needs for Band Representative Services (BRS) under the Canadian Human Rights Tribunal (CHRT) decision, Order 427.

Following the payment request in the amount of \$1,196,355.00, the Department requested additional clarifications to support the review process. Given the complexity of the request as well as the nature of the activities, additional time to complete the review was requested and an email was sent to Wabaseemoong Independent Nations regarding the status of the payment and that the 15-day timeline process had paused.

The Department has now finalized its review and the payment request in the amount of \$1,196,355.00 to support the acquisition of a modular trailer which would serve as an office building to deliver prevention programming was considered ineligible as per the First Nation Child and Family Services (FNCFS) Program Terms and Conditions and the Ontario Recipient Guide for BRS.

[456] While the Panel has little information about Canada's response to the appeal, the COO submits it was denied.

[457] The appeal form contains more information on the request than in the original request. However, as shown in tab 3 of the COO's record, there is sufficient evidence for the Panel to find that it is more probable than not that the original denial was not based on substantive equality principles and that no alternatives were provided to Wabaseemoong Independent Nations when the claim was denied. The claim was deemed ineligible as per the FNCFS Program Terms and Conditions and the Ontario Recipient Guide for Band Representative Services.

[458] This type of situation is precisely what should trigger an adequate substantive equality analysis according to the Wabaseemoong Independent Nations' priorities and specific needs. There are ample reasons in all the Tribunal's numerous rulings to indicate what substantive equality is. The Panel finds in light of the above and the remaining evidence found at tab 3 of the COO's record of documents, that a case-by-case approach used by Canada should have yielded a positive result. This also demonstrates a unilateral decision and a disregard for the real needs of First Nations children and families that form part of these proceedings.

[459] Furthermore, Canada relies heavily on its discussions with First Nations and respecting their priorities when this was not done here.

[460] The Panel arrives to a similar conclusion in the situation of Asubpeeschoseewagong Netum Anishinabek where the Band Representative program operates out of a single room in a shared trailer in what used to be the Chief and Council Chambers before the leadership moved out in order to allow the Band Representatives to use the space. Consequently, the Chief and Council no longer have offices or chambers. Their request to use their surplus funds was denied. (See tab 4 of the COO's record of documents, April 9, 2020).

[461] While the Panel appreciates that this may not always be the case, these examples support the COO and the NAN's positions and some of their requested orders.

[462] In light of the above, the same can be said about Canada's argument that the requested order would make child and family services the infrastructure priority for all communities which could cause delays for other infrastructure projects identified as a priority by the community. This submission is unconvincing especially if Canada applies a substantive equality lens to specific needs identified by First Nations.

[463] The Panel believes a further clarification order is necessary, five and a half years after the *Merit Decision* and three years after the 2018 CHRT 4 ruling, to be sufficiently responsive to the discrimination identified in the *Merit Decision* and subsequent rulings while complete reform is achieved.

[464] This order could be revisited once new information and/or studies are completed.

[465] While Ms. Wilkinson, testified that Canada was going beyond the building repair orders she also admitted to the Chair that there were also 2016 orders to cease the discrimination according to all the findings in the decision.

THE CHAIR: You understand that the pieces that you referred to were immediate relief. Do you understand that the Tribunal had phased ---

THE WITNESS: Yes, absolutely.

THE CHAIR: Okay.

THE WITNESS: Yes.

THE CHAIR: And do you recall that in our decision in 2016 we also said cease the discriminatory practice according to all the findings in the decision?

THE WITNESS: Yes

(see cross-examination of Ms. Johanne Wilkinson dated May 7, 2019 at p.163 lines 5-14).

[466] Some of those 2016 findings clearly addressed Band Representatives and the need to shift to prevention.

[467] Canada submits that the Tribunal does not have the remedial power to dictate the specifics of Canada's replacement policy for funding Band Representative Services. The Panel has the remedial power to ensure that the systemic discrimination found is eliminated and does not reoccur and that Canada's actions are responsive to its orders to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in the *Merit Decision*.

[468] Canada can apply a real substantive equality analysis and adopt a policy that is responsive to the systemic discrimination without waiting for the Panel to issue clarification orders. In all fairness, Canada has done this in many instances but there is room for improvement and consistency such as in this case.

[469] Services have to be delivered in adequate spaces. Not providing adequate space is preventing the provision of those services.

[470] The Panel is not dictating the specifics of the replacement policy. It simply ensures the replacement policy is effective in light of the evidence and its findings and does not perpetuate discrimination, repeat past flaws and errors:

Despite the discordance between Ontario's Child and Families Services Act and AANDC's policy to no longer fund Band Representatives, Minister Duncan indicated that "it falls within the responsibilities of First Nation governments to determine their level of engagement in child welfare matters" and "we do not foresee the Government of Canada providing funding support in this area" (Annex, ex. 27 at p.1)

(see *Merit Decision* at para. 238, emphasis added).

[471] There is a striking resemblance between this finding and Canada's arguments as part of this motion: "Canada must now be given time to follow the democratic structures and rules in place to ensure accountability in spending public funds. Most importantly, there is no reason to disrupt the current system, which depends on communities to develop and prioritize their needs". This argument is one of the main arguments that was rejected in 2016 and systemic discrimination was found.

[472] Another excerpt from the *Merit Decision* is helpful here:

In terms of infrastructure and capacity building, the 1965 Agreement has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, Transcript Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see Transcript Vol. 25 at p. 32).

(see *Merit Decision* at para. 245, emphasis added).

[473] Furthermore, Canada submits there is no ongoing discrimination regarding capital expenditures. However, the Panel finds that ISC affiants admit that conversations to address capital expenditures are still ongoing to understand needs and to "build a case" for new authorities. In the interim, needs are only partially addressed and funding is capped, and case-by-case requests for additional funds may end up being denied as explained above. This approach falls short. Canada did not establish that its current approach is sufficiently responsive to eliminate the systemic discrimination.

[474] On the issue of prevention services provided by First Nations in Ontario, the Panel did not make specific actual costs orders for other prevention services except for mental health services and Band Representatives. The Panel finds that some improvements were made and that Canada did provide funding through limited immediate relief allocations for prevention services in Ontario. Canada also provided funding at actual costs for Band Representatives services except for actual costs of building purchase and construction. Consequently, the funding is still insufficient to meet the real needs of the First Nations children and families on-reserve in Ontario.

[475] Prevention services must be funded at actuals including capital for the purchase and/or construction of buildings to support the delivery of prevention and Band Representative services in order to start addressing the systemic discrimination identified in the *Merit Decision* while Canada develops a new, adequate long-term funding formula that is informed by studies and consultations. This is necessary given the significant passage of time since the *Merit Decision* and even since the more recent 2018 CHRT 4. Ms. Isaak recognized that First Nations in Ontario are different because prevention is provided through communities, (see Cross examination of Ms. Paula Isaak, October 30, 2018 ("Paula Isaak Cross"), p. 111-112, lines 20-7).

[476] Moreover, the Panel agrees with the COO that First Nations in Ontario are directly engaged in providing prevention and Band Representative Services to their First Nations citizens. This growth in programming has not been appropriately supported, which has put pressure on the already overburdened capital and infrastructure of First Nations in Ontario.

[477] For those reasons, the Panel finds a further clarification order is warranted.

[478] The Panel also wishes to address the feasibility studies and needs assessments off-reserve.

[479] The off-reserve portion of the order for feasibility studies and needs assessments applies to First Nations agencies and communities that also operate off-reserve under the Federal Program for the Ontario region. The federal government submits that the Terms and Conditions and authorities for the FNCFS Program do not permit the expenditure of funds on infrastructure off-reserve. This level of expansion of the program would require additional authorities, and would be better facilitated through the Community Infrastructure Branch.

[480] This ruling addresses all services under the FNCFS Program and Jordan's Principle, prevention services and Band Representatives. Jordan's Principle is not restricted to services on-reserve and intertwines with the other services especially when there are gaps. In a holistic perspective, feasibility studies and needs assessments would potentially assist in identifying specific needs for the First Nations agencies and communities who operate off-reserve and highlight what is the federal government's responsibility and what is not. These reasons also apply to all off-reserve orders in this ruling for feasibility studies and needs assessments.

Order

Pursuant to section 53 (2) of the *CHRA*, the Tribunal orders Canada to:

Fund actuals costs for Band Representatives and prevention services on-reserve within 30 days of this order and advise the First Nations in writing.

Consult with COO and the NAN, advise in writing and provide funding for Ontario First Nations to conduct feasibility studies and needs-assessments for the purchase and/or construction of capital assets that support the delivery of Band Representatives and prevention services on-reserve and off-reserve when applicable under the Federal Program in Ontario within 30 days of this order. Canada shall post this information on the ISC website.

XI. Small Agency Reimbursement Context

[481] The Tribunal, in 2018 CHRT 4, directed Canada to reimburse small FNCFS Agencies for downward adjustments to their funding that Canada imposed based on the small number of children they serve. In particular, the Tribunal made the following order in paragraphs 251-252:

The Panel, pursuant to Section 53 (2) (a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies' costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs small first nations agencies' for reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.

[482] The Caring Society's current motion seeks further clarification and direction relating to the portion of the order directing Canada to "provide funding on actual costs to First Nations Agencies, to be reimbursed retroactive to January 26, 2016." In particular, the Caring Society's motion is brought to address how the actual costs of these agencies should be determined for the purpose of reimbursements under this order.

[483] The Panel has considered the specific funding challenges of small FNCFS Agencies at various points in previous decisions, going back to the *Merit Decision*. In the *Merit Decision*, the Panel found, in paragraph 384, that

[f]or small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[484] Later in the decision, at paragraph 386, the Panel found that

AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[485] Similarly, in the *Merit Decision* at paragraph 389, the Panel found:

Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services.

[486] In summarizing its key findings in paragraph 458 of the *Merit Decision*, the Panel noted that

The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

[487] In 2016 CHRT 10, the Tribunal directed Canada to take immediate measures to address items, which included “assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies” and that “AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention” (paras. 10 and 23).

[488] In 2016 CHRT 16, the Panel reiterated its relief order from 2016 CHRT 10, including the portion related to “remote and/or small agencies” (2016 CHRT 16 at para. 36). Further, “INAC [was] ordered to immediately stop formulaically reducing funding based on arbitrary population thresholds” (para. 40). Accordingly, the Tribunal ordered, at paragraph 160(A)(5), that

In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level.

[489] In 2018 CHRT 4, the Panel found that Canada was not in full compliance with previous orders relating to small agencies and therefore issued subsequent orders. For example, in paragraph 247, the Tribunal found that “[w]hile Canada complied to stop reducing the agencies’ funding for those who serve less than 251 children, the Panel finds Canada not in full compliance with its previous orders. This Panel ordered Canada to eliminate population thresholds and levels and, to immediately address adverse impacts for small agencies who encounter the greatest challenges especially, if they are isolated.” Accordingly, the Tribunal issued the orders at paragraphs 251-252 that are already reproduced at the outset of this section.

[490] As already noted, the issue in this motion involves retroactive funding for FNCFS Agencies for the period between January 26, 2016 and February 1, 2018. During that period, the FNCFS Program funding formula estimated costs for certain expenses on a core funding list such as the Board of Directors, the director, HR services, administrative overhead, insurance and audit. For agencies serving less than 800 children, this amount was reduced. Until the Tribunal’s order in 2016 CHRT 16, the reduction ranged from a 12.5% reduction for FNCFS Agencies serving 700-799 children to an 87.5% reduction for FNCFS Agencies serving 100-199 children (see Canada’s September 30, 2016 Compliance Report at Annex C and Canada’s October 31, 2016 Compliance Report at pp 4-5).

[491] The parties have established the CCCW to attempt to implement the remedy in this decision and resolve any outstanding matters that may arise. This issue of reimbursement for the downward scaling of small FNCFS Agency funding has been subject to such discussions. Through that process, Canada indicated that it is willing to provide retroactive reimbursement for expenses actually incurred and for retroactive salary increases for small FNCFS Agency staff in accordance with provincial standards.

XII. Small Agency Reimbursement Party Submissions

A. The Caring Society

[492] The Caring Society seeks the following orders:

1. Canada shall reimburse small FNCFS Agencies (serving fewer than 800 registered Indian children) for any funding reduction related to Canada’s application of downward adjustments based on population thresholds in its operations formula for core funding, retroactive to January 26, 2016, where those amounts have not yet been reimbursed pursuant to the Tribunal’s February 1, 2018 Order (2018 CHRT 4); and
2. Canada shall contact all small FNCFS Agencies within six weeks of the date of the Order to advise them of the Order.

[493] The Caring Society's central argument is that the funding formula was designed to fund FNCFS Agencies based on the government's costing model, to which the downward scaling was applied for small agencies. Therefore, the Panel's order in 2018 CHRT 4 to reimburse small agencies for actual costs should be based on the actual costs identified in the funding model, excluding the downward scaling, rather than expenses actually paid.

[494] The Caring Society does not consider Canada's position that it will provide reimbursement for expenses actually incurred and retroactive staff salary and benefit increases in accordance with provincial standards to be adequate compensation.

[495] The Caring Society reviews the Panel's findings in earlier decisions, going back to the *Merit Decision*, that Canada's downward scaling of core funding for agencies serving less than 800 children registered under the *Indian Act*, RSC 1985, c I-5, was discriminatory. In particular, the Caring Society cites paragraphs 384, 386, 389 and 458 of the *Merit Decision*; paragraph 23 of 2016 CHRT 10; paragraphs 24, 29, 36, 40 and 160(A)(5) of 2016 CHRT 16; and paragraphs 154, 195, 247, 251, 252, 420, and 421 of 2018 CHRT 4 as examples of the problems the Panel identified with Canada's funding of small agencies and the corresponding remedial orders the Panel made. The amendments to paragraph 421 of 2018 CHRT 4 do not change the analysis of the current issue.

[496] The Caring Society identifies how the costing model funded certain functions on a pro-rated manner for small agencies and also imposed varying downward scaling to the assumed costs for agencies serving less than 800 children. The Caring Society understands this practice was applicable during the 2015/16, 2016/17 and first 10 months of the 2017/18 fiscal years. Collectively, the downward scaling during this timeframe resulted in \$29.6 million that small FNCFS Agencies did not receive.

[497] The Caring Society disagrees with Canada's argument that the *Financial Administration Act* limits funding to works, goods or services because the payments would be made pursuant to a Tribunal order. Further, the Caring Society argues that these expenses should already have been budgeted and included in the annual appropriations.

[498] Further, Canada calculates administrative overhead based on a percentage of salaries and benefits rather than at actual cost. It seems particularly unclear why Canada would not be willing to provide corresponding retroactive funding for administrative overhead based on retroactive increases to salaries it is willing to provide. The Caring Society submits that the Tribunal's previous orders require providing small FNCFS Agencies with the entirety of their core funding.

[499] The Caring Society argues that it is unreasonable to require small FNCFS Agencies to have actually incurred relevant expenses in order to be eligible for reimbursement. It is unreasonable to expect these agencies to have spent money they did not have. They should be placed in the financial position they would have been in had Canada immediately complied with the Tribunal's order on January 26, 2016.

B. Commission

[500] The Commission takes no position on the requested order but hopes to provide some background and general comments to assist the Panel.

[501] At the time of the *Merit Decision*, Canada's funding formula contained downward adjustments for small FNCFS Agencies tied to a small number of population thresholds. A slight change in child population could lead to a huge change in funding from crossing a threshold. The Tribunal found that the child population thresholds were discriminatory because they did not reflect actual service needs and provided inadequate fixed funding for operation and prevention. In 2018 CHRT 4, the Tribunal found that Canada's interim change of no longer reducing funding for agencies serving less than 251 children was not sufficient to remedy the problem identified in the *Merit Decision*. Accordingly, the Tribunal ordered Canada to analyze the results of FNCFS Agencies' needs assessment, do a cost-analysis

of the real needs of small agencies, develop an alternative system of funding small agencies based on the actual costs of providing appropriate services, cease the practice of not fully funding the costs of small agencies, and to provide retroactive funding of costs back to January 26, 2016.

[502] Subsequently, Canada funded the needs assessment completed by the IFSD. Canada has established a process for small agencies to obtain funding for the actual cost of services delivery and encourages them to reach out if they have unmet needs. Canada has also published guides for procedures for claiming retroactive reimbursement of expenses incurred. The Caring Society has taken the position that the ruling requires the retroactive provision of the full funding that would have been available had Canada not had the downwards scaling rather than only providing reimbursement for expenses actually incurred.

[503] The Commission acknowledges that Canada has taken steps such as funding the IFSD report, creating a process for reimbursement of past expenses actually incurred, and discussing this matter while paying actual costs on an interim basis.

[504] Nonetheless, the parties have reached an impasse in discussions on this matter and the Commission looks forward to any guidance the Tribunal provides.

[505] The Commission further notes that it would be open to enforceable timelines relating to the IFSD report and remoteness report aimed at developing a long-term funding approach for small agencies.

C. Assembly of First Nations

[506] The AFN supports the Caring Society's position.

D. The Chiefs of Ontario

[507] The COO did not make submissions on this issue.

E. Nishnawbe Aski Nation

[508] NAN did not make submissions on this issue.

F. Canada

[509] Canada requests that the motion be dismissed. Canada submits that it has complied with the Tribunal's order to fund small agencies at actual costs retroactive to January 26, 2016. Canada submits that the requested order is in effect a request for compensation and general damages for small FNCFS Agencies which goes beyond the Tribunal's order of restitution for monies spent.

[510] Canada reviews that the *Merit Decision* addressed Canada's funding approach for small FNCFS Agencies serving a child population of less than 1000. Core and administrative funding were scaled down for agencies serving fewer than 800 children. The issue was subsequently addressed in 2016 CHRT 16 and 2018 CHRT 4.

[511] Canada subsequently revised its policies to provide actual cost funding to smaller agencies. In particular, Canada is paying small agencies actual costs retroactive to January 2016 where they did not have a source of funds and therefore incurred costs and, since 2018, Canada is paying actual costs on an ongoing basis until an alternative system is in place. Canada is encouraging agencies to contact ISC if they have unmet needs. Canada has increased the available funding in the 2018 Budget. Canada cannot reimburse for costs not actually incurred. Canada is willing to provide retroactive salary and benefit funding so that staff can be retroactively compensated in line with their provincial counterparts. Canada also confirmed small agencies could claim their deficits in a retroactive claim. Canada has paid

approximately \$24 million in retroactive payments even before the expiration of the deadline to submit retroactive claims. This is close to the funding reduction calculated to have occurred from the downward adjustment. Canada has also provided funding to pay claims for small agencies at actual costs.

[512] Canada submits that the Caring Society is now seeking an order for retroactive expenditures small agencies could have made but did not. The Tribunal's order to retroactively reimburse small agencies based on actual costs cannot be interpreted in a manner that would result in reimbursement of expenses not actually incurred.

[513] Canada asserts that its interpretation of actual costs and reimbursements is consistent with the Directive on Transfer Payments issued under section 7(1) of the *Financial Administration Act* that indicates that the total amount of contributions is not to exceed the amount of eligible expenditures actually incurred. This is distinguishable from Canada's retroactive funding of staff wages and benefits as the staff performed their functions during the relevant period and would have been compensated at a higher rate had Canada's discriminatory conduct not occurred.

[514] Small agencies have subsequently been able to expand their services based on Canada's funding of actual costs.

[515] Canada submits that the Caring Society's request is for an extension of the Tribunal's orders beyond compensation for monies spent to now cover compensation for discrimination and general damages. Those remedies go beyond the scope of section 53(2)(a) of the *CHRA* and beyond the Tribunal's statutory powers.

XIII. Small Agencies Analysis

[516] The Tribunal set out its initial reasoning in the letter-decision. As promised, the Tribunal is now providing more detailed reasons.

[517] The Caring Society seeks an order that Canada reimburse small FNCFS Agencies (serving fewer than 800 eligible children) for any funding reduction related to Canada's application of downward adjustments based on population thresholds in its operations formula for core funding, retroactive to January 26, 2016, where those amounts have not yet been reimbursed pursuant to the Tribunal's February 1, 2018 Order (2018 CHRT 4).

[518] Canada submits that the requested additional order for non-incurred expenses is in effect a request for compensation and general damages for small FNCFS Agencies downward scaling.

[519] The Tribunal's February 1, 2018 order was to "provide funding on actual costs [to] small First Nations agencies, to be reimbursed retroactive to January 26, 2016". The Panel agrees with the Caring Society that the goal of the orders was to ensure proper data collection and to be responsive to the real needs of First Nations children.

[520] This is why the Panel ordered at Schedule B, amended paragraph 421 that:

pursuant to Section 53 (2) (a) of the *CHRA*, Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies' costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs small first nations agencies, to be reimbursed retroactive to January 26, 2016 within 15 business days after receipt of documentation of expenses. FNCFS agencies must submit documentation of expenses for retroactive payments to Canada no later than March 31, 2019. This order complements the order above.

[521] The order is meant to bring small agencies onto equal footing to other agencies and to have all their actual costs paid so that First Nations children are not adversely impacted by the lack of resources available to small First Nations agencies.

[522] Furthermore, Canada was ordered to cease its practice of not funding actual needs of children, otherwise referred to as downward scaling, and develop an appropriate funding methodology that reflects actual needs of the children served by small First Nations agencies. Also, the Panel did not exclude small agencies from its actual costs orders.

[523] Therefore, the Panel confirms small agencies should receive actual costs funding for all their operations including funding for the costs for administration and governance, prevention, intake/investigation, and legal services at their actual cost. The Panel clarifies this is already covered under the 2018 CHRT 4 orders for FNCFS small agencies (see paras. 247-252; 411 as amended in Schedule B) that Canada confirmed it is implementing.

[524] Canada submits it revised its policies to provide actual cost funding to smaller agencies. In particular, Canada is paying small agencies actual costs retroactive to January 2016 where they did not have a source of funds and therefore incurred costs and, since 2018, Canada is paying actual costs on an ongoing basis until an alternative system is in place. Canada is encouraging agencies to contact ISC if they have unmet needs. Canada has increased the available funding in the 2018 Budget. Canada cannot reimburse for costs not actually incurred. Canada is willing to provide retroactive salary and benefit funding so that staff can be retroactively compensated in line with their provincial counterparts. Canada also confirmed small agencies could claim their deficits in a retroactive claim. Canada has paid approximately \$24 million in retroactive payments even before the expiration of the deadline to submit retroactive claims. According to Canada, this is close to the funding reduction calculated to have occurred from the downward adjustment. Canada argues it has also provided funding to pay claims for small agencies at actual costs.

[525] In the event that Canada's practice does not cover all actual costs of small First Nations agencies to offer services that respond to the real needs of the children they serve, the Panel clarifies that actual costs for administration and governance, prevention, intake/investigation, and legal services should be funded by Canada at actual costs. If these costs were not reimbursed at actual costs, the small agencies should claim these costs and seek reimbursement from Canada. If the small agencies went into deficit/debt and/or had to reallocate prevention or operation funds to offer the required services to children as a result of downward scaling, the funds ought to be reimbursed by Canada. If the funds do not fall in the above categories and have not been incurred, they likely fall under another subsection of the *CHRA* such as section 53(2)(d) which was not argued as part of this motion. The subsection is reproduced below:

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice;

[526] Canada submits that the Caring Society is now seeking an order for retroactive expenditures small agencies could have made but did not. The Tribunal's order to retroactively reimburse small agencies based on actual costs cannot be interpreted in a manner that would result in reimbursement of expenses not actually incurred.

[527] Therefore, the Panel agrees with Canada on this part that non-incurred expenses are a form of compensation and this did not form part of the 2018 CHRT 4 retroactive actual costs orders. The Tribunal's order to fund small agencies at actual costs retroactive to January 26, 2016 did not include the Caring Society's additional request.

[528] While the Panel believes it is within the scope of the claim, such arguments on compensation and general damages were not advanced by the Caring Society. No other order will be made on this request as part of this ruling.

XIV. Proposal to Parties and Retention of Jurisdiction

[529] The Panel retains jurisdiction on all its previous orders including the clarification orders in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or until all the outstanding issues including long-term relief have been resolved by the parties or ruled upon by the Panel. This does not affect the Panel's retention of jurisdiction on other issues in this case.

[530] As part of its retained jurisdiction, the Panel has in the past encouraged the parties to seek clarifications or modifications of the orders from the Tribunal (2018 CHRT 4, para. 445). The Panel continues to be willing to entertain requests for clerical corrections to the orders or amendments to the orders the parties agree are in the best interests of children, as the parties and Panel did with the amendments 2017 CHRT 35 brought to the orders in 2017 CHRT 14.

[531] The Panel is aware of public announcements that the parties have recently entered into negotiations to settle outstanding matters, including those at issue in this decision. In the absence of submissions on these discussions, the Panel has not in any way considered them in providing its reasons, in particular as it issued the letter-decision prior to the negotiations commencing. That said, the Panel is happy to support the negotiations as it can. It occurs to the Panel that the parties may, for example, wish to suspend or modify the timelines set out in the orders for the duration of, or as a result of, their negotiations. The Panel is open to any submissions any of the litigants might make on this issue, in particular if they have already discussed it with the other parties and have reached a consensus.

XV. Order

[532] Pursuant to section 53(2) of the *CHRA* the Tribunal orders Canada to:

- A. Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of this order advising them on how to access this Capital asset funding. Canada will post this information on the ISC website.
- B. For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of this order. Canada shall post this information on the ISC website.
- C. The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of FNCFS services on-reserve. This also includes studies for First Nations that also operate under the Federal FNCFS Program off-reserve such as Ontario.
- D. Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of this order advising them on how to access this Capital asset funding. Canada shall post this information on the ISC website.
- E. For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon for First Nations and FNCFS Agencies that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of this order. Canada shall post this information on the ISC website.
- F. The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of Jordan's Principle on-reserve and in the Yukon and off-reserve where applicable under Jordan's Principle.

- G. The Tribunal orders Canada in consultation with the COO and the NAN, to provide funding for First Nations and FNCFS Agencies to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of Jordan's Principle on-reserve and off-reserve, where applicable under Jordan's Principle in Ontario.
- H. Fund actuals costs for Band Representatives and prevention services on-reserve within 30 days of this order and advise the First Nations in writing.
- I. Consult with COO and the NAN, advise in writing and provide funding for Ontario First Nations to conduct feasibility studies and needs-assessments for the purchase and/or construction of capital assets that support the delivery of Band Representatives and prevention services on-reserve and off-reserve when applicable under the Federal Program in Ontario within 30 days of this order. Canada shall post this information on the ISC website.
- J. The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

November 16, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: November 16, 2021

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne , counsel for Assembly of First Nations, the Complainant

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Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Schedule A

Annex to Ruling 2021 CHRT 41

Amendments to the Orders on the Consent of the Parties

1. Context

[533] On December 13, 2021 a letter was filed at the Tribunal by some of the parties and agreed to by all parties requesting an extension of the December 16, 2021 deadlines ordered in 2021 CHRT 41. On December 15, 2021, the Tribunal issued its direction and granted the request extending the timelines in the Tribunal's major capital orders (2021 CHRT 41) to January 14, 2022 given the parties were engaged in facilitated settlement discussions throughout the fall.

[534] As explained in the December 13, 2021 letter, the Caring Society, the AFN, Canada, COO and NAN engaged in negotiations in November and December 2021 to reach an agreement-in-principle on outstanding matters before the Tribunal, including with respect to major capital. The parties submit that as was reported in the media earlier this month, such an agreement-in-principle was reached on December 31, 2021.

[535] A proposal for amendments to the Tribunal's November 16, 2021 Order (2021 CHRT 41) was agreed-to as part of the discussions leading to the agreement-in-principle.

[536] On January 14, 2022, the Caring Society filed a notice of motion to vary on consent of all the parties in these proceedings with a number of proposed amendments to the 2021 CHRT 41 ruling which are reproduced below. The parties agree the amendments would resolve the dispute on the letter-decision which was followed by the detailed reasons included in 2021 CHRT 41 ruling. The parties advise this agreement will resolve Canada's application for judicial review filed before the Federal Court on September 27, 2021 (Federal Court File No. T-1477-21).

[537] Of note, a similar process was already used in the past in two other rulings (2017 CHRT 14 and 2018 CHRT 4) and was successful. It is an expeditious way to resolve contentious matters in the best interest of the First Nations children who will not have to wait for years before the matter is resolved. This also is inline with the objective of the *CHRA* to resolve matters expeditiously and in the public interest. This reasoning led to the Panel's proposal at paragraphs 530-531. Section 53(2) of the *Canadian Human Rights Act*, Rules 1(6), 3(1) and 3(2) of the Tribunal's Rules of Procedure (Proceedings prior to July 11, 2021), the Tribunal's implied jurisdiction to control its own processes and the Tribunal's continued jurisdiction and approach in this case all support the Tribunal's power to make the amendments.

[538] Upon consideration, the Panel finds the proposed amendments to be reasonable and that they do not change the spirit or substance of the ruling. Moreover, the Panel values the work done by the parties who have expertise and/or knowledge who have negotiated and/or agreed to the details of these amendments. Therefore, the Panel agrees with the proposed amendments and modifies its 2021 CHRT 41 ruling below.

[539] The Panel hopes that Canada's discretion included at paragraph L of the amendments will never be used to perpetuate discrimination.

[540] These amendments do not modify any other rulings or orders in this case.

[541] The Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

[542] The Panel thanks all parties for their work.

2. Amendment

[543] The amendments to the Orders at paragraph 532 and as repeated throughout the decision are below. For clarity, the below amendments supersede the text of the original decision. The original text in paragraph 532 and as repeated throughout the decision has not been changed to reflect the below amendment.

3. Amended Order

[544] Paragraph 532 is amended. Pursuant to section 53(2) of the *CHRA* the Tribunal orders Canada to:

- A. For FNCFS Agencies, including small agencies, and/or First Nations, fund the full cost of the purchase of capital assets that are needed to support the delivery of FNCFS to First Nations children, youth and families on-reserve including in Ontario and in Yukon that are underway or that the FNCFS Agency or First Nation advises are ready to proceed as per paragraphs 191 and 192 (e.g., has relevant First Nations approvals and for which feasibility and design work is complete). Within 15 days of this amended order, Canada will advise FNCFS Agencies and First Nations in writing on how to access this capital assets funding, and Canada will post this information on the ISC website within 30 days.
- B. For the construction of capital assets by FNCFS Agencies and First Nations, fund the full cost of projects that are needed to support the delivery of FNCFS to First Nations children, youth and families on-reserve including in Ontario and in Yukon that are underway or that the FNCFS Agency or First Nation advises are ready to proceed as per paragraphs 191 and 192 (e.g., has relevant First Nations approvals and for which feasibility and design work is complete). Within 15 days of this amended order, Canada will advise FNCFS Agencies and First Nations in writing on how to access the capital assets funding, and Canada shall post this information on the ISC website within 30 days.
- C. In consultation with the Parties, provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of FNCFS to First Nations children, youth and families on-reserve, including in Ontario, and in Yukon. This also includes studies for First Nations and FNCFS Agencies that serve children living off-reserve who are eligible under the FNCFS Program.
- D. Fund all First Nations or First Nations-authorized service providers for the full cost of the purchase of capital assets to provide safe, accessible, confidential and culturally- and age-appropriate spaces that are needed to support the delivery of Jordan's Principle services to First Nations children on-reserve including in Ontario and to First Nations children in the Northwest Territories and in Yukon that are underway or that the First Nation or First Nations-authorized service provider advises are ready to proceed as per paragraphs 191 and 192 (e.g., has relevant First Nations approvals and for which feasibility and design work is complete). Within 15 days of this amended order, advise First Nations, Jordan's Principle service coordinators and FNCFS agencies in writing on how to access this capital asset funding, and Canada shall post this information on the ISC website within 30 days.
- E. For the construction of capital assets, fund the full cost of projects to provide safe, accessible, confidential and culturally- and age-appropriate spaces that are needed to support the delivery of Jordan's Principle services to First Nations children on-reserve, including in Ontario and to First Nations children in the Northwest Territories and in Yukon for First Nations or First Nations-authorized service providers where these projects are underway or the First Nation or First Nations-authorized service provider advises are ready to proceed as per paragraphs 191 and 192 (e.g., has relevant First Nations approvals and for which feasibility and design work is

- complete). Within 15 days of this amended order, Canada shall advise First Nations, Jordan's Principle service coordinators and FNCFS Agencies in writing of how to access the capital assets funding, and Canada shall post this information on the ISC website within 30 days.
- F. In consultation with the Parties, provide funding for First Nations or First Nations-authorized service providers to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets to provide safe, accessible, confidential and culturally- and age-appropriate spaces for the delivery of Jordan's Principle services on-reserve, including in Ontario, in the Northwest Territories and in Yukon and off-reserve where these services are eligible under Jordan's Principle.
 - G. In consultation with the COO and the NAN, to provide funding for First Nations and First Nations authorized service providers in Ontario to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets to provide safe, accessible, confidential and culturally and age-appropriate spaces for the delivery of Jordan's Principle services.
 - H. Fund First Nations in Ontario for the full cost of the purchase or construction of capital assets that are ready to proceed as per paragraphs 191 and 192 and that support the delivery of First Nations Representative services and prevention services related to child and family services to First Nations children, youth and families on-reserve consistent with paragraph M. Within 15 days of this amended order, Canada shall advise First Nations in Ontario in writing how to access this capital asset funding.
 - I. In consultation with the COO and the NAN, provide funding for First Nations in Ontario to conduct feasibility studies and needs assessments for the purchase and/or construction of capital assets that support the delivery of First Nations Representative services and prevention services to First Nations children, youth and families on-reserve and off-reserve for the First Nations who operate under the FNCFS Program off-reserve in Ontario. Within 15 days of this amended order, Canada shall write to First Nations in Ontario to advise them how to access this funding for feasibility studies and needs assessments, and Canada shall post this information on the ISC website within 30 days.
 - J. The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.
 - K. Canada's review of capital projects for FNCFS Agencies or First Nations situated in remote areas will consider that some aspects of a project may need to be approved before full feasibility or design work is complete due to factors including, but not limited to, seasonal access to the community (e.g., availability of an ice road during the winter months only).
 - L. Where an FNCFS Agency or First Nation has advised Canada that a project is ready to proceed as per paragraphs 191 and 192 (e.g., has relevant First Nations approvals and for which feasibility and design work is complete) or has submitted a request for feasibility study funding, Canada will make a determination on full funding of the project or study within 30 business days (other than in exceptional circumstances where complexity related to the project's design or the impact of local circumstances on its delivery, or other unforeseen circumstances, require additional time for Canada to consider the proposal). Where Canada's position is that it will not fund the full cost of a project or feasibility study, that a project is not ready to proceed, or that it requires more than 30 business days to make a determination, Canada will advise the FNCFS Agency or First Nation in writing, clearly substantiating why the project is being delayed, deferred or is ineligible in whole or in part. In the case of incomplete or denied project proposals, Canada will provide the First Nation or FNCFS Agency a reasonable period of time to correct any deficiency.
 - M. The scope of capital asset categories for the purposes of paragraphs 532(A) to (I) above and considerations related to Canada's approvals process will be further elaborated in a guide to be developed by Canada and the parties within 45 days of the amended order. The creation of this

guide will not delay funding for projects that are underway or that are ready to proceed as per paragraphs 191 and 192 (e.g., have relevant First Nations approvals and for which feasibility and design work are complete) and shall not adversely affect First Nations and First Nations service providers from accessing funding for the full cost of purchasing or constructing major capital assets, or for conducting capital needs assessments and feasibility studies.

- N. Within 45 days of this amended order, Canada and the parties will develop and implement a joint review mechanism to provide First Nations involvement in both reviewing how Canada is applying the criteria for funding major capital projects under paragraphs 532(A) to (I) and to monitor the overall rollout of funds for such projects.
- O. The funding noted above will be provided based on an initial five-year commitment of \$276.2M for service sites for FNCFS and Jordan's Principle services, backed by a three-year, \$93.5M contingency fund for major capital related to Jordan's Principle group requests. For capital projects to support the delivery of First Nations Representative services in Ontario, funding will be provided based on an initial five-year commitment of \$399M.
- P. Funding in excess of the initial commitments noted in paragraph 523(O) will be informed by the feasibility studies conducted pursuant to the orders in paragraphs 532(C), (F) and (I), be provided based on the actual needs of First Nations children, youth and families, be consistent with substantive equality, and address data-driven cost drivers such as inflation, population growth and poverty metrics. Canada's funding of the full cost of major capital projects will also include any reasonable cost overruns (such as increased cost of materials, inflation, or job-site conditions differing from those contemplated in construction plans) resulting between the feasibility/design phase and construction, which will be further defined in the guidance documents for recipients.
- Q. For greater clarity, Canada to carry out the above in compliance with paragraphs 422 and 424 of 2018 CHRT 4 (paragraphs containing orders relating to Indigenous Services Canada not reallocating funding).

[545] The orders made above apply until such time as one of the options below occur:

- 1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.
- 2. Canada reaches an agreement that is Nation-specific even if the Nation is not yet providing its own child welfare services and the provisions for major capital in the agreement for child and family services or Jordan's Principle are more advantageous for the Nation than the orders in this ruling.
- 3. Long-term reform is completed in accordance with best practices recommended by the experts and the parties and interested parties, and funding for the purchase or construction of major capital assets is no longer based on discriminatory funding formulas or programs, including as set out in a Final Order by the Tribunal approving a Final Settlement Agreement signed by Canada and the Parties.

4. This does not affect the Panel's retention of jurisdiction on other issues and orders in this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

January 18, 2022

TAB 24

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 8 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2022-03-24

File number: T1340/7008

Citation:

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 8 (CanLII), <<https://canlii.ca/t/jpdl7>>, retrieved on 2026-01-02

**Most recent
unfavourable
mention**

Tribunal
canadien
des
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2022 CHRT 8

Date: March 24, 2022

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Contents

I. Context 1

II. Requested orders on consent 6

III. Grounds for the motion and Tribunal findings 9

A. Grounds for the motion 9

B. Tribunal findings 14

(i) Performance Informed Budgeting 15

(ii) Fund Actual Cost Post-Majority Care 18

(iii) High Needs Jordan's Principle Recipients past the Age of Majority 25

(iv) Fund Needs Assessment and Long Term Funding Research 29

(v) Timelines for Supporting Research Data Requests 33

(vi) ISC Cultural Competency and Anti-Discrimination Plan 33

(vii) Amendment to 2018 CHRT 4 39

(viii) Amendment to 2021 CHRT 12 39

(ix) Establish the End Date for Compensation 48

IV. Legal Framework 53

V. Final remarks 60

VI. Panel Chair's remarks 61

VII. Orders 61

VIII. Retention of Jurisdiction 63

I. Context

[1] This ruling concerns a March 4, 2022, consent order request made by the parties to these proceedings to expand Jordan's Principle services orders to youth from 18 to 25 years of age and for the application of the FNCFS program to youth ages 18 to 25 that age out of care. This consent order also provides for increased funding for prevention services for children, youth and families. This consent order request addresses a specific timeline for the implementation of the above and to set March 31, 2022 as the end date for eligibility for compensation for the victims of the discrimination found by the Tribunal. Finally, the parties made a number of other consent order requests. This will be further detailed below.

[2] In 2016, the Tribunal released its *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [Merit Decision] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the FNCFS Program but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was the FNCFS Program creating incentives to remove First Nations from their homes, families and communities. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the Merit Decision. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief so as to allow immediate change followed by adjustments and finally, sustainable long-term relief informed by data collection, new studies and best practices as identified by First Nations experts, the specific needs of First Nations communities and of First Nations Agencies, the National Advisory Committee on child and family services reform and the parties.

[3] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

[89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the Merit Decision and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the CHRA, the Charter, the Convention on the Rights of the Child and the UNDRIP to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in *all government services*

affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] Furthermore, recently, the Quebec Court of Appeal in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, recognized the Tribunal's concern that funding only formed part of the Preamble and did not create an obligation for sustainable funding under *An Act Respecting First Nations, Inuit and Metis children, youth and families*, SC 2019, c 24 (see paras. 271-272, 274). The Court at para. 562 states: "Ainsi, une nouvelle approche s'impose, ayant pour piliers la collaboration fédérale-provinciale et la prise en compte des peuples autochtones en tant qu'acteurs politiques et producteurs de droit. Cette approche doit prévaloir tant pour ce qui est des initiatives législatives que de leur mise en œuvre, y compris leur financement" (emphasis ours).

[6] The Panel is pleased with this helpful finding that will guide governments in the future. Moreover, as part of this motion, in her affidavit dated March 4, 2022, Dr. Cindy Blackstock asserts that:

25. [she] is concerned that First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families* may not benefit from the Tribunal orders, including this consent order. Canada has taken the position, and has repeatedly advised her, that it does not have obligations under the Tribunal's orders to First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families*. Dr. Blackstock affirms the Agreement in Principle reached on December 31, 2021(AIP), also excludes such First Nations. However, the AIP does state that these First Nations will not receive less funding than they would have received under the Reformed CFS Funding Approach for the services in question.

[7] Dr. Blackstock adds that:

25. ... Respecting the right of First Nations to be self-determining, I believe that First Nations ought to have the right to make a free, prior and informed choice about which funding approaches, policies and practices, including those arising from the Tribunal proceedings, ought to apply.

[8] The Tribunal agrees and is satisfied the AIP ensures First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families* will not receive less funding than they would have received under the reformed First Nations Child and Family Services [FNCFS] Funding Approach for the services in question.

[9] This is significant to ensure that First Nations do not have to face the unacceptable choice between adequate and sustainable funding under the reformed FNCFS Program or the exercise of their inherent right to self-government to develop and offer their own child and family services with the uncertainty of adequate sustainable funding especially upon the date of renewal of the agreements between the First Nation and Canada.

[10] The Panel agrees with Ms. Stephanie Wellman from the Assembly of First Nations (AFN) that the focus of this case is not on the *Act Respecting First Nations, Métis and Inuit children, youth and families* and that "[i]t is not for Canada, the AFN, this Tribunal or any other party to these proceedings to speak to the manner in which self-determining peoples opt to exercise their jurisdiction." (March 7, 2022 Affidavit, para. 80).

[11] This Tribunal's case is also about children and families who are also rights holders and deserve to have their human rights respected. The Tribunal's role is to eliminate the discrimination found and prevent the same or similar practices to reoccur.

[12] The Tribunal cannot force First Nations that are not part of these proceedings to do anything. However, the Tribunal has jurisdiction over Canada as per the *Canadian Human Rights Act*, RSC 1985 c H-6 [CHRA] to ensure that discriminatory practices adversely impacting First Nations children and families are eliminated and do not resurface in a new form in the long-term.

[13] The Tribunal made findings in the *Merit Decision* where Canada had concluded a funding agreement with the Attawapiskat First Nation:

[122] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

(emphasis added).

[14] When the Tribunal expressed its concerns about sustainable and adequate funding not being guaranteed under the *Act Respecting First Nations, Métis and Inuit children, youth and families*, it did so with the above in mind and not in any way to hinder First Nations' inherent rights that this Panel has recognized on multiple occasions.

[15] The Tribunal's focus is on Canada not repeating its past discriminatory practices or creating new ones that would harm First Nations children, families and Nations.

[16] Finally on this point, the Tribunal is pleased to hear that the AFN sought, and achieved, recognition within the AIP that such First Nations exercising their jurisdiction would receive no less than the funding provided under the eventual reformed FNCFS Program. In her March 4, 2022, affidavit Dr. Valerie Gideon, Associate Deputy Minister of ISC, asserts that:

15. [t]he Agreement-in-Principle notes that First Nations that have chosen to avail themselves of the framework offered by *An Act respecting First Nations, Inuit and Métis children, youth and families* ... to facilitate the exercise of their jurisdiction will "not receive less funding than they would have received under the reformed FNCFS Funding Approach for the services for which they have assumed jurisdiction." ISC [Indigenous Service Canada] will ensure that enhancements to the FNCFS Program, including those sought through this motion, are made available to those First Nations retroactive to April 1, 2022.

[17] Dr. Valerie Gideon further affirms that:

16. ... ISC and the Assembly of First Nations will discuss how to adjust the [*Act respecting First Nations, Inuit and Métis children, youth and families*] interim funding framework to reflect these enhancements. By April 1, ISC will also have reached out to the two

Indigenous Governing Bodies who have signed or are on the cusp of signing coordination and fiscal relationship agreements. It will propose to discuss the enhancements available to those two entities. Regardless of the time required to have those discussions, ISC will make retroactive to April 1, 2022, any adjustments to the Indigenous Governing Bodies' agreements.

[18] This is extremely positive news and with the understanding that this commitment is reflective of what will also be included in the Final Settlement agreement for long-term reform addresses the Tribunal's concerns on this point.

II. Requested orders on consent

[19] In particular, this consent motion is for the following orders, as agreed to by the parties on December 31, 2021:

- 1. Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.
- 2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence-informed way agreed to by the Parties.
- 3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.
- 4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):
 - a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;
 - b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");

- c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and
 - d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle, including but not limited to identifying and addressing formal equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").
- 5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.
 - 6. a. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada. b. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.
 - 7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4:

[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at \$2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services. These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

- 8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

[42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at \$2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

- 9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents.

[20] The wording for the seventh proposed order was modified in response to questions raised by the Panel. The Panel believed that given the procedural history in this case, the requested order should be clarified, to avoid future disagreements between the parties on the interpretation of the order. In particular, on March 11, 2022, the Tribunal wrote to the parties seeking clarification. The Panel's main question related to the \$2,500 funding per person resident on reserve and in the Yukon for prevention services in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements.

[21] The Panel requested clarity in the case where reform is delayed and the prevention funds that are carried over have all been used. The Panel believed this eventuality should be reflected in the terms of the requested order to ensure that First Nations communities and First Nations agencies would have sufficient prevention funds while reform is completed.

[22] In response to the Panel's questions, the Parties agreed to add the following wording to the requested order:

Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties.

[23] The Panel considered this amended wording proposed by the Parties in its analysis.

III. Grounds for the motion and Tribunal findings

A. Grounds for the motion

[24] The Caring Society, the AFN and Canada made joint submissions on the grounds for this motion and filed separate affidavits along with untested evidence in support of this motion. The Chiefs of Ontario (COO), the Nishnawbe Aski Nation (NAN), the Commission and Amnesty International filed separate letters with the Tribunal indicating their consent to the motion. The Tribunal has considered all the materials and submissions filed by the parties. In the interest of conciseness, only some will be reproduced below:

11. As part of the Actuals Decision [2018 CHRT 4], the Tribunal ordered Canada, in consultation with the Parties, to undertake a cost analysis of the real needs of FNCFS Agencies, including small agencies, and to guide a data collection process (paragraphs 408, 418 and 421). The Caring Society and the AFN requested that the Institute of Fiscal Studies and Democracy (the "IFSD") take on the research outlined by the Tribunal, with the AFN acting as the project contract holder. The National Advisory Committee on First Nations Child and Family Services (the "NAC") provided directional and strategic support.

12. In April 2018, the IFSD began its work on the following: (a) developing reliable data collection, analysis, and reporting methodology for analyzing the needs of FNCFS Agencies, in alignment with the Tribunal's rulings; (b) providing technical expertise to analyze agency needs, providing strategic advice on how best to monitor and respond to actual agency needs from fiscal and governance perspectives; and (c) analyzing the needs assessment completed by FNCFS Agencies and communities.

13. On December 15, 2018, the IFSD released its first report, *Enabling First Nations Children to Thrive* (the "IFSD Phase One Report"). The IFSD Phase One Report defined and outlined the existing funding gaps in the FNCFS Program and the ongoing hardships

facing First Nations children, youth, and their families: gaps in funding for prevention, poverty, information technology, and capital were identified as key components to the ongoing disparity.

14. Following the release of the IFSD Phase One Report, the Caring Society and the AFN asked the IFSD to define a funding approach and performance measurement framework for First Nations child and family services, with funding support from Indigenous Services Canada. The purpose of this second phase was to present a funding structure; a means of developing evidence to understand the well-being of children, families, and communities; and a range of scenarios to cost the proposed approach. Canada agreed to fund this second phase on May 13, 2019.

15. On July 31, 2020, IFSD released its second report, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being (the “IFSD Phase Two Report”). Based on 2019/2020 fiscal data, the IFSD Phase Two Report proposes a performance framework called “Measuring to Thrive” and a needs-based block funding approach based on indicators of well-being, bottom-up budgeting complemented by need and performance components, as well as control exercised by First Nations in the development and delivery of child well-being services.

16. The IFSD Phase Two Report outlines a funding approach designed as a block transferred budget with components addressing gaps in need, including prevention, poverty, geography, information technology and capital, with other supplements for the shift to a result-focused approach that addresses the real needs of First Nations children, youth, families, and First Nations. Among the various components costed by the IFSD, the funding approach recommends that prevention be funded (at the upper end) at \$2500 per capita, based on community population, automatically adjusted based on inflation and population.

17. On July 22, 2021, the IFSD submitted its response to the AFN’s request for proposal for *Research for the Modeling of a Wellbeing Focused Approach for First Nations Child and Family Services Through Performance Budgeting* (“IFSD Phase Three”). IFSD Phase Three is focused on modeling the funding approach outlined in the IFSD Phase Two Report in order to build capacity and an enhanced bottom-up planning framework for FNCFS Agencies and First Nations, while building confidence among stakeholders. Canada agreed to fund the entire proposal on December 31, 2021.

18. On April 2, 2019, the AFN proffered evidence regarding the many challenges youth in care face once they age out of care. On November 22, 2019, Youth in Care Canada released *Justice, Equity and Culture: the First-Ever YICC Gathering of First Nations Youth Advisors* (the “2019 Youth in Care Report”), which was tendered in evidence and referenced in 2020 CHRT 7 paras. 30-32. In December 2021, Youth in Care Canada released *Children Back, Land Back: A Follow-Up Report for First Nations Youth in Care Advisors* (the “2021 Youth in Care Report”). The evidence, including evidence put forward during the hearing on the merits, underscores the need for young people to be involved in matters affecting them on an ongoing basis as well as services and supports to assist youth in care and former youth in care as they transition to adulthood.

ISC’s inclusion of post-majority care in the FNCFS Program

19. Prior to March 2020, First Nations children were no longer eligible for services pursuant to the FNCFS Program when they reached the age of majority in their province or territory of residence.

20. On March 27, 2020, following discussions at the Consultation Committee on Child Welfare (“CCCW”), Canada announced that, as an exceptional measure in response to the COVID-19 pandemic, it would temporarily keep supports in place for First Nations young adults ageing out of care after reaching the age of majority to avoid discharging them from care during the pandemic.

21. In Budget 2021, Canada announced that it would continue to fund post-majority supports under the FNCFS Program for First Nations young adults for up to two years beyond the point the individual is no longer eligible for child and family services, either because they have reached the age of majority, or are no longer eligible for extended care services as per the provincial or Yukon legislation. The Tribunal has found that many of these young people were removed as children unnecessarily due to Canada’s discrimination as found by the Tribunal.

22. The evidence filed in support of this motion (some of which is already before the Tribunal) indicates that First Nations youth ageing out of care who do not have access to post-majority supports may have higher needs owing to the multi-generational trauma of residential schools and hardships arising from Canada’s discrimination found by the Tribunal. Youth in care and former youth in care are a marginalized group with unique needs that require specific supports.

Canada’s Commitments to Immediate Measures that Redress the Ongoing Discrimination

23. Canada acknowledges that it has the onus to redress the discrimination identified by the Tribunal and prevent its recurrence. This consent order is the first step on the path to the long-term measures ordered by the Tribunal.

24. Starting in November 2021, the Parties engaged in settlement discussions regarding the long-term reform of the FNCFS Program and Jordan’s Principle. The Parties were assisted by the Honourable Murray Sinclair.

25. On December 31, 2021, the Parties announced that they had reached an Agreement-in-Principle on long-term reform. As part of that Agreement-in-Principle, the Parties committed to reforming the FNCFS Program by March 31, 2023, as well as improving compliance with and reforming Jordan’s Principle. Also, in the Agreement-in-Principle, the parties have agreed that the Reformed CFS Funding Approach will accommodate First Nations and FNCFS service providers experiencing exceptional circumstances, to be defined in the Final Settlement Agreement, which may require a longer transition to the Reformed CFS.

26. In addition, the terms of the consent order sought in this consent motion (see paras 1-9 under “orders sought”) were annexed to the Agreement-in-Principle. Following the execution of the Agreement-in-Principle, the Caring Society, the AFN, and Canada agreed to seek this order as soon as possible.

27. While the research and community consultation are not at a sufficient stage for complete reform of the FNCFS Program to be implemented, the funding of prevention at \$2,500 per capita will provide families with supports they need and deserve to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. Prevention funding at \$2,500 per capita will also provide First Nations and FNCFS Agencies with greater resources “up front” (as opposed to through

the application-based actuals process) and will provide greater funding to First Nations without FNCFS Agencies (currently receiving \$947 per capita, subject to inflation adjustments, pursuant to 2021 CHRT 12).

28. With respect to Jordan's Principle, the evidence demonstrates that for some high needs First Nations youth and young adults who reach the age of majority, the loss of access to Jordan's Principle is detrimental to them and their families. Canada has agreed to assess the resources required to aid families and/or young adults in identifying supports for needed services for these recipients. Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.

29. Canada acknowledges that Indigenous Services Canada ("ISC") requires transformation in order to address the "old mindset" repeatedly identified by the Tribunal, which contributed to the discrimination under the FNCFS Program and Jordan's Principle. In response to 2016 CHRT 16 at para 29, 2018 CHRT 4 at para 154, 2019 CHRT 7 at para 63, 2020 CHRT 15 at para 84, and 2021 CHRT 41 at para 341, Canada has agreed to consult with the Parties and continue the implementation of mandatory cultural competency training and performance commitments for employees within ISC, to complete work begun through the CCCW. In addition, Canada has agreed to work with the Parties to establish an expert advisory committee within sixty (60) days of the order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada has further agreed to take reasonable measures to begin implementing the work plan.

30. Finally, the Parties acknowledge that some questions remain unanswered regarding the best path forward for long-term reform. This is particularly the case with respect to modeling the IFSD Phase Two Report, assessing the real needs of First Nations without FNCFS Agencies, formulating a better long-term approach to Jordan's Principle and reforming ISC to prevent the discrimination from recurring. Canada has agreed to provide funding and data to enable IFSD to conduct the following research to assist the Parties in developing long-term solutions to address the findings of the Tribunal:

- a. IFSD Phase Three;
- b. the Non-Agency First Nations Needs Assessment;
- c. the Jordan's Principle Data Assessment; and
- d. the Jordan's Principle Needs Assessment.

31. To ensure that the work undertaken by the IFSD can be completed in a timely manner, Canada is agreeing to fulfill all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

Based on Canada's Commitments, the End Date for Compensation Under the FNCFS Program is Justified

32. Based on Canada's consent to the orders outlined herein, the Parties are of the view that the factual basis on which the Compensation Entitlement Decision was made will significantly change as of April 1, 2022, due to increased amounts of prevention funding being made available to communities.

33. In addition, the provision of post-majority supports to young people ageing out of care or young adults who were in care duly considers the multi-generational trauma flowing from Canada's discrimination and enables a more holistic child welfare approach. Young people in care and young adults from care have long advocated for post-majority supports and this action responds to their advocacy.

34. As a result, the Parties request that the Tribunal set March 31, 2022, as the end date for eligibility for compensation under the Compensation Entitlement Decision for the particular victims impacted by the discrimination in the FNCFS Program identified by the Tribunal in 2016 CHRT 2 and subsequent decisions.

35. This amendment to the Compensation Entitlement Decision will resolve one of the issues before the Federal Court of Appeal in Canada's appeal from the Federal Court's decision upholding the Compensation Entitlement Decision.

36. Should the Parties to the Federal Court class proceedings in Federal Court File Nos. T-402-19 and T-1751-21 reach a settlement agreement, Canada and the Assembly of First Nations will make submissions to the Tribunal regarding the impact of that settlement agreement with respect to the Tribunal's Compensation Entitlement Decision and Compensation Payment Decision and any relief requested from the Tribunal in that regard.

37. The Parties further rely on:

- (a) subsection 91(24) of the *Constitution Act, 1867*;
- (b) Section 53(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;
- (c) Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's *Rules of Procedure (Proceedings prior to July 11, 2021)*;
- (d) the Tribunal's implied jurisdiction to control its own processes; and
- (e) such further and other grounds as counsel may advise.

B. Tribunal findings

[25] Some of the evidence such as the affidavits and some attachments were untested, nevertheless the Tribunal may accept such evidence given section 50(3)(c) of the *CHRA*:

subject to subsections (4) and (5), authorizes the Tribunal to receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law.

[26] However, while the evidence can be accepted under this section, the probative value will be appreciated by the Panel in weighing the evidence.

[27] Furthermore, some of the evidence was already tested at the hearing on the merits or in subsequent proceedings.

[28] The Panel has weighed the evidence considering the above.

[29] Upon consideration, the Panel agrees with the parties' order requests and will address them now in turn.

(i) Performance Informed Budgeting

Order request #1. Reform to the First Nations Child and Family Services Program (“FNCFS Program”) shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy (“IFSD”) Measuring to Thrive framework.

[30] The AFN insisted that discussions on compensation also include a separate track on long-term reform. The Panel believes this was instrumental and necessary. Moreover, it is in line with the Panel’s approach to remedies in this case and the Panel’s goal to remain seized of this case until sustainable long-term reform orders on consent or otherwise have been made that will eliminate the systemic racial discrimination found and prevent it from reoccurring.

[31] The AFN submits that Canada advised it was open to negotiations on both compensation and long-term reform.

[32] While the Panel has considered all the materials, it finds Dr. Cindy Blackstock’s affidavit reliable given her expert knowledge of the matters at hand. Moreover, upon examination of the evidence attached to the affidavit, the Panel finds the affirmed declaration to be consistent with the referenced evidence. Dr. Blackstock provides a concise and very useful outline of this order request indicating that:

16. As part of this consent motion, Canada has agreed to reform the FNCFS Program to reflect a performance-informed budgeting approach, with consideration of the well-being outcome indicators defined in the IFSD Measuring to Thrive framework. A Tribunal order requiring Canada to adopt a performance-informed budgeting approach consistent with the Measuring to Thrive framework will provide a foundation for the further development of a durable and equitable long term funding approach for the FNCFS Program that addresses ongoing discrimination and prevents its recurrence. The Measuring to Thrive framework provides the foundation for the further development of the Reformed Funding Approach pursuant to the IFSD Phase Three Research proposal. The Reformed Funding Approach must be based on evidence informed principles including the following:

- a. Funding will be provided by Canada based on evidence informed well-being indicators for First Nations children, youth, and families, as opposed to being driven by bureaucratic markers for funding;
- b. The well-being indicators will facilitate reliable data collection at a community, regional and national level to inform best practices and improve federal child welfare policies and legislation over time;
- c. Funding will be based on a bottom-up budgeting approach driven by the *actual needs* of children, families and communities, reflecting the guidance and direction provided by the Tribunal to date; and
- d. Funding will address the structural drivers of the over-representation as well as culturally based child welfare services.

[33] Dr. Blackstock further affirms that:

17. The Measuring to Thrive framework is a results-based tool to plan, monitor, and assess the performance of policies and programs, against the goal of thriving First Nations children, families and First Nations. It is vital that the factors driving the over-representation of First Nations children in care (such as poverty, poor housing, substance misuse and domestic violence) be measured and addressed to ensure success and erase the discriminatory funding practices of Canada.

18. Implementation of the performance-based budgeting framework in the Measuring to Thrive approach consistent with the IFSD recommendations, will center funding levels and structures on the needs of children, youth and families. This will mark a departure from the non evidence informed bureaucratic approach that was a hallmark of Canada's discriminatory conduct and funding formulas, policies, procedures and agreements under the FNCFS Program.

[34] The Panel finds this approach in line with its findings and previous orders such as a “cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision” order. In other words, those injunction-like powers to cease and desist aim to compel Canada to stop the systemic discrimination found by the Tribunal following the evidence-based findings in the *Merit Decision* and subsequent rulings as a road map with indicators of what constitutes the systemic discrimination found. Further, reform is an important component of the Tribunal's orders. As the Panel previously stated, “By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve” (see *Merit Decision* at paras. 463, underlining changed). Consequently, the National Program, funding formulas and agreements need a full-scale reform not just support pillars (band-aid, unsustainable short-term solutions) put in place.

[35] Further, the Panel believes that the consent order requests are in line with its findings:

“AANDC's [now ISC] reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that “finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison”. This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.”

(“see ”*Merit Decision*“ at para ”465“, emphasis added).”

[36] In 2018 CHRT 4 at para. 236 the Tribunal ordered that its immediate to mid-term orders will remain in effect:

Until such time as one of the options below occur:

1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.
2. Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling.

3. Reform is completed in accordance with best practices recommended by the experts including the NAC and the parties and interested parties, and Eligibility of reimbursements from prevention/least disruptive measures, building repairs, intake and investigations and legal fees services are no longer based on discriminatory funding formulas or programs.

4. Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel.

(emphasis added)

[37] The Panel believes that subparagraph 4 applies in these consent order requests. Moreover, the Panel believes that some of the consent order requests, including request # 1, are intended to comply in the near future with subparagraph 3 above.

[38] Furthermore, in 2018 CHRT 4 at para. 415:

The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

[39] Moreover, Dr. Valerie Gideon asserts in her March 4, 2022, affidavit that:

7. ISC has agreed to fund the AFN to contract IFSD to undertake Phase Three of its research, *Implementing a well-being focused approach to First Nations child and family services through performance budgeting*. That research will model the reformed FNCFS funding approach with First Nations and service providers. ISC and the parties will consider Phase Three's findings and recommendations in the transition to the new funding approach (recommendations on such topics as the FNCFS Program's performance indicators and the activities of the national First Nations-led Secretariat function).

[40] For the reasons explained above, the Panel agrees to make such order and, as will be explained below, the Panel has the power to make such an order.

(ii) Fund Actual Cost Post-Majority Care

Order request # 2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence-informed way agreed to by the Parties.

[41] Dr. Blackstock in her affidavit and evidence correctly characterizes the Tribunal's previous decisions and the evidence in the record.

[42] Dr. Blackstock affirms that:

31. [a]lthough the Tribunal did not directly address or consider post majority services in the *Merits Decision* or in the rulings that followed, evidence was tendered during the hearing on the merits on some of the tragic circumstances facing First Nation youth leaving care at the age of majority. Excerpts of the following evidence from the hearing on the merits are attached as Exhibit “E” to [her] affidavit:

- a. Commission’s Book of Documents, Tab 3: National Policy Review at p. 56;
- b. Commission’s Book of Documents, Tab 5: Wen: De We are Coming to the Light of Day at pp. 195 and 200;
- c. Commission’s Book of Documents, Tab 389: Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair at p. 44;
- d. My February 25, 2013, examination-in-chief at pp. 146-147; and
- e. Betty Kennedy’s September 4, 2013, examination-in-chief at pp. 14.

[43] The Panel agrees with the Caring Society that:

32. [i]t is important to recognize that, given the long history of this case, all First Nations young adults currently aged 18-25 who were placed in care under the FNCFS Program experienced the harms arising from Canada’s discrimination. Canada, therefore, has a positive moral obligation to provide supports to these young people to mitigate some of the harms its willful and reckless discrimination caused. The Panel also agrees the evidence listed by Dr. Blackstock above address leaving care at the age of majority and support the need for the requested order.

The Caring Society believes strongly in centering and empowering the voices of youth in care. Therefore, on September 2019, the Caring Society entered into an agreement with Youth in Care Canada (“YICC”) to organize a national consultation with First Nations youth in care or formerly in care regarding the Compensation Process. In November 2019, YICC released *Justice, Equity and Culture: the First-Ever YICC Gathering of First Nations Youth Advisors*, which is attached as Exhibit “11” to [Dr. Blackstock’s] December 8, 2019, affidavit filed with the Tribunal. This report makes important recommendations regarding the Compensation Process and recommendations regarding child welfare system reforms, including the need for post-majority supports for youth transitioning out of care.

In November 2021, the Caring Society entered into an agreement with the Assembly of Seven Generations (A7G) to provide an advisory report regarding reform of the FNCFS Program, among other things. In January 2022, A7G released *Children Back, Land Back: A Follow-Up Report of First Nations Youth In Care Advisors*. This report also included key recommendations regarding the need for supports for First Nations young adults transitioning out of care. A copy of this report is attached to [Dr. Blackstock’s] affidavit dated March 4, 2022, as Exhibit “F”.

[44] The Panel has considered the evidence provided through Dr. Blackstock’s affidavit alongside all the evidence in the record.

[45] The Panel considered and accepted the YICC’s 2019 recommendations as part of the compensation process orders (see 2020 CHRT 7 at paras. 31-34).

[46] The Panel finds the YICC reports and recommendations to be reliable given the methodology employed to arrive to their findings. Furthermore, the reports and recommendations are also highly relevant given the YICC's direct knowledge and experience of the impacts of being in care and aging out of care.

[47] The findings in YICC's report *CHILDREN BACK, LAND BACK: A Follow-Up Report of First Nations Youth In Care Advisors* discuss how the underfunding impacted their childhood and adolescence as well as long-term impacts. These impacts included the following but are not limited to:

- Removal from birth, biological or blood family
- Lack of support for birth, biological or blood family – money instead flows to foster families. In this vein, there are minimal supports to be able to cover the cost of living.
- Lack of resources for child and family services as well as related services which have a major impact on child and family well-being, for example health clinics, therapy, and rehab centers on reserve.
- Youth believe underfunding caused them to be shifted from temporary to permanent wards of the state and even resulted in being adopted to non-Indigenous families.
- Attending services and placements not culturally safe therefore resulting in experiences of microaggressions and racism.
- Struggling with addiction and mental health with no proper supports.
- Experiencing homelessness and poverty especially after aging out of care.
- Increased vulnerability of experiencing human trafficking.
- Increased interaction with the criminal justice system (for the youth in care as well as their families).
- Lack of supports to succeed in school, resulting in high school dropouts and undiagnosed learning disabilities.

[48] The YICC report #2 made important recommendations and stated that “while we cannot turn back time to undo the harm and abuse that Indigenous youth and children have experienced in child welfare, we can use the lessons of hindsight and the generations of reports, recommendations and solutions to prevent harm and abuse from happening to another generation of Indigenous youth and children” (p. 28).

[49] Another important recommendation is that:

Canada and its provinces/territories must acknowledge and be honest about the violence they have caused to Indigenous youth and children and their families through their policies and legislation. This acknowledgement of past and ongoing violence must be followed up with actions and systemic changes.

Within this acknowledgement, Indigenous rights as well as distinctions-based rights, treaty rights, and inherent rights must be recognized. Indigenous peoples must be involved in every aspect of these systems that impact them alongside evaluation of these systems to ensure ideologies are remedies. Furthermore, First Nations must be supported to move to self government with culturally based and equitable funding if they want to go that path.

(p. 28, emphasis omitted).

[50] The YICC report also mentions at p. 30 that:

It is an understatement to say that the relationship between Indigenous youth, children, families and communities and Canada is tense and strained. Trust has been broken. Those that have been impacted by child welfare want to see justice and accountability. Canada cannot be trusted to make the best decisions for Indigenous youth and children and Canada's promise to do better cannot be trusted. Until trust can be rebuilt, there must be a mechanism in place that can hold Canada accountable. This mechanism must be led and designed by Indigenous youth as mentioned in *Accountability in Our Lifetime: A Call to Honour the Rights of Indigenous Children and Youth*.

[51] Some of the recommendations are directed to youth aging out of care:

Presently, supports to "age out" of child welfare vary by province and territory. The First Nations Child and Family Services program ends care at age 18, though there is an ongoing moratorium on "aging out" of care due to the COVID-19 pandemic. The Federal 2021 Budget promised to "permanently ensure that First Nations youth who reach the age of majority receive the supports that they need, for up to two additional years, to successfully transition to independence." It is essential to listen to and incorporate feedback from the youth who will be impacted by this policy change. The decision to formally transition into adulthood must also be made in consultation with the youth leaving care – including based on their own readiness level. Supports must be provided to help youth transition into adulthood.

(p. 37)

[52] The Panel accepts the YICC's recommendations and finds that many findings in report #2 to be corroborating the evidence provided by the parties in these proceedings that led to the Tribunal's previous findings. This speaks to the probative value of the report #2. Finally on this point, the Panel wants to emphasize the YICC's voices have also been heard by this Tribunal. The Panel values the YICC's viewpoint informed by direct experience.

[53] Moreover, research has been completed by Dr. Mary Ellen Turpel-Lafond. Dr. Turpel-Lafond's report, "On Their Own: Examining the Needs of B.C. Youth as They Leave Government Care", dated April 2014, explored the issue of the termination of services for youth involved with the child and family services system in British Columbia when they reach the age of 19. This report noted that despite improvements to the supports available to transition young people out of care and into independence, there remains much to be done to assist them to become full, contributing members of society. This report is filed as an exhibit to the affidavit of Dr. Mary Ellen Turpel-Lafond on April 2, 2019.

[54] The report, "Paige's Story: Abuse, Indifference and a Young Life Discarded", filed as an exhibit to the affidavit of Dr. Mary Ellen Turpel-Lafond on April 2, 2019, provides an analysis of ongoing issues faced by Indigenous youth involved with the child and family services system. The report documents the life of an Indigenous girl from British Columbia, who never received the nurturing or protection she deserved. The Representative has taken the unusual step of using Paige's actual name in this report, because it is important to acknowledge that this is the story of a real girl, a real person – a person who deserved much better from the society in which she briefly lived. Paige was in and out of the child and family services system, being moved some 50 plus times between the ages of 14 to 16. There were serious issues with respect to Paige's required protection, but various parties who had interactions with Paige failed to report her circumstances to the authorities. This resulted in Paige aging out of care at age 19 without a transition plan or adequate supports, which culminated in Paige's death from an overdose shortly after her 19 birthday. The outcome was predictable and should have been prevented. The report made several recommendations regarding the "professional indifference" demonstrated by those who

are supposed to care for children that contributed to Paige's death, and to put in place safeguards for all children in care, with particular attention paid to Indigenous children, to provide and enhance transition supports as they age out of care.

[55] Further, the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, is attached to Stephanie Wellman's affidavit dated March 7, 2022, as Exhibit "H". This Report outlines the need for support for youth aging out of care. For example, Call for Justice 12.11 outlines further programming recommendations for youth "aging-out" of care. These recommendations include "a complete network of support from childhood into adulthood based on capacity and needs," as well as "opportunities for education, housing, and related supports. This includes the provision for free post-secondary education for all children in care in Canada."

[56] The Panel finds there is sufficient probative, relevant and reliable evidence in this case to make the requested order.

[57] The Panel agrees with the consent order request and finds this could bring positive change to youth aging out of care especially given the higher risks to experience, homelessness, poverty and human trafficking and other risks as identified in YICC's report #2 and referred to above.

[58] Moreover, the MMIWG, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* vol. 1a, made similar findings:

The National Inquiry heard about instances of human trafficking from First Nations, Inuit, and Métis witnesses, who often spoke about their experiences within the context of their history within child welfare, or the need to find medical care not available in home communities

(p. 565)

For Indigenous girls and 2SLGBTQQIA youth, the dangers associated with moving from one place to another or with being displaced from a safe community are significantly heightened. However, given the extensive violence and abuse experienced by many youth in care, leaving a foster home or other living accommodation may be the only option that seems to exist in order to escape violence.

... "Erin Pavan, the manager of STRIVE Youth in Care Transition Program, poignantly described the lack of security that exists for Indigenous girls, youth, and 2SLGBTQQIA people in these contexts: "So, aging out of care is really like a euphemism for the abrupt termination of all ... services. Like, this 'aging out,' I don't even like this term, I think it's too gentle for what the experience is; it's like being pushed off a cliff, right?""

For many of the family and friends who shared their truths, the failure to address the realities of abuse and violence experienced by children and youth within child welfare forces many youth, in their attempts to escape violence, to enter into more dangerous situations, which usually begin with running away. Even for those youth who do remain in care, aging out of care and the lack of support are akin to – as Erin puts it – pushing them off a cliff. In both cases, poverty, housing, barriers to education, and unique vulnerabilities to drugs, trafficking, and other forms of interpersonal violence collectively remove safety. As we heard from many families, recognizing what happens at the edge of this cliff and how basic economic and social security is undermined here is key to understanding the violence that leads to the disappearance and death of Indigenous women and girls.

...

Understandably, the challenges of daily survival mean that, for many youth in foster care or those who have aged out of foster care, completing high school, pursuing post-secondary education, or finding employment become impossible. Erin Pavan put things into perspective.

They're not graduating high school; I think that by age 19, like 32% of youth aging out of care will have a high school diploma, compared to 84% for the general population. And, so they're not finishing school.

They're also less likely to have a job. They're going to make less money. A lot of them are relying on income assistance right off the bat, 40% will go right onto income assistance.

The income assistance rate just finally got raised in BC, but for Vancouver it is not even near enough money to live off of. You can't even pay rent with it, never mind buy food. So they're going into extreme poverty right off the bat, with no high school diploma, not enough supportive people in their lives. Obviously, by definition, anyone who's been through care is going to have trauma. So they've got trauma; they're more likely to have issues with their mental health, with substance use, more likely to be involved with the criminal justice system, become young parents. They're more likely to die young. Of the 1,000 youth who age out of care in BC every year, three to four will be dead before they turn 25.

So I think you can really see the connection, right, between the missing and murdered young women and the care system.

(pp. 555-557, footnotes omitted).

[59] The Panel thanks the parties for this important advancement and their dedicated efforts. The Panel is honored to make such an order that may have far reaching positive effects for youth aging out of care.

[60] Finally on this point, the Panel finds it has the power to make such an order. As successfully demonstrated by the parties, the evidence in this case supports the order. The Tribunal's powers to make the order are further explained below.

(iii) High Needs Jordan's Principle Recipients past the Age of Majority

Order request # 3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.

[61] Stephanie Wellman, Director of Social Development with the Assembly of First Nations (AFN), employed with the AFN since May 2015, provided an affidavit affirmed on March 7, 2022. Prior to this Ms. Wellman worked in the AFN Health Sector and transferred sectors in March 2018 to the AFN Social Development Sector. In the Social Development Sector, she worked on Jordan's Principle until 2019.

[62] The Panel finds her affidavit and evidence very helpful given her relevant experience and expertise and the important details provided in her affidavit and evidence. Moreover, the Panel finds the evidence filed to support her affidavit does corroborate her declaration.

[63] She affirms that:

16. On December 31, 2021, the Parties executed an AIP on long-term reform and a separate AIP on compensation. On January 4, 2022, the Parties publicly announced that they reached these agreements. As part of the AIP on long-term reform, and upon execution of a Final Settlement Agreement by November 30, 2022, the Parties committed to reforming the FNCFS Program by March 31, 2023 and improving Canada's compliance with and reforming Jordan's Principle.

[64] As Ms. Wellman stated in her affidavit:

20. The AFN has been mandated and called on by First Nations leadership, parents and caregivers, Jordan's Principle Service Coordinators (Navigators) and others with intimate knowledge of the impact of Jordan's Principle to advocate for supports for youth with disabilities beyond the age of majority. The advocacy of the AFN has been fundamental in supporting and calling on Canada to address said issues, which is an immediate measure requested in this Motion.

21. The AFN Chiefs-in-Assembly have called for the need to improve how Jordan's Principle is delivered, with a goal of ensuring that First Nations are not limited by the current program authorities. This was a component of AFN Resolution 27/2018, *Support for the long-term implementation of Jordan's Principle*, attached to [her] affidavit as "Exhibit A".

22. The AFN has participated in and organized several gatherings concerning Jordan's Principle. During these sessions, the AFN heard the need to be supporting youth beyond the age of majority, as disabilities do not simply end when a child turns 18.

23. At the Jordan's Principle Service Coordinators Gathering in November 2019, presenter Lyndia Jones, from the Independent First Nations (Ontario), provided a recommendation for on-reserve disability services for First Nations children "aging out" of Jordan's Principle eligibility, attached to [Ms. Wellman's] affidavit as "Exhibit B".

24. Further, at the Jordan's Principle Summit in September 2018, the challenges of youth aging out of Jordan's Principle eligibility were noted, referencing the need for adult-focused disabilities programs on-reserve, and support for caregivers. The report from the Jordan's Principle Summit is attached to [Ms. Wellman's] affidavit as "Exhibit C".

25. The AFN led national engagement on federal accessibility legislation and noted the potential implications for First Nations persons with disabilities.

...

The most prominent shortcomings of Jordan's Principle are the stringent eligibility criteria and the child only policy, providing no greater access to services or protection from jurisdiction wrangling for [First Nations persons with disabilities] over 18 years of age" (Appendix B, p. 7).

[65] The Panel finds this is supported by other evidence found at pages 7-8 of Appendix B to the AFN led Engagement on Federal Accessibility Legislation dated March 2017). Further, in Appendix A, at p. 18:

Jordan's Principle could be expanded in contemplation of accessibility legislation to apply to any First Nations person, regardless of age, with any type of disability or disabilities caught in a jurisdictional dispute where those services are available off-reserve.

[66] Ms. Wellman's affidavit continues:

26. [She states that] a number of reports have supported the AFN's advocacy efforts and First Nations concerning the issue of post-majority care for high needs individuals. In terms of regional reports, the Keewaywin Engagement Manitoba First Nations Jordan's Principle Implementation Report, from Manitoba in 2017 call for supports beyond the age of 18, attached to my affidavit as "Exhibit E", states:

Youth with special needs that are aging out of care require support past 18 years of age and the same services and supports they received while under the age of 18 must continue into their adult lives. Providing life skills programming and access to independent living units will empower our young adults aging out of care to move toward independence.

...

31. In the final report of the Public Inquiry Commission on relations between *Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, known as the Viens Commission report, is attached to [Ms. Wellman's] affidavit as "Exhibit G". This report recommended that the provincial government "initiate discussions with the federal government to extend the Jordan's Principle to adults".

...

34. In 2021, three human rights complaints were filed against Canada for its failure to support First Nations adults with disabilities in Manitoba. The complaints highlight that Jordan's Principle has effected important changes for children and youth with disabilities. However, there remains a critical gap when youth reach the age of majority, who are then left without the services and supports that they were receiving. These complaints also bring forward concerns about connection to culture for young adults and other adults with disabilities who are forced to leave their communities to access supports, due to the lack of disability supports and services on-reserve.

[67] Dr. Blackstock affirms in her March 4, 2022, affidavit that:

36. The Caring Society provides some assistance to First Nations children, families and First Nations community navigators to ensure ISC's approach and provision of Jordan's Principle is consistent with the Tribunal's decisions. In this role, we have encountered many First Nations youth who are receiving significant supports, services, and products via Jordan's Principle. Some of these individuals are high needs youth who are having their day-to-day needs managed and met by services funded under Jordan's Principle. ISC ceases providing Jordan's Principle services, products and supports when youth reach the provincial age of majority meaning that high needs adolescents will almost certainly experience gaps in supports, services and products detrimental to their health and overall well-being.

[68] The consent order sought will enable Canada to assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority.

[69] After considering all the evidence including the above, the Panel agrees with the requested order. The Panel finds the evidence filed as part of this motion supports a finding that First Nations with high needs and with disabilities given the eligibility cut-off when reaching the age of majority stop receiving services under Jordan's Principle and experience barriers and gaps in services.

[70] Of note, the First Nations and First Nations Persons with Disabilities Engagement on Federal Accessibility Legislation report dated March 2017, at Appendix B, page 8, mentions that:

Due to the fact that there is no clear governmental department that should be responsible for providing services to First Nations Persons With Disabilities, it is necessary that the government develop a cross-departmental coordinated effort [...] to ensure a comprehensive provision of services.

[71] The requested order will allow to obtain evidence-based information to ensure First Nations persons with disabilities and high needs reaching the age of majority have their specific needs met. This is consistent with applying a substantive equality lens to services and programs.

[72] It is also in the interest of the good administration of justice and human rights to address this now rather than to wait for the three complaints to proceed.

[73] Finally on this point, the Panel finds it has the power to make such an order. As successfully demonstrated by the parties, the evidence in this case supports the order. The Tribunal's powers to make the order are further explained below.

(iv) Fund Needs Assessment and Long Term Funding Research

Order request # 4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):

- a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;
- b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");
- c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and
- d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle, including but not limited to identifying and addressing formal equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").

[74] In her March 4, 2022, affidavit, Dr. Blackstock affirms that:

39. The Caring Society recognizes that further funding approach research and work is required to achieve meaningful long-term reform to satisfy the Tribunal's direction in the *Merits Decision*. Under the FNCFS Program, further research is necessary to model the Measuring to Thrive framework as outlined in the IFSD Phase Three Proposal. ...

40. The results of the IFSD Phase Three work will assist the Parties in finalizing a long-term reform funding approach for the FNCFS Program (the "Phase Three Recommendations"). Canada's agreement to fund this work as of December 31, 2021, pursuant to this consent motion is an important step to reforming the FNCFS Program on a final basis. ...

41. Research to inform evidence-based long-term reform recommendations for Jordan's Principle will be critical to ensuring that Jordan's Principle is equitable, sustainable, accessible and that Canada is held accountable for the full and proper implementation of the Tribunal's orders. The Caring Society strongly believes such research must inform a longer-term funding approach for Jordan's Principle that embeds the Measuring to Thrive framework indicators for children, families, and communities to promote more holistic and seamless funding. We also see value in underpinning Jordan's Principle with the Spirit Bear Plan, given the large number of Jordan's Principle requests that relate to formal equality.

[75] Further:

42. IFSD has agreed to take on this Jordan's Principle research and, pursuant to this consent motion, Canada has agreed to fund it.

[76] The Panel agrees with the Caring Society and finds this is in line with the Panel's approach, findings and orders to eliminate systemic discrimination and prevent the same or similar discriminatory practices to emerge. Moreover, recently filed evidence in support of this motion substantiates Dr. Blackstock's assertions. The Panel finds this order is necessary to achieve evidence-based meaningful and sustainable long-term reform informed by the real needs of children, youth and families. This is consistent with the Panel's orders to provide services according to the First Nations children's real needs.

[77] In her March 7, 2022 affidavit, Ms. Wellman states that:

37. The work of the IFSD has been critical thus far in the matter associated with this motion and negotiations in understanding and formulating a well-being focused approach for FNCFS. The need for an evidence base and equitable funding regime for FNCFS has long been recognized by First Nations citizens and leaders, service providers, and academics and has led to a long history of research which preceded the IFSD reports. This was the goal of the Joint National Policy Review in 2000 and of the Wen:de Reports in 2005, which stated that "any new funding regime should be founded on evidence-based research and data – not speculation."

[78] The Panel arrives to the same conclusion in weighing previous evidence and recently filed evidence in the record.

[79] Furthermore, Ms. Wellman asserts in her March 7, 2022 affidavit that:

38. ... research is vital to the success of FNCFS reform. Evidence-based decision-making in child and family services is essential to reduce risk factors through targeted interventions for First Nations children and families to achieve long-term goals and ensure that interventions achieve intended outcomes. The AFN has advocated for this research to be completed. The Parties to the FNCFS and Jordan's Principle negotiations with respect to the AIP agree that Canada shall fund research by the IFSD.

[80] She further adds that:

53. ... [D]ue to bureaucracy and underfunding of other programs, parents, guardians and professionals must seek other ways for First Nations children's needs to be met and continue to turn to Jordan's Principle.

[81] Ms. Wellman affirms that:

57. ... [C]hallenges have been noted at Jordan's Principle Operations Committee meetings, including on October 30, 2020 [excerpt from meeting record, full meeting record and presentation attached as "Exhibit O"]:

The approved requests need to be situated within the context of the compliance rates and denials in order to give the broader context. ...

...

59. For example, the 2020-21 deep dive analysis and summary of key findings (attached to [Stephanie Wellman's] affidavit as "Exhibit P") points to a high number of approved requests in the areas of education, medical transportation, respite, mental wellness and allied health, across individual and group requests. ...

60. The 2020-21 deep dive analysis also indicates challenges with compliance with this Panel-ordered timelines: 65% for individual urgent requests; 63% for non-urgent individual requests; 35% for urgent group requests; and 73% for non-urgent group requests.

[82] Further, in Stephanie Wellman's affidavit dated March 7, 2022:

59. ... The deep dive indicates that roughly half of the approved products and services under individual and group requests are within the normative standard (p. 2).

[83] Again, in Stephanie Wellman's same affidavit:

58. Further, the data that is reported on in the deep dive analysis does not give a full picture of where the gaps exist. While the analysis certainly points to where gaps may exist, there is a need for a comprehensive analysis of the data to understand the true scope and depth of the gaps. This work would assist to identify what is required to fill them.

...

61. A complete understanding of what is currently being covered by Jordan's Principle is required for true equality to exist for First Nations children. For instance, analysis on the services and supports being sought and their cost is critical to forecasting expenditures within Jordan's Principle and to supporting the identification of gaps in other programs and services to fill them. The work proposed by the IFSD Jordan's Principle Data Assessment and Jordan's Principle Needs Assessment will assess these critical gaps and measure what is needed to close them.

[84] The Panel entirely agrees and finds this is supported by the evidence.

[85] The parties have obviously and carefully thought this through and intentionally negotiated the required elements to be covered by further IFSD research to achieve evidence-based long-term reform for the benefit of First Nations children, youth and families. As successfully demonstrated by the parties, the evidence in this case supports the order.

[86] Therefore, the Panel finds it has the power to make such an order. The Tribunal's powers to make the order are further explained below.

(v) Timelines for Supporting Research Data Requests

Order request #5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

[87] This request is ancillary to the request to fund the various IFSD research studies. It creates expectations for both the researches conducting the studies and Canada in supporting the research by providing relevant information. The Panel agrees with this wise operative request to ensure the IFSD work is efficient and has all the necessary data to conduct its research without experiencing long delays. As it will be explained below, the Panel has the authority to make such a consent order.

(vi) ISC Cultural Competency and Anti-Discrimination Plan

Order request #6 a. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada.

Order request #6 b. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.

[88] As set out in Dr. Blackstock's affidavit dated March 4, 2022:

48. The NAC has considered necessary reforms of ISC and reforms within the Government of Canada. In its *Interim Report of the National Advisory Committee on First Nations Child and Family Services Program Reform, January 2018* [see Exhibit I attached to Dr. Blackstock's affidavit], the NAC makes several recommendations regarding internal reform, training, and education, including the following:

- a. A comprehensive 360 evaluation of ISC's FNCFS Program and Jordan's Principle must be completed to ensure it is fulfilling the Treasury Board Authorities and is compliant with the law and Canada's commitment to the Truth and Reconciliation Commission (TRC) Calls to Action. Such an evaluation should include consultation with First Nations leadership, FNCFS Agencies and experts such as provincial/territorial child advocates. The evaluation can inform the reformulation of ISC and Indigenous Crown Relations. This evaluation should be made public, and the evaluation team/group will be selected jointly by First Nations leadership and Canada. These evaluations should be done every 4 years to ensure ongoing compliance (see p. 17).
- b. Mandatory training for all Government of Canada officials interacting with First Nations children, youth and families on First Nations peoples and reconciliation (see p. 17).
- c. Linking performance measures and awards for all Government of Canada employees interacting with First Nations children, youth and families with compliance with the TRC Calls to Action and the *United Declaration on the Rights of Indigenous Peoples* ("UNDRIP") (see p. 18).

...

50. From the Caring Society's perspective, reform of ISC is critical to sustainable and equitable long-term reform. In addition to the recommendations made by the NAC, the Caring Society will continue to advocate for full ISC reform including: (a) ensuring that ISC staff have proper credentials in First Nations child and family services, children's health, education and social services; (b) implementing employee performance and incentive programs linked to ensuring non discrimination and alignment with human rights law, including but not limited to the United Nations Convention on the Rights to

the Child (with attention to General Comment No. 11) and UNDRIP; and (c) adoption and implementation of the Spirit Bear Plan to address all inequities in federally funding public services. The Spirit Bear plan was introduced as an exhibit to the cross examination of Sony Perron (then Associate Deputy Minister at Indigenous Services Canada) on May 9, 2018, and a copy is attached to Dr. Blackstock's affidavit as Exhibit "J".

[89] The Panel accepts the above and finds this is consistent with the evidence and history in this case. For example, in the *Merit Decision*, the Panel wrote:

[449] The CRC's monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25).

[90] As set out in Ms. Wellman's affidavit of March 7, 2022:

Moreover, the AFN Chiefs-in-Assembly unanimously supported the Spirit Bear Plan during the 2017 Special Chiefs Assembly through AFN Resolution 92/2017, Support the Spirit Bear Plan to End Inequities in all Federally Funded Public Services for First Nations Children, Youth and Families, attached to [Stephanie Wellman's affidavit dated March 7, 2022] as "Exhibit R".

[91] The Spirit Bear Plan is set out as Exhibit J to Dr. Blackstock's affidavit dated March 4, 2022 and as Exhibit Q to Stephanie Wellman's affidavit dated March 7, 2022:

Spirit Bear calls on:

1 CANADA to immediately comply with all rulings by the Canadian Human Rights Tribunal ordering it to immediately cease its discriminatory funding of First Nations child and family services. The orders further require Canada to fully and properly implement Jordan's Principle (www.jordansprinciple.ca). all federally funded public services provided to First Nations children, youth and families

2 PARLIAMENT to ask the Parliamentary Budget Officer to publicly cost out the shortfalls in all federally funded public services provided to First Nations children, youth and families (education, health, water, child welfare, etc.) and propose solutions to fix it.

3 GOVERNMENT to consult with First Nations to co-create a holistic Spirit Bear Plan to end all of the inequalities (with dates and confirmed investments) in a short period of time sensitive to children's best interests, development and distinct community needs.

4 GOVERNMENT DEPARTMENTS providing services to First Nations children and families to undergo a thorough and independent 360° evaluation to identify any ongoing discriminatory ideologies, policies or practices and address them. These evaluations must be publicly available.

5 ALL PUBLIC SERVANTS, including those at a senior level, to receive mandatory training to identify and address government ideology, policies and practices that fetter the implementation of the Truth and Reconciliation Commission's Calls to Action.

[92] The Panel notes that included in the MMIWG report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, filed in evidence in support of this motion, there is a specific call to justice concerning the Spirit Bear Plan:

12.13. We call upon all governments and child welfare agencies to fully implement the Spirit Bear Plan.

[93] Furthermore, Canada publicly accepted the MMIWG report and findings. Consequently, the Panel believes this should inform long-term reform.

[94] In her affidavit, Stephanie Wellman asserts that:

67. ... First Nations have called for training to be given to senior officials at ISC and the Department of Crown-Indigenous Relations and Northern Affairs Canada. Such training may include ongoing evaluation to ensure officials understand the information and can translate it into practice effectively.

68. Training would be directed by an expert Advisory Committee and may include the development and implementation of a training program for all staff working with the FNCFS Program. While the scope and content of the training has yet to be developed, the AFN is of the view that such training may cover:

- • First Nations' cultures, worldviews, and histories;
- • Factors contributing to the over-representation of First Nations children in child and family services, including the intergenerational impacts of the Residential Schools;
- • The findings of the MMIWG2S inquiry, including how it impacts First Nations families;
- • Recent social movements like Idle No More or Families of Sisters In Spirit;
- • The history of the FNCFS Program, including the reviews and evaluations conducted from 2000 to 2011 and this Panel's findings.

[95] Moreover, Dr. Blackstock states that:

47. [she] recognizes that Canada has done some work on staff training. However, this is not sufficient to address the ongoing discrimination or prevent its recurrence. For example, Dr. Amy Bombay designed training for ISC staff on matters directly relating to the Merits Decision ranging from residential schools to child development. She conducted a pre- and post-test of ISC employees who took the training. Results indicate ISC staff showed a positive benefit from that training regarding historical understanding and matters peripheral to their duties. However, old mindset thinking patterns became more entrenched when the training included material about contemporary injustices. Consistent with the Tribunal's orders, the Caring Society will work to ensure that the final settlement agreement includes evidence informed long-term reform measures for child and family services and Jordan's Principle that include significant and structural changes within the Department to safeguard against a repetition or new manifestation of the discrimination experienced by First Nations children, youth, and families.

[96] Dr. Blackstock further asserts that:

46. [t]he immediate steps in the proposed consent order regarding reform at ISC are of great importance to the Caring Society. Canada has a long history of failing to take adequate steps to implement many measures to save children's lives and childhoods. This is reflected in the numerous non-compliance and procedural motions required to get Canada to act since the *Merits Decision*. This pattern of Canada knowing better but not doing better even when the arising harms are severe is emblematic of Canada's historic and contemporary conduct toward First Nations children, youth, and families. Up until now, there is little evidence that Canada has learned from its misconduct and made changes so that it does not recur. In my view, this pattern is clear in the findings made by the Tribunal in the *Merits Decision* and in the subsequent decisions related to non-compliance.

[97] According to Stephanie Wellman:

66. [t]he AFN has heard from First Nations that the overall training should include a truth telling component on how Canada's past and contemporary actions impact First Nations children, youth, and families to identify and remediate colonial philosophies, practices and policies that persist today. Such training may include experiential learning relevant to the First Nations served by the officials, such as Elder's teachings, ceremonies, the *Touchstones of Hope*, and attendance at First Nations research seminars and Elder's gatherings to ensure ongoing professional development.

[98] The Panel accepts the above and finds this is consistent with the evidence, the Panel's findings and the history in this case. The Panel agrees with the AFN and insists that training should include a truth-telling component, all the items listed above and the Tribunal's findings and orders. While the Panel acknowledges Canada's steps forward, the Panel has emphasized on multiple occasions the need for ISC to eliminate its old mindset, an important contributing factor that led to systemic discrimination.

[99] The Panel finds it has authority to make the requested order which is necessary and supported by the evidence in this case. The Tribunal's powers will be further detailed below.

[100] Moreover, Dr. Blackstock affirms in her March 4, 2022, affidavit that:

53. ... [she hopes] that these incremental changes will result in significant structural reform within ISC and lead to the extinguishment of the "old mindset" of the Department that has resulted in devastating impacts on First Nations children, youth and families. Without these fundamental changes, there will be no lasting and durable reform.

[101] Dr. Gideon in her March 4, 2022, affidavit provides important details on this point. In sum, she affirms that:

32. ISC, the AFN and the Caring Society will discuss and agree to a list of candidates to join a new Expert Advisory Committee to support the design and implementation of an independent evaluation of ISC. ...

33. ISC will initiate the process to put in place a contract for expert evaluators to support ISC, the parties and the Expert Advisory Committee in developing a framework for ISC's internal evaluation. This framework is still to be developed. Discussions to date have focused on innovative methodologies to identify systemic barriers that have led to the discrimination related to First Nations children and youth in ISC as identified by the Tribunal. Following the work of the Committee and discussion between the parties, recommendations will be developed based on the findings to identify actions required to redress and prevent the discrimination identified by the Tribunal from recurring.

[102] The Panel finds this order request is well in line with its previous findings and orders to redress and prevent the discrimination identified by the Tribunal from recurring. The Panel believes that this could lead to positive outcomes.

[103] Furthermore, in its *Merit Decision* and subsequent rulings, the Panel stressed the importance of ceasing the mass removal of First Nations children from their homes, families, communities and Nations now. The Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue. However, it was never the sole issue that led to findings of systemic discrimination. Other structural and systemic changes ought to be made for the Panel to consider the systemic discrimination is eliminated in the long-term.

[104] This order request may be responsive to address those structural and systemic changes. Further, this order is supported by the evidence and previous findings in this case. Finally on this point, the Tribunal has the power to make such an order as it will be further explained below.

(vii) Amendment to 2018 CHRT 4

Order request # 7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4

[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at \$2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services. These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

[105] The Tribunal will explain its findings and reasons for both prevention funding Order requests 7 and 8 under the order request 8 below.

(viii) Amendment to 2021 CHRT 12

Order request # 8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

[42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at \$2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

[106] On March 7, 2022, Stephanie Wellman's provided a very helpful affidavit and evidence attached. Upon review of the evidence attached to the affidavit, the Panel finds the evidence to be consistent with the affirmed declaration. Stephanie Wellman indicates that:

70. First Nations have long advocated for adequate prevention funding for FNCFS. It has been well documented in reports, such as the *Wen:de We are Coming to the Light of Day*, Royal Commission on Aboriginal Peoples filed into the record as Exhibit HR-2, and the Joint National Policy Review (2000) filed into the record as Exhibit HR-1, that the current funding formula for the FNCFS Program inadequately invests in prevention.

71. Prevention within the FNCFS Program reform context must aim to ensure that children remain in their family and First Nation as a priority, with removal as a last resort. Prevention, including early intervention policies, must be adequately practiced and funded in each community.

[107] The Panel agrees and has considered the above-mentioned evidence and has made multiple findings in that regard, e.g. 2018 CHRT 4:

[161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *[Merit] Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[108] Stephanie Wellman also affirms prevention “must be developed and mobilized to the standards that communities set and at the levels that communities decide” (March 7, 2022 Affidavit at para. 71).

[109] The Panel finds this is consistent with the spirit of its rulings requiring Canada to consider the unique and distinct needs of First Nations communities and to avoid a one-size fits-all top-down approach. In 2018 CHRT 4, the Panel wrote:

[163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance (emphasis added).

[110] Stephanie Wellman adds that:

72. Canada must consider prevention and reform within the context of First Nations social determinants of health and wellbeing, including environment, education, gender, economic opportunities, community safety, housing and infrastructure, meaningful access to culture and land, access to justice, and individual and community self-determination, among others.

73. Prevention must address the structural and systemic reasons for First Nations' higher rates of involvement with child and family services. For example, housing, water, racism, infrastructure inadequacies, poverty, etc. All these impact child and family wellbeing, and prevention must therefore encompass the systemic drivers of First Nations' overrepresentation in child and family services. Systemic change must also recognize the colonization of First Nations as a fundamental underlying health, social and economic determinant.

74. Prevention must include evidence-based primary, secondary, and tertiary culturally based programming situated in a life-course continuum: from pre-natal development to birthing, childhood, adolescence, adulthood, as Elders, and through death and post-death.

[111] The Panel entirely agrees with the above. This corroborates the evidence in this case and is in line with the Panel's findings in the *Merit Decision* and in 2018 CHRT 4:

[166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *[Merit] Decision* at paras. 341-347), (emphasis added).

[112] As explained above and in previous rulings, the Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue.

[113] For example, in 2018 CHRT 4, a prevention/least disruptive measures focused ruling by this Tribunal, found (emphasis omitted):

[93] The fundamental core of Canada's systemic discrimination is that it fails to fund First Nation Child Welfare based on need, including addressing and redressing historical disadvantages. The Panel in its decision wrote that it's "...focus is whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and the communities" (...).

...

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

...

[150] Canada cannot justify paying enormous amounts of money for children in care when the cost is much higher than prevention programs to keep the child in the home. This is not an acceptable or sound fiscal or social policy. This is a decision made by Canada unilaterally and it is harming the children. (...), (see the *Decision* at paras. 262 and para. 297).

...

[180] The Panel reiterates that the best interest of the child is the primary concern in decisions that affect children. See, for instance, UNCRC, article 3 and article 2 which affirm that all children should be treated fairly and protected from discrimination. (see also the *[Merit] Decision* at paras.447-449). The Panel found that removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child. This is an important finding that was meant to inform reform and immediate relief (see the *[Merit] Decision* at paras 341-349).

...

[191] The United Nations CESCR recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 *[Merit] Decision*. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding observations on the sixth periodic report of Canada, March 4223, 2016, E/C.12/CAN/CO/6, paras.35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para. 33, Exhibit L).

[114] The Panel entirely agrees with this wise approach to prevention reform proposed by the parties in order to generate real and lasting systemic change. Moreover, the evidence filed supports this finding.

[115] As set out in Ms. Wellman's March 7, 2022 Affidavit:

76. The per capita costs are based on current prevention services and actual spending described in the case studies analyzed by the IFSD. For instance, the \$2,500 per capita cost is based on a case study of K'wak'walat'si Child and Family Services (KCFS), which serves the 'Namgis First Nation and the village of Alert Bay on Cormorant Island off the coast of British Columbia. Since 2007, not a single child in 'Namgis First Nation has been placed in care. This success has been largely credited to the introduction of comprehensive prevention programming.

[116] This success story is referenced in Stephanie Wellman's affidavit and also included in the IFSD report #1, *Enabling Children to Thrive* filed in evidence. The report states that a case for prevention is clear from both FNCFS agency cases and from existing research. The unanimity from agencies and experts on the importance and need for a focus on prevention services and funding to match cannot be overemphasized (pp.93-94). This report is relevant and reliable especially given the methodology employed and the expert actors involved including the advisory role of the National Advisory Committee.

[117] Stephanie Wellman's affidavit continues:

77. These best practices in prevention are further modelled after Carrier Sekani Family Services (CSFS), a large prevention focused organization. The agency's life cycle model (from cradle to grave), informed by its own research, extends across health and social programs and services. From intensive family preservation to telehealth initiatives, CSFS has empowered its staff to innovate, try, fail, and succeed, in support of the people and communities they serve.

78. By providing a budget of \$2,500 per capita for prevention, Canada would enable service providers and communities to deliver this best practice life cycle model of prevention.

[118] This is also consistent with previous findings by this Panel. In 2018 CHRT 4, the Panel said (emphasis omitted):

[118] The orders are made in the best interests of children and are meant to reverse incentives to place children in care.

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

[120] The best way to illustrate this is to reproduce Ms. Lang's answer to the AFN's question: AFN: So if every child in Ontario that's on First Nations was apprehended, INAC would pay costs for those apprehensions correct? (...) So my question is, it's kind of peculiar to me that the federal government has no qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me that just does not make sense. Now as a Program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions? Ms. Lang: for eligible expenditures, yes.

[121] This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example

of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings.

...

[148] Of particular note, *Wen:De Report Three* recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, *Wen:De Report Three* indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are overrepresented amongst children in care and Aboriginal children in care; they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.), (see 2018 CHRT 4 at paras. 148-149 citing the Merit Decision).

“ ... ”

“[160] This is the time to move forward and to take giants steps to reverse the incentives that bring children into care using the findings in the [*Merit*] *Decision*, previous reports, the parties' expertise and also everything gathered by Canada through its discussions since the [*Merit*] *Decision*.”

[119] The 2018 CHRT 4 immediate relief orders on actuals were made in 2018 after the Caring Society and the AFN, urged the Panel to order them. The parties made compelling arguments and brought evidence to support it. The Panel indicated that the orders could be amended as the quality of information increased. The Panel recognized “that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.” (see 2018 CHRT 4 at para. 237). This is the case here. The evidence in the record demonstrates that there is a need to amend the previous prevention orders given that a number of issues arose as part of the implementation phase of the 2018 CHRT 4 orders.

[120] Moreover, the parties were able to establish that the process for reimbursement to actuals was causing hardships for First Nations and First Nations Agencies. Dr. Blackstock has affirmed that:

19. ... While the funding at actuals approach has been effective in ensuring more prevention services are provided to children, youth, and families, ISC determining eligible prevention expenses has been problematic particularly given the lack of social work expertise within the department.

[121] Further, Dr. Blackstock also affirmed that “the “request-based” nature of the actuals process has also posed an obstacle for some FNCFS Agencies, who may lack capacity to make the request.” (March 4, 2022 affidavit at para. 19). The Tribunal finds this was previously demonstrated in these proceedings (see for example, 2020 CHRT 24 at paras 34-36).

[122] Moreover, recent relevant and reliable evidence contained in the IFSD report #2, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being, July 31, 2020 found at p. 29 that:

The significant 48% increase in FNCFS program spending in 2018–19 is attributed to the CHRT-mandated payments (the FNCFS program spending is projected to decrease by 9% in 2019–20) Case study analysis suggests that the CHRT payments have had immediate impacts on programming and operations. The supplementary investments, however, are one-time payments and not guaranteed beyond the next fiscal year. This reality puts progress on prevention programming and practices at risk.

[123] The above also supports the need for greater prevention funding as per the order requests including the eligibility for these funds to be carried forward by the First Nation and/or First Nations Child and Family Service providers(s).

[124] Furthermore, Dr. Blackstock affirms that “[g]reater “up-front” funding will allow FNCFS Agencies to focus their energies and resources on program development and delivery.” (March 4, 2022 affidavit at para. 19).

[125] The Panel finds the evidence supports the need for a shift from the “request-based” nature of the actuals process where ISC determines eligible prevention expenses to a comprehensive community-level programming. The implementation of these orders will provide families with supports they need and in providing First Nations, FNCFS Agencies with greater resources “up front” to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. This will also provide greater funding to First Nations without FNCFS Agencies.

[126] The IFSD report also supports this shift.

[127] The Panel agrees and is really pleased with these order requests. The parties’ hard work will generate real change for First Nations children and youth. This responds to the Tribunal’s 2018 call for giant steps towards a shift.

[128] As indicated in Stephanie Wellman’s March 7, 2022 Affidavit:

75. The \$2,500 per capita level of prevention funding is based on the case studies conducted by the IFSD in its Phase 1 report, which resulted in two fundamentally different approaches to prevention programming. This ranged from a First Nation with minimal prevention programming (\$800) to comprehensive community-level programming targeted to the entire community, operating on a prevention basis (\$2,500). The \$2,500 per capita amount is to be considered the level necessary for agencies or communities to reasonably deliver best practices in prevention.

[129] As noted in IFSD report # 2, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* at p. 248:

... In its Phase 1 study, [*Enabling First Nations Children To Thrive*], December 15, 2018, that costed the FNCFS system, IFSD estimated (based on actual models) that per capita expenditures for prevention should range from \$800 to \$2,500 across the entire community. At \$800, programming is principally youth-focused and may not be CFS focused. At \$2,500 per person, a full lifecycle approach to programming can be possible with linkages between health, social and development programming. ...

The First Nation’s current per capita CFS expenditure estimates align to previous findings for communities unaligned to an FNCFS agency (ranging from \$500 to \$1,000 based on the population source). As the First Nation contemplates its next steps in CFS, it may wish to consider increasing its per capita budget to expand its resources for program and service delivery. IFSD estimated that the average cost of a child in care to be \$63,000 per year. With

opportunities for prevention program that have demonstrated positive results, there are various options for supporting the well-being of children, families and communities through wrap-around holistic services.

[130] As noted in IFSD report #1, *Enabling First Nations Children To Thrive* these costs would be ongoing in nature and subject to changes in population and inflation. Per person spending on prevention should range from \$800–\$2,500 with total annual costs of \$224M to \$708M (p. 10).

[131] The report provides further details at pages 87-88:

Prevention was the focus of experts and agencies, and consistently defined as the most significant funding gap that agencies are facing. The gap in prevention funding is a challenge and is connected to the system's current funding structure that incentivizes the placement of children in care.

Shifting to a prevention-focused approach will require increased investment and a change in funding structure, such that agencies have the ability to allocate resources to meet community need. To cost-estimate an increase in prevention funding for FNCFS agencies, benchmarks of current prevention spending were identified and a range of per capita investments in prevention were defined: \$800, \$2,000 and \$2,500.

The per capita costs are based on current prevention services and actual spending described in case studies. The prevention cost estimates are premised on the assumption that prevention should target the entire population in the agency's catchment and not only the child population served.

[132] Moreover, as defined in 2021 CHRT 12, Non-Agency communities also form part of the Tribunal's previous orders. The Panel agrees that they should also benefit from the increased ongoing prevention funding as detailed in order request # 8. As explained above, this will greatly benefit their communities.

[133] The parties were successful in demonstrating the need for the requested orders # 7 as modified and 8. The Panel entirely agrees with the order requests # 7 & 8 and finds they are justified and supported by the evidence. Furthermore, the Tribunal has the authority to make those orders as it will be explained below.

(ix) Establish the End Date for Compensation

Order request # 9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents.

[134] In her March 4, 2022, affidavit, Dr. Blackstock affirms that:

15. [o]n the strength of these immediate measures, which are to be implemented pursuant to the "consent order requested on this motion starting on April 1, 2022, and assuming there is no disruption or reduction in current prevention service levels due to reductions in funding as a result of the implementation of these measures (which senior officials at ISC have assured me will not occur), I believe that the discrimination will be alleviated to a level whereby March 31, 2022, can be reasonably fixed as the end-date for FNCFS Program compensation eligibility pursuant to the Tribunal's compensation orders."

[135] Ms. Wellman affirms in her March 7, 2022, affidavit that:

17. It became apparent to the AFN that some commitments the Parties were considering for long-term reforms did not have to wait until April 2023 and could be implemented. At the AFN's request, the Parties agreed to seek the implementation of a number of immediate measures by way of a consent proceeding before this Panel that would be implemented in April 2022. Secondly, it was apparent that the Parties needed to address some outstanding items that were of concern to this Panel before compensation could be paid.

...

19. [t]he Parties agreed to immediate measures to redress the ongoing discrimination found by this Panel throughout this proceeding, for amendment to this Panel's order regarding funding for prevention in 2018 CHRT 4, and for an end date for compensation, as contemplated within 2019 CHRT 39. These would form the terms of a consent order.

[136] Based on Canada's consent to the orders outlined herein, the Parties are of the view that the factual basis on which the *Compensation Decision* was made will significantly change as of April 1, 2022, due to increased amounts of prevention funding being made available to First Nations communities. Moreover, resolving the items at this time will address any existing barriers to the compensation process and will clear the way for the payment of compensation.

[137] Furthermore, Dr. Gideon affirms in her March 4, 2022, affidavit that:

51. [t]his order would set the end date for the period within which the removal of a child would give rise to a compensation claim as March 31, 2022. The justification for that end date rests on the seven measures described above to take effect on April 1, 2022.

52. The immediate measures identified in the order comprise very significant investments made in line with the parties' recommendations and evidence and are critical steps supporting the transition to full reform as outlined in the Agreement-in-Principle.

[138] The parties submit that given the evidence-based investments made and their emphasis on preventing children from entering care and supporting them once they leave care justify an end date for compensation of March 31, 2022.

[139] Furthermore, the Panel finds that the success stories discussed above where similar measures to the measures included in the consent orders in this ruling have been implemented and resulted in no child being taken into care. This is a very compelling argument in favour of the requested order.

[140] Moreover, for the particular victims of discrimination under the FNCFS Program, the Tribunal set the eligibility period as January 1, 2006 to a date ordered or agreed upon, as the discrimination under the FNCFS Program was ongoing. The Tribunal set the following parameters for an "end date" for compensation for the particular victims of the discrimination under the FNCFS Program: (a) the Tribunal, informed by the Parties and evidence, makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; (b) the Parties agree on a settlement agreement for effective and meaningful long-term relief; or (c) the Tribunal ceases to retain jurisdiction and beforehand amends 2019 CHRT 39 [the *Compensation Decision*] (at paras. 245, 248, 249 and 254).

[141] The Panel does not make a finding as part of this ruling that all the systemic discrimination explained in the Tribunal's findings has ceased even if the orders in this ruling are giants steps forward in achieving the elimination of the systemic discrimination.

[142] In a recent ruling, the Tribunal reiterated some of its previous findings and wrote in 2021 CHRT 41:

[56] Nevertheless, it may be less compelling for Cabinet and Treasury Board to approve authorities if there is a belief that other programs may be responsive to needs. However, to date while efforts are made to collect information, the information remains unclear on the elimination of the lack of coordination found that impacts service delivery. There is insufficient evidence about different programs offered to First Nations children and families on-reserve and how each really address the real needs of children and families. In other words, the Tribunal is unaware of the existence of a completed thorough analysis of all programs on-reserve, how they interrelate, intersect and ensure that there are no gaps in services to First Nations children. There is insufficient evidence to date to establish that the gaps in services to First Nations children and families on-reserve or ordinarily on reserve have all been addressed and accounted for by other programs when the FNCFS Program's authorities do not include items or place a funding cap. The Tribunal raises this point to illustrate that referring to other programs when a legitimate request is made for service delivery may not be sufficiently responsive to the Tribunal's orders as it will be explained below.

...

[58] ... Canada was found liable and was ordered to cease the discrimination that is still ongoing until long term reform is implemented.

...

[63] Further, the Tribunal ordered a complete reform of the FNCFS Program to cease and desist from the discriminatory practice found in the decision including to move away from the lack of coordination of federal programs causing gaps, denials and delays in services to First Nations children and families.

[143] The evidence in this motion demonstrates there is still work to be done to address the findings above.

[144] However, the Panel agrees with the parties that the consent orders in this ruling will ensure the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case will cease given the implementation date of April 1, 2022.

[145] Since the beginning in the *Merit Decision* and onward, the Panel has focused its orders on adequate, needs-based, culturally appropriate services and sufficient funding informed by the evidence. The Panel has always emphasized the paramount need to stop removals of children from their homes, families and communities. When removals were necessary, the Panel stressed the importance of keeping the children in their communities and Nations.

[146] The Panel previously found that removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations.

[147] The Panel also previously found that the lack of prevention perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Merit Decision* and rulings. It incentivizes the removal of children rather than assisting communities to stay together.

[148] In 2019 CHRT 39 [*the Compensation Decision*] the Panel found:

[163] ...

Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing improvement. The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently. The third factor, substance misuse, is within the personal domain for change but requires access to services. Overall, CIS- 98 results suggest that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children. ...

[164] “... First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents’ control.”

(emphasis omitted).

[149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.

[150] The elimination of the mass removal of children is achievable when a real shift is made from reactive services that bring children into care to preventive services, especially when prevention services are developed and delivered by the First Nations children’s respective First Nations communities. The evidence provided by the parties demonstrates that this shift will be made possible with the April 1, 2022 implementation of increased prevention funds provided to First Nations and First Nations child and family service providers across Canada.

[151] Finally, the consent orders discussed above are in line with the Panel’s findings and orders. The Panel believes the full and timely implementation of those orders will significantly improve the lives of First Nations children, families and communities.

[152] As it will be explained in the next section, the Tribunal has the authority to make such an order.

IV. Legal Framework

[153] In considering the Tribunal’s powers to make the requested orders, the Tribunal relies on the following:

This Tribunal’s January 26, 2016 order (2016 CHRT 2 [*Merit Decision*]) ordered Canada to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in that decision.

This Tribunal's April 26, 2016 order (2016 CHRT 10) required Canada to immediately take measures to address the findings in its January 26, 2016 decision.

This Tribunal's September 14, 2016 order (2016 CHRT 16) required Canada to update its policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision.

This Tribunal's understanding in making its September 14, 2016 order (2016 CHRT 16) that reform of Canada's policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision would be achieved over the longer term, with certain interim measures being put in place until that time.

The principles set out for immediate relief in the Tribunal's February 4, 2018 order (2018 CHRT 4).

All other rulings made by this Panel in this case.

[154] In light of the above and consistent with the Tribunal's detailed findings in the *Merit Decision* which included other related provincial/territorial agreements and other funding methods, all subsequent rulings and the Tribunal's approach to remedies and, pursuant to section 53(2) of the *CHRA*, the Panel finds it has statutory authority to make the consent orders requested by the AFN, the Caring Society and Canada and agreed to by the COO, the NAN, the Commission and Amnesty International as it will be further explained below.

[155] The Panel previously reviewed Canada's responsibility to remedy the discriminatory practice in this case in 2018 CHRT 4:

[215] In its [*Merit*] *Decision* and rulings, the Panel found that Canada was responsible for funding to cover the costs of providing family and child welfare services to First Nations on reserves. It found that this responsibility included funding to cover the costs of providing services to First Nations children on reserves in need of care, in a manner that was culturally appropriate and substantively equal to the manner that the services were provided to non-First Nations children in Canada. It found that the basis upon which Canada was calculating and providing the funding was flawed in various respects, resulting in insufficient funding (i.e. underfunding) to provide the services in the manner hereinbefore described, and to meet the needs of First Nations children on reserve. It found that Canada was underfunding the services now being requested by the Moving Parties to be paid on an actual cost basis as immediate relief in this case. It found that Canada knew that it was underfunding the services and that the underfunding of prevention services, in particular, while Canada fully funded maintenance and apprehension expenses, created a perverse incentive to remove far too many First Nations children on reserve from their homes and families. It found that this underfunding of services was one of the discriminatory practices engaged in by Canada in this case, and that Canada needed to take immediate steps to eliminate this discriminatory underfunding and to fully reform the Program in the longer term.

[216] Canada has accepted the Tribunal's [*Merit*] *Decision* and rulings that it is discriminating against First Nations children by underfunding the services and that both immediate steps and longer-term reform need to be undertaken to eliminate this discriminatory underfunding of services to First Nations children on reserve.

[217] All of the parties agree that the Tribunal's remedial powers are to be interpreted broadly to give effect to the objectives of the *CHRA* in eliminating discrimination when there has been a determination by the Tribunal that discrimination has occurred and an order to cease has been made, in order to ensure that the discrimination does not continue.

[156] Furthermore, the Panel previously wrote in 2018 CHRT 4:

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

[157] The Panel also wrote in 2016 CHRT 10 that:

[15] ... [C]onstructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 40 [Grover], “[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility.

[16] The Panel also said that aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[158] In the initial *Merit Decision*, the Panel indicated its approach once a complaint is substantiated:

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal’s remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal’s remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal’s powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[159] The Panel further addressed its remedial authority in 2018 CHRT 4:

[31] The Panel provided an overview of the Tribunal’s broad and flexible remedial authorities in 2016 CHRT 10 (paras. 10-19) which was not judicially reviewed.

[32] Moreover, in making its orders the Tribunal is operating under its Statute that permits it to address past discriminatory practices, and prevent future ones from occurring. This is provided for in the *Act* under section 53 (2) (a): that the person cease the discriminatory

practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (...).

(emphasis omitted).

[160] As noted in 2018 CHRT 4 at paragraph 40, “[t]he Tribunal made extensive findings in [the *Merit Decision*] and provided very detailed reasons as to how it arrived at its findings.” As noted in the *Merit Decision*, [t]hose findings demonstrate that “AANDC’s design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves” (*Merit Decision* at para. 458). Moreover, [t]he Tribunal also found that “[t]he failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families” (2016 CHRT 2 at para. 458, emphasis added). Later, “[t]he Panel specifically mentioned that reform must address the findings in the [*Merit*] *Decision*. This case is about underfunding, policy, authorities and, the National Program that were found to be discriminatory” (see 2018 CHRT 4 at para. 40). The lengthy *Merit Decision* is authoritative in this case and the findings referred to above can be found in the *Merit Decision* and will not be repeated here. The Tribunal outlines the above to support that it has authority to issue this Consent Order since the subject matter of this Consent Order forms part of the evidence and findings in this case.

[161] Moreover, 2018 CHT 4 provides that:

[34] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease-and-desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]).

[162] Subsequently, the Panel noted in 2018 CHRT 4 that:

[51] Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question.

[163] Furthermore, the Panel previously indicated in 2018 CHRT 4 that:

[53] ... it “may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of Courts, to have to file another complaint for the implementation of the Tribunal’s orders and reform of the First Nations’ Child welfare system.”

[164] The Panel also said in 2018 CHRT 4 that:

[50] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past.

[165] A similar approach to remedies was taken in the *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998], OHRBID, No 10, 1998 CanLII 29849 (ON HRT), 32 CHHR D/1 and [2002] OHRBID, No 22 decisions from the HRTO informed by the specific facts in the case and affirmed on appeal (see *Ontario v. McKinnon*, 2004 CanLII 47147 (ONCA)). The Tribunal relied on this case in 2018 CHRT 4 (see paras. 24 and 388). The Tribunal held that “[a]kin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here” (2018 CHRT 4 at para. 388). While the Panel said this in 2018, notably, next month will mark the tenth year when the Federal Court quashed the former Chairperson’s decision in this case and ordered a different Panel to adjudicate this case. This is when Sophie Marchildon, Edward P. Lustig and Réjean Bélanger were first seized of this matter.

[166] In a recent decision, *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839 the Ontario Divisional Court discussed the case at hand and commented on the monitoring and updating of funding policies, programs and formulas in systemic cases to ensure substantive equality:

[189] The Tribunal’s findings in this regard are reasonable. Indeed, they are consistent with the SCC’s decision in *Moore* and the Canadian Human Rights Tribunal’s decision in *Caring Society*, two cases concerning systemic discrimination in government funding policies. *Moore* and *Caring Society* make clear that governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH’s position that it can wait before acting until midwives – a deeply sex-segregated profession that is highly susceptible to systemic gender discrimination in compensation – have proven that the MOH’s conduct constitutes sex discrimination.

(footnotes omitted).

[167] Recently, in a judicial review initiated by Canada in this case, the Federal Court in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, in dismissing all of Canada’s arguments, made important comments on the Tribunal’s approach to remedies in this case:

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

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

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

[138] I agree with the Tribunal’s reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [*Grover*] where the task of determining “effective” remedies was characterized as demanding “innovation and flexibility on the part of the Tribunal...” (2016 CHRT 10 at para 15). Furthermore, I agree that “the [CHRA] is structured so as to encourage this flexibility” (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

...

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

...

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

...

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

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

[168] Moreover, the above follows the original approach to remedies taken by this Panel in its previous rulings.

[169] The Tribunal's powers to make the requested orders are grounded in section 53(2) of the *CHRA*; Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure (Proceedings prior to July 11, 2021); the Tribunal's implied jurisdiction to control its own processes and the approach in these proceedings described above.

V. Final remarks

[170] The Panel views this case as a catalyst for change to services provided to First Nations children, youth and families thanks to the tireless work of the parties, particularly the First Nations parties in this case who never gave up. The Panel honours their courage and determination. The Panel hopes that reform and real transformative change which will be the hallmarks of true justice will now be swift and future issues that may arise will be resolved expeditiously.

VI. Panel Chair's remarks

[171] As there is need for truth to achieve reconciliation there can be no true justice without truth. While the path forward paved by the parties' concerted efforts is certainly generating real hope, the path that led up to the need for this case was marked with systemic discrimination towards First Nations Peoples. Truth demands the unadulterated honesty to look at both paths to avoid repeating history. There is a real need to study the past to change minds and ways informed by the whole truth. The real goal is that minds and ways are changed to create a true shift giving birth to transformative justice and lasting change. This is a minimal requirement to honour the children and their families who were harmed and those who lost their lives.

VII. Orders

[172] Pursuant to section 53(2) of the *CHRA*, the Tribunal issues the following orders:

1. Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.
2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence-informed way agreed to by the Parties.
3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.
4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):
 - a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;
 - b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the

- “Non-Agency First Nations Needs Assessment”);
- c. the IFSD assessment regarding available data on the use of Jordan’s Principle to inform a future cost assessment of Canada’s implementation of Jordan’s Principle and program reform (the “Jordan’s Principle Data Needs Assessment”); and
 - d. upon completion of the Jordan’s Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan’s Principle, including but not limited to identifying and addressing formal* equality gaps, in keeping with the Tribunal’s rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the “Jordan’s Principle Long Term Funding Approach Research”).

*** This order does not modify any substantive equality orders made by this Tribunal in this case.**

5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.
6. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence- informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.
7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal’s order in 2018 CHRT 4

[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of **April 1, 2022**, fund prevention/least disruptive measures at \$2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services.

These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal’s order in 2021 CHRT 12:

[“42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/ least disruptive measures for non-Agency First Nations (as defined “in “2021 CHRT 12”) at \$2500 per person resident on reserve and in the Yukon, on the same terms as “outlined in “2018 CHRT 4” at paragraph “421“.1 with respect to FNCFS Agencies. ”

9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish **March 31, 2022**, as the end date for compensation for removed First Nations children and their parents/ caregiving grandparents.

[173] The above amendments to 2018 CHRT 4 and 2021 CHRT 12 are effective as of today's date and will be amended in the text of those decisions in due course.

[174] The above orders do not modify any other orders and rulings made by this Tribunal in these proceedings.

VIII. Retention of Jurisdiction

[175] Pending a complete and final agreement on long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Consent Orders contained in this ruling. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief or as the Panel sees fit considering the upcoming evolution of this case.

[176] This does not affect the Panel's retention of jurisdiction on other issues and orders in this case. The Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

March 24, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: March 24, 2022

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke Julie McGregor and Adam Williamson , counsel for Assembly of First Nations, the Complainant

Jessica Walsh and Ansumala Juyal, counsel for the Canadian Human Rights Commission

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counsel for the Respondent

Maggie Wentle and Krista Nerland for the Chiefs of Ontario, Interested Party

Julian Falconer, Asha James and Amanda Micallef, counsel for the Nishnawbe Aski Nation, Interested
Party

TAB 25

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 26 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2022-09-02

File number: T1340/7008

Citation:

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 26 (CanLII), <<https://canlii.ca/t/jszrx>>, retrieved on 2026-01-02

**Most recent
unfavourable
mention**

Tribunal
canadien
des
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2022 CHRT 26

Date: September 2, 2022

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Contents

I. BACKGROUND 1

II. Previous Interested Party Requests 2

III. Summary of the Parties' Positions 5

A. FSIN 5

B. Other parties 6

IV. Law 6

V. Analysis 9

VI. Order 16

I. BACKGROUND

[1] This is a motion under Rule 8(1), 8(2) and 3 of the Rules of Procedure under the *Canadian Human Rights Act* (the “CHRA”) (03-05-04) (the “Old Rules”) by the Federation of Sovereign Indigenous Nations (“FSIN”), who are First Nations located in Saskatchewan, to be added as interested parties to participate in a motion brought jointly by the Assembly of First Nations (AFN) and Canada in this case (joint motion). The joint motion is made under Rule 3 of the Tribunal’s Rules of Procedure (Proceedings Prior to July 11, 2021) and is for orders under paragraph 53(2)(b) of the CHRA and under Rule 1(6) and 3(2)(d) and pursuant to the Tribunal’s continuing jurisdiction in this matter. The joint motion is for a confirmation that the Compensation Final Settlement Agreement on compensation (Compensation Agreement) satisfies the compensation orders and framework for compensation made by this Tribunal.

[2] The Old Rules have recently been revised in *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the “New Rules”). Given that this case is ongoing and was initiated under the Old Rules, the Old Rules will govern this motion.

[3] This request arises in the context of a complaint brought by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) against Canada on behalf of First Nations children and families. In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada now Indigenous Services Canada)*, 2016 CHRT 2 (the *Merit Decision*), the Tribunal found that the complaint was substantiated and that Canada engaged in racial and systemic discriminatory practices contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *CHRA* or the *Act*) in its provision of services to First Nations children and families.

[4] The complaint is now in the remedial phase. This includes financial compensation for affected First Nations children and caregivers (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 20, 2021 CHRT 6, 2021 CHRT 7). On June 14-18, 2021, the Federal Court heard Canada's application for judicial review of the Compensation Entitlement Decision (2019 CHRT 39), the Framework for the Payment of the Compensation (2021 CHRT 7) and the Tribunal's orders regarding eligibility under Jordan's Principle (2020 CHRT 20 and 2020 CHRT 36). On September 29, 2021, the Federal Court (2021 FC 969) dismissed Canada's applications in their entirety.

[5] The Tribunal has issued extensive orders to eliminate systemic discrimination, prevent it from recurring and to reform the First Nations Child and Family Services Program and services including remediating the discriminatory funding framework for First Nations child and family services and shifting towards a prevention and First Nations communities led approach to services in order to cease the mass removal of children from their homes, families, communities and Nations (in particular 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14, 2017 CHRT 35, 2018 CHRT 4, 2020 CHRT 20, 2021 CHRT 12, 2021 CHRT 41 and 2022 CHRT 8). The Tribunal has retained jurisdiction to address the remaining remedial matters pertaining to reform implementation and long-term remedies. These reforms are First Nations led and are sustainable for generations to come. They aim to eliminate discrimination and prevent it from reoccurring.

II. Previous Interested Party Requests

[6] A number of organizations, including representatives of First Nations governments, have identified this case as having significant interest and importance to them or their members and have sought to intervene as interested parties.

[7] On September 14, 2009, the Tribunal granted interested party status to the Chiefs of Ontario (COO) and Amnesty International. The COO was given broad participatory rights including calling evidence and cross-examining opposing witnesses. Its participation was subject to the limit that its submissions and evidence not duplicate or overlap those of the parties including the Commission. Amnesty International was given an opportunity to participate in a more limited way. Its participation was limited to legal submissions, including on international sources of law.

[8] The Nishnawbe Aski Nation (NAN) requested interested party status at the beginning of the remedial stage in 2016. The Tribunal granted that request in 2016 CHRT 11. The extent of NAN's participation was limited to "the specific considerations of delivering child and family services to remote and Northern Ontario communities and the factors required to successfully provide those services in those communities." (para. 5). The Tribunal found it clear that NAN had an interest in the proceedings and that it could provide assistance to the Panel in determining outstanding remedial issues. NAN was directed to limit its submissions to outstanding remedial issues and not seek to re-open matters that had already been decided. NAN was to ensure its contributions were not duplicative of those of other parties.

[9] The Congress of Aboriginal Peoples (CAP) requested interested party status in 2019 to participate in the determination of the scope of Jordan's Principle for children without *Indian Act*, RSC 1985 c I-5, status living off-reserve. The Tribunal, in 2019 CHRT 11, granted CAP limited interested party status. CAP was allowed to make submissions on the applicable motion but was required to take the evidentiary record as it was and to conform to the existing timeframe for the hearing.

[10] On October 8, 2020, on consent of the parties, the Panel added the Innu Nation as an interested party status with a limited interested party status to a Caring Society motion for a determination that First Nations children and families living on-reserve and in the Yukon who are served by a provincial or territorial agency or service provider are within the scope of the Tribunal's current remedial orders (the Caring Society's Motion). These are First Nations that are not served by First Nations Child and Family Services Agencies (FNCFS Agencies). The Caring Society's motion also sought corresponding orders that Canada be directed to remedy this deficiency (2020 CHRT 31).

[11] The Panel reiterated that granting interested party status is a question governed by a case-by-case approach in applying the relevant legal principles to the particular facts of the case before the Tribunal. In this specific case, the Tribunal's reform orders impact First Nations on-reserves and in the Yukon across Canada.

[12] The Panel found the Innu Nation was impacted by these proceedings both as a First Nation government seeking to provide prevention services through an agency and as a complainant in a human rights matter seeking similar relief. The Innu Nation submitted it had experience establishing an agency that provides prevention services to First Nations children, the Labrador Innu Round Table Secretariat Inc. (IRT Secretariat). The Innu Nation also alleged it was informed by Canada that the IRT Secretariat is not eligible for funding because the agency did not fit within Canada's eligibility policies. While it appeared that the Innu Nation could potentially be covered by the Tribunal's orders, differing views between the Innu Nation and Canada may have resulted in excluding the Innu Nation from the purview of the Tribunal's orders. The Innu Nation submitted it had specific evidence to support its position, evidence that was not necessarily before the Tribunal to allow it to determine the issues in the Caring Society motion. This evidence would potentially bring expertise and a different legal position than the legal positions advanced by the other parties.

[13] Moreover, in June 2020, the Innu Nation had filed a complaint with the Commission on a matter that was a live issue before this Panel and involving similar questions of fact and law concerning the impacts of this Panel's previous rulings and orders on the Innu Nation and their Agency, the IRT Secretariat. The Panel believed that given the procedural history in this case and, given that children are central in this matter, there was also a public interest for efficiency and expeditiousness to resolve this issue. Therefore, allowing the Innu Nation to participate in this motion would effectively account for this public interest. Again, the subject matter raised in the Caring Society's motion also addresses implementation and compliance to the Panel's previous orders especially the Panel's 2018 CHRT 4 ruling and orders and the interpretation of its related orders.

[14] The Panel in the past, has allowed the COO and the NAN, who are both interested parties in this case, to file new evidence and cross-examine affiants. Therefore, the Panel disagreed with Canada that the Tribunal should not allow interested parties to file evidence or to cross-examine affiants. As masters of its own house and, in keeping with the search for truth in an inquiry format as per the terms of the Act, the Tribunal has the ability to allow interested parties to bring evidence and cross-examine affiants as long as the Tribunal honours two legal principles pursuant to section 48.9(1) of the *CHRA*: the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[15] The Panel determined that the Innu Nation's participation, including presenting evidence, was also permitted by the Tribunal's Rules of Procedure.

[16] Finally on this point, the Innu Nation's participation in the Caring Society's motion could not duplicate the parties' submissions. It had to make best efforts to avoid duplicating questions during cross-examinations and focus its submissions at the hearing. The Innu Nation's assistance had to bring expertise and add a different perspective to the positions including the legal positions taken by the other parties and further the Tribunal's determination of the matter.

[17] The Panel directed a timeline for adjudicating the FSIN's motion.

III. Summary of the Parties' Positions

A. FSIN

[18] The FSIN is a political organization representing the 74 First Nations in Saskatchewan and pursuing the interests of First Nations people in Saskatchewan.

[19] The FSIN and its member First Nations are constituted of a diverse group of cultural and linguistic groups including the Dakota, Dene, Nahkawe (Saulteaux), Nakota, Swampy Cree, Lakota, Plains Cree and Woodland Cree Nations in Saskatchewan.

[20] The FSIN and its member First Nations also represent a significant population of First Nations rightsholders with diverse socio-economic, geographic, and demographic circumstances.

[21] The FSIN is committed to honouring the spirit and intent of the Treaties, as well as the promotion, protection and implementation of the inherent rights to which its diverse member First Nations are entitled.

[22] The FSIN derives its mandate and directives from the Chiefs-in-Assembly which is a duly called and properly constituted meeting of the elected Chiefs of 74 Saskatchewan First Nations. Through consensus the Chiefs-in-Assembly of the FSIN has been given broad and expanding mandate to address issues faced by First Nations people and communities in the context of First Nations child health and welfare including prevention, removal and Jordan's Principle. The FSIN also receives this mandate through its Health and Social Development Commission.

[23] FSIN seeks leave to intervene in this matter for the limited purpose of participating in the AFN and Canada's joint motion. As it will be discussed in the analysis section below, the FSIN submits its participation will be useful to the Tribunal because it will bring that unique and informed perspective on the very significant implications that the Final Settlement Agreement will have on First Nations people in Saskatchewan.

[24] In particular, FSIN states it has a keen interest in ensuring that the right to compensation for victims of discrimination and Rights-holders as provided by the Tribunal's Compensation Orders is upheld.

[25] Moreover, the FSIN argues the Compensation Agreement will have a profound and significant impact on its families, children and communities.

[26] The FSIN also submits it will add to the legal positions of the parties and bring a different perspective than the other parties.

B. Other parties

[27] The Caring Society supports the FSIN's motion. No party opposed the motion. However, the AFN and Canada submit that FSIN should be limited to filing written submissions and make oral arguments at the hearing on the Final Settlement Agreement only.

IV. Law

[28] The *CHRA* contemplates interested parties in s. 50(1) and 48.9(2)(b) and accordingly confirms the Tribunal's authority to grant a request to become an interested party. The procedure for adding interested parties is set out in Rule 8 of the Tribunal's Rules. Consequently, the Tribunal has the jurisdiction to allow any interested party to intervene before this Tribunal in regard to a complaint.

[29] "The onus is on the applicant to demonstrate how its expertise will be of assistance in the determination of the issues" (*Canadian Association of Elizabeth Fry Societies and Renee Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para. 34).

[30] In determining the request for interested party status, the Tribunal may consider amongst other factors if:

- A) the prospective interested party's expertise will be of assistance to the Tribunal;
- B) its involvement will add to the legal positions of the parties; and
- C) the proceeding will have an impact on the moving party's interests.

[31] However, while the criteria listed above and developed in *Walden* are still helpful in similar contexts, "in *Attaran v. Citizenship and Immigration Canada*, 2018 CHRT 6 (*Attaran*), the Tribunal held that what is required is a holistic approach on a case-by-case basis. It cited with approval *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 11 (*NAN*)."¹ *Letnes v. RCMP and al*, 2021 CHRT 30 at para. 14. Therefore, the Tribunal case law shows that the analysis must be performed not strictly and automatically, but rather on a case-by-case basis, applying a flexible and holistic approach.

Interested party status will not be granted if it does not add significantly to the legal positions of the parties representing a similar viewpoint.

See, for example, *Attaran* at para. 10.

[32] As noted, the Panel addressed the test for granting interested party status in 2016 CHRT 11 when the Panel granted interested party status to the Nishnawbe Aski Nation (*NAN*). In that ruling, the Tribunal outlined the considerations on granting interested party status, at paragraph 3, as follows:

An application for interested party status is determined on a case-by-case basis, in light of the specific circumstances of the proceedings and the issues being considered. A person or organization may be granted interested party status if they are impacted by the proceedings and can provide assistance to the Tribunal in determining the issues before it. That assistance should add a different perspective to the positions taken by the other parties and further the Tribunal's determination of the matter. Furthermore, pursuant to section 48.9(1) of the *CHRA*, the extent of an interested party's participation must take into account the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (see *Nkwazi v. Correctional Service Canada*, 2000 CanLII 28883 (CHRT) at paras. 22-23; *Schnell v. Machiavelli and Associates Emprize Inc.*, 2001 CanLII 25862 (CHRT) at para. 6; *Warman v. Lemire*, 2008 CHRT 17 at paras. 6-8; and *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2011 CHRT 19 at paras. 22-23).

[33] Subsequently, in 2020 CHRT 31 the Panel noted:

[28] The Tribunal in granting interested party status within the context of this specific case, recognized the challenge in determining which potential organisations or First Nations governments should be granted interested party status when the nature of the issues means that a large number of First Nations communities are directly affected by this case:

The Panel's role at this stage of the proceedings is to craft an order that addresses the particular circumstances of the case and the findings already made in the *[Merit] Decision*. The Tribunal's remedial clarification and implementation process is not to be confused with a commission of inquiry or a forum for consultation with any and all interested parties. If that were the case, every First Nation community or organization could seek to intervene in these proceedings to share their unique

knowledge, experience, culture and history. Processing those applications, let alone admitting further parties into these proceedings, would significantly hinder the Panel's ability to finalize its order.

(2016 CHRT 11, at para. 14)

[29] As indicated earlier, in applying the test, the Panel granted the NAN interested party status. The Tribunal concluded that the Tribunal's decisions would have a direct impact on the remote First Nation communities represented by the NAN and that the NAN had specific expertise in the challenges providing child and family services to remote, northern communities that, for example, lack year-round road access.

[30] In granting the NAN's interested party request, the Tribunal recognized the challenge of maintaining an efficient and effective hearing process. Accordingly, the Tribunal directed the NAN to limit its written submissions to the context of remote and northern communities that was within its particular expertise distinct from the expertise of the other parties. The Tribunal also directed the NAN to limit its submissions to the outstanding remedial issues and avoid re-opening any matters that had already been determined. The Tribunal further directed a timeline for the NAN's submissions that would avoid unduly delaying the proceedings.

[31] As mentioned above, the Tribunal granted the CAP limited interested party status in 2019 CHRT 11 on the specific issue of determining who constituted a First Nations child living off-reserve for the purpose of Jordan's Principle. In reaching that decision, the Panel relied on its earlier analysis in 2016 CHRT 11. While emphasising the obligation of organizations seeking interested party status to avoid delaying the matter, the Tribunal found that the CAP had relevant expertise and could bring a different perspective than the existing participants in the case.

[32] Accordingly, the Tribunal granted the CAP scope to participate as an interested party solely for the particular motion in which it had a particular interest and expertise, and on specific terms. Those terms excluded the CAP from case management, did not allow it to file evidence, and imposed submission deadlines that would avoid delaying the matter. The CAP's participation was limited to making legal submissions.

[34] As mentioned above, the Innu Nation's assistance had to bring expertise and add a different perspective to the positions including the legal positions taken by the other parties and further the Tribunal's determination of the matter. The Innu Nation's participation in the Caring Society's motion could not duplicate the parties' submissions. It had to make best efforts to avoid duplicating questions during cross-examinations and focus its submissions at the hearing.

V. Analysis

[35] The Panel reiterates that the proper analysis is a case-by-case holistic approach rather than a strict application of the factors from *Walden*. The interested party has to bring expertise and add a different perspective to the positions including the legal positions taken by the other parties and further the Tribunal's determination of the matter.

[36] Further, *Walden* and *Letnes* are distinguishable for another reason. In both cases, the interested party was a bargaining agent and the complainants were members of the bargaining agent. As noted in *Letnes* at para. 19, "absent exceptional circumstances, a union will automatically be granted intervention status in proceedings dealing with human rights in the workplace when one of its members is the complainant." That is very different from the current context where many organizations represent different First Nations.

[37] In analyzing the expression “further the Tribunal’s determination of the matter” the Tribunal considers the legal and factual questions it must determine, the adequacy of the evidence and perspectives before it, the procedural history of the case, the impact on the proceedings as well as the impact on the parties and who they represent. The Panel also considers the nature of the issue and the timing in which an interested party status seeks to intervene. Moreover, if adding another interested party will positively or negatively impact the Tribunal’s role to appropriately determine the matter. Finally, the Tribunal will consider the public interest in the matter.

[38] The Panel stresses the importance of considering the context and specific facts of the case in all proceedings before the Tribunal including interested parties’ status. Otherwise, it may lead to legalistic, technical and unjust outcomes. Furthermore, the Parties cannot ignore the previous interested party rulings in this case. The approach taken in those rulings is the most relevant and authoritative to this motion given that this is the same case with the same historical context.

[39] At the time of this motion, the Panel has been on this case for a decade and heard the merits of the case including compensation and has released its substantive decisions. The Panel remains seized of this case to supervise adequate implementation of its previous orders and to issue new orders if necessary to eliminate systemic discrimination and prevent it from reoccurring. Over the years, the Panel added 5 interested parties at various times and for various reasons. Two before the hearing on the merits, one at the beginning of the remedies phase and two others for specific motions and for specific reasons summarized above. The Panel ruled on the issue of compensation and on the compensation process (compensation decisions) on a time frame of over a year considering a large evidentiary record, complex and numerous legal and factual questions assisted by the parties especially First Nations complainants. Moreover, the Federal Court affirmed the compensation decisions. Therefore, the Panel is acutely aware of what may assist or hinder its consideration of the matter. This analysis cannot be overlooked. The Panel has consistently identified the need to take a contextual and holistic approach. This approach refined and developed the approach from *Walden*, *Attaran* and *Letnes* similarly added to the jurisprudence. The Tribunal cannot now ignore these subsequent cases. Of note, both *Attaran* and *Letnes* rely on this Panel’s earlier ruling. The request must be considered in a holistic manner, case-by-case approach taking into consideration if it furthers the Tribunal’s determination of the matter. The Panel clarifies that the Tribunal’s determination of the matter is informed by the list of criteria mentioned above.

[40] Further, the *Letnes* ruling was made at the early stages of the complaint before the Tribunal yet the Tribunal still limited the interested party’s participation.

[41] Moreover, in this wide-ranging case, impacting First Nations communities in Canada, the Tribunal has to consider that every First Nation community or organization could seek to intervene in these proceedings to share their unique knowledge, experience, culture and history. Would they have expertise to offer? Absolutely. However, it is impossible for all of the First Nations to join this case without halting the work of the Tribunal. The Tribunal is informed by three large organizations representing First Nations (AFN, COO, NAN) and an organization with expertise in child welfare and other services offered to First Nations children regardless of where they reside (Caring Society) to consult with First Nations by different means and bring their perspectives to these proceedings.

[42] Moreover, the Panel recognizes that the rights holders are First Nations people and First Nations communities and governments. While it is ideal to seek every Nations’ perspective again, these proceedings are not a commission of inquiry, a truth and reconciliation commission or a forum for consultation. The Panel relies on the evidence, the parties in this case and the work that they do at the different committees such as the National Advisory Committee on Child Welfare (NAC), tables, forums and community consultations to inform its mid and long-term findings.

[43] With the principles enunciated above and upon consideration of the parties’ submissions, the Panel finds that while the FSIN’s undoubtably has experience, expertise and valuable points of view, their intervention at this stage should only be permitted in a limited manner as part of these proceedings.

[44] There is no doubt that the FSIN possesses significant expertise in the areas of child welfare, health and Jordan's Principle. Notably, it supports two regional experts as representatives at the NAC, to advocate for and provide information and expertise with respect to regional priorities, needs and perspectives of First Nations child health and welfare in Saskatchewan. The NAC's recommendations inform the parties' work and the Tribunal.

[45] The FSIN also supports its representative at the Jordan's Principle Action Table created under the NAC to provide on the ground subject matter expertise required to develop policy options for the long-term implementation of Jordan's Principle.

[46] Additionally, the FSIN supports its representative at the Jordan's Principle Operation Committee created under the NAC for the purposes of information sharing and operational monitoring at the national, regional and community level. The FSIN also sits on the Saskatchewan First Nations Child and Family Services Regional Tripartite Table ("Regional Tripartite Table"). Saskatchewan First Nations Family and Community Institute Inc hosts the Regional Tripartite Table, which meets quarterly and includes representatives from Saskatchewan First Nations Child and Family Service Agency (FNCFSA) Executive Directors, Indigenous Services Canada, FSIN and the Saskatchewan Ministry of Social Services.

[47] The Panel agrees that the Compensation Agreement will have a significant impact on First Nations families, children and communities in Saskatchewan. This is also true for the other First Nations in the other provinces, the Yukon territory and most if not all First Nations in Canada. Therefore, FSIN's argument on bringing a regional perspective is not the most compelling argument given the risk the Tribunal may face if every First Nations' desire to participate in this case to bring their expertise and specific view on the Compensation Agreement. This would not only be impossible to manage for this Tribunal but it would also have the detrimental effect of halting the proceedings for months or possibly years. This would not be in the best interest of First Nations children and families.

[48] Furthermore, the Tribunal already has the COO and the NAN bringing regional perspectives including the important question of remoteness. While the Tribunal understands that First Nations in Saskatchewan and in Ontario may have different perspectives, the Tribunal has relied on the AFN for a broader First Nations perspective across Canada given its mandate and structure representing the views of over 600 First Nations in Canada. For example, the Panel relied on the AFN's resolutions in 2020 CHRT 20.

[49] The FSIN's motion states that the Compensation Agreement should be brought before the Chiefs-in-Assembly for full review for their free, prior and informed consent. This position may be advanced by the Caring Society given the nature of their cross-examination questions. The AFN's affiant also responded to those questions. The right of free, prior and informed consent was also raised by the Caring Society and also answered by the AFN affiant. The FSIN should ensure it does not duplicate the Caring Society's arguments on this point and may adopt the Caring Society's position.

[50] The FSIN argues its distinct knowledge and experience spanning decades and comprising important projects, initiatives and partnerships intended to examine and address class actions will be of use to this Tribunal in evaluating a number of features of the Final Settlement Agreement. This includes eligibility requirements, administrative burdens, safeguards for procedural fairness, and evidentiary requirements which have similarities and differences with prior settlement agreements. The FSIN has experience and expertise in the impact large class actions settlement agreements have had on First Nations communities, families and survivors. The AFN and other parties to these proceedings also have extensive experience and involvement in class actions involving First Nations and are apprised of the errors that were made in the past. This was raised by the AFN at the compensation hearing before the Tribunal that led to the compensation decisions of 2019 and 2020. Therefore, the FSIN should add and not duplicate the parties' submissions on this point.

[51] The part of the joint motion as to whether the Settlement agreement satisfies this Tribunal's compensation decisions and process is within the expertise of this Tribunal. The question: Can the Tribunal modify its earlier decision that has been affirmed by the Federal Court without the consent of all the parties to the order? While this is a novel legal question, it is within the expertise of the Tribunal, who benefits from the informed views of the parties and the Commission who has significant expertise in the human rights regime under the *CHRA*. There is a second question: Is the motion premature given the outstanding details to be determined in the Settlement Agreement? This question is also within the expertise of the Tribunal, who will benefit from the parties' informed submissions.

[52] As part of the Federal Court proceedings, opposing views can be shared through an established process. It may be more appropriate for the FSIN to provide its views at the Federal Court given the Federal Court is the one who will approve or reject the Compensation Agreement.

[53] The Panel agrees this Tribunal is tasked with evaluating a settlement agreement which impacts on a collective that experienced historical patterns of discrimination contributing to vulnerability and marginalization. This was also the case at the time of the compensation hearing, decision and the compensation process in the last years. However, the specific context of the joint motion is distinct from that of the negotiations that led to the Compensation Agreement or the Federal Court proceedings given that it arises after extensive Tribunal proceedings, findings and orders and negotiations between the parties as part of a Tribunal ordered process that led to the subsequent compensation process decisions to which FSIN did not request to be part of until now. FSIN's expertise may have been added then. At this time in the proceedings, the FSIN does not have all the context and information that led to the compensation process and this may create more confusion for the Panel, especially as it is now faced with First Nations complainants' who were part of the compensation process order who now disagree with each other. The Panel always values the views of distinct Nations. However, unlike the previous interested parties' requests, the timing of the FSIN's motion does not work in their favor given the unique and specific context of numerous compensation rulings already rendered and the specific approach to the compensation process already completed and affirmed by the Federal Court.

[54] Moreover, as part of the compensation process the Tribunal heard different viewpoints from First Nations and had to choose between expert First Nations' viewpoints which was a difficult task for the Panel given the Panel's respect of First Nations inherent rights and distinct needs. The established schedule is very tight leading to the Federal Court hearing commencing on September 19, 2022 and the number of parties already involved is adding to the complexity of these proceedings. For the reasons explained above, adding another interested party at this time without limitations may jeopardize the process. The Panel also notes that the FSIN seeks to participate in case management, mediation, negotiation or other dispute resolution or administrative processes further to this case or after the hearing. The Panel finds this would add complexity to the already complex proceedings as explained above. For those reasons, the FSIN will only be allowed to file written submissions and make oral submissions at the hearing within the parameters outlined in the order below.

[55] The Panel agrees that the Indigenous community in Canada is not a monolith and that its diversity produces a complex and nuanced body of experience, knowledge, and expertise. What might be good at the national level might not capture and accommodate regional variations, processes and expectations such as those in Saskatchewan. This is why the Panel has continually ruled that a one size-fits-all approach should not apply to eliminating the discrimination identified by the Tribunal and that meaningful reform ought to take into account the specific needs of First Nations children, families and communities. As mentioned above, these distinct perspectives are considered in many ways including via the different committees, tables, forums and First Nations-led programs informing the parties and the Tribunal.

[56] For the compensation issue, the Tribunal has already ruled on this issue and worked with the parties over a year to establish a compensation process which was affirmed by the Federal Court. The broader negotiations for the Compensation Agreement were conducted outside the Tribunal process. While meaningful consultations ought to be conducted to reach an agreement impacting rights holders,

the FSIN's motion highlights the complexities in reaching consensus in a Tribunal process in order to provide meaningful and timely compensation to First Nations children and families. This being said, the Panel will allow FSIN to participate in a limited manner by way of oral and written arguments on the Compensation Agreement given that FSIN committed to provide a different perspective informed by their expertise and will add to the legal positions of the other parties. This could potentially assist the Tribunal in determining some aspects of the joint motion. Finally, the FSIN like most First Nations in Canada will be impacted by the joint motion.

[57] Again, it may be more appropriate for the FSIN to provide its views on the broader Compensation Agreement and negotiations at the Federal Court as part of the Federal Court proceedings, where opposing views and concerns can be shared through an established process. The AFN's affiant provided a link as part of her cross-examination: www.fnchildcompensation.ca, the established process is outlined there and is as follows:

It is important to understand the difference between objecting to the Settlement and opting out. People have the right to object to the agreement in whole or in part during the Federal Court approval hearing and still receive compensation if the settlement is approved in court. To object or comment on the settlement, you have two options:

Option 1: Object or provide comments in writing – Send comments to the Administrator by mail to PO Box 7030, Toronto ON M5C 2K7, email to fnchildclaims@deloitte.ca or fax to 416-815-2723, and your comments will be sent to the Federal Court before the hearing.

Option 2: Object in person – Ask to speak in court about the proposed settlement commencing on September 19, 2022, either in person at the Federal Court in Ottawa or by video conference. To request to speak at the hearing, please contact the Administrator at 1-833-852-0755.

If you want to object, you must send your written comments or request to speak at the hearing by September 12, 2022.

VI. Order

[61] Order:

- A) THE TRIBUNAL GRANTS the motion of the Federation of Sovereign Indigenous Nations (FSIN) in part;
- B) The Tribunal grants the FSIN a limited interested party status with the following conditions:
- C) The FSIN will only participate in the AFN and Canada's Notice of Motion for Approval of the Final Settlement Agreement dated July 22, 2022 (joint motion) until the hearing of the motion is completed; The FSIN will not participate in mediation, negotiation or other dispute resolution or administrative processes further to this case or after the hearing;
- D) The FSIN will not participate in case management unless specifically directed by this Tribunal;
- E) The FSIN may not request postponements or changes to the pre-established schedule and hearing dates established by the Tribunal and accepted by the other parties;
- F) The FSIN will not be authorized to file evidence and must take the evidentiary record as it is;
- G) The FSIN may not cross-examine the affiants;

- H) The FSIN is allowed to provide written submissions of not more than 20 pages and focused on the Final Settlement Agreement on compensation (Compensation Agreement) and must not repeat the positions of the other parties. If another aspect of a party's position is shared by the FSIN, the FSIN may indicate clearly that it adopts the same position on this aspect. The FSIN will bring a different perspective than the other parties. The FSIN will add to the legal positions of the parties. The FSIN will not participate in other issues that are in front of the Tribunal in this case.
- I) The FSIN will not delay the proceedings and must file its submissions no later than September 9, 2022. Given the short timeframe before the hearing of this issue, any delay will be deemed a renunciation by FSIN to participate in the proceedings;
- J) The FSIN is allowed to make oral submissions if any, only on the dates already set by this Tribunal of September 15-16, 2022 and no longer than 45 minutes. This right to oral arguments can be reduced, limited or denied by this Panel if the written submissions are deemed repetitive of the other parties' submissions and/or not adding to the legal positions of the parties and not bringing a different perspective than that of the other parties. In that case, the Panel will consider the FSIN's written submissions as part of its deliberations alongside the submissions and oral arguments of the other parties.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

September 2, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 2, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Adam Williamson , counsel for Assembly of First Nations, the Complainant

Jessica Walsh and Ansumala Juyal, counsel for the Canadian Human Rights Commission

Christopher Rupar, Paul Vickery, Jonathan Tarlton, Meg Jones, Sarah-Dawn Norris , counsel for the Respondent

Maggie Wenté, Jessie Stirling and Darian Baskatawang for the Chiefs of Ontario, Interested Party

Julian Falconer, Christopher Rapson, and Natalie Posala, counsel for the Nishnawbe Aski Nation, Interested Party

Michael Seed, Counsel for the Federation of Sovereign Indigenous Nations

TAB 26

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 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2022-12-20

File number: T1340/7008

Citation:

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 (CanLII), <<https://canlii.ca/t/ko8tm>>, retrieved on 2026-01-02

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Citation: 2022 CHRT 41

Date: December 20, 2022

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

I. Introduction 1

II. Context 1

III. Summary of the Parties' Positions 5

A. AFN and Canada 5

(i) Initial Submissions 5

(ii) Reply Submissions 19

B. Canada 22

C. Amnesty International 24

D. Chiefs of Ontario 24

E. Nishnawbe Aski Nation 24

F. Caring Society 25

(i) Facts 25

(ii) Arguments 29

G. Commission 32

H. Post-Hearing Submissions 33

IV. Functus officio and Finality 33

A. Law on functus officio and finality 33

B. The Tribunal's retained jurisdiction on the compensation issue and the issues of functus officio and finality of its orders 45

(i) Human Rights Regime 79

V. The FSA and the Specific derogations from the Tribunal's Compensation Orders 90

A. Entitlement for children removed and placed in non-ISC funded placements 91

(i) Removed children and the parties' differing interpretations post Federal Court ruling 94

(ii) Non-ISC Removed children 95

B. Estates of caregiving parents and grandparents 116

C. Certain caregiving parents and grandparents will receive less compensation 120

D. Some Jordan's Principle victims/survivors may receive less compensation 122

E. Conclusion on Derogations 126

VI. Opting-out provision 127

VII. Informing the public about the FSA 129

VIII. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC), Self-government, AFN resolutions 136

A. Individual rights versus collective rights 147

IX. The request to amend the Tribunal's compensation orders to reflect the terms of the FSA is denied 149

A. The Compromise factor in reaching the FSA and human rights lens 151

B. New information namely the FSA since the Tribunal rendered its orders 153

C. The remedy is forthcoming to the victims 153

D. The broader scope and enhanced compensation for some victims/survivors 154

X. Conclusion 160

XI. Order 163

A. The Tribunal grants the motion in part and Declares/Finds 163

XII. Retention of jurisdiction 164

I. Introduction

[1] The Panel congratulates the AFN and Canada for making important steps forward towards reconciliation and for their collaborative work on the Final Settlement Agreement on compensation for the class members in the class action (FSA). The FSA is outstanding in many ways, it promises prompt payment, it is a First Nations controlled distribution of funds, and it allows compensation in excess of what is permitted under the *CHRA* for many victims/survivors. The FSA aims to compensate a larger number of victims/survivors going back to 1991. The Panel wants to make clear

that it recognizes First Nations inherent rights of self-government and the importance of First Nations making decisions that concern them. This should always be encouraged. The Panel believes this was the approach intended in the FSA which was First Nations-led.

II. Context

[2] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [Merit Decision] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

[3] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the Charter, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

[6] The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

[7] The Tribunal encouraged the parties for years to resolve compensation issues.

[8] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

[9] The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Panel who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

[10] Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights. The same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions that are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the *CHRA* regime and the Tribunal's orders.

[11] In May 2022, the AFN and Canada advised the Tribunal that they needed a hearing in June to present the FSA. The Tribunal set aside all summer to deal with the matter expeditiously and to have sufficient time to properly consider over 3000 pages of documents but the AFN and Canada advised that class counsel were not yet ready to sign the FSA. The FSA was finally signed on July 4, 2022, and announced publicly but was only presented to the Tribunal on July 22, 2022. The motion to address the FSA was heard in September to afford fairness to all parties. The Panel agrees the victims/survivors have been waiting long enough and emphasizes that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the *Compensation Decision* in 2019.

[12] The Panel appreciates the parties' work to prepare for this hearing on a short-time frame and the submissions they provided both in writing before the hearing and at the hearing. There were a few issues on which the Panel had outstanding questions after the hearing. The Panel Chair requested that the parties address these outstanding questions. Once again, the Panel thanks the parties for responding to these questions promptly.

[13] The Panel emphasizes that it acknowledges First Nations inherent rights to self-determination and self-governance. The Panel recognizes that the Canadian legal system views this motion as balancing individual and collective rights, while First Nations may frame the dialogue around responsibilities. The Tribunal emphasizes that First Nations rights holders are best placed to make decisions for their own citizens in or outside the courts. The Tribunal stresses the important fact that First Nations are free to make agreements concerning their citizens. The Tribunal understands the difficult choices made by the AFN and why the AFN has made them. First Nations had to work with \$20 billion when they were asking much more for all cases.

III. Summary of the Parties' Positions

A. AFN and Canada

(i) Initial Submissions

[14] On July 22, 2022, the AFN and Canada submitted a joint notice of motion and supporting materials.

[15] The AFN and Canada requested a declaration that the Final Settlement Agreement (FSA) fully satisfies the terms of the Panel's *Compensation Decision*, related compensation orders and the Compensation Framework. In the alternative, the AFN and Canada request the Tribunal to amend the various compensation orders and the Compensation Framework to conform to the FSA. In any event, the Tribunal's declaration or amendments would be conditional on the Federal Court approving the FSA.

[16] The AFN has the support of the Attorney General of Canada and the representative plaintiffs of the class actions before the Federal Court.

(a) Context

[17] The AFN outlines the context that led to this motion. It explains how Canada sought to engage in negotiations to provide compensation for children covered by the class action proceedings and the CHRT proceedings through a global compensation settlement. Simultaneously, Canada engaged in negotiations on long-term reform of the First Nations Child and Family Services Program (FNCFS Program) and Jordan's Principle. The FSA provides \$20 billion in compensation to survivors.

[18] The AFN identifies its history of trying to address the discrimination in the FNCFS Program, dating back to 1998 and involving reports such as the National Policy Review and the Wen:de reports.

[19] The AFN indicates that it was the only party in these CHRT proceedings to advance a claim for individual compensation for children, parents and siblings affected by Canada's discrimination. The Tribunal ultimately awarded the maximum compensation available under the *CHRA* to affected First

Nations children and caregiving parents and grandparents. This compensation was for children removed from their homes, families and communities and those who experienced a delay, denial or gap in the delivery of an essential service. The AFN notes that the Tribunal retained jurisdiction to address issues that arose in the compensation process. Furthermore, the Tribunal sought to promote a dialogic approach with discussions and negotiations between the parties. The AFN explains how the parties engaged in subsequent discussions and also came back to the Tribunal for further rulings on compensation. The Tribunal retained jurisdiction on all its compensation rulings, including retaining jurisdiction over the Compensation Framework.

[20] The AFN notes that the compensation decisions were upheld by the Federal Court on judicial review. During those arguments, the AFN and Caring Society argued that Canada should pay compensation to every child affected by the FNCFS Program that was taken into out-of-home care and to children affected by Canada's narrow interpretation of Jordan's Principle. Compensation should be paid to both children and their parents or grandparents. The AFN highlights the comments in the Federal Court decision encouraging the parties to engage in good faith discussions to achieve a fair and just settlement.

[21] The AFN describes the class action suits brought in the Federal Court. The class actions provide compensation for victims of Canada's discrimination dating back to 1991. The classes of victims eligible for compensation under the class actions drew on the victims identified in the Compensation decision. It establishes six classes of victims:

- A)Removed child class: First Nations children removed from their homes between 1991 and 2022 as minors while they or one of their parents was ordinarily resident on reserve.
- B)Removed child family class: Parents, grandparents or siblings of members of the removed child class.
- C)Jordan's Principle class: All First Nations minors living in Canada who between 2007 and 2017 had a confirmed need for an essential service and faced a denial, delay or service gap with respect to that needed essential service.
- D)Trout child class: Similar to the Jordan's Principle class, but covering First Nations children between 1991 and 2007.
- E)Jordan's Principle family class: Parents, grandparents or siblings of members of the Jordan's Principle class.
- F)Trout family class: Parents, grandparents or siblings of members of the Trout child class.

[22] The AFN indicates its estimates on the size of each class. The Removed child class is estimated at 115,000 members. The Removed child family class is estimated to have 1.5 caregiving parents or grandparents eligible for compensation for each child, with some caregivers having multiple removed children. The other classes are harder to estimate. The Jordan's Principle class is estimated to be between 58,385 and 69,728 members. The Trout child class is estimated at 104,000. There is no estimate for the Jordan's Principle and Trout family class sizes.

[23] The AFN recounts the history of the negotiations that resulted in the FSA. Discussions first occurred through a mediator as part of the Federal Court process relating to the class actions. In addition to the parties to the class actions, the Caring Society participated in these mediations. Following this, negotiations occurred under the supervision of the Honourable Murray Sinclair. These negotiations primarily involved the parties to the class actions, with some consultations with the Caring Society and other parties before the Tribunal. These negotiations led to an Agreement-in-Principle.

[24] The Agreement-in-Principle provided \$20 billion to release Canada of all compensation claims under the Tribunal proceedings and class actions. Any unused compensation funds would not revert back to Canada. The parties acknowledged there was uncertainty on the number of victims eligible for compensation. The design of the distribution of the funds was up to the class action plaintiffs. The Agreement-in-Principle also addressed the opt-out period, the fact that the orders would satisfy the Tribunal compensation process, the tax treatment of compensation, notice, legal fees and a request for a public apology. The parties used the Agreement-in-Principle as the basis to develop the FSA.

[25] The AFN indicates that class counsel and the AFN had the following objectives when developing the FSA:

- A) maintain and increase the awards under the Tribunal's Compensation Decision to the greatest extent possible;
- B) ensure proportionality in compensation based on objective factors;
- C) where compromises are required, compensation should favour children;
- D) a trauma informed and culturally sensitive process;
- E) no obligation for survivors to undergo an interview or cross-examination to receive compensation;
- F) a claims process that is easy and simple enough not to require professional assistance to get compensation;
- G) provide support to survivors through the compensation process; and
- H) the entire settlement fund amounts go to survivors without deductions for counsel fees or payments to third parties.

(b) FSA Terms

[26] The AFN summarizes the terms of the FSA.

[27] The preamble codifies the objectives of the FSA. This includes administering the funds in an expeditious, cost-effective, user-friendly, culturally sensitive and trauma-informed manner. Overall, the objectives aim to ensure survivors are well supported in the process and do not experience barriers and re-traumatization.

[28] The \$20 billion in settlement funds are to be paid into trust once all possibilities of appeal from the settlement order have been exhausted.

[29] The AFN summarizes the classes covered by the FSA as follows:

- A) Removed child class: A First Nations individual who
- B) Removed child family class: All brothers, sisters, mothers, fathers, grandmothers and grandfathers of a member of the removed child class at the time of removal.
- C) Jordan's Principle class: First Nations individuals who, between December 12, 2007 and November 2, 2017, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on ground including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

- D)Jordan's Principle family class: All brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Jordan's Principle Class at the time of the delay, denial or service gap.
- E)Trout child class: First Nations individuals who, between April 1, 1991 and December 11, 2007, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on grounds including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.
- F)Trout family class: All brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Trout Child Class at the time of the delay, denial or service gap.

i. while under the age of majority;

ii. while they or at least one of their caregivers were ordinarily resident on reserve or living in the Yukon;

iii. were removed from their home by child welfare authorities or voluntarily placed into care between April 1, 1991 and March 31, 2022;

iv. whose placement was funded by ISC.

[30] First Nations individuals includes individuals registered pursuant to the *Indian Act*, those entitled to be registered under s. 6(1) or 6(2) of the *Indian Act* as it read on February 11, 2022, and those included on Band Membership lists and who met the Band Membership requirements under s. 10-12 of the *Indian Act* by February 11, 2022. For purposes of the Jordan's Principle class, it also includes individuals recognized by their First Nation by February 11, 2022.

[31] The AFN estimates that \$7.25 billion will be used to compensate the removed child class, \$5.75 billion for the removed child family class, \$3 billion for the Jordan's Principle class, \$2 billion to the Trout child class and \$2 billion for the Jordan's Principle and Trout family classes.

[32] The AFN indicates that the parties will recommend an administrator to be appointed by the court. The administrator will be responsible for developing processes to compensate individual claimants and ensuring the funds flow in a trauma-informed manner. The administrator will be responsible for ensuring appropriate standards are maintained in how the funds are distributed to beneficiaries. This is consistent with the objectives of the claims process, that aims to minimize the administrative burden on survivors. The administrator will provide regular reports, which will assist a First Nations led Settlement Implementation Committee and ultimately the Federal Court in overseeing the process and addressing any systemic issues that arise.

[33] The AFN identifies that the FSA will have a comprehensive plan to provide notice to beneficiaries. There will be an opt-out period. Beneficiaries will have three years to make a claim once they reach the age of majority, with extensions possible for personal circumstances.

[34] A Cy-près fund will benefit beneficiaries who do not receive direct compensation. The fund will have an endowment of \$50 million and support activities such as family reunification, access to cultural activities, access to transitional supports and facilitating access to services for Jordan's Principle beneficiaries who may lose access to services upon attaining the age of majority.

[35] The AFN highlights that the full \$20 billion in compensation funds will benefit survivors because Canada has agreed to pay the costs of administering the settlement and counsel fees separately. In addition, the \$20 billion will be invested and any interest will also benefit survivors.

[36] The AFN notes that Canada will make best efforts to ensure that the benefits are not taxable income and do not affect federal, provincial or territorial social assistance benefits.

[37] The AFN explains that the FSA provides wellness supports for beneficiaries. These include service coordination, bolstering the existing network of health and cultural supports, access to mental health counselling, and access to a youth specific support line.

[38] The AFN explains the process for compensating the estates of deceased children who are entitled to compensation. It also indicates that there is a process in place for individuals who lack legal capacity because of a disability.

[39] The FSA contemplates Canada proposing to the Office of the Prime Minister that the Prime Minister make an apology.

[40] The AFN notes that there are some areas where more work is required. These areas include finalizing the Jordan's Principle assessment methodology, approving the plan to give notice to beneficiaries, assembling data in Canada's control, appointing an administrator, and receiving approval of the FSA by the Federal Court.

(c) Arguments

[41] First, the AFN argues that the Tribunal should support the FSA because it has the support of the AFN, Canada and class action counsel. The AFN has their full support in its submissions. The AFN indicates it supports the FSA because it ensures the timely payment of compensation, significantly expands the number of survivors eligible for compensation, and provides that those who suffered the greatest harm will receive the greatest compensation. The AFN views the FSA as the most effective and efficient means of paying out the significant compensation for First Nation victims of Canada's discrimination. The AFN emphasises that it has pushed for individual compensation since the start of the Tribunal's case and notes that, as the national political governing body for First Nations, it is best positioned to understand the impact of the compensation on First Nations across Canada.

[42] Second, the AFN argues that the Tribunal has the jurisdiction to endorse the FSA. The AFN highlights the broad remedial powers under the *CHRA*. It identifies how the Tribunal has used the broad remedial authority in this case to craft the existing orders in this case, including retaining jurisdiction that provides the Tribunal broad discretion to return to a matter. The AFN relies on the dialogic approach as endorsed by the Federal Court. The AFN views the dialogic approach as encouraging the parties to engage in negotiations and having sufficient flexibility to support the negotiations that occurred in this case. The *CHRA* supports the Tribunal being flexible and innovative in providing human rights remedies.

[43] Given this context of the Tribunal's remedial powers, the AFN argues the Tribunal's retained jurisdiction is sufficiently broad to permit it to consider the FSA as satisfying its compensation orders. The Tribunal has explicitly retained the jurisdiction on remedial issues which provides it jurisdiction to consider the AFN and Canada's proposal to endorse the FSA. The FSA is a product of negotiations as contemplated with the dialogic approach.

[44] Third, the AFN argues that the Tribunal has discretion in the manner in which it evaluates the FSA as satisfying the Tribunal's compensation orders. The AFN submits that there are no precedents directly on point for when the parties successfully negotiated a settlement outside the Tribunal's process that satisfies a compensation order. There are some parallels with the Compensation Framework negotiated by the parties but there are still differences in the circumstances. The AFN accordingly submits the Tribunal should interpret its broad remedial jurisdiction to consider whether the FSA satisfies the Tribunal's compensation orders.

[45] Generally speaking, the AFN contends that the Tribunal should apply a test of whether the FSA reasonably and in a principled manner satisfies the Tribunal's compensation orders and the underlying principle of promoting the rights of survivors. The AFN suggests specific factors that can help make this assessment. These include whether the FSA meets the Tribunal and *CHRA*'s compensation objectives, international human rights principles, the results of the dialogic process, and reconciliation. The AFN

also asks the Tribunal to draw on principles considered by the Federal Court in approving class action settlements compensating First Nations individuals for Canada's historic discrimination. In such circumstances, the Federal Court considers whether the settlement is fair and reasonable and whether it is in the best interests of the class as a whole. This can involve considering the settlement terms and conditions, the likelihood of success or recovery through litigation, the future expense and duration of further litigation, the dynamics of settlement negotiations and positions taken therein, the risks of not unconditionally approving the settlement, and the position of the representative plaintiffs. Of particular significance are the litigation risks of not approving the agreement and the view of the representative plaintiffs.

[46] Fourth, the AFN sets out how the different parts of the FSA align with and build on the Tribunal's compensation orders.

[47] The quantum of compensation is fair, reasonable and principled. The AFN argues it meets or exceeds the objectives of the Tribunal's orders. The total compensation of \$20 billion is significant. The amounts payable to individuals will be meaningful and the total compensation is historic and reflects the magnitude of the harms.

[48] The AFN submits that the compensation mechanism is reasonable and takes advantage of experience gained from previous First Nations settlements. The mechanism minimizes re-traumatizing victims. It also prioritizes access to justice, efficiency and expediency. In order to achieve this, the FSA adopts an approach that is modeled on the Indian Residential School Settlement common experience payment. There is a presumption in favour of qualification for compensation with low burdens of proof and evidentiary requirements on survivors. Proportionality in compensation relies on objective factors whenever possible.

[49] The AFN explains that members of the removed child class would receive, at a minimum, the \$40,000 in damages ordered by the Tribunal. The FSA expands compensation temporally to cover children affected by Canada's discriminatory funding back to April 1, 1991 when Directive 20-1 came into force. This expands the number of children eligible for compensation by about 56,000. The AFN argues that the eligibility is also expanded to children who were removed from their home but were not removed from their community because they were placed in ISC funded care within their community. In addition to expanding eligibility, basing eligibility on ISC funded care links compensation to the discriminatory practice that incentivised removals and placements over preventative measures and it facilitates the identification of affected children. The AFN indicates that there is compensation for victims in this category who suffered exceptional harm based on objective proxies of harm such as a child's age and number of years in care. This allows the compensation to exceed the statutory maximum the Tribunal could order. The exact value of these enhancement payments is not yet known, both because the number of beneficiaries is not yet known and the relative weight of different factors is not yet known.

[50] The AFN indicates that compensation for the removed child family class is similarly based on ensuring a minimum payment of \$40,000 to eligible beneficiaries. It also expands the eligible beneficiaries as the number of eligible children is increased. The AFN argues that the FSA expands the caregivers eligible for compensation beyond biological parents and grandparents as contemplated in the Tribunal's orders to now include adoptive and step caregivers.

[51] The AFN argues that the FSA expands the scope of eligible beneficiaries with the Trout child class and the Trout family class. These classes expand eligibility for Jordan's Principle to cover the period between 1991 and 2007 both for affected children and caregivers. The FSA will provide up to \$20,000 for children who do not have objective aggravating factors and up to \$40,000 for those children with objective aggravating factors. Caregivers of children who suffered the highest levels of impact may be entitled to some direct compensation. Including these beneficiaries is significant as their harm predates the recognition of Jordan's Principle.

[52] The AFN supports the establishment of a Cy-près fund that will primarily benefit class members who do not receive direct compensation. It will be endowed with \$50 million. This includes siblings of affected children. The benefits of the Cy-près fund are consistent with the Tribunal's concern that this sort of fund be in addition to, rather than instead of, direct compensation.

[53] The AFN contends that the FSA supports the Tribunal's concern that any compensation process minimizes trauma to survivors. This is consistent with the objectives of the Tribunal's compensation orders. It does this both by requiring the administrator to take a trauma-informed approach and requiring the administrator to follow a presumption that claimants are acting in good faith and requiring the administrator to draw all reasonable inferences in favour of claimants. Some further examples include a guarantee that none of the child victims will be required to submit to an interview or examination and the Cy-près fund's objective of providing culturally sensitive and trauma-informed services. The supports during the compensation process include service coordination, bolstering existing health and cultural supports, access to mental health counselling, and enhanced helpline services.

[54] The AFN argues that the supports available to victims under the FSA supports and expands the initiatives contemplated under the Tribunal's compensation orders. The supports that are available are robust. They will also remain available until all beneficiaries have completed the claims process. In addition to the supports aimed at ensuring a culturally sensitive and trauma-informed approach, navigators will be available to help claimants navigate the process. Canada will provide further funding for five years to the AFN to implement First Nations-led supports. The Cy-près fund aims to provide benefits to class members who are not eligible for direct compensation.

[55] The AFN explains that it has a notice plan that aims to ensure every beneficiary will receive notice in order to submit a claim. Individuals who sign up will receive notice when they are eligible to make a claim for compensation.

[56] The AFN indicates that the FSA provides an opt-out period of six-months. Individuals may opt out of the compensation process during that time. If the Tribunal declares that the FSA satisfies its compensation orders, such individuals would not be able to pursue compensation under the Tribunal's orders.

[57] There are a number of further ways in which the FSA mirrors the Tribunal's compensation orders. These include the administrator in charge of distributing compensation, the distribution protocol, Canada funding supports to beneficiaries as they navigate the process, efforts to ensure the compensation is tax-free and does not affect social assistance benefits, a right for survivors to appeal denials of benefits, and protections to ensure survivors are the ones who benefit from the compensation.

[58] Fifth, the AFN argues that while the FSA seeks alignment with the Tribunal's compensation orders, where there are necessary deviations, they are consistent with the principles underlying the Tribunal's compensation orders. The AFN argues that compromises were required because of the fixed amount of compensation available, the complexities and lack of data for Jordan's Principle and Trout class members, and expanding eligibility back to 1991. Compromises were designed to favour children who suffered substantial impacts.

[59] The AFN indicates there are two points where the removed child family class may deviate from the Tribunal's Compensation Framework. First, caregiving parents and grandparents will receive additional compensation up to \$60,000 in the event they had multiple children removed rather than multiples of \$40,000. The second change is that if there is an unexpected number of claimants, compensation may be reduced to ensure that all caregiving parent and grandparent victims receive compensation. The maximum compensation of \$60,000 similarly ensures there are enough funds to compensate all eligible caregiving parents and grandparents. Further, family class members who are not eligible for direct compensation can still benefit from the Cy-près fund.

[60] The AFN contends that the process for compensating Jordan's Principle victims generally follows the principles identified by the Tribunal. The FSA aims to ensure that children who suffered discrimination and were objectively impacted are compensated through a process that is objective and efficient and the definition of essential services is reasonable. The process focuses on establishing a confirmed need for an essential service that was the subject of a delay, denial or service gap. Those claimants who are most impacted will receive at least \$40,000 while those who are less seriously impacted will receive up to \$40,000. This accounts for the significant uncertainty in the class size and is expected to result in children who were eligible for Jordan's Principle compensation under the Tribunal's orders receiving at least \$40,000. The framework to determine what is an essential service will be developed with the assistance of experts. The starting point is the list of services currently eligible for Jordan's Principle funding. The process is designed to be flexible so that it can consider services that are essential for a particular child but are not generally essential services. The process does not require interviews or examinations of claimants. There is a recognition that the type of documentation required to support a claim might vary.

[61] The AFN explains that only caregiving parents and grandparents of Jordan's Principle and Trout class children who suffered a significant impact will be eligible for compensation. This reduction in eligibility occurred because the number of caregiving parents and grandparents was unknown. Caregivers who do not receive a direct benefit would nonetheless benefit from the Cy-près fund.

[62] The AFN indicates that the exclusion for caregivers who committed abuse limits the definition of abuse to sexual abuse and serious physical abuse. In particular, it does not include neglect or emotional maltreatment that may qualify as psychological abuse. This limits the need to assess the reason for the child's removal. A caregiver who is denied compensation may challenge the denial but this will not involve the removed child.

[63] The AFN notes that compensation for estates is available to the estates of children and also to family class members who complete an application prior to their death. The FSA contemplates situations where there is no appointed estate executor and cases where beneficiaries are persons with a disability that prevents them from having the legal capacity to manage their own finances.

[64] The AFN acknowledges that a release from liability was not contemplated in the Tribunal's orders but submits that its limited nature, applying only to Canada and not other service providers or governments. The FSA also does not foreclose individuals seeking compensation above the FSA entitlements for personal harm suffered as a result of the child welfare system.

[65] Sixth, the AFN identifies a number of specific factors that support endorsing the FSA. These include international human rights, reconciliation, the dialogic approach, litigation risk, and participation of the representative plaintiffs.

[66] The AFN submits that international human rights law, and in particular the *UNDRIP*, support the FSA. In particular, articles 7 and 8 protect First Nations from the forced removal of their children and forced assimilation. The *United Nations Covenant on the Rights of the Child* recognizes the rights of children. While the Tribunal's orders were an effective means of redress for children affected by discrimination during a certain period, reconciliation measures also provide effective redress.

[67] The AFN views the FSA as promoting the goals of reconciliation. The words and intention of the FSA promote reconciliation. It will recommend an apology from the Prime Minister. The result was a product of negotiations instead of litigation. The FSA furthers the work of the Tribunal's compensation orders. Importantly, this process and the compensation process it will create are First Nations-led. The FSA reflects First Nations knowledge, experience and expertise. The AFN has consistently sought individual compensation, as the FSA achieves. The AFN represents First Nation rights-holders who endorsed the FSA through their representatives.

[68] The AFN argues that the FSA was ultimately the result of the dialogic approach. This is consistent with the Tribunal's desire for the compensation process to be defined by the parties. The AFN indicates that while the dialogue primarily involved the AFN, Canada and Moushoom class counsel, the involvement of the Caring Society and the representative plaintiffs enriched the discussions. These were First Nations lead negotiations. The Caring Society was kept informed at various points in the negotiations.

[69] The AFN contends that the threat of future litigation supports endorsing the FSA. Legal proceedings are fraught with uncertainty and Canada has filed an appeal of the Tribunal's compensation orders with the Federal Court of Appeal. The certainty of the settlement is preferable to proceeding with this continued litigation risk. Even if the class action litigation succeeds, there is no guarantee of receiving greater compensation. The Trout class members are particularly vulnerable if the case were to proceed to litigation, as Jordan's Principle had not yet been recognized. Members of the removed child class who experienced discrimination prior to 2005 are also vulnerable because they are not entitled to compensation under the Tribunal's orders. Even within the Tribunal proceedings, there are significant outstanding issues in the Compensation Framework that the parties have solved in the FSA. Furthermore, the compensation would start flowing expeditiously under the FSA.

[70] The AFN highlights the representative plaintiffs' support for the FSA. This support is significant, as these individuals have been involved in the process from the outset. They provided their input. They recognize the need for a result that is fair and equitable and recognizes the need to expeditiously compensate survivors in a way that minimizes re-traumatizing victims.

[71] In conclusion, the AFN contends that the FSA satisfies the Tribunal's compensation orders. The \$20 billion will effectively implement the Tribunal's orders and result in the expeditious financial compensation of survivors. The compensation quantum and process are designed to restore dignity to victims. It is not an implementation of the Tribunal's compensation decisions but reflects a negotiated settlement based on the same principles. This is the best resolution available for First Nations across Canada. It builds on the work done by the Tribunal.

(ii) Reply Submissions

[72] In its reply submissions, the AFN reiterates the significant quantum of the settlement agreement, both in direct compensation and in terms of program reform. The AFN also reiterates the significant encouragement from both the Tribunal and the Federal Court to engage in negotiations. The AFN contends that the Caring Society misunderstands the FSA and in fact participated in its development. Furthermore, the Caring Society opposed individual compensation to survivors and instead favoured payments into a trust fund. The Commission's technical arguments should also be rejected. The Commission's concern for precedent fails to consider that the FSA is unprecedented in scale and scope. Any individuals entitled to compensation under the Tribunal's orders who might not receive it under the FSA will nonetheless benefit from the Cy-près fund. The FSA was largely supported by First Nations leadership and was a First Nations-led process. Not accepting it will create significant litigation risk, delay and general uncertainty. The settlement funds are at risk if the Tribunal does not approve the FSA.

[73] First, the AFN indicates that it is following the direction from Justice Favel's decision to engage in good faith negotiations. The Federal Court decision should not be read as finding that the Tribunal's compensation orders are final and cannot be revisited.

[74] Second, the AFN submits that the compensation order is not final. The Panel explicitly stated that it retained jurisdiction and welcomed suggestions and clarification on the compensation process, wording, or content of the orders. The FSA clearly addresses the ambiguity of what is meant by children "in care." The AFN disagrees with the Commission's reading of *Hughes v. Elections Canada*, 2010 CHRT 4 and argues that instead demonstrates the latitude available to the Tribunal for remedial orders. The AFN contends that this case is distinguishable from cases about finality cited by the Commission and Caring Society as those cases were in an employment context that lack the complexity and need for

reconciliation in the current case. Furthermore, the AFN is not asking the Tribunal to entirely revisit the remedies issues, as there are a number of uncertainties and outstanding issues with the Compensation Framework. The remedies in this case are not yet final. The AFN finds the Caring Society's arguments to include broad categories of beneficiaries as creating uncertainty.

[75] Third, the AFN argues that the Panel is not *functus officio* and that the principle of finality does not require the Tribunal to reject the FSA. The AFN argues that the FSA brings finality to the litigation, while rejecting it creates uncertainty, confusion and continued litigation. Tribunals have greater flexibility to retain jurisdiction than courts do and this is the sort of situation where tribunals should apply that flexibility. First, the lack of appeal rights in the *CHRA* means that the Tribunal should take a less formalistic and more flexible approach to reconsidering decisions. The availability of judicial review is not a right of appeal. The AFN relies on *Merham v Royal Bank of Canada*, 2009 FC 1127 for the proposition that the Tribunal can retain jurisdiction even after a judicial review. Second, the doctrine of finality applies more flexibly when a Tribunal is asked to consider whether a novel course of action complies with its orders. The AFN relies on *Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832*, 1999 CanLII 14235 (MB QB) for the proposition that a tribunal can answer questions about whether a course of action not contemplated at the time of the order complies with its order. None of the parties contemplated the more advantageous FSA at the time of its compensation orders. The FSA has the overwhelming support of First Nations across the country and there should not be further delays in providing compensation.

[76] Fourth, the AFN contends that the Tribunal's retained jurisdiction enables it to grant the relief sought. The Panel is seized to determine whether the parties have satisfactorily settled the outstanding compensation issues. The Tribunal's continued jurisdiction is not limited to procedural matters. Contrary to the Commission's contention, *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3 in fact supports the Tribunal's broad retained jurisdiction. Further, the Caring Society is incorrect that endorsing the FSA would overturn the Tribunal's earlier orders – those would remain as powerful precedents.

[77] Fifth, the AFN disputes that its motion is premature. The significant size of the FSA makes it unrealistic not to have a phased approach. The staged approach in this proceeding was designed to promote consultation with First Nations. The Jordan's Principle compensation in particular is complex, and the phased approach ensures that it can be implemented in trauma-informed and culturally relevant manner. Furthermore, the AFN disagrees that Jordan's Principle compensation remains vague and uncertain. The Federal Court evidence includes the AFN's impact assessment matrix for Jordan's Principle and an expert report. The existing detail on Jordan's Principle compensation represents an evolution and more detail on eligibility for compensation.

[78] Sixth, the AFN contends that the Caring Society second-guesses the terms of the FSA. The AFN argues that the Panel should focus on the benefits of the FSA – the 116,000 removed children who are expected to receive compensation. This expands the scope compared to the Tribunal's original orders. The AFN argues that the Jordan's Principle compensation will entitle children who have suffered physical, developmental, or lasting or permanent harm will receive a minimum of \$40,000, with an intention to provide these children more than \$40,000. The AFN indicates that the children who may receive less than \$40,000 may not have been eligible for compensation under the Tribunal's orders. The AFN believes that the list of essential services, which differs from the list proposed by the Caring Society, is in the best interests of the class.

[79] The AFN also disputes the Caring Society's claim that the Tribunal has not distinguished between biological parents. The AFN relies on 2020 CHRT 15 at paras. 32, 44, and 45 for the proposition that the Tribunal limited compensation to caregivers who were biologically related to affected children. The AFN maintains that expanding the eligible list of caregivers would subject children to more intensive questioning to determine which caregiver could properly receive compensation.

[80] Given that the opt-out provisions from the Tribunal's Compensation Framework have not been finalized, it is impossible to conclude that the FSA does not conform to the Tribunal's opt out provisions.

[81] Seventh, tinkering with the FSA will unwind the careful construction of the agreement. All the provisions of the FSA are interconnected and changing any one provision may jeopardize the \$20 billion settlement. The law on approval of class action settlements is clear that the settlement is either approved or rejected as a whole.

[82] Eighth, the AFN was the only party to request individual compensation and is the national representative organisation of First Nations. It is not precluded from seeking a variation of the Tribunal's compensation orders. Through its resolutions from the Chiefs in Assembly, the Tribunal has found that the AFN has the mandate to speak on behalf of affected children. Similarly, the AFN contends that the First Nation interested parties – the Chiefs of Ontario and Nishnawbe Aski Nation – provide their unqualified support for the FSA. The AFN argues that it is best positioned to speak on behalf of the First Nation victims in this case.

B. Canada

[83] Canada did not submit initial submissions in support of the motion and instead relied on the AFN's submissions. Canada did, however, submit reply submissions.

[84] Overall, Canada argues that the FSA is the product of negotiation and that endorsing it supports reconciliation. The Tribunal has the jurisdiction to significantly amend its compensation orders, if necessary, as it did this in 2022 CHRT 8. The support of representatives of First Nation rights holders favours approving the FSA.

[85] More specifically, Canada explains that the Tribunal can modify its earlier orders. The Tribunal has retained jurisdiction and can change a previous decision if new circumstances arise. The issue for the Tribunal is whether the FSA satisfies its previous orders. Some flexibility is required, as it would otherwise be impossible for the parties to negotiate a settlement which differed in any way from the Tribunal's orders. This would undermine the dialogic approach. This approach was endorsed by Justice Favel in the judicial review. Furthermore, the Federal Court's judicial review did not endorse the Tribunal's orders as the sole possible outcome but only as a reasonable outcome that allows space for other orders. The Tribunal's retained jurisdiction does not distinguish between substantive and clerical revisions of previous orders, as demonstrated with the substantive amendments in 2022 CHRT 8. The expressions of the Tribunal's retained jurisdiction to promote dialogue and the quasi-constitutional nature of the *CHRA* provide ample authority for the Tribunal to grant the requested orders. No settlement is perfect as they necessarily involve balancing benefits and compromises. This is not an attempt to undermine the Tribunal but instead an attempt to move forward with parties who represent the First Nations rights holders.

[86] Canada contends that the settlement should be approved because it is fair and reasonable. It does not perfectly match the compensation orders but some flexibility is required. The AFN and Moushoom class counsel have devised a method of compensating claimants proportional to the harm they suffered. The AFN consulted with First Nations leadership and the Caring Society in this process. The FSA extends compensation to cover an additional 15 years and provides some beneficiaries with compensation that will exceed what the Tribunal ordered.

[87] Canada indicates that the Caring Society's argument that the Tribunal's orders covered removed children placed in non-ISC funded placements is a new argument that should not be raised at this late stage in the proceedings. This is an attempt to add a new group of beneficiaries that would significantly alter the Tribunal's existing orders. This group has not been previously raised before the Tribunal so there is no evidence or argument relating to them.

[88] Canada denies that the motion is premature. The phased approach aims to ensure the final approach approved by the Federal Court has broad support from First Nations and claimants. Individual claimants who are not satisfied by this approach will have the full information they need before choosing whether to opt out.

C. Amnesty International

[89] Amnesty International indicated it would not file submissions on this motion.

D. Chiefs of Ontario

[90] The Chiefs of Ontario (COO) indicated that its leadership council agreed that the FSA was fair, reasonable and for the most part satisfies the Tribunal's compensation orders. The COO clarified it did not accept the FSA "without qualification" as described by the AFN.

[91] The COO undertook a consultation process to ensure that the FSA had support throughout the regions and First Nations it represents. While settlements rarely give all parties exactly what they want, the COO ultimately accepted the FSA despite its difficulties and deficiencies. It presents a reasonable outcome that brings finality to the process and compensates survivors without further delays.

E. Nishnawbe Aski Nation

[92] The Nishnawbe Aski Nation (NAN) supports the motion as the FSA substantively satisfies the Tribunal's compensation orders. NAN recognises that the FSA is not perfect but it respects the rights of its citizens to receive meaningful compensation. The FSA provides safeguards to protect survivors in remote communities.

[93] NAN identified concerns that distributing large settlement funds in remote communities can have significant negative consequences for survivors. NAN is pleased that the current process builds on past experiences to address these challenges.

[94] NAN understands that the Tribunal made its awards of \$40,000 considering the maximum compensation it could order. NAN also understands Canada would not agree to provide unlimited compensation funds for the FSA. Accordingly, NAN supports the concept of proportionality even if it means certain beneficiaries receive less than \$40,000.

[95] Further, NAN supports finality. It recognizes that the parties want finality for the settlement agreement and that there are dispute resolution mechanisms built into the FSA such that the Tribunal's retained jurisdiction of compensation matters would not be necessary.

F. Caring Society

[96] The Caring Society opposes the motion.

[97] The Caring Society emphasises that this case involves children. It is important that the approach to the case recognises the particular circumstances of children and the harms that they suffered. The Tribunal's remedies were tailored to the established evidence of harms. Canada opposed this case throughout. Now, an outside class action would provide more compensation to some victims before the Tribunal but would significantly detract from the Tribunal's awards in other ways and oust the Tribunal's jurisdiction. While the Tribunal retains jurisdiction, the compensation orders themselves are final. The Tribunal must ensure all victims entitled to compensation under its orders receive it. The uncertainty on Jordan's Principle compensation also makes this motion premature. If the Tribunal nonetheless assesses the merits of the FSA, the Tribunal should still reject the FSA. It does not clearly satisfy the Tribunal's compensation orders.

(i) Facts

[98] The Caring Society provides an overview of pertinent facts, starting from the filing of the complaint to the substance of the FSA.

[99] The AFN and Caring Society filed the complaint in 2007 as a last resort after trying to address the underlying issues through negotiations with Canada. Canada continually obstructed the process. The Tribunal found that Canada retaliated against Dr. Blackstock and separately awarded abuse of process costs against Canada for delaying the process by failing to disclose a large number of highly relevant documents. The Tribunal heard and accepted largely uncontradicted evidence about the harm caused by Canada's discrimination. This evidence demonstrated the harm of both removals under the First Nations Child and Family Services Program and from the narrow implementation of Jordan's Principle. The Tribunal recognized the suffering First Nations children experienced. The Tribunal found that Canada was aware of the discrimination and refused to act to rectify it.

[100] In terms of compensation, the Caring Society requested \$20,000 plus interest for Canada's wilful and reckless conduct for each child affected by Canada's discrimination. The Caring Society requested that these funds be paid into a trust fund. The AFN strongly advocated for the maximum compensation available to be paid to every victim of Canada's discrimination and did not restrict this request to those in ISC-funded care. Canada argued there was insufficient evidence to justify the requested compensation.

[101] The Tribunal ordered \$40,000 in compensation to defined categories of child victims and eligible caregiving parents and grandparents. The end date for compensation was still to be determined since the Tribunal found the discrimination was ongoing. The Tribunal emphasized that its remedies were based on the evidence presented. The orders did not make any distinctions between First Nations children placed in ISC-funded care and those in other care arrangements, as it was the removal itself that was the harm. These remedies are based on human rights principles, not tort principles. They apply regardless of the existence of a class action.

[102] The Caring Society reviews the development of the Compensation Framework and presents it as an example of the dialogic framework in action. It involved negotiations between the parties but required many issues to be adjudicated by the Tribunal. This process provided an opportunity for consultations and for the other parties to receive information from Canada. The dialogic approach where the parties could draw on the Tribunal's expertise to address disputes contributed to the success in developing the Compensation Framework. This process was upheld during the judicial review.

[103] The Compensation Framework established key aspects for compensating beneficiaries. It defines a "necessary/unnecessary removal" in s. 4.2.1. The definition focuses on the impact of the removal on the child and not the source of funding. Similarly, the definitions of "essential service," "service gap," and "unreasonable delay" focus on the experience of the child. An "essential service" captures substantive equality for First Nations children seeking social services and that it is essential because the absence of the service would cause the child to suffer real harm. It would not cover all services eligible for funding under Jordan's Principle. A "service gap" evolved in response to Canada's arguments and requires that the child's need must be confirmed and the service must be recommended by a professional. While some objective confirmation of need was required, Canada was not required to be aware of the need. An "unreasonable delay" was a delay of more than 12 hours for an urgent request and 48 hours for non-urgent requests unless Canada could demonstrate that the delay did not prejudice the affected First Nations child.

[104] On the issue of compensating estates, the Tribunal found that it would be unfair not to compensate estates of victims who had passed away while waiting to receive compensation.

[105] The Caring Society is not a party to the class actions. The Caring Society did, however, participate in some discussions and set out its position that it would not support a settlement that reduced the compensation for affected children below the \$40,000 the Tribunal ordered Canada to pay. The Caring Society was not invited to participate in drafting the FSA although it provided some feedback. There was no recourse to an adjudicator on points of disagreement while the FSA was being drafted.

[106] The Caring Society outlines three key departures from the Tribunal's orders and uncertainty about Jordan's Principle.

[107] First and most significantly in the Caring Society's view, the FSA excludes First Nations children removed from their home, family and community and placed into non-ISC funded care. The Caring Society contends that Canada's discriminatory conduct includes underfunding preventive services and least disruptive measures which incentivized children being unnecessarily taken into care. The focus was not on whether the placement was funded by Canada. Some First Nations children were placed in ISC funded care after they were removed, while others were not. In any event, they suffered harm from the removal. While funding actual costs for foster care placements exacerbated the harm, that was not Canada's only discriminatory conduct. Focusing on the funding source is contrary to the Tribunal's focus on the experiences of the affected children.

[108] The FSA disentitles the estates of deceased caregiving parents and grandparents. The Tribunal rejected this position as it would have allowed Canada to benefit from delaying compensation to victims of its discrimination. Excluding this category of beneficiaries is not consistent with the objectives of the *CHRA*.

[109] The FSA differs from the compensation the Tribunal ordered for caregiving parents and grandparents. The Tribunal ordered \$40,000 in compensation to a parent or grandparent who was the primary caregiver for a First Nations child eligible for compensation unless the child was removed for reasons of sexual, physical or emotional abuse. The Tribunal made no distinction between biological and adoptive parents.

[110] The FSA does not guarantee the same compensation. The limited pot of funding does not guarantee all eligible caregiving parents and grandparents will receive \$40,000 if they had a child removed. For Jordan's Principle parents and caregiving grandparents, only some classes are eligible for compensation. Reducing the compensation some caregiving parents and grandparents are entitled to and eliminating it for others is not in keeping with the human rights approach adopted in this case.

[111] The FSA does not provide certainty that Jordan's Principle and Trout class members will receive comparable compensation. Compensation will be based on a confirmed need for an eligible service. Only First Nations children who experienced a "significant impact" will be guaranteed to receive \$40,000. This differs from the Tribunal's approach. As such, the definition of "significant impact" will be significant in determining whether children eligible for compensation under the Tribunal's orders would receive it under the FSA. The term is not currently defined.

[112] The Caring Society contends that the opt-out in the FSA replaces the opt-out in the Compensation Framework and is not clearly adapted to the circumstance where half the victims are still children. The AFN and Canada did not seek the Tribunal's approval for the opt out form despite the fact that it waives rights under both the class action and the Tribunal process. The FSA requires victims to decide if they will opt out of the FSA by February 2023, by which time they may not yet have a full picture of their rights under the FSA. The requirement to opt out of both the Tribunal process and the class action puts victims who would receive less than \$40,000 under the FSA in an untenable position. While this is a moot point if the Tribunal suspends its compensation process in favour of the FSA, it otherwise creates uncertainty.

[113] The release is also broadly worded. It is unclear if Canada would attempt to use it to limit the enforcement of a long-term reform order from the Tribunal.

(ii) Arguments

[114] The Caring Society identifies three issues. First, the Caring Society contends the Tribunal does not have the jurisdiction to modify its previous decisions as requested by the AFN and Canada. Second, the motion is premature given the details that have yet to be established in the FSA. Third, even if the Tribunal can revisit its earlier decisions, it should not approve the FSA.

[115] First, the Caring Society argues that the Tribunal does not have the jurisdiction to modify its previous decisions as requested. Vertical *stare decisis* obliges the Tribunal to follow the Federal Court's judicial review upholding the compensation orders. The Caring Society supports the Tribunal's retained jurisdiction to address outstanding compensation issues. This should not, however, extend to re-adjudicating final decisions. *Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 does not empower a Tribunal to remain seized such that it decides a matter differently, which is what the AFN and Canada are seeking in this motion. Consistency and finality remain important, especially in this case where the Federal Court has decided a judicial review.

[116] The AFN and Canada have failed to specify the amendments they seek. This lack of specificity undermines procedural fairness, the rule of law and the principle of finality. Furthermore, the amendments cannot reduce compensation as parties cannot contract out of human rights obligations. It is contrary to the objectives of the *CHRA* to allow Canada to change venues to avoid human rights legislation by reaching an agreement with only certain parties to the Tribunal case.

[117] While the *CHRA* allows a complaint to be dismissed because it was adequately addressed elsewhere, it does not prevent the Tribunal from awarding compensation on the basis that other proceedings could award compensation.

[118] Second, the Caring Society contends that the motion is premature. The FSA does not provide certainty as to which victims eligible for compensation under the Tribunal's orders will be eligible for compensation. The eligibility for Jordan's Principle claimants is particularly vague, as there is no indication of the threshold required for materiality. Claimants cannot materially assess whether their circumstances will meet the eligibility criteria. There is no public guidance on how a significant impact will be determined, which may affect the quantity of compensation for Jordan's Principle and Trout class claimants. The definition of delay has also not yet been determined.

[119] The Caring Society contends that the eligibility for removed children to receive compensation is premised on a misconception about what triggers the eligibility for compensation. From the Caring Society's perspective, it was always clear that it was the act of removal that triggered eligibility for compensation because that effectively captured the harm from Canada's discriminatory conduct. If there is now a dispute about the meaning of "in care" in the Tribunal's orders, that is appropriately resolved through the dialogic approach and seeking clarification from the Tribunal if required.

[120] The final point of uncertainty is the potential impact of the release on the Tribunal's supervision of long-term reform initiatives.

[121] Third, the Tribunal ought to apply a human rights lens if it considers whether it should endorse the FSA.

[122] In applying the human rights framework, the Tribunal relied on evidence of harm to make its compensation orders. The AFN and Canada should have a corresponding obligation to lead evidence to establish why victims are no longer worthy of the compensation the Tribunal has awarded them.

[123] The Tribunal should apply a human rights lens rather than a class action or tort lens. The Tribunal therefore should not approach this motion as a court approving a class action settlement. The Federal Court endorsed the Tribunal's dialogic approach. The dialogic approach does not, however, encompass modifying the Tribunal's compensation orders without evidence after they have been upheld on judicial review and over the objections of other parties. The Caring Society submits that it would create a problematic precedent for other cases if the Tribunal were to accept

revoking compensation for victims who suffered the worst case of discrimination. Remedial orders from human rights tribunals must be final rather than a bargaining chip. The *CHRA* provides for the Commission to approve human rights settlement agreements but there is no comparable requirement for settlements outside the human rights regime. The Tribunal is the proper forum for resolving human rights claims and allowing another process to invalidate the Tribunal's orders undermines the human rights regime.

[124] This case is particularly significant because the former s. 67 created a presumption for many First Nation individuals that the human rights regime was not able to protect them. This case was instrumental in changing that but modifying the compensation orders could undermine trust in human rights among First Nations communities.

[125] The Tribunal has continuously emphasised the best interests of the First Nations children affected by this case. The Tribunal should continue to apply this lens. The Caring Society submits that the Tribunal process has never drawn compensation distinctions based on the type of placement. Children had no control over their placement once they were removed and who funded it. Furthermore, it does not reflect the reason for the child's removal from their home – namely, that Canada's discriminatory provision of the FNCFS Program meant that they were not adequately supported with the least disruptive measures and experienced the trauma of being removed from their homes.

[126] The Caring Society is concerned that granting the motion would be a dangerous precedent for the human rights regimes. Victims will be vulnerable if human rights damages can be set aside through a civil process. It is unfair to force victims to defend their entitlements against an outside process. It is particularly problematic to accept the federal government negotiating a reduction in the compensation it will pay victims.

G. Commission

[127] The Commission focuses its submissions on administrative law principles. It recognizes that the FSA would result in significant compensation for a large number of individuals if it were to be implemented. The Commission makes no submissions on whether the FSA is a good resolution for its intended beneficiaries.

[128] The Commission submits that the Tribunal has jurisdiction to consider whether the FSA will satisfy its compensation orders. However, the FSA does not satisfy the Tribunal's compensation orders.

[129] In terms of the AFN's alternative relief of amending the Tribunal's orders, the Commission submits that the Tribunal lacks the jurisdiction to substantively amend its compensation orders. The Tribunal's compensation orders are final. The Tribunal is *functus officio*. While tribunals should apply this principle flexibly, none of the exceptions justifying the Tribunal revisiting its earlier rulings applies in this motion. Finality is particularly important in this case given the duration of the case.

[130] The Commission reviews *Attorney General of Canada v. Canadian Human Rights Commission*, 2013 FC 921 (*Berberi*), *Canada (Attorney General) v. Grover*, 1994 CanLII 18487 (FC) and *Hughes v Transport Canada*, 2021 CHRT 34 to identify the sort of situation in which the Tribunal could retain jurisdiction and the limits on that ability.

[131] The Tribunal's retained jurisdiction relates to making additional orders to ensure its compensation orders are effectively implemented. It does not extend to changing the substance of its prior remedial orders. If it is broader, it is to add or specify categories of beneficiaries, not to reduce or narrow beneficiaries.

[132] Canada sought to review the compensation orders as final orders rather than as interim or interlocutory orders. The route to challenge or vary the orders is through judicial review, now at the Federal Court of Appeal. To simultaneously ask the Tribunal to revisit the orders challenges established principles and procedures of administrative law. The Federal Court of Appeal would not have the

appropriate record before it if the Tribunal were to substantively vary its orders. There would also be a risk that both the Federal Court of Appeal and the Tribunal are simultaneously reviewing the orders. If the Tribunal amended its orders first, the Federal Court of Appeal might find that the judicial review was moot, necessitating an entirely new judicial review if there was a desire to challenge the orders. Re-opening the case would also strain the Tribunal's resources as more litigants sought to challenge final Tribunal decisions.

[133] In the event that the Tribunal reconsiders its orders, the Commission contends that the Tribunal should apply a human rights lens based on the *CHRA*. The Tribunal's role under the *CHRA* is to provide redress for victims of a discriminatory practice, which requires examining the FSA to determine whether it provides appropriate compensation to victims based on a human rights lens. The Tribunal must apply principles of fairness and access to justice in balancing the expanded beneficiary list under the FSA with those individuals who will receive less compensation or be denied compensation. The Tribunal's focus needs to be on those individuals covered by its prior orders. The Tribunal should not apply a class actions framework.

H. Post-Hearing Submissions

[134] After the hearing, the Panel Chair requested further submissions on specific questions. The first question sought clarification on whether the parties negotiating the FSA negotiate it on the basis that the Tribunal's orders provided compensation for ISC-funded placements of First Nations children. The second question followed up and on the first and asked if a misapprehension of the scope of the Tribunal's orders affected First Nations' support for the FSA. The third question invited further comments from the parties on the issue of individual versus collective rights that the AFN raised in its reply submissions. These submissions are addressed in the reasons as they arise.

IV. Functus officio and Finality

A. Law on *functus officio* and finality

[135] The Panel has previously reviewed the principles of *functus officio* and finality in 2020 CHRT 7:

[54] Furthermore, the Federal Court in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 80 FTR 256, 28 Admin LR (2d) 231 (F.C.) [*Grover*], a case that this Panel relied on in previous decisions in this case (see for example, 2017 CHRT 14, at para. 32, see also 2018 CHRT 4 at para. 39), an application for judicial review of a Tribunal decision had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. *Grover* is summarized as follows in *Berberi v. Attorney General of Canada*, 2011 CHRT 23 [*Berberi*]:

[13] ...The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the Act does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

[14] It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the

Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler*, supra. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)

[15] Similarly, in *Canada (Attorney General) v. Moore*, 1998 CanLII 9085 (FC), [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

[16] The reasoning in these cases supports the conclusion that the Tribunal has broad discretion to return to a matter and I find that it had discretion in the circumstances here. Whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case. That is consistent with the principle set out in *Chandler v. Alberta Association of Architects*, relied upon by the applicant, which dealt with the decision of a board other than the Canadian Human Rights Tribunal. (*Moore* at para. 49)

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal Court concluded that subsection 53(2) of the Act empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

[18] The Tribunal jurisprudence that has considered the *functus officio* principle and interpreted *Grover* and *Moore*, has generally found that absent a reservation of jurisdiction from the Tribunal on an issue, the Tribunal's decision is final unless an exception to the *functus officio* principle can be established (see *Douglas v. SLH Transport Inc.*, 2010 CHRT 25; *Walden v. Canada (Social Development)*, 2010 CHRT 19; *Warman v. Beaumont*, 2009 CHRT 32; and, *Goyette v. Voyageur Colonial Ltée*, (November 16, 2001), TD 14/01 (CHRT)). However, recent Federal Court jurisprudence, decided several years after *Grover* and *Moore* and which examined the authority of the Commission to reconsider its decisions, provides further guidance on the application of the *functus officio* principle to administrative tribunals and commissions.

(*Berberi* at paras. 13-18, emphasis ours)

[21] The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and

change a remedial order, the Federal Court expanded on the reasoning in *Grover* and stated that “the Tribunal has broad discretion to return to a matter...” (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether “there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation” (*Chandler* at para. 22). This method of analyzing the Tribunal’s discretion to return to a matter is consistent with the Federal Court’s reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?

[22] The primary focus of the *Act* is to “...identify and eliminate discrimination” (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the *Act* grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, “subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination” (*Grover* at para. 32). The *Act* does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: “The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy” (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to “...be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose” (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44).

(*Berberi*, at paras. 21-22)

[55] The Panel agrees with the above reasoning outlined in *Berberi* on the retention of jurisdiction over remedial orders to ensure that they are effectively implemented and has adopted and followed this approach from the *Merit Decision* and onward.

[56] Additionally, the Tribunal used a similar approach to remedies in *Grant v. Manitoba Telecom Services Inc.*, 2013 CHRT 35 [*Grant*] once the decision on the merits was rendered:

[3] The Tribunal retained jurisdiction on many of the remedies requested by the Complainant, including the missed pension contributions, in order to get further submissions and clarification from the parties.

[4] Both parties were given the opportunity to provide additional submissions on the Complainant’s outstanding remedial requests from *Grant (decision)* on a conference call on July 10, 2012.

(*Grant* at paras. 3-4, emphasis ours).

[7] In *Grant (remedies)*, the Tribunal again retained jurisdiction in the event the parties were unable to reach an agreement on the pension remedy, among others.

[8] The parties have been unable to work out the details of the Complainant's lost pension and disagree on what remedy the Tribunal ordered with respect thereof.

(*Grant*, 2013 CHRT 35 at paras 7-8, emphasis ours).

[57] The Tribunal in *Grant* provided further direction on the remedy in that subsequent ruling. Of interest, this case was challenged at the Federal Court after the decision on the merits while the Tribunal was deciding further remedies. The application for judicial review was ultimately discontinued.

[136] The Tribunal continues to rely on its previous analysis outlined above and will now address the additional case law raised in the parties' submissions.

[137] *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 involved a review of the Practice Review Board of the Alberta Association of Architects (the Board) issuing an intention to resume its hearing to address remedies. The Board initially made findings of misconduct and issued related penalties. However, those findings and penalties were struck because the Board lacked the jurisdiction to issue them. The Board only had the power to issue recommendations. After the findings of misconduct and related penalties were overturned, the Board gave notice to the parties that it intended to reconvene to make recommendations that were within its jurisdiction.

[138] Broadly speaking, the majority of the Supreme Court concluded that the Board had never issued a valid remedy decision. It was therefore entitled to receive further submissions and issue a remedy within its jurisdiction.

[139] In reaching this conclusion, the majority commented that as a general rule, a tribunal cannot revisit a decision because it has changed its mind, made an error or there has been a change in circumstances. It may only alter a decision if authorized by statute, where the error is clerical or there was an error in expressing the manifest intention of the tribunal.

[140] Given that this general rule is based on the policy principle of finality, it must be applied flexibly. That flexibility was appropriate in this case where the Board had not granted any valid remedy. However, this flexibility would not allow a tribunal to alter its remedies once it has issued a valid remedial decision:

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason, I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

...

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection.

[141] In its reply submissions, the AFN relies on *Canada (Attorney General) v. Symtron Systems Inc.*, 1999 CanLII 9343 (FCA) for the proposition that the availability of judicial review does not play a determinative role in the Tribunal's ability to revisit its earlier decisions. *Symtron Systems* involved a complaint under NAFTA to the Canadian International Trade Tribunal by an American company, Symtron, that the Department of Defence had not properly evaluated whether a competitor complied with the minimum RFP requirements. The CITT's initial decision directed the Department of Defence to review whether Symtron and the successful proponent met the RFP requirement. The review was silent on the main reason the competitor was alleged to not meet the requirements. Symtron brought the case back to the CITT, which concluded that the Department of Defence had not addressed whether the competitor, International Code Fire Services, met the RFP requirements. The Department of Defence and the competitor sought judicial review.

[142] On judicial review, the Federal Court of Appeal found that *functus officio* did not apply to the second complaint to the CITT because it was a new complaint. Nonetheless, the FCA commented that the CITT must allow "some latitude when faced with a new complaint which might, in other circumstances, be the subject of an appeal or an action for enforcement."

[143] Aside from the distinguishing feature that *Symtron Systems* involved a new complaint, *Symtron Systems* says little about the degree of flexibility a tribunal should have. The specific facts in *Symtron Systems* seem to contemplate approaching the tribunal's jurisdiction flexibly to ensure a remedy is effectively implemented. There was no suggestion in that case that the flexibility extends to revoking or narrowing an earlier remedial decision. Instead, the flexibility is more in line with how the Tribunal has previously interpreted its retained jurisdiction in this case to provide the flexibility to ensure that its remedies are effectively implemented.

[144] The AFN also relies on *Merham v. Royal Bank of Canada*, 2009 FC 1127 for the proposition that an administrative decision-maker can reconsider a decision even after it has been upheld on judicial review.

[145] *Merham* involved a human rights complaint to the Commission by Mr. Merham against his manager at RBC. The Commission dismissed the complaint when it was first submitted and the Commission's decision was upheld on a judicial review. Mr. Merham did not challenge the judicial review but successfully brought a small claims court action against his manager that called into question his manager's truthfulness during the Commission investigation. Mr. Merham asked the Commission to reconsider its decision in light of this new evidence. The Commission issued brief reasons indicating it had reviewed Mr. Merham's new evidence and declined to further investigate his complaint.

[146] The Court found that the Commission had jurisdiction to reconsider its decisions even though the decision was upheld on judicial review. However, this is "a discretionary power which must be used sparingly in exceptional and rare circumstances" (para. 25).

[147] Nonetheless, the Federal Court upheld the Commission's decision not to further investigate the complaint. The Commission was reasonable in concluding that Mr. Merham's new evidence would not affect the disposition of the case.

[148] *Merham* is of minimal assistance to the AFN. In some cases, if new information comes to light, it might be appropriate for the Tribunal to reconsider its earlier substantive decision. However, the nature of the new information in *Merham* is significantly different than in the current case. The new evidence in *Merham*, according to Mr. Merham's submissions, cast doubt on the evidentiary basis for the Commission's decision. By contrast, in the current decision, the AFN and Canada do not argue that there is new evidence that contradicts the Tribunal's factual findings that the First Nations children identified in the Tribunal's compensation decisions experienced discrimination. Instead, the AFN and Canada wish to replace the Tribunal's orders with a settlement they subsequently negotiated in a class action. That is distinguishable from the circumstances in *Merham* where the Commission was asked to reconsider its decision.

[149] The AFN also relies on *Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832*, 1999 CanLII 14235 (MB QB) for the proposition that a tribunal can answer questions about whether a course of action not contemplated at the time of the order complies with its order. None of the parties contemplated the more advantageous FSA at the time of the Tribunal's compensation orders. The AFN contends that the FSA has the overwhelming support of First Nations across the country and there should not be further delays in providing compensation.

[150] In *Rogers Sugar*, the Court of Queen's Bench of Manitoba examined the arbitrator's decisions concerning the appropriate calculations and amounts for severance payments according to the collective agreement.

[151] Subsequent to the parties' receipt of the award, a dispute arose concerning the calculation of severance pay in the case of permanent employees. The parties asked the arbitrator if the company's method of calculating severance pay as represented by the company's spreadsheet was the appropriate method. The arbitrator confirmed that it was appropriate. No written ruling of this decision was received. The parties continued to disagree on the meaning of the arbitrator's ruling and consequently agreed to approach the arbitrator once more. On September 17, 1997, a letter was sent setting out both points of view. A written letter was sent to the arbitrator setting out the particular issue in dispute the second time, namely, whether the arbitrator's award was intended to completely replace the current language of the collective agreement, in particular the reference to "fraction of a year" set out in the collective agreement. On September 26, 1997, the arbitrator provided the parties with a written decision.

[152] The company submitted that the first consensual approach to the arbitrator to clarify the calculation of the severance pay provisions awarded was appropriate and within the arbitrator's reserved jurisdiction to implement his June 4th award. However, when the arbitrator was asked for a second clarification in September, his decision was not a clarification but rather a reversal of his clarification issued on August 15, 1997.

[153] The Court found the doctrine of *functus officio* applies even if the parties' consent since consent cannot clothe the arbitrator with jurisdiction he does not have. However, the Court cited *Chandler* for the need for flexibility when administrative tribunals apply this principle. The principle is based on the policy ground which favours finality of proceedings. The arbitrator was not *functus officio* and did not exceed his jurisdiction when it clarified its order on both occasions, he was within his retained jurisdiction of implementing his award and was attempting to clarify his decision in response to specific questions asked. The Court wrote this "must be understood in the context of the question which was placed before him" (para. 33). In sum, "the arbitrator's actions in both August and September of 1997 were in the nature of clarification and therefore he was not functus" (para. 33, emphasis added). Notably, the Court did not find the arbitrator to reverse a previous decision that he had made but rather clarified an unclear order.

[154] It also stands for the proposition that flexibility and a less formalistic approach must be applied by administrative tribunals when asked to reopen a matter: "Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal (in a

court proceeding). (p. 862) (Chandler was followed in *Canada Post Corp. v. C.U.P.W.*“(1991),” 1991 CanLII 8312 (ON SCDC), “84 D.L.R. (4th) 574”“.”) (para. 31). The Court stated the principle of *functus officio* is subject to two exceptions. It does not apply where there has been a slip or a clerical error in drawing up the judgment. It also does not apply when there has been an error in expressing the manifest intention of the fact finder.

[155] This second case clarifying the manifest intention of the fact finder applies in the Tribunal’s current case should the parties request that the Tribunal clarify the non-ISC, categories of removed children further discussed below and also supports previous requests for clarification. This also supports the Tribunal’s approach to retained jurisdiction and previous decisions that, for example, clarified that the estates of otherwise eligible victims were within the scope of the Tribunal’s initial *Compensation Decision* and are owed compensation. Similarly, the Tribunal is not precluded from approving the FSA because it includes beneficiaries that the Tribunal had not previously been asked to consider. However, the case does not support disentanglements for the purpose of compromise through negotiation and in light of a cap on compensation.

[156] In fact, in light of the parties’ disagreements in *Rogers Sugar*, the arbitrator clarified that he had no intention to reduce entitlement. The written decision states: ““It was not my intention to reduce in any way the existing entitlement for severance (permanent employees) while I was adding some additional entitlement for those with long service. Therefore, the “fraction of a year” was meant to remain,”” (para. 9). The arbitrator later further clarified his order.

[157] *Rogers Sugar* supports the Tribunal’s approach to considering the FSA, to reconvene for a hearing on the contested issue of non-ISC removed children and for further clarification of its orders. However, it does not support an amendment to its previous compensation orders to remove entitlements to victims/survivors when no errors were made concerning those victims/survivors.

[158] The AFN submits that *Zutter v. British Columbia (Council of Human Rights)*, [1995] 57 BCAC 241, 1995 CanLII 1234 (BC CA) applies here and that it stands for the proposition that a Human Rights Tribunal may reconsider its own decisions simply by virtue of the fact that it is a Human Rights Tribunal.

[159] The Panel disagrees with the AFN’s interpretation of this decision and finds the facts and issues entirely different from the case at hand:

[1] The issue on this appeal is whether the British Columbia Council of Human Rights (the “Council”) has the jurisdiction to re-open a complaint which has been discontinued by the Council under s. 14(1)(a) of the *Human Rights Act*, S.B.C. 1984, c. 22 (the “Act”).

[160] For unclear reasons, Mr. Zutter was not notified of the decision to discontinue the complaint until September 23, at which time he discovered that no written response to the investigation report summary had ever been received by the Council. He dismissed his solicitor and lodged a complaint with the Law Society. The Court was advised that the solicitor in question was subsequently disciplined for his failure to represent Mr. Zutter adequately (para. 12).

[13] In the meantime, Zutter once again turned to the Coalition for assistance, and on 30 September 1991 the Coalition wrote asking the Council to re-open the matter and consider the submissions which, by reason of his solicitor’s ineptitude, Zutter had been denied the opportunity to make before Council took its decision to discontinue his complaints. Relying on s. 15 of the Act, the Council responded by stating that it did not have the statutory authority to reconsider its decision:

15. A determination under section 14(1)(a), an order under section 14(1)(d)(ii) or section 14(3) or the dismissal of a complaint under section 14(1)(d)(i) shall be communicated in writing to the complainant and the person who is alleged to have

contravened this Act, and, where the proceedings are discontinued or the complaint is dismissed, no further proceedings under this Act shall be taken in relation to the subject matter of the discontinued proceedings or the dismissed complaint.

[14] A further request to re-open, made on Zutter's behalf by the B.C. Public Interest Advocacy Centre in December of 1991, was rejected by the Council in a letter dated 7 February, 1992, the relevant portions of which read as follows:

The Council does not consider that, once notice of the investigation report and a reasonable opportunity for response have been provided, the principle of procedural fairness imposes a duty to enquire as to the status of a party's response, particularly where the party is represented by legal counsel. In the Council's view, the process of disclosure following completion of the investigation is dictated by the requirements of procedural fairness and is not part of the investigative process as such.

For the above reasons, The Council concludes that the required standard of procedural fairness has been met. Therefore, your request that the Council reconsider its decision of July 25, 1991 is denied.

[161] The Court found:

[23] ... it cannot be doubted that from Zutter's point of view, and indeed from that of any reasonable person, the result to him is unfair in the ordinary sense of that word. Thus, it would be an unfortunate irony if the Council, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy that unfairness.

...

[31] I do not accept the argument of the appellants that the equitable jurisdiction described by Martland J. in *Grillas* must be viewed as subservient to the doctrine of *functus officio*, in the case of all administrative tribunals except those where such jurisdiction is expressly stated to exist, in order to give effect to the "sound policy" of finality in the proceedings of such tribunals. That policy will necessarily govern the manner in which the jurisdiction to reconsider is exercised by the Council, thus ensuring its restrictive application, just as the power of this Court to admit fresh evidence is carefully and restrictively exercised in deference to the same policy.

[32] The equitable jurisdiction to reconsider was recognized to exist in, and found to have been properly exercised by, the administrative tribunals under consideration in *Re Lornex Mining Corporation Ltd.*, 1976 CanLII 1123 (BC SC), [1976] 5 W.W.R. 554 (B.C.S.C.), in *Re Ombudsman of Ontario and the Minister of Housing* (1979), 1979 CanLII 1933 (ON SC), 103 D.L.R. (3d) 117 (Ont.H.C.), aff'd, (1980), 1980 CanLII 1740 (ON CA), 117 D.L.R. (3d) 613 (Ont.C.A.), and more recently in *Attorney General of Canada v. Grover and Canadian Human Rights Commission* (4 July, 1994), T-1945-93 [reported 1994 CanLII 18487 (FC), 24 C.H.R.R. D/390] (F.C.T.D.). In each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute. The judge below applied the first two of these authorities when reaching his conclusion that the Council had jurisdiction to reconsider its decision to discontinue Zutter's complaints in the circumstances of this case, and I am of the view that he was right to do so.

[162] This paragraph citing *Grover*, supports the Tribunal's approach to retention of jurisdiction on remedial orders including on long-term reform and the orders requested from the parties in 2022 CHRT 8. However, it does not go as far as supporting removing compensation entitlements to victims/survivors that were vindicated in Tribunal orders subsequently affirmed by the Federal Court. Even in the absence of a Federal Court decision, once the Tribunal has made compensation entitlements orders to victims/survivors, it cannot disentitle them absent a Federal Court order to do so for unreasonableness.

B. The Tribunal's retained jurisdiction on the compensation issue and the issues of functus officio and finality of its orders

[163] The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders and finds it substantially but not fully satisfies the Tribunal's orders.

[164] As it will be demonstrated below, the Panel remained seized of all its compensation orders to ensure effective implementation of its orders.

[165] Further, the Panel is not barred by the Federal Court decision from reviewing the FSA in order to consider if the FSA fully satisfies the Tribunal's orders.

[166] From 2019 to 2022 the Tribunal issued a series of rulings on the issue of compensation. We will look at them in turn and highlight some portions that are relevant to this motion.

[167] The first compensation ruling also called by the parties as the Compensation Entitlement Decision is 2019 CHRT 39. This decision is extensive and focuses on the evidence of harm, pain and suffering to First Nations children and families and the government's actions which were found to be devoid of caution. The *CHRA* is structured in a way where the remedies are at the discretion of the Tribunal Member(s) once the complaint is substantiated. There are many cases where discrimination has been found and no special compensation was awarded. This stems from the fact that the evidence of conduct that is devoid of caution must be established on a balance of probabilities. In some cases, this may not be found by the Tribunal. In this case, the Panel provided extensive reasons to support its findings of fact and legal conclusions. All the other compensation rulings follow the same reasoning found in the *Compensation Entitlement Decision*. The quantum of compensation awarded was also established at the Complainants' request, including the AFN who was mandated by the Chiefs-in-Assembly to seek the maximum compensation amounts under the *CHRA* (see AFN directed by the *Chiefs in Assembly resolution no.85/2018*). The Tribunal agreed and also ensured that victims/survivors who desire to obtain more than the maximum amount of compensation under the *CHRA* could do so through other recourses. Of note, the AFN welcomed the *Compensation Entitlement Decision* and also defended it in Federal Court. The Federal Court agreed with the AFN, the Caring Society and the Commission. The decision was found to be reasonable. As will be evident in reviewing the compensation decisions, the quantum for compensation was established in the first compensation decision and was never revisited throughout the series of rulings. What was asked following the *Compensation Entitlement Decision* was to clarify and add entitlements, not remove them, based on the evidence and to clarify definitions. The balance of the requests was for the purpose of establishing a compensation process, trust funds and the approval of a framework for compensation.

[168] At the beginning, of the first compensation ruling, the Tribunal provided reasons and set the table for the compensation process:

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grandparent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not

justify denying compensation to victims/survivors. In recognizing that the maximum of \$20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grandparents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common Experience Payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language, culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para. 10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay \$40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grandparents until the age of majority.

[263] For all the other children who have no parents, grandparents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grandparents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nations child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grandparents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than December 10, 2019. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation. (emphasis added).

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added. (2019 CHRT 39)

[169] This clearly indicates that the Tribunal did not recognize that it was *functus* on the issue of compensation or that all orders were complete. Notably, however, the question of quantum of compensation was never up for discussion and no suggestion was made by the Tribunal or the parties to modify the quantum of compensation or to reduce or disentitle categories already recognized by the Tribunal in its compensation orders. In fact, this aspect was final and supported by findings and reasons and sent a strong deterrent message to Canada and a message of hope to the victims/survivors whose rights were vindicated by those findings and corresponding orders. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. The Tribunal noted the important purpose of individual compensation for victims of discrimination:

was necessary to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

(2019 CHRT 39 at para 14).

[170] Indeed, in the *Compensation Entitlement Decision*, 2019 CHRT 39, at para. 206, the Tribunal also made clear that its obligations are to safeguard the human rights of the victims/survivors it identified, irrespective of any proposed class proceedings:

The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy discrimination and if applicable, as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[171] More recently, the Nova Scotia Court of Appeal, made significant comments in *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70, regarding the important societal purpose of deterrence in cases involving government behaviour:

[254] In *Vancouver (City) v. Ward*, 2010 SCC 27 ("Ward") the Supreme Court of Canada cited the critical role that deterrence plays in arriving at damage awards against governments to compensate for rights violations. Deterrence is a real, necessary and significant factor:

[29] [...] Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. [...] Similarly, deterrence as an object of Charter damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the Charter in the future.

[...]

[256] In *Walsh*, the Alberta Court of Appeal also commented on the importance of an award acting as a deterrent against future discriminatory conduct:

[31] Human rights legislation must be accorded a broad and purposive interpretation having regard to its fundamental purpose: to recognize and affirm that all persons are equal in dignity and rights and to protect against and compensate for discrimination. In addition to compensating victims of discrimination, the remedial authority under human rights legislation serves another important societal goal: to prevent future discrimination by acting as both a deterrent and an educational tool: *Robichaud v. Brennan*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 (S.C.C.).

[32] Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct.

[33] Human rights tribunals recognize that both pecuniary and non-pecuniary, or general, damages can and should be awarded in appropriate cases.

[257] We are of the view that the Board erred in failing to take into account the deterrent impact of any damage award that it might make, (emphasis added).

[172] The Panel also awarded interest on compensation in the *Compensation Entitlement Decision* which reinforces the finality of the quantum of compensation awarded.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past (see for example, *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20 at para. 21).

(2019 CHRT 39)

[173] This being said, the Panel agrees with Canada and the AFN that the Federal Court in affirming the Tribunal's orders found the Tribunal had made reasonable decisions within the range of different reasonable outcomes. This is not to be understood that once final orders on compensation quantum and categories of victims/survivors have been made, they can later be changed to accommodate a settlement that reduces or removes some entitlements to include others within a fixed amount of money. This exercise may be reasonable when orders have not yet been made. The agreement occurred after the evidence-based findings and orders were made confirming compensation entitlement to categories of victims/survivors by this Tribunal. This important fact is determinative in considering the FSA. The Tribunal was open to adding people which is exactly what the FSA does and on this point the Tribunal is very pleased.

[174] However, the Tribunal never envisioned reducing compensation quantum or disentitling the victims/survivors who have already been recognized before the Tribunal through evidence-based findings in previous rulings. The difficulty would not have occurred but for the fixed amount of \$20 billion that Canada offered, which forced First Nations to make difficult choices. We will return to this aspect below.

[175] The request that the Tribunal approve the FSA would have been entirely different and more appropriate if the FSA had been presented to the Tribunal before the Tribunal had issued its orders or if the FSA included all victims/survivors covered by the Tribunal's orders.

[176] The compensation process continues at this time and the Tribunal foresaw that the parties could appear before the Tribunal to seek clarifications and further orders on process and implementation. An example of seeking clarification is when the parties' different interpretation of the Tribunal's orders impacts the implementation of the orders.

[177] Now the Tribunal has made entitlement orders upheld by the Federal Court. The Tribunal's decision remains untouched at this time. It is open to the parties to come back before the Tribunal for the implementation phase.

[178] Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the *Merit Decision* to a finding that there never was racial discrimination and, therefore, no remedy is required. In the same vein, if evidence-based findings are made that victims/survivors have suffered and should be compensated, the parties cannot contract out or ask the Tribunal to amend its previous evidence-based findings and related orders to a finding that certain victims/survivors entitled by this Tribunal have not suffered and should no longer receive compensation.

[179] This is significantly different than asking the Tribunal to make a finding based on new evidence presented that demonstrates that some aspects of the discrimination found by this Tribunal has ceased in compliance with the injunction-like order made by this Panel to cease the discriminatory practice or that some amendment requests may enhance the Tribunal's previous orders to eliminate discrimination (2022 CHRT 8). The Tribunal's retention of jurisdiction is to ensure its orders are effectively implemented. This includes not narrowing its orders (see for example Jordan's Principle definition in 2017 CHRT 14) and eliminating the discrimination found in a complex nation-wide case involving First Nations from all regions. This is done through reporting, motions, clarification requests, etc. and findings are made on the evidence.

[180] Moreover, in 2022 CHRT 8, the Tribunal accepted to make a finding based on the evidence, its previous findings and orders to amend its orders to establish an end date for compensation:

Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents

(2022 CHRT 8 at para. 172.9).

[181] Of note, this finding was made on the evidence presented that linked the increased sustainable prevention funding and community-based programs with the ceasing of removals of children from their homes, families and communities:

[149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.

[150] The elimination of the mass removal of children is achievable when a real shift is made from reactive services that bring children into care to preventive services, especially when prevention services are developed and delivered by the First Nations children's respective First Nations communities. The evidence provided by the parties demonstrates that this shift will be made possible with the April 1, 2022 implementation of increased prevention funds provided to First Nations and First Nations child and family service providers across Canada.

[151] Finally, the consent orders discussed above are in line with the Panel's findings and orders. The Panel believes the full and timely implementation of those orders will significantly improve the lives of First Nations children, families and communities.

(2022 CHRT 8)

[182] The Panel agrees with Canada that this is not the first time the Tribunal has significantly amended an order, as demonstrated by the order in 2022 CHRT 8 discussed above. Although consent is not a precondition to jurisdiction, both the Commission and the Caring Society agreed that the Tribunal had the authority to make that order. The 2022 CHRT 8 order made substantive changes to this Tribunal's previous orders. It ordered Canada to fund post-majority care at actual costs; fund additional research by the Institute of Fiscal Studies and Democracy; fund prevention measures on an ongoing basis at \$2500, adjusted for inflation, per person for those persons on reserve and in the Yukon; and, finally, it set March 31, 2022, as the end date for compensation for removed children and their caregiving parents and grandparents.

[183] The Panel finds that the 2022 CHRT 8 amendments clearly are in line with the retained jurisdiction to ensure discrimination is eliminated and does not reoccur.

[184] The preceding example supports the fact that the Tribunal had retained jurisdiction to ensure effective implementation of its orders. The Tribunal expanded its orders and amended its orders to establish an end date for compensation based on the evidence provided that removals of children from their communities are being eliminated through sustainable and adequately funded community-led and developed programs.

[185] Moreover, to determine if the Tribunal can amend its orders, one needs to look at the nature of the amendments sought and the evidence supporting the amendments. Furthermore, a close look at the orders linked to the findings and reasons is necessary to determine if the nature of the amendments sought is permissible.

[186] Following the *Compensation Entitlement Decision*, the Tribunal issued another ruling, 2020 CHRT 7, explaining the nature and purpose of the Tribunal's retention of jurisdiction:

[51] The Panel in its *Compensation Decision*, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of victims/survivors or wording amendments to the ruling similar to the process related to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35. While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders, (emphasis added).

[52] The Panel explicitly retained jurisdiction over compensation (see *Compensation Decision* at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see *Compensation Decision* at para. 270), (emphasis added).

[53] This is a clear indication that the Panel was open to suggestions for possible modifications of the *Compensation Decision* Order, welcoming comments and suggestions from any party. The Panel originally chose the January 1, 2006 and December 2007 cut-off dates following the Caring Society's requests in its last compensation submissions with the understanding that the evidence before the Tribunal supported those dates and also supported earlier dates as well. Considering this, instead of making orders above what was requested, the Panel opted for an order including the possibility of making amendments or further compensation orders. The Panel was mindful that parties upon discussion of the compensation orders and process may wish to add or further specify categories of compensation beneficiaries. This process is complex and requires flexibility, (emphasis added).

...

[74] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further orders:

[75] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

[76] Canada is also ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to First Nations parents or caregiving grandparents living on reserve and in the Yukon Territory of First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and were taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

...

[151] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further order:

[152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the Compensation Decision Order, including the referenced period in the Order above mentioned in Question 2.

[187] Again, none of the reasons above support a compensation disentitlement or a reduction of quantum. Rather, they support adding and clarifying orders, not removing entitlements. The quantum in the *Compensation Entitlement Decision* is also followed in the added orders. This reinforces the finality of the quantum orders. In adding more beneficiaries entitled to compensation, the amounts of compensation already ordered are applied to them in the same manner. No request was made by the AFN to reduce the amounts of compensation to those added categories. In fact, the AFN and the Caring Society argued to add them as forming part of the Tribunal's previous compensation orders. The Tribunal examined the evidence and submissions and made findings justifying the additional orders.

[188] Further, the Tribunal's willingness to clarify compensation entitlements and the possibility of adding, not removing, beneficiaries in light of the evidence presented is clear:

[154] Furthermore, the Panel requests submissions on this point and, on whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The Panel also requests submissions on whether First Nations children living on reserve or off-reserve who were not removed from the home but experienced a gap, delay and/or denial of services, were deprived of essential services as a result of the discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.

[155] The Panel will establish a schedule for parties to make submissions on the questions and comments identified in the two preceding paragraphs.

[156] Additionally, the interested parties, the Chiefs of Ontario and the Nishnawbe Aski Nation have requested further amendments to the compensation orders to broaden the compensation orders to include off-reserve First Nations children and to include a broadener class of caregivers reflecting caregiving practices in many First Nations communities including aunts, uncles, cousins, older siblings, or other family members/kin who were acting in a primary caregiving role, amongst other things. The Panel has questions for the interested parties and parties on these issues. The Panel will establish a schedule for parties to make submissions on the Panel's questions and will make a determination once the questions are fully answered. Depending on the outcome, the Panel may further amend the compensation orders. (emphasis added).

[157] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

(2020 CHRT 7)

[189] In a subsequent ruling, 2020 CHRT 15, the Panel referred to its previous compensation orders and quantum when asked to broaden its order and provide clarifications:

[2] In the *Compensation Decision*, Canada was ordered to pay compensation in the amount of \$40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) and to consult with the Canadian Human Rights Commission (Commission) and the interested parties, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), to co-develop a culturally safe compensation process framework including a process to locate the victims/survivors identified in the Tribunal's decision, namely First Nations children and their parents or grandparents. The parties were given a mandate to explore possible options for the compensation process framework and return to the Tribunal. The AFN, the Caring Society and Canada have jointly indicated that many of the COO, the NAN and the Commission's suggestions were incorporated into the Draft Compensation Framework and Draft Notice Plan. The Panel believes that this is a positive outcome.

[3] However, some elements of the Draft Compensation Framework are not agreed upon by all parties and interested parties. In particular the two interested parties, the COO and the NAN, made additional requests to broaden the scope of the Compensation Decision orders with which the other parties did not agree, as it will be explained below. Further, the COO and the NAN made a number of specific requests for amendments to the Draft Compensation Framework. The NAN's requests mainly focus on remote First Nations communities, some of which will be discussed below. This reflects the complexity of this case in many regards. The Panel is especially mindful that each First Nation is unique and has specific needs and expertise. The Panel's work is attentive to the inherent rights of self-determination and of self-governance of First Nations which are also important human rights. When First Nations parties and interested parties in this case present competing perspectives and ask this Tribunal to prefer their strategic views over those of their First Nations friends, it does add complexity in determining the matter. Nevertheless, the Panel believes that all the parties and interested parties' views are important, valuable and enrich the process. This being said, it is one thing for this Panel to make innovative decisions yet, it is another to choose between different First Nations' perspectives. However, a choice needs to be made and the Panel agrees with the joint Caring Society, AFN, and Canada submissions and the AFN's additional submissions on caregivers which will be explained below. At this point, the Panel's questions have now been answered and the Panel is satisfied with the proposed Draft Compensation Framework and Draft Notice Plan and will not address all of the interested parties' suggestions that were not accepted by the other parties (i.e. the Caring Society, the AFN and Canada) ordered to work on the Draft Compensation Framework. The Panel will address the contentious issue involving specific definitions including some suggestions from the NAN concerning remote First Nations communities and two substantial requests from the COO and the NAN to broaden the scope of compensation below. For the reasons set out below, the Panel agrees with the Caring Society, the AFN and Canada's position on the COO and the NAN's requests.

(Emphasis added)

[190] The Tribunal's retention of jurisdiction allowed it to address wording clarifications related to the compensation orders:

[4] Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions resulting in the Draft Compensation Framework and Draft Notice Plan have been productive, and the parties have been able to agree on how to resolve most issues. At this point, there remains disagreement on three important definitions on which the parties cannot find common ground. These definitions are

“essential service”, “service gap” and “unreasonable delay”. While the Panel is not imposing the specific wording for the definitions, the Panel provides reasons and guidance to assist the parties in finalizing those definitions as it will be explained below.

(2020 CHRT 15)

[191] The compensation process was viewed by the parties as follows and the Tribunal agreed:

[5] The Caring Society, the AFN and Canada wish to clarify the proposed process for the completion of the Tribunal’s orders on compensation. As the AGC outlined in its April 30, 2020 letter, the Complainants and the Respondent are submitting the Draft Compensation Framework and Draft Notice Plan for the Tribunal’s approval in principle. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the Draft Compensation Framework will be adjusted to reflect said orders and will undergo a final copy edit to ensure consistency in terms. The Complainants and the Respondent will then consider the document final and will provide a copy to the Tribunal to be incorporated into its final order. The Panel agrees with this proposed process.

(2020 CHRT 15)

[192] In light of the above, the Tribunal approved the Draft Compensation Framework and Draft Notice Plan “in principle” and discussed the opt out provision:

[12] The Panel has studied the Draft Compensation Framework and Draft Notice Plan alongside all the parties’, including interested parties’, submissions and requests. The Panel approves the Draft Compensation Framework and Draft Notice Plan “in principle”, with the exception of the issues addressed below. The “in principle” approval should be understood in the context that this framework is not yet finalized and that the parties will modify this Draft Compensation Framework and Draft Notice Plan to reflect the Panel’s reasons and orders on the outstanding issues regarding compensation. The Draft Compensation Framework, Draft Notice Plan and the accompanying explanations in the joint Caring Society, AFN and Canada submissions provide the foundation for a Nation-wide compensation process. The opt-out provision in the Draft Compensation Framework addresses the right of any beneficiary to renounce compensation under this process and pursue other recourses should they opt to do so. The opt-out provision protects the rights of people who disagree with this process and who prefer to follow other paths. The Panel expects that the parties will file a final Draft Compensation Framework and final Draft Notice Plan seeking a consent order from this Tribunal.

(2020 CHRT 15)

[193] The Tribunal’s orders in 2020 CHRT 20 and 2020 CHRT 36 have impacted the compensation entitlement in broadening the categories of victims once the Tribunal had clarified the First Nation children who are recognized by their Nation are eligible under Jordan’s Principle.

[194] Again, none of the above findings support a reduction of quantum or a disentitlement of compensation for any category of victims/survivors recognized in the Tribunal’s orders.

[195] None of the orders entertain or envision a disentitlement of compensation once orders have been made. On the contrary, the Tribunal ensured the victims/survivors could opt out and/or also pursue other recourses to obtain more compensation if they so desired. The Tribunal had discussions with parties on expanding, not removing, categories of beneficiaries. However, the parties submitted adding beneficiaries may jeopardize the entire compensation process:

[10] The NAN also made submissions in favour of such broadened compensation orders as described above. However, upon consideration, the Panel does not want to jeopardize the compensation process as a whole.

(2020 CHRT 15)

[196] The Tribunal was cautioned by the AFN to reject the NAN's requests to expand compensation. The AFN feared that it would jeopardize the compensation process. The Tribunal agreed with the AFN.

[197] Moreover, the Tribunal's retention of jurisdiction on compensation was necessary given the Tribunal's supervisory role in the compensation process. As it will be further demonstrated below, the same can be said about the compensation payment process under the Compensation Framework once the guide is finalized by the parties.

[198] Of note, Canada itself viewed the compensation orders as final and argued against reopening those orders:

[9] Canada argues that their comments on the temporal scope above do not suggest a reopening of these compensation orders under Jordan's Principle. Additionally, Canada submits that the complaint mentioned Jordan's Principle and did not mention services prior to the adoption of Jordan's Principle in December 2007.

...

[176] The Panel retains jurisdiction until the process for compensation issue has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

(2020 CHRT 15)

[199] In 2021 CHRT 6, the Tribunal addressed its retention of jurisdiction as follows:

[135] The Tribunal retains jurisdiction on all its compensation orders including the approval and implementation of the Compensation Process. The Tribunal's retention of jurisdiction in relation to the compensation issue does not affect the Tribunal's retained jurisdiction on any other aspects of the case for which the Panel continues to retain jurisdiction.

[200] Further, the Tribunal also discussed the retention of jurisdiction on the compensation issue in 2021 CHRT 7:

[41] The Panel retains jurisdiction on all its Compensation orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.

(emphasis added)

[201] The retention of jurisdiction read with the reasons in 2021 CHRT 7 make clear that the retention of jurisdiction at this point is for the implementation of the compensation orders and processing of claims under the Framework for the Payment of Compensation (Compensation Framework) under 2019 CHRT 39 and accompanying schedules. This was necessary given the Tribunal's supervisory role in the payment of compensation:

[27] The Draft Compensation Framework includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6).

(2021 CHRT 7)

[202] Section 9.6 of the Compensation Framework reads as follows:

9.6. Potential beneficiaries denied compensation can request the second-level review committee to reconsider the decision if new information that is relevant to the decision is provided, or appeal to an appeals body composed of individuals agreed to by the Parties and hosted by the Central Administrator. The appeals body will be non-political and independent of the federal public service. The Parties agree that decisions of the appeals body may be subject to further review by the Tribunal. The reconsideration and appeals process will be fully articulated in the Guide.

[203] Under the Compensation Framework, the Tribunal may review the decision of the appeals body to ensure its compensation orders are properly interpreted and followed by the appeals body.

[204] In 2021 CHRT 7, the Panel examined the Framework for the Payment of Compensation under 2019 CHRT 39 and accompanying schedules as detailed in the Draft Compensation Framework filed on December 23, 2020.

[205] The Panel carefully examined the parties' Framework for the Payment of Compensation under 2019 CHRT 39 and accompanying schedules as detailed in the Draft Compensation Framework filed on December 23, 2020 to ensure this was in line with its orders. Otherwise, the Panel would have asked questions and requested adjustments. While the Panel's orders prevailed, the compensation process needed to reflect the Tribunal's reasons and orders in order to be approved by the Tribunal.

[206] The Panel found the Draft Compensation Framework to be in line with its previous orders which speaks to the analysis conducted by this Tribunal on the issue of compensation and the continuity of 2019 CHRT 39:

[33] The Panel reviewed the Draft Compensation Framework submitted on December 23, 2020 and acknowledges it contains the appropriate changes reflecting the Panel's recent compensation rulings.

(2021 CHRT 7, emphasis added).

[37] After careful consideration of the specifics of this consent order request, which is summarized above, the Panel finds that the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

(2021 CHRT 7, emphasis added).

[207] The parties themselves understood the need for consistency with the Tribunal's orders and that they could not deviate from these orders even if on consent:

1.2. The Framework is intended to be consistent with the Tribunal's Compensation Entitlement Order. Where there are discrepancies between this Framework and the Compensation Entitlement Order, or such further orders from the Tribunal as may be applicable, those orders will prevail and remain binding.

(Compensation Framework, emphasis added).

[208] The parties only completed the Compensation Framework once the Tribunal had made orders on contentious and outstanding questions on eligibility for compensation as explained above and other clarifications.

1.3. The Framework is intended to facilitate and expedite the payment of compensation to the beneficiaries described in the Compensation Entitlement Order, as amended by subsequent Tribunal decisions.

(Compensation Framework, emphasis added).

[209] This is also reflected in the Framework for example, section 4.2.5.

“First Nations child” means a child who:

- a) was registered or eligible to be registered under the Indian Act;
- b) had one parent/guardian who is registered or eligible to be registered under the Indian Act;
- c) was recognized by their Nation for the purposes of Jordan’s Principle; or
- d) was ordinarily resident on reserve, or in a community with a self-government agreement.

(emphasis added).

[210] This reflects the Tribunal’s orders in 2020 CHRT 20.

[211] The compensation orders are reflected in the Compensation Framework in many areas. For example, the parties requested the Tribunal’s clarification on specific definitions such as ““Essential service””, ““Service gap””, ““Unreasonable delay”” and ““confirmed need”” prior to finalizing the Compensation Framework:

4.2.3.1. For purposes of s. 4.2.2. “confirmed needed” and “recommended by a professional” must be interpreted as per 4.2.2.2.

(Compensation Framework)

[212] The Tribunal viewed the Compensation Framework as now forming part of its orders and agreed to issue a consent order. Consent orders, while more flexible given the parties’ agreement, are still subject to section 53 of the *CHRA* and once issued are part of the Tribunal’s orders. They must be implemented and are not recommendations or aspirational documents.

[213] Of note, the Tribunal analyzed and made findings on the Compensation Framework in 2021 CHRT 7 in order to approve it. This is made clear when reading the ruling. For example, 2021 CHRT 7 states:

[22] Section 4 stipulates which First Nations children and caregivers are eligible for compensation. It addresses children who were necessarily or unnecessarily removed from their families (4.2.1). In relation to Jordan’s Principle, it outlines what constitutes an essential service, service gap, and unreasonable delay (4.2.2). It defines the meaning of the term First Nations child in the context of compensation (4.2.5). Generally, a First Nations child includes a child who is registered or eligible to be registered under the *Indian Act*, has a parent who is

registered or eligible to be registered under the *Indian Act*, is recognized by their First Nation for the purpose of Jordan's Principle, or was ordinarily resident on a reserve or in a community with a self-government agreement (4.2.5).

[23] Section 5 outlines various provisions to locate and identify eligible beneficiaries.

[214] This is an example of the Tribunal reviewing the Compensation Framework and highlighting specific parts of the Compensation Framework. It is clear when reading all the compensation rulings in order including the last ruling approving the Compensation Framework that the approved Compensation Framework was found to be in line with the Tribunal's orders:

4. Definitions of Beneficiaries

4.1. A "beneficiary" of compensation is a person, living or deceased, described at paras. 245-257 of the Compensation Entitlement Order, as expanded by the Tribunal's decision in 2020 CHRT 7, at paras 125-129.

(Compensation Framework)

[215] The parties themselves described the Tribunal's decision in 2019 CHRT 39 as the *Compensation Entitlement Decision* and acknowledged it was further expanded in 2020 CHRT 7.

[216] After its analysis, the Tribunal found:

[19] The purpose of the *Draft Compensation Framework* is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be **consistent with, and subordinate to, the Tribunal's orders** (1.2).

(2021 CHRT 7, emphasis added).

...

[40] Pursuant to section 53 of the CHRA and its previous rulings, the Tribunal approves the Framework for the Payment of Compensation under 2019 CHRT 39 along with accompanying schedules as submitted by the parties on December 23, 2020. The Tribunal will make the Framework available to the public upon request.

(2021 CHRT 7, emphasis added)

[217] This is not the first time the Tribunal is being asked to challenge eligibility to previous compensation orders. NAN requested an amendment to the Draft Compensation Framework to change the time period for which First Nations children would be eligible for Jordan's Principle compensation. The Tribunal answered it could no longer do so:

[16] In 2021 CHRT 6, released February 11, 2021, the Tribunal addressed the approach for compensating victims/survivors who are legally unable to manage their own finances. The Tribunal determined that it was appropriate and within the Tribunal's legal authority to approve a compensation regime where an Appointed Trustee, as defined in the Draft Compensation Framework, would manage the compensation funds for victims/survivors who lack the legal capacity to do so themselves. Further, the Tribunal rejected a request by NAN to challenge the eligibility criteria for compensation given the Tribunal had already ruled on the issue and upheld the scope of compensation payments set out in the Draft Compensation Framework.

(2021 CHRT 7, emphasis added)

[218] Of note, the Tribunal's title in 2021 CHRT 6 explains the intent of the ruling: Compensation Process Ruling on Four Outstanding Issues in Order to Finalize the Draft Compensation Framework. (emphasis added).

[219] At paragraph [6], the Tribunal wrote:

[6] ... This ruling provides the reasons contemplated in the Panel's December 14, 2020 letter. Following this letter ruling, the parties were able to finalize the Draft Compensation Framework and, on December 23, 2020 they submitted the final version to obtain a final consent order on the issue of the compensation process.

(2021 CHRT 6, emphasis added).

[220] A closer look to some of the submissions made by the parties and reasons from this Panel demonstrate the finality of the compensation eligibility orders:

[110] NAN opposes section 4.2.5.2 of the Draft Compensation Framework's restriction of the timeframe of discrimination for which First Nations children who are not eligible for *Indian Act* status are entitled to compensation and section 4.2.5.3's restriction of these children's eligibility for compensation for wilful and reckless discrimination under section 53(3) of the *CHRA*. NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries. NAN relies on its earlier submissions from March 20, 2019 on identifying First Nations children for the purpose of Jordan's Principle. NAN argues that it was always of the view that Jordan's Principle applied to all First Nations children and that Canada should have been of this view as well. NAN relies on evidence cited in *Daniels v. Canada*, 2013 FC 6 to demonstrate Canada's knowledge. Further, the treaty relationships, which Canada recognizes, do not allow Canada to unilaterally determine First Nations identity. Further, NAN does not find it persuasive for Canada to argue that Canada believed a provision designed to prevent jurisdictional gaps in services for First Nations children only applied to First Nations children eligible for *Indian Act* status. Accordingly, the *Merit Decision* cannot represent a clear break from the past as contemplated in *Hislop*. NAN argues that Canada's exclusion of First Nations children without *Indian Act* status was unreasonable according to the criteria established in *Hislop*, para. 107. In addition, NAN argues the different timeframes for which beneficiaries are entitled to compensation will complicate the process.

[111] Canada, the AFN and the Caring Society submitted a joint response opposing NAN's request to remove sections 4.2.5.2 and 4.2.5.3 from the Draft Compensation Framework. They note that the provisions were not drafted with the intent to deny compensation to any eligible beneficiaries and that, to the extent of any inconsistency with the Tribunal's orders, section 1.2 ensures the Tribunal's orders take precedence. They argue that while NAN would prefer an earlier start date for compensation than that provided in section 4.2.5.2, the issue has already been litigated and should not be reconsidered. Canada, the AFN and the Caring Society considered it unreasonable to award damages for wilful and reckless conduct while the eligibility criteria for Jordan's Principle were unclear. They submit that while sections 4.2.5.2 and 4.2.5.3 do not precisely mirror specific language in the Tribunal's orders, any potential beneficiary who disagrees with the provisions will have an opportunity to contest them.

[112] The Panel generally agrees with the merit of the NAN's additional submissions. Moreover, the Panel notes the NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries.

[113] However, as mentioned above, the eligibility for compensation under Jordan's Principle orders have already been argued and answered by this Tribunal. Furthermore, the Panel finds the joint response from the AFN, the Caring Society and Canada referred to in para. 111 above to be acceptable especially in light of sections 1.2 and 9.6 of the Draft Compensation Framework.

[129] The Tribunal has provided a number of decisions and rulings directly addressing the victims' entitlement to compensation for discriminatory conduct. Most notably, the *Merit Decision* found that Canada's programs and funding discriminated against First Nations children and amounted to discriminatory conduct. In the Compensation Decision, the Tribunal found that the victims on whose behalf the complaint was brought were entitled to compensation. The Tribunal addressed the quantum of compensation and considered some general eligibility parameters such as which classes of family members were entitled to compensation. The Tribunal also recognized the value in directing the parties to negotiate further aspects of the compensation process.

(2021 CHRT 6, emphasis added)

[221] The following paragraph also speaks to the Tribunal's view that the retention of jurisdiction on the compensation issue at this point was separate from the other issues in these proceedings:

[42] This does not affect the Panel's retention of jurisdiction on other issues in this case.

(2021 CHRT 7)

[222] Before the FSA was presented to the Tribunal for approval, the parties requested a number of consent orders and amendments to the Tribunal's previous orders.

[223] The Tribunal's ruling in 2022 CHRT 8 clearly demonstrates the analysis to determine if the requested orders are in line with the Tribunal's findings and orders and if such amendments can be made:

(viii) Amendment to 2021 CHRT 12

Order request # 8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

[42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at \$2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

[106] On March 7, 2022, Stephanie Wellman's provided a very helpful affidavit and evidence attached. Upon review of the evidence attached to the affidavit, the Panel finds the evidence to be consistent with the affirmed declaration. Stephanie Wellman indicates that:

70. First Nations have long advocated for adequate prevention funding for FNCFS. It has been well documented in reports, such as the Wen:de We are Coming to the Light of Day, Royal Commission on Aboriginal Peoples filed into the record as Exhibit HR-2, and the Joint National Policy Review (2000) filed into the record as Exhibit HR-1, that the current funding formula for the FNCFS Program inadequately invests in prevention.

71. Prevention within the FNCFS Program reform context must aim to ensure that children remain in their family and First Nation as a priority, with removal as a last resort. Prevention, including early intervention policies, must be adequately practiced and funded in each community.

[107] The Panel agrees and has considered the above-mentioned evidence and has made multiple findings in that regard, e.g. 2018 CHRT 4:

[161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *[Merit] Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[108] Stephanie Wellman also affirms prevention “must be developed and mobilized to the standards that communities set and at the levels that communities decide” (March 7, 2022 Affidavit at para. 71).

[109] The Panel finds this is consistent with the spirit of its rulings requiring Canada to consider the unique and distinct needs of First Nations communities and to avoid a one-size fits-all top-down approach. In 2018 CHRT 4, the Panel wrote:

[163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance (emphasis added).

[110] Stephanie Wellman adds that:

72. Canada must consider prevention and reform within the context of First Nations social determinants of health and wellbeing, including environment, education, gender, economic opportunities, community safety, housing and infrastructure, meaningful access to culture and land, access to justice, and individual and community self-determination, among others.

73. Prevention must address the structural and systemic reasons for First Nations' higher rates of involvement with child and family services. For example, housing, water, racism, infrastructure inadequacies, poverty, etc. All these impact child and family wellbeing, and prevention must therefore encompass the systemic drivers of First Nations' overrepresentation in child and family services. Systemic change must also recognize the colonization of First Nations as a fundamental underlying health, social and economic determinant.

74. Prevention must include evidence-based primary, secondary, and tertiary culturally based programming situated in a life-course continuum: from pre-natal development to birthing, childhood, adolescence, adulthood, as Elders, and through death and post-death.

[111] The Panel entirely agrees with the above. This corroborates the evidence in this case and is in line with the Panel's findings in the Merit Decision and in 2018 CHRT 4:

[166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the [Merit] Decision at paras. 341-347), (emphasis added).

[112] As explained above and in previous rulings, the Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue.

[113] For example, in 2018 CHRT 4, a prevention/least disruptive measures focused ruling by this Tribunal, found (emphasis omitted):

[93] The fundamental core of Canada's systemic discrimination is that it fails to fund First Nation Child Welfare based on need, including addressing and redressing historical disadvantages. The Panel in its decision wrote that it's "...focus is whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and the communities" (...).

...

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

...

[150] Canada cannot justify paying enormous amounts of money for children in care when the cost is much higher than prevention programs to keep the child in the home. This is not an acceptable or sound fiscal or social policy. This is a decision made by Canada unilaterally and it is harming the children. (...), (see the Decision at paras. 262 and para. 297).

...

[180] The Panel reiterates that the best interest of the child is the primary concern in decisions that affect children. See, for instance, UNCRC, article 3 and article 2 which affirm that all children should be treated fairly and protected from discrimination. (see also the [Merit] Decision at paras.447-449). The Panel found that removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child. This is an important finding that was meant to inform reform and immediate relief (see the [Merit] Decision at paras 341-349).

...

[191] The United Nations CESCR recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 [Merit] Decision. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding

observations on the sixth periodic report of Canada, March 4223, 2016, E/C.12/CAN/CO/6, paras.35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para. 33, Exhibit L).

[114] The Panel entirely agrees with this wise approach to prevention reform proposed by the parties in order to generate real and lasting systemic change. Moreover, the evidence filed supports this finding.

[115] As set out in Ms. Wellman's March 7, 2022 Affidavit:

76. The per capita costs are based on current prevention services and actual spending described in the case studies analyzed by the IFSD. For instance, the \$2,500 per capita cost is based on a case study of K'wak'walat'si Child and Family Services (KCFS), which serves the 'Namgis First Nation and the village of Alert Bay on Cormorant Island off the coast of British Columbia. Since 2007, not a single child in 'Namgis First Nation has been placed in care. This success has been largely credited to the introduction of comprehensive prevention programming.

[116] This success story is referenced in Stephanie Wellman's affidavit and also included in the IFSD report #1, *Enabling Children to Thrive* filed in evidence. The report states that a case for prevention is clear from both FNCFS agency cases and from existing research. The unanimity from agencies and experts on the importance and need for a focus on prevention services and funding to match cannot be overemphasized (pp.93-94). This report is relevant and reliable especially given the methodology employed and the expert actors involved including the advisory role of the National Advisory Committee.

[117] Stephanie Wellman's affidavit continues:

77. These best practices in prevention are further modelled after Carrier Sekani Family Services (CSFS), a large prevention focused organization. The agency's life cycle model (from cradle to grave), informed by its own research, extends across health and social programs and services. From intensive family preservation to telehealth initiatives, CSFS has empowered its staff to innovate, try, fail, and succeed, in support of the people and communities they serve.

78. By providing a budget of \$2,500 per capita for prevention, Canada would enable service providers and communities to deliver this best practice life cycle model of prevention.

[118] This is also consistent with previous findings by this Panel. In 2018 CHRT 4, the Panel said (emphasis omitted):

[118] The orders are made in the best interests of children and are meant to reverse incentives to place children in care.

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

[120] The best way to illustrate this is to reproduce Ms. Lang's answer to the AFN's question: AFN: So if every child in Ontario that's on First Nations was apprehended, INAC would pay costs for those apprehensions correct? (...) So my question is, it's kind of peculiar to me that the federal government has no

qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me that just does not make sense. Now as a Program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions? Ms. Lang: for eligible expenditures, yes.

[121] This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings.

...

[148] Of particular note, Wen:De Report Three recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, Wen:De Report Three indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are overrepresented amongst children in care and Aboriginal children in care; they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.), (see 2018 CHRT 4 at paras. 148-149 citing the *Merit Decision*).

...

[160] This is the time to move forward and to take giants steps to reverse the incentives that bring children into care using the findings in the *[Merit] Decision*, previous reports, the parties' expertise and also everything gathered by Canada through its discussions since the *[Merit] Decision*.

[119] The 2018 CHRT 4 immediate relief orders on actuals were made in 2018 after the Caring Society and the AFN, urged the Panel to order them. The parties made compelling arguments and brought evidence to support it. The Panel indicated that the orders could be amended as the quality of information increased. The Panel recognized "that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases." (see 2018 CHRT 4 at para. 237). This is the case here. The

evidence in the record demonstrates that there is a need to amend the previous prevention orders given that a number of issues arose as part of the implementation phase of the 2018 CHRT 4 orders.

[120] Moreover, the parties were able to establish that the process for reimbursement to actuals was causing hardships for First Nations and First Nations Agencies. Dr. Blackstock has affirmed that:

19. ... While the funding at actuals approach has been effective in ensuring more prevention services are provided to children, youth, and families, ISC determining eligible prevention expenses has been problematic particularly given the lack of social work expertise within the department.

[121] Further, Dr. Blackstock also affirmed that “the “request-based” nature of the actuals process has also posed an obstacle for some FNCFS Agencies, who may lack capacity to make the request.” (March 4, 2022 affidavit at para. 19). The Tribunal finds this was previously demonstrated in these proceedings (see for example, 2020 CHRT 24 at paras 34-36).

[122] Moreover, recent relevant and reliable evidence contained in the IFSD report #2, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being, July 31, 2020 found at p. 29 that:

The significant 48% increase in FNCFS program spending in 2018–19 is attributed to the CHRT-mandated payments (the FNCFS program spending is projected to decrease by 9% in 2019–20) Case study analysis suggests that the CHRT payments have had immediate impacts on programming and operations. The supplementary investments, however, are one-time payments and not guaranteed beyond the next fiscal year. This reality puts progress on prevention programming and practices at risk.

[123] The above also supports the need for greater prevention funding as per the order requests including the eligibility for these funds to be carried forward by the First Nation and/or First Nations Child and Family Service providers(s).

[124] Furthermore, Dr. Blackstock affirms that “[g]reater “up-front” funding will allow FNCFS Agencies to focus their energies and resources on program development and delivery.” (March 4, 2022 affidavit at para. 19).

[125] The Panel finds the evidence supports the need for a shift from the “request-based” nature of the actuals process where ISC determines eligible prevention expenses to a comprehensive community-level programming. The implementation of these orders will provide families with supports they need and in providing First Nations, FNCFS Agencies with greater resources “up front” to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. This will also provide greater funding to First Nations without FNCFS Agencies.

[126] The IFSD report also supports this shift.

[127] The Panel agrees and is really pleased with these order requests. The parties’ hard work will generate real change for First Nations children and youth. This responds to the Tribunal’s 2018 call for giant steps towards a shift.

[128] As indicated in Stephanie Wellman’s March 7, 2022 Affidavit:

75. The \$2,500 per capita level of prevention funding is based on the case studies conducted by the IFSD in its Phase 1 report, which resulted in two fundamentally different approaches to prevention programming. This ranged from a First Nation with minimal prevention programming (\$800) to comprehensive community-level programming targeted to the entire community, operating on a prevention basis (\$2,500). The \$2,500 per capita amount is to be considered the level necessary for agencies or communities to reasonably deliver best practices in prevention.

[129] As noted in IFSD report # 2, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* at p. 248:

... In its Phase 1 study, [*Enabling First Nations Children To Thrive*], December 15, 2018, that costed the FNCFS system, IFSD estimated (based on actual models) that per capita expenditures for prevention should range from \$800 to \$2,500 across the entire community. At \$800, programming is principally youth-focused and may not be CFS focused. At \$2,500 per person, a full lifecycle approach to programming can be possible with linkages between health, social and development programming. ...

The First Nation's current per capita CFS expenditure estimates align to previous findings for communities unaligned to an FNCFS agency (ranging from \$500 to \$1,000 based on the population source). As the First Nation contemplates its next steps in CFS, it may wish to consider increasing its per capita budget to expand its resources for program and service delivery. IFSD estimated that the average cost of a child in care to be \$63,000 per year. With opportunities for prevention program that have demonstrated positive results, there are various options for supporting the well-being of children, families and communities through wrap-around holistic services.

[130] As noted in IFSD report #1, *Enabling First Nations Children To Thrive* these costs would be on-going in nature and subject to changes in population and inflation. Per person spending on prevention should range from \$800–\$2,500 with total annual costs of \$224M to \$708M (p. 10).

[131] The report provides further details at pages 87-88:

Prevention was the focus of experts and agencies, and consistently defined as the most significant funding gap that agencies are facing. The gap in prevention funding is a challenge and is connected to the system's current funding structure that incentivizes the placement of children in care.

Shifting to a prevention-focused approach will require increased investment and a change in funding structure, such that agencies have the ability to allocate resources to meet community need. To cost-estimate an increase in prevention funding for FNCFS agencies, benchmarks of current prevention spending were identified and a range of per capita investments in prevention were defined: \$800, \$2,000 and \$2,500.

The per capita costs are based on current prevention services and actual spending described in case studies. The prevention cost estimates are premised on the assumption that prevention should target the entire population in the agency's catchment and not only the child population served.

[132] Moreover, as defined in 2021 CHRT 12, Non-Agency communities also form part of the Tribunal's previous orders. The Panel agrees that they should also benefit from the increased ongoing prevention funding as detailed in order request # 8. As explained above, this will greatly benefit their communities.

[133] The parties were successful in demonstrating the need for the requested orders # 7 as modified and 8. The Panel entirely agrees with the order requests # 7 & 8 and finds they are justified and supported by the evidence. Furthermore, the Tribunal has the authority to make those orders as it will be explained below.

[224] Three important aspects can be drawn from this approach. First, the Tribunal always relies on evidence to support its findings and orders. Second, the Tribunal analyses if the requested orders are in line with its previous reasons, findings and orders. Third, the focus of the retention of jurisdiction is to achieve sustainable reform and long-term relief that build on short-term and long-term orders in the best interest of First Nations children and families as defined by First Nations themselves.

[225] This approach is consistent with the clearly expressed intent by the Tribunal to issue short-term, mid-term and long-term relief and for long-term relief to be informed by the short-term and mid-term phases.

[226] The Panel previously wrote in 2018 CHRT 4:

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

...

[415] The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

[227] The Tribunal has clearly expressed on a number of occasions that it will retain jurisdiction until sustainable long-term relief and reform has been addressed in a way that is responsive to the Tribunal's findings and role to eliminate the discrimination found and prevent its reoccurrence or similar discriminatory practices to arise. The Tribunal has always focused on the need to uphold the principle of substantive equality considering the specific needs of First Nations children, families, communities and Nations as an integral part of eliminating the systemic discrimination found. Those specific needs are accounted for in First Nations-led and designed prevention programs for example.

[228] The Tribunal recently discussed its retention of jurisdiction on all its orders in 2022 CHRT 8:

[175] Pending a complete and final agreement on long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Consent Orders contained in this ruling. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief or as the Panel sees fit considering the upcoming evolution of this case.

[176] This does not affect the Panel's retention of jurisdiction on other issues and orders in this case. The Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

[229] All the above support the conclusion that the Tribunal's retention of jurisdiction allows the Tribunal to examine the FSA in order to determine if it is in line with its orders and victims/survivors receive appropriate compensation. The Tribunal is not *functus officio* in that regard. Furthermore, the principle of *functus officio* and finality applies to the Tribunal and must be applied flexibly considering the factual matrix of the case, findings, reasons and orders already made in this case. This is a case-by-case exercise based on law, facts and the evidence that involves applying the case law to the matter at hand with a careful review of the Tribunal's retention of jurisdiction and the purpose for such retention of jurisdiction. In this case, as demonstrated above, the quantum for compensation is final. The categories of victims/survivors who are entitled to compensation is final in the sense that they cannot be reduced or disentitled unless their compensation is found unreasonable by a reviewing Court.

[230] The Tribunal considered the request for compensation by direct and specific reference to the evidence in this case. This fundamental tenet of justice was underscored by the Federal Court in its upholding of the Tribunals' orders, concluding that the Tribunal's jurisdiction to make the orders flowed not only from the parameters and objectives of the CHRA, but also from the evidentiary foundation upon which the Tribunal grounded its decisions:

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

(2021 FC 969 at para. 231, emphasis added).

[231] The Tribunal is responsible for applying the CHRA and the human rights framework reflected in that legislation. While the AFN and Canada have brought this motion to seek the Tribunal's approval for an agreement under the class actions that would settle both the class actions and the complaint before the CHRT, that does not change the fact that the Tribunal is tasked with applying the CHRA. It does not have jurisdiction to apply tort or class actions law, and has consistently throughout this case ensured that it does not do so.

[232] Given that its jurisdiction comes from the CHRA, the Tribunal's role is not duplicative of a court approving a class action settlement. The Tribunal does not have that power and it would be entirely duplicative of the court's role. Further, the Tribunal is not at the stage of the proceedings of deciding whether to approve an early-stage settlement, where liability and compensation are still contested. Instead, the Tribunal is assessing whether its existing orders are satisfied or, in the alternative, whether it should modify them. The Tribunal has consistently taken an evidence-based approach in assessing this case and considers whether the evidence demonstrates its existing orders are satisfied or justifies revisiting its previous orders through the dialogic approach.

[233] The Tribunal notes that the Federal Court upheld the Tribunal's use of the dialogic approach to the compensation orders, noting that this provided flexibility so that the Tribunal could fulfil its statutory mandate to address discrimination:

I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [Grover] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal..." (2016 CHRT 10 at para 15). Furthermore, I agree that "the [CHRA] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

(2021 FC 969 at para 138, citing to *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC).

[234] Justice Favel, in the Federal Court's judicial review, aptly captured the fact that compensation under the CHRA is not equivalent to tort damages:

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

(2021 FC 969 at para 189).

[235] Further, the AFN's argument that the FSA provides finality is partly true and partly wrong. It is true in the literal sense that if not challenged, the FSA could end litigation and bring finality and promptly compensate most, but not all, recognized victims/survivors in the near future. This is the concept that certain disputes must achieve a resolution from which no further appeal may be taken, and from which no collateral proceedings may be permitted to disturb that resolution. The very fact this joint motion is opposed and if it is fully granted may lead to a judicial review of this ruling speaks to the risk of the FSA not achieving finality in that sense.

[236] It is wrong by ignoring another paramount aspect of the need for finality in human rights proceedings as correctly described by the Caring Society: the assurance that once rights have been recognized and vindicated (which is no small task for complainants and victims who often face powerful respondents challenging their claim at every turn), they are no longer up for debate by outside actors or respondents who may disagree with the orders made against them and therefore contract out of their human rights obligations under the CHRA.

[237] The AFN and Canada are so focused on the FSA that they ignore the grave injustice of reducing or disentiitling victims/survivors once evidence-based findings and orders that benefit victims have been made by a human rights tribunal. This more broadly sets a dangerous precedent for victims/survivors in Canada.

[238] Canada has consistently argued against the Tribunal's jurisdiction at every stage of this case, from the case's initial referral to the Tribunal, to the Tribunal's remedial jurisdiction to the Tribunal's ability to retain jurisdiction to use the dialogic approach to implement an effective remedy. Canada, in this motion, is proposing an even broader jurisdiction than the Tribunal has ever considered or found where the Tribunal would be able to alter its final compensation orders not because of any issue with the Tribunal's ruling but because Canada and the AFN have reached a tentative settlement of a separate class action.

[239] This question is also a question of the integrity of the human rights regime and of the Tribunal's.

(i) Human Rights Regime

[240] The Federal Court, in this case, addressed the Tribunal's specific role conferred by Parliament:

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

(2021 FC 969 at para 139).

[241] Parliament's intention when it adopted the *CHRA* was to create a system particularly tailored to address the social wrong of discrimination.

[242] This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Merit Decision*, 2016 CHRT 2 at para. 346:

A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII) at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:

[L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para. 346).

[243] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at para. 3):

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

(2019 CHRT 39)

[244] The Tribunal agrees with the Caring Society who submits that the Tribunal ought to apply a human rights framework that centers the child and parent/caregiver experience of harm in determining this motion. The Tribunal agrees with the four criteria the Caring Society identifies as important to the analysis:

(i) a critical examination of the evidence adduced in relation to the victims who will be impacted by the deviations in the Compensation FSA;

(ii) the nature of compensation awarded as a quasi-constitutional right under the *CHRA* and the meaning of retracting that acknowledgement;

(iii) the best interests of First Nations children and their families, particularly given the historical and intergenerational trauma experienced by the victims, as already acknowledged by the Tribunal; and

(iv) the potential of creating a dangerous precedent where human rights compensation can be bargained for outside of the dialogic approach and outside of the protections that the human rights regime provides.

[245] The Tribunal is tasked with implementing the *CHRA* and must ensure the human rights regime is not cast aside in favour of civil claims. The process before the Tribunal has already awarded remedies to compensate for Canada's discrimination. To revisit or undermine those orders raises issues of finality on quantum and entitlements. There is not a legal basis for the sort of change to the Tribunal's existing entitlement orders being requested by Canada and the AFN.

[246] The Caring Society correctly recognizes that the Tribunal carefully crafted its remedies in this case to match the evidence of demonstrated harm to specific First Nations children and caregivers affected by Canada's systemic racial discrimination. These conclusions are based on applying evidence collected over the course of a decade to the legal framework of the *CHRA*.

[247] Canada challenged this process at every step in front of the Tribunal and sought to judicially review the Panel's compensation decisions. The judicial review has been dismissed, and so the Tribunal's orders are enforceable absent a successful appeal to the Federal Court of Appeal.

[248] The Tribunal also agrees with the Caring Society's concern that the FSA, unlike the Tribunal's orders, requires victims/survivors to give up the right to further recourse in order to accept compensation. This is particularly concerning for victims who are receiving less compensation under the FSA than they would be entitled to under the Tribunal's orders. Further, many of these victims are children whose human rights are particularly important to safeguard. It is not the victims/survivor's fault that Canada's extensive discrimination affected a large number of victims. The victims should not be required to give up their rights to compensation to shield Canada from further liability. The potential for other causes of action against Canada, including *Charter* claims, should not negate the victims/survivors' ability to access compensation under the *CHRA*.

[249] Denying entitlements once recognized in orders is an unfair and unjust outcome that the Tribunal cannot endorse given the *CHRA*'s objectives and mandate. The Tribunal's authority flows from its quasi-constitutional legislation and the Tribunal is, according to the Supreme Court, the "final refuge of the disadvantaged and the disenfranchised."

[250] Furthermore, a perpetrator cannot circumvent the Tribunal and Courts by contracting out its human rights obligations in the effort of derogating to existing orders. Canada opposed the compensation requests and then the Tribunal orders and challenged them at the Federal Court and now the Federal Court of Appeal. While it is noble to try to resolve the issues and stop litigation in the interest of reconciliation, this nobility is tarnished when vulnerable victims/survivors who are children or are caregiving parents or grandparents who suffered multiple losses of their children or are deceased are now disentitled by Canada who signed the FSA. This is not healthy reconciliation. This is also the opposite of what the Tribunal intended when it encouraged the parties to negotiate and resolve outstanding matters. The Tribunal did not envision that progress and negotiation would derogate from its binding orders in a way that reduces compensation or disentitles some victims/survivors who were recognized in the Tribunal's orders.

[251] Throughout these proceedings, Canada opposed the complaint and tried to shield itself by arguing that it did not provide the services directly, it opposed remedies, it narrowed the interpretations of the orders on multiple occasions, etc. Now it tries to shield itself from some Tribunal orders by hiding behind the fact the First Nations made those difficult decisions to compromise and carve out victims/survivors from the FSA to add others from the class actions. This is only occurring because Canada placed a cap on compensation. While the amount of compensation is impressive, what is more impressive is the length and breadth of Canada's systemic racial discrimination over decades impacting hundreds of thousands of victims who deserve compensation.

[252] Canada remains responsible for fulfilling its human rights obligations, both in general and the specific orders from the Tribunal. Canada is not absolved of this responsibility by putting the FSA forward as a First Nations-led process. First Nations were constrained by the fixed amount of compensation Canada was willing to provide, which did not ensure all victims/survivors identified through the Tribunal process would be compensated in line with the Tribunal's orders.

[253] Moreover, it would undermine the *CHRA*'s ability to protect human rights if respondents were able to avoid liability by reaching an agreement with only certain parties to a human rights case to remove the case from the Tribunal's jurisdiction in favour of an alternative forum. It would reduce the ability of victims to receive a remedy that acknowledges that their human rights have been violated.

[254] The potential for setting a dangerous precedent is significant and could have widespread impacts on the human rights system. The AFN acknowledges in its submissions that there does not appear to be a precedent along the lines of what the AFN and Canada are requesting. While the AFN contends that this case is unique and unlikely to be replicated, the Tribunal is not convinced that it should sacrifice human rights principles on the assumption that this case is unique. To that end, the Caring Society urges the Tribunal to consider the broader and precedential implications of this motion on the integrity of the human rights regimes throughout Canada, including its specific impact on other First Nations human rights cases. The Tribunal agrees with the Caring Society that setting aside human rights remedies in an alternative forum would leave victims of discrimination vulnerable. The Caring Society is particularly concerned about the implications this has for the human rights regime when the federal government is responsible for the discrimination. The Tribunal has consistently sought to address the systemic discrimination in this case by holding Canada accountable:

Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.

(2020 CHRT 7 at para 130).

[255] It is not appropriate that victims/survivors of discrimination should be required to defend their entitlement to compensation from a collateral attack seeking to remove the Tribunal's jurisdiction and override the orders entitling them to compensation. This is particularly concerning where successful complainants are not entitled to legal fees from successfully advancing their case before the Tribunal, making hiring counsel more challenging (see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471).

[256] It is well established that "contracting out of" a human right is not permissible. As emphasized by the Supreme Court:

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada

and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy....The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

(*Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202).

[257] Further, it would be an absurd interpretation of the *CHRA* to allow an outside process to which not all parties have agreed to participate to usurp the role of the Tribunal to order compensation to victims/survivors of discrimination as identified in a Tribunal process. The Tribunal agrees with the Caring Society that public trust in the human rights system is likely to be eroded if orders to compensate victims of discrimination are not binding on respondents and can be bargained away. The Tribunal process allows for the public affirmation of human rights that the current motion would, if granted, undermine. This is particularly true in the current case where the parties have returned to the Tribunal multiple times to compel Canada to remedy its discriminatory conduct. In those rulings, the Tribunal had to confirm that its orders were legally binding on Canada and that Canada was obliged to address the systemic racial discrimination.

[258] Granting the AFN and Canada's motion now would contradict the Tribunal's previous rulings that indicated that its remedial orders required implementation. The Caring Society urges the Tribunal to once again reassert the important principle that human rights orders are binding and that compliance is not negotiable. Human rights regimes are meant to offer comprehensive protection over discrimination complaints. Allowing settlement agreements reached in the context of a civil claim to invalidate a ruling made by human rights tribunals could have a series of unintended negative consequences on human rights regimes. The Supreme Court of Canada in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362 distinguished common law remedy from human rights remedies:

[63] In this case, the trial judge awarded punitive damages on the basis of discriminatory conduct by Honda. Honda argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhaduria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181. In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend — namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself. Moreover, the recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect. In this respect, they confirm the Code's remedial thrust.

[259] More importantly, the Tribunal frowns on reducing compensation or disentitling victims/survivors once they have been vindicated at the Tribunal and upheld by the Federal Court. This dangerous precedent would send a very negative message to victims/survivors in this case and other human rights cases in Canada and could potentially become a powerful deterrent to pursue human rights recourses under the *CHRA*. Victims/survivors would never have the peace of mind that their substantiated complaints and awarded remedies would be forthcoming to them if, at any time before remedies are implemented, these remedies can be taken away from them without the need for a successful judicial review.

[260] This is even more troubling when we consider the nature of the complaints before the Tribunal in this case. The very nature of human rights rests upon the protection of vulnerable groups. From the beginning the Tribunal found and wrote that this case is about children and the Tribunal's mandate to eliminate discrimination and prevent similar practices from arising. Permitting reductions or disentitlements of compensation for victims/survivors who have been recognized in evidence-based findings and corresponding orders does not breathe life into human rights. Rather, it takes its breath away.

[261] This cannot be how the human rights regime is administered in Canada.

[262] The Tribunal also agrees with the following Commission arguments that explain the human rights regime under the *CHRA*:

42. The *CHRA* does not expressly address the issue of finality. However, section 57 explains that a Tribunal order to award compensation under section 53(2)(e) or section 53(3) may be made an order of the Federal Court for the purpose of enforcement.

43. While this Tribunal has broad remedial discretion, this authority is constrained by the *CHRA* framework and by the evidence presented.

44. The *CHRA* requires this Tribunal to balance flexibility and innovation in remedies with natural justice principles.

45. The dialogic approach does not mean this Tribunal can reconsider its orders in perpetuity. It is meant to facilitate the implementation of orders. It is not intended to be used to negotiate out of binding legal obligations.

[263] Substantive variations of this Tribunal's orders may lead to new litigation or proceedings that disturb established legal principles. If courts and tribunals could continuously revisit and vary their decisions, the administration of justice would not work the way it was meant to, and it would be procedurally unfair to the parties. When a party is not satisfied with a decision of this Tribunal, it can bring an application for judicial review at the Federal Court. It is only in very limited situations that a court or a tribunal can vary, amend, or reconsider an order or a decision, (see *Hughes v Transport Canada*, 2021 CHRT 34 at paras 61-62).

[264] The Tribunal further agrees with the Commission that simultaneously seeking recourse through the judicial review or appellate processes while also returning to this Tribunal for the same outcome (i.e., to re-litigate or change the remedies ordered) creates a problematic precedent and challenges established principles and procedures of administrative law.

[265] The Tribunal agrees with the Commission and ““acknowledges the AFN’s submission that “the FSA will significantly expand the number of survivors who would otherwise not be entitled to compensation” by including classes of beneficiaries that go beyond the scope of the Tribunal inquiry. Equally, some people who are entitled to a remedy under this Tribunal’s compensation orders will not receive one under the FSA. In taking these factors into account, this Tribunal must apply principles of fairness and access to justice”” (Commission Submissions, para. 65).

[266] The *CHRA* provides this Tribunal with a specialized framework and statutory mandate purposely designed to meet the unique needs of victims/survivors of discrimination. It is the proper framework to apply when considering how this Tribunal may exercise its discretion. It contemplates the adjudication and remediation of group complaints such as this. Class actions are judicial proceedings that are governed by separate objectives, legal principles, case law, and rules of procedure. All of this is distinguishable from the case at hand. It is not necessary for this Tribunal to apply class action governing factors and jurisprudence to decide whether to vary its orders to conform to the FSA. Expanding or reducing the scope of the groups of complainants included in this Tribunal’s

compensation orders to mirror the class action groups would require new evidence and a hearing on the merits of these issues. Further, the groups of complainants this Tribunal ordered to be paid compensation are protected from alteration by the principle of finality of quantum and of categories.

[267] The Tribunal must be allowed to complete its task to ensure victims/survivors of the discrimination are compensated. This task cannot involve reducing or removing some victims/survivors' rights to entitlement.

[268] Furthermore, in determining if the victims/survivors will be compensated, the Tribunal cannot divorce the task from the evidence and findings that warrant the remedy. In the same way, in performing an analysis of if victims/survivors will be compensated, the Tribunal must first have found liability under the *CHRA*, then determine who the victims/survivors are, if they have suffered and what is the appropriate remedy. This is an exercise based on evidence and precedes the implementation phase where the Tribunal examines if the remedy is owed to the victims/survivors. This is not to say that both analyses cannot be done at the same time in a ruling. Rather, this is to highlight the adjudicative process one must follow under the *CHRA*.

[269] This being said, to make findings on the effectiveness of implementation or if the remedy is forthcoming, the Tribunal must first know what it is that needs to be forthcoming. Consequently, the Tribunal looks at its orders and the evidence on implementation to make findings on their effectiveness. This is not an open door to reduce or remove entitlements. It is a door to improve, refine, clarify orders if need be to ensure they effectively compensate the victims.

[270] One main argument raised in this motion is that the negotiation requires compromise and compromises needed to be made given the fixed amount provided. This is an exercise that is best done at earlier stages of proceedings and prior to orders being made.

[271] Another important argument is the one made on reconciliation. If victims/survivors who have been recognized by a human rights Tribunal and the Federal Court are later removed for the greater good of making a final deal to serve others is this a good example of reconciliation? We think not. On the contrary, it is quite concerning. This is even more concerning when the voices of those excluded are the deceased and children.

[272] Canada and the AFN also highlight that this FSA is First Nations-led. The Tribunal appreciates this important fact. However, sovereign nations who are members of the AFN are not exempt from international human rights scrutiny in regards of their citizens. Moreover, states like Canada cannot contract out of their human rights obligations by invoking the sovereignty of First Nations especially when some First Nations call upon Canada to indicate that they have not provided their consent on the FSA.

[273] The AFN and Canada removed the finality aspect of the Tribunal's orders on quantum and recognized categories of victims/survivors in order to achieve finality in the FSA. This benefits Canada in many ways at the expense of some victims/survivors but may create another problem.

[274] The Panel is concerned that the AFN and Canada may have opened themselves to potential liability if the disentitled victims under the Tribunal's orders opt out of the FSA and seek to pursue a recourse against the AFN and/or Canada for removing them from the FSA and changing their opting out options. This point is more of a comment for reflection and is not determinative on this motion.

[275] The parties have not addressed how First Nations governments who are the rights holders will have to deal with victims/survivors once recognized and now disentitled by their own First Nations who may seek justice. The AFN submits that few First Nations peoples avail themselves of the Commission and Tribunal's proceedings. While it is true that First Nations face barriers advancing human rights claims, during the course of the last decade, the Tribunal's experience is that there has been an increase of First Nations cases referred to the Tribunal by the Commission. The Members of this Panel have travelled across the country and heard numerous First Nations cases that often resolve through

mediation. The Panel chair had the privilege of hearing a case in a NAN community in a northern and remote area and others in British Columbia and Nova Scotia. Member Lustig chairs a number of First Nations cases and is the adjudicator who ruled in *Beattie v Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1.

[276] Moreover, the results for First Nations as a result of these proceedings and the parties collective work cannot be understated. For example, since the Tribunal's 2016 ruling, **2.13 million** services have been approved under Jordan's Principle according to Indigenous Services Canada's Jordan's Principle webpage. This is one of the many examples of real change beginning to address the systemic discrimination in this case. The fact the AFN's new executive now changed its mind cannot undo the evidence of change in this case which is a result of the parties' work before this Tribunal to hold Canada accountable. Further, the Tribunal recently relied on this case in a complaint from a rights-holding First Nation concerning the discriminatory underfunding of policing services and substantiated the complaint (see *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4 (CanLII)). So far, the *Merit Decision* is cited in over 50 cases by Tribunals and Courts involving First Nations cases and Non-First Nations cases in Canada.

[277] Furthermore, the *Compensation Entitlement Decision* was relied upon in other recent human rights cases where the principles of compensation for infringements of human dignity and egregious cases have been discussed: *RR v. Vancouver Aboriginal Child and Family Services Society* (No. 6), 2022 BCHRT 116 (CanLII); *R.L. v. Canadian National Railway Company*, 2021 CHRT 33; *Hugie v. T-Lane Transportation and Logistics*, 2021 CHRT 27; *André v. Matimekush-Lac John Nation Innu*, 2021 CHRT 8.

[278] The Tribunal agrees with the Caring Society that it should consider the legacy of the now repealed section 67 of the *CHRA* that was seen in many First Nation communities as excluding them from the protections of the *CHRA*. This case has changed that perception and the results of this case, in particular the compensation orders, were greeted with celebration in many First Nations communities. In addition to validating the experiences of victims/survivors of Canada's discrimination, this built confidence in the human rights process as an option for First Nations to seek redress. Reversing the Tribunal's compensation orders would undermine this progress and faith in the human rights system. It would send a message that the human rights of First Nations People are negotiable.

[279] The Tribunal remains open to ensure the compensation remedy is forthcoming to the victims/survivors and may require further action however, this is not to say it is fair, just and acceptable to reduce entitlements or disentitle victims/survivors who have been vindicated in the Tribunal's findings.

[280] On this point the Tribunal answers two specific questions as follows:

1. Are all the categories of victims/survivors in the Tribunal's orders covered by the FSA?
 - a. No.
2. If the answer to question 1 is no, can the Tribunal find that the FSA fully satisfies the Tribunal's orders if categories of victims/survivors have been removed from the Tribunal's orders?
 - a. No.

V. The FSA and the Specific derogations from the Tribunal's Compensation Orders

[281] The parties addressed four potential derogations from the Tribunal's compensation orders in the FSA:

- 1) Entitlement for First Nations children removed and placed in non-ISC funded placements

- 2) Estates of deceased caregiving parents and grandparents are not entitled to compensation
- 3) Certain caregiving parents and grandparents will receive less compensation
- 4) Some Jordan's Principle victims/survivors may receive less compensation

[282] The Tribunal will address them in turn here. Furthermore, the Tribunal reviewed the FSA in its entirety and finds it substantially satisfies the Tribunal's compensation orders. Given the FSA does not fully satisfy the Tribunal's compensation orders and consequently, cannot be fully approved in its current form, the Tribunal will only focus on the main derogations from the Tribunal's orders given this is the reason for the denial of part of this motion. In sum, the Tribunal will not conduct a clause-by-clause analysis of the FSA in this ruling as it is not necessary or determinative to discuss where the FSA is in line with the Tribunal's orders or where it does vary in an acceptable way (not reducing or removing entitlements to victims/survivors).

A. Entitlement for children removed and placed in non-ISC funded placements

[283] The FSA adds another requirement in order to award compensation to First Nations children. The Tribunal decisions provide compensation for children removed from their homes, families and communities as a result of the FNCFS Program's systemic discrimination. The FSA narrows it to removed children who were also placed in ISC-funded care. In light of the evidence presented throughout this case, the Tribunal ordered the maximum compensation available under the *CHRA* for the great harms caused by the removal of First Nations children rather than the number of years in care or the other harms that occurred in care. The Tribunal explained that a removed child or caregiving parent or grandparent had other recourses in addition to this maximum compensation that they could pursue to obtain higher amounts of compensation for the additional harms they suffered. The FSA and class actions focus on these additional harms and the Tribunal agrees this is an appropriate focus for the FSA and the class actions. However, the requirement of removal and placement in care in an ISC-funded location cannot be considered a proper interpretation of the Tribunal's findings and orders. The Panel disagrees with the AFN and Canada's interpretation of the Tribunal's orders on this point. The Caring Society properly characterized the Tribunal's findings and orders in that regard.

[284] Moreover, the AFN's interpretation of the children eligible for compensation because of their removal by child and family services was raised for the first time in this motion. The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's Compensation Orders. However, the manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion. The AFN's arguments about the ambiguity in which children are covered by the Tribunal's orders and the challenges in providing compensation to certain children are better addressed in a separate motion where the parties have sufficient notice to lead evidence on this point. The Tribunal is open to further clarifying and addressing implementation challenges for these victims/survivors. In fact, if there is ambiguity or outstanding challenges that will delay compensation, those issues should be resolved now so that the parties are able to implement the Compensation Framework promptly. There appears to be a dispute about what the Tribunal meant by the term in "in care" and this could have been clarified earlier or at least during the time the parties to the FSA were negotiating. This category called by the parties as Non-ISC children is viewed by the AFN and Canada as a new category and the Caring Society views this as a category already included in the scope of the Tribunal's orders.

[285] The parties now disagree on the interpretation of the Tribunal's orders on who are the removed children and if only ISC funded placements are to be considered for the purpose of removed children.

[286] Instead of seeking clarification with the Tribunal as was done on a number of occasions in the past, as part of the compensation process, the AFN and Canada went with their own interpretation which was incorporated in the FSA. The Tribunal addressed clarifications on compensation motions, on average, in two months, except for the very complex issue of First Nations eligibility under Jordan's Principle which took much longer. The Caring Society, recognized by this Tribunal for their expertise in child welfare, disagrees with the AFN and Canada's interpretation and shares the same views as this Panel on this point.

[287] The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's compensation orders. This is not an issue that the Tribunal was asked to address at the time it made its compensation orders or when asked to add the estates or clarify other aspects such as the children in care as of January 1, 2006 or the definitions of essential services, etc.

[288] The appropriate manner to address this was by way of a motion for clarification of the Tribunal's orders and not by way of this motion. The manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion.

[289] However, the FSA's attempt to unilaterally remove these victims from the scope of the Tribunal's compensation through the class action proceeding is close to being a collateral attack on the Tribunal's decisions. This being said, the Tribunal has considered the AFN's new submissions on this point and finds that determining whether using ISC-funded placements as a measure of eligibility is appropriate would require a notice of motion clearly raising the issue and allowing an opportunity to fully assess relevant evidence. This motion is not the appropriate manner to do so as it would be procedurally unfair with the tight timelines on this motion that prevent those who oppose the AFN and Canada's views on this point from leading contrary evidence and properly challenging the AFN's evidence.

[290] The Tribunal will now turn to a brief review of its previous rulings.

[291] In the *Merit Decision*, the Panel discussed the term "in care":

[117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child "in care". The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.

...

[119] There are circumstances, however, when the risk to the child's safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

(i) Removed children and the parties' differing interpretations post Federal Court ruling

[292] The Panel provided compensation for the removals of children from their homes, families and communities based on the strong evidence that established the link between Canada's discriminatory practice and the evidence of harm for pain and suffering and wilful and reckless conduct. It is not the goal here to be reexplaining what was already explained at length in previous decisions now upheld by the Federal Court as reasonable. The parties now disagree on the interpretation of the Tribunal's orders on who are the removed children and if only ISC funded placements are to be considered for the purpose of removed children.

[293] The Tribunal's decision in 2019 CHRT 39, addressed the link between the evidence and the harms it was compensating. The Tribunal focused on harms to dignity and the Tribunal also ordered a critical and unprecedented human rights remedy that directly impacts the victims/survivors in this case: human rights compensation for the infringement of dignity, pain and suffering and acknowledgement of the federal government's wilful and reckless conduct.

(ii) Non-ISC Removed children

[294] The Panel's summary reasons and views on the issue of compensation were outlined in 2019 CHRT 39 as follows:

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being \$40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its [*Merit*] *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous

findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group, namely First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the Attorney General of Canada's (AGC's) position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

[295] Later, in the *Compensation Entitlement Decision*, the Tribunal further described the harm done to First Nations children and their families which is linked to the removal of the child:

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation.

[149] The use of the "words unnecessarily removed" account for a distinction between two categories of children: those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the Decision. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

...

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial discrimination. The Panel also made numerous findings of adverse impacts toward First Nations children and families, adverse impacts that cause serious harm and suffering to children: the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and trauma suffered by Aboriginal people**, in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para. 459). (...)

The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves (see 2016 CHRT 2 at, para. 467).

[296] The Panel focused on the effects of the systemic discrimination and how those effects caused harms and led to removals of First Nations children. A number of findings were made in the *Compensation Entitlement Decision*. Some important findings are reproduced below to highlight the Tribunal's focus on removals:

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The Wen:de report goes on to say that:

(...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First

Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see Wen:de at, pp.13-14) (emphasis ours).

Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see Wen:de pp.13-14).

The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples (...)

Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting effect. - Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**

The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see Wen:de at, pp.90-91).

The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more

drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see Wen:de at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

In *Godbout v. Longueuil*, La Forest J. held that: ...the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**... choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered a **strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**

Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7. (see Wen:de at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46.

The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:

Moreover, it was held that the loss of a child constitutes the kind of psychological harm which may found a claim for breach of s.7. Lamer J., for the majority, held: I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent...As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

The Court went on to state that there are circumstances where loss of a child will not found a *prima facie* breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the government's failure to provide adequate funding and services (see Wen:de at, pp.96-97) (emphasis ours).

The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children. The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (Wen:de at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discusses the psychological damage, pain and suffering endured by First Nations children and their families:

WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).

Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself.... The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart. Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:

Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.

Nowhere has this pain been more difficult to experience than in the area of family life. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.

This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.

People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.

Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,

(see RCAP, *Gathering strength*, vol. 3, at, p. 25) (emphasis ours).

[171] More recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard. (see 2018 CHRT 4 at, para. 122).

Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para. 123).

Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system. (see 2018 CHRT 4 at, para. 124).

[...]

[184] The evidence is ample and sufficient to make a finding that each First Nations child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grandparent who had one or more children under her or his care who was unnecessarily removed from their home, family and community has suffered. Any parent or grandparent if the parents were not caring for the child who had one or more children removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grandparents, the grandparents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grandparents not

caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grandparents.

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the Decision. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged Decision. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the Decision and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFS Program, funding formulas, authorities and practices.

[297] The Tribunal cannot reproduce all its lengthy findings in the *Compensation Entitlement Decision*, 2019 CHRT 39, and subsequent compensation process rulings. The above excerpts are to emphasize the point that, given the evidence before it, the Tribunal compensated removals of First Nations children as opposed to the time they spent in care. While the Tribunal agrees the systemic and racial discrimination is focused on how the Federal FNCFS Program adversely impacted First Nations children and families on reserve and in the Yukon, the Tribunal did not focus on ISC funded placements. This motion is the first time that the Tribunal heard of this narrower interpretation.

[298] Further, the AFN's submissions in this motion show that they were considered and then removed for reasons that the Tribunal was not able to consider at the time it made its compensation orders. The AFN argues in its supplementary written submissions that the only children entitled to compensation under the Tribunal's orders but not entitled to compensation under the FSA are those children placed into kith placements, being placements with friends. The AFN contends that this was a principled exclusion on the basis that kinship placements were already excluded from the scope of compensation and, to the AFN's mind, there was not a significant difference for First Nations between a kith and kinship placement. Given that the AFN did not see a significant difference between kith and kinship placements, the AFN maintains that it was a principled compromise during the negotiations to exclude kith placements from the scope of compensation under the FSA. The AFN also contends that expert evidence subsequent to the Tribunal approving the Compensation Framework indicates that it is not practical to collect data to enable compensation for children in kith and kinship placements. Using other methods to identify these children would result in retraumatizing them.

[299] The Tribunal does not have sufficient evidence before it to accept the AFN's contention that restricting the scope of compensation to children placed in ISC-funded care would only exclude children placed in kith and kinship care and not other First Nations children removed from their homes, families and communities. The Caring Society correctly indicates that the terminology for different types of placements varies across Canada as different provincial legislation uses different terms.

[300] The Caring Society's interpretation is correct when it submits that the Compensation Framework itself also indicates a broad-based approach. Contrary to the class action Final Settlement Agreement, which privileges using ISC records to determine eligibility, the CHRT Compensation Framework contemplates ISC proactively reaching out to professionals, service providers and provincial/territorial governments to identify beneficiaries (sections 5.3-5.5) and specifically contemplates obtaining assistance from child and family service agencies across the country (section 5.6(c)) and from provincial and territorial governments (section 5.7(a)). The CHRT Compensation Framework further states that the work required for service providers to bring this information forward will be funded by Canada (sections 5.4 and 5.6(b)). The CHRT Compensation Framework stated that the result of the information

gathering efforts by ISC, FNCFS Agencies and provincial/territorial governments would be a “Compensation List”, being a list of individuals on which there was agreement regarding eligibility for compensation (section 8.3). Individuals not on the Compensation List would still be able to apply to have their claim considered (section 8.7).

[301] The Caring Society’s assertion is correct that the detailed process outlined in sections 5.3 to 5.8 to generate section 8.3’s CHRT Compensation List, as well as the residual ability to apply for compensation included in section 8.7, would not have been required if compensation was limited to ISC-funded placements. As the AFN has made clear in its submissions, ISC-funded placements can be identified by ISC data alone, and do not require access to the wide array of sources identified in the CHRT Compensation Framework. The Tribunal agrees this in and of itself is evidence of the Compensation Framework’s broad approach to implementing the Tribunal’s orders. This approach was agreed to by the Caring Society and the AFN, and by Canada subject to its objections in its judicial review.

[302] Further, the Tribunal has insufficient evidence to understand how many children would be excluded by limiting compensation to those First Nations children placed in ISC-funded care. While the Tribunal would be concerned even if it is a small number of children who would be excluded, the Tribunal did not have an opportunity to assess how many children were at risk of being excluded.

[303] The AFN and Canada support their request to use ISC-funded placements as a measure of eligibility because of the challenges identifying First Nations children in other types of placements. As noted consistently in its retention of jurisdiction, the Tribunal is open to addressing issues that arise in implementing its orders. However, the nature of this motion did not allow the Tribunal to test the evidence relating to the challenges asserted by the AFN. The timelines required for this motion to meet the AFN and Canada’s deadlines in the Federal Court were such that procedural fairness did not allow the other parties to test the AFN’s assertion that it would not be feasible to identify affected First Nations children outside of ISC-funded placements. There was not enough time for the other parties to conduct a detailed cross-examination of the AFN’s witnesses and for the other parties to call their own evidence, which may have included expert evidence. This is particularly true given that the more detailed information provided by the AFN was filed as a result of the Panel’s follow-up questions after the hearing.

[304] As such, the Tribunal is not in a position based on the current evidentiary record to make a determination of how significant the challenges are in compensating First Nations children who were in non-ISC funded placements.

[305] It is unfair to those victims/survivors whose rights are now advocated by the Caring Society to remove compensation from them without adjudication and findings of the difficulties in locating them. The evidence raised in response to the Panel Chair’s questions do not allow the Panel to make the appropriate findings at this time. The Panel welcomes a further consideration by way of a motion of this discrete issue and any other interpretation issues, such as the issue of biological parents, that appear to be contentious.

[306] Of note, at the time of the compensation hearing that led to the *Compensation Decision*, 2019 CHRT 39, the AFN, joined by other First Nations parties, urged the Tribunal demonstrate courage and to order compensation even if it could be difficult to locate beneficiaries. The First Nations parties argued that the difficulty of identifying victims should not prevent the Tribunal from making orders. This is what the Tribunal did:

[188] The Panel need not hear from every First Nations child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not (see section 50 (3) (c) of the

CHRA). We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47, 62, 66, 121, and 133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The novelty and uncharted territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[307] As it will be explained below, the Tribunal did not have any indication the parties would adopt this interpretation. This is confirmed by the finalization of the Draft Compensation Framework which will be further addressed below.

[308] Moreover, the question of other factors that play a role in removals was addressed by this Panel in the *Compensation Entitlement Decision*, 2019 CHRT 39:

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve the interplay of numerous underlying factors (see for example, 2016 CHRT 2 [*Merit*] *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[309] The Tribunal focused on the adverse impacts of the Federal Program causing harm to First Nations children and families and not whether the First Nations child was placed in ISC funded care. What happens if as a result of the Federal Program, a First Nations child is removed and placed in care but not funded by ISC? The Tribunal was not confronted with this question until now and, therefore, could not have made any order with this rationale in mind.

[310] The Tribunal confirms the proper characterization of the Tribunal's orders is held by the Caring Society as summarized below. Notably, the Caring Society's accurate understanding of the Tribunal's rulings and the absence of a disagreement on the interpretation until now even when the parties were working collaboratively on the compensation process suggests the issue became one when choices were made on who should be removed under the FSA to ensure sufficient funds were there for the other categories of victims/survivors and regardless of binding orders from this Tribunal.

[311] In January 2022, the Caring Society wrote to the AFN and advised the AFN it would not agree to a reduction of compensation for children victims/survivors who were entitled to the maximum compensation under the Tribunal's orders. The Caring Society also wrote that any adult victims (i.e., parents and caregiving grandparents) eligible to receive \$40,000 in compensation per 2019 CHRT 39 and 2021 CHRT 7 shall not have their entitlement unduly infringed save and except in circumstances where class action counsel and Canada can demonstrate that lower amounts are just compensation for the infringement of dignity and wilful and reckless discrimination found by the Tribunal, (see letter of January 21, 2022, exhibit A, to the affidavit of Jasmine Kaur, dated August 5, 2022).

[312] The AFN and Canada did not seek prior clarification from the Tribunal on this point even though the parties came back to the Tribunal to request an amendment to the end date for compensation and other long-term reform orders.

[313] However, the Tribunal has indicated in its letter-decision that it is open to clarify this order should the parties wish to obtain clarification and if changes are needed. This should be dealt with after a motion with proper notice and new evidence is provided in order to ensure fairness to the victims/survivors.

[314] The Panel agrees with the Caring Society that there appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the Tribunal ordered compensation for Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivizing children being unnecessarily moved from their home, family and community during child welfare involvement. The case did not address whether a child was placed in care funded by ISC after their removal.

The Tribunal never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC. Canada's funding of actual maintenance costs contributed to the systemic racial discrimination by creating an incentive to place children in care but did not limit discrimination to those children placed in care funded by ISC. The Panel's experience throughout has been to focus on the harm experienced by the affected children based on Canada's discriminatory and underfunded provision of child and family services.

[315] This was addressed in 2019 CHRT 39:

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 [*Merit*] *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: "Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care." (see 2016 CHRT 2 *Decision* at, para. 197).

[316] In 2019 CHRT 39 at para. 168, the Tribunal found "“experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging in and of itself [...] The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.”"

[317] The Tribunal recognized that removing a child from their family is always a harmful event and particularly problematic when it could have been prevented with appropriate services. The Tribunal found that the discriminatory underfunding of prevention services increased the likelihood of children being unnecessarily removed from their homes (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177). This initial removal was discriminatory regardless of whether the child's subsequent placement was funded by ISC.

[318] The Tribunal agrees with the Caring Society, the insidious nature of the discrimination spread throughout the continuum of child and family services: from the moment a referral was received to the long-term placement of a child, and all the services (or lack of services) in between. One of the critical findings of the Tribunal was its determination that the failure to equitably fund prevention services and least disruptive measures led to higher rates of children having to unnecessarily leave their homes, (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177).

[319] The Tribunal agrees with the Caring Society that it never squarely defined the meaning of "“in care”" in its reasons because such a definition was never needed, as the systemic discrimination acutely arose from the discriminatory underfunding and lack of preventative services and least disruptive

measures that led to the removal. This discrimination was further exacerbated by Canada's funding models that covered the actual costs of maintenance, further incentivizing the removal of First Nations children to be placed in foster care and other state funded placements. But the systemic discrimination was never confined in the way that is now being suggested in this motion – First Nations children who were removed were harmed and experienced an infringement of their human rights and dignity when they were deprived to receive preventative services and least disruptive measures due to Canada's discriminatory conduct.

[320] The Tribunal will not revisit all its findings as this is not a review of its previous decisions nor should a collateral attack occur as part of this motion. The appropriate way is to bring a motion to allow the Tribunal to consider new information and evidence and determine if an amendment is warranted in light of the legal analysis provided above and continued below.

[321] The Tribunal will now turn to the parties' work on the Compensation Framework and how the Tribunal interpreted such work.

[322] As explained above, the Tribunal in order to issue the consent order in 2021 CHRT 7 considered the Compensation Framework and accompanying schedules. This included schedule B: Taxonomy of compensation categories for First Nations Children, Youth and Families: Canadian Human Rights Tribunal Ruling 2019 CHRT 39 (the Taxonomy). The Compensation Framework references the Taxonomy and explains its role in the compensation process and in locating the potential beneficiaries:

a) The Taxonomy was designed for child and family services providers to assist in the process of identifying and locating potential beneficiaries; however, a feasibility investigation is underway to determine if, and how, it can assist other service providers to identify beneficiaries.

b) Canada will fund any adaptations required to apply this Taxonomy to meet the needs of specific service provider communities, as determined by the independent experts who drafted the taxonomy in Schedule "B".

c) Identifying children who were necessarily and unnecessarily removed will likely require assistance from child and family service agencies across the country. The Taxonomy is intended to guide their review of individual records in their possession so as to expedite the process of identifying and locating potential beneficiaries and ultimately validation of claims for compensation.

5.6 The report entitled "Canadian Human Rights Tribunal (CHRT) Ruling 2019 CHRT 39: Taxonomy of compensation categories for First Nations children, youth and families" dated November 2019 and authored by Marina Sistovaris, PhD, Professor Barbara Fallon, PhD, Marie Saint Girons, MSW and Meghan Sangster, Med, MSW of the Policy Bench: Fraser Mustard Institute for Human Development will assist in the identification of potential beneficiaries (the "Taxonomy"). The Taxonomy is attached as Schedule "B".

[323] The Taxonomy was also found to be in line with the Tribunal's reasons and orders and therefore was accepted by the Tribunal before it rendered its last ruling on compensation in 2021 CHRT 7.

[324] The Taxonomy is informative in many aspects and supports the Tribunal's reasons and orders. The Taxonomy's purpose is as follows:

The purpose of this briefing note is to: (1) develop a taxonomy of compensation categories; and (2) frame questions that will help guide individuals appointed by the Canadian Human Rights Tribunal (CHRT) to carry out the process of identifying individuals eligible to receive compensation according to the conditions set out by 2019 CHRT 39. The development of compensation categories and framing of questions involved:

- a) a content review of the 2019 CHRT 39 ruling;
- b) mapping out the compensation categories, identifying common themes and defining key terms and concepts;
- c) reviewing provincial and territorial child welfare legislation, identifying and defining key terms and concepts;
- d) analyzing and synthesizing information concerning the 2019 CHRT 39 ruling and child welfare legislation in Canada; and
- e) framing questions corresponding to the compensation categories.

[325] The Taxonomy clearly follows the Tribunal’s reasons and orders and takes into account the subsequent compensation rulings that were issued as clarification:

2.0 Background

On September 6, 2019, the CHRT issued the eighth non-compliance order—2019 CHRT 39—concerning compensation for First Nations children, youth and families negatively impacted by Canada’s child welfare system. The CHRT found that Canada’s “willful and reckless conduct” and discriminatory child welfare practices have contributed to the ongoing pain and suffering of First Nations children, families and communities. According to the Tribunal’s ruling, the Government of Canada is required to pay First Nations children, youth and families the maximum amount of compensation permitted under the 1985 *Canadian Human Rights Act (CHRA)* who were: unnecessarily placed in care since January 1, 2006; necessarily placed in care but outside of their extended families since January 1, 2006 or denied or delayed receiving services between December 12, 2007 and November 2, 2017 as a result of the Government of Canada’s discriminatory application of Jordan’s Principle.

(emphasis added).

[326] The Taxonomy document is also instructive on the categories of beneficiaries covered under the Tribunal’s orders. Again, the Tribunal upon review of the taxonomy document did not identify discrepancies, contradictions or concerns:

4.0 Compensation Categories

Three central compensation categories are extrapolated from the 2019 CHRT 39 ruling:

Category 1: Compensation for First Nations Children and their Parents or Grandparents in Cases of Unnecessary Removal of a Child in the Child Welfare System;

Category 2: Compensation for First Nations Children in Cases of Necessary Removal of a Child in the Child Welfare System

Category 3: First Nations Children and their Parents or Grandparents in Cases of Unnecessary Removal of a Child to Obtain Essential Services and/or Experienced Gaps, Delays and Denials of Services that Would Have Been Available under Jordan’s Principle.

These have been further divided into subcategories, for which the eligibility requirements are explained below. Each category is detailed in the taxonomy document.

[327] Further, the taxonomy document also describes out-of-home care placements and includes kinship care and a variety of placements:

5.9 Out-of-Home Care/Placement

Out-of-Home Care/Placement: “[E]ncompasses the placements and services provided to children and families when children are removed from their home due to abuse and/or neglect” (Child Welfare Information Gateway, n.d.: Overview Out-of-Home Care). Placement outcomes include:

- a) “Kinship Out of Care: An informal placement has been arranged within the family support network; the child welfare authority does not have temporary custody.
- b) Customary Care: [A] model of Indigenous child welfare service that is culturally relevant and incorporates the unique traditions and customs of each First Nation.
- c) Kinship in Care: A formal placement has been arranged within the family support network; the child welfare authority has temporary or full custody and is paying for the placement.
- d) Foster Care (Non-Kinship): Include any family-based care, including foster homes, specialized treatment foster homes, and assessment homes.
- e) Group Home: Out-of-home placement required in a structured group living setting.
- f) Residential/Secure Treatment: Placement required in a therapeutic residential treatment centre to address the needs of the child.” (Fallon et al., 2015, p. 105).

Out-of-home placement can sometimes lead to reunification, adoption, or legal guardianship:

Reunification: “[T]he return of children to their family following placement in out-of-home care” (Canadian Child Welfare Research Portal, n.d., Reunification).

Adoption: “The social, emotional, and legal process through which children who will not be raised by their birth parents become full and permanent legal members of another family while maintaining genetic and psychological connections to their birth family” (Child Welfare Information Gateway, n.d., Glossary).

Legal guardianship: “Guardianship is most frequently used when relative caregivers wish to provide a permanent home for the child and maintain the child's relationships with extended family members without a termination of parental rights. Caregivers can assume legal guardianship of a child in out-of-home care without termination of parental rights, as is required for an adoption.” (Child Welfare Information Gateway, n.d., Guardianship).

[328] The Tribunal agrees with the parties who submit the Compensation Framework is more akin to a reference document and, therefore, the Tribunal's orders prevail. However, the Tribunal made its orders in 2021 CHRT 7 and incorporated the Compensation Framework in its orders after finding it was in line with its findings and orders. The Compensation Framework is therefore highly relevant to determine if

the non-ISC funded placements were included in the Tribunal's orders. While the Compensation Framework can be further amended and is less static than the formal entitlement and quantum orders made by this Tribunal, it is a clear indication of what the Tribunal considered at the time it made its orders. The fact that the AFN and Canada now limit its meaning and value to support carving out certain children does not change what the Tribunal considered at the time it made its compensation orders. Moreover, if the Compensation Framework referring to the taxonomy document ought to be set aside for the purposes of analyzing the compensation and related beneficiaries, there was no need for the parties to wait for its finalization after the Tribunal clarified definitions and categories. This is not the logic that was followed in this case regardless of what the AFN and Canada are now stating. The Tribunal was asked to clarify a number of orders and definitions for the parties to be able to finalize the Compensation Framework. The parties requested those clarifications and advised the Tribunal this would assist in finalizing the Compensation Framework. The Tribunal ordered the parties to develop a compensation process. The Compensation Framework is part of that process. Denying it now to justify the FSA is of no help. The Compensation Framework needed to be finalized before developing a guide for compensation distribution which is one of the final stages of the compensation process. This guide was not developed given that Canada judicially reviewed the Tribunal's compensation rulings. Back-peddling to erase this to support disentanglements is of no use and is completely rejected here. A better view of this, is if new evidence which is properly tested demonstrates impossibilities or serious impracticalities for this category of beneficiaries, then, further order requests in keeping with the best interests of those children, could potentially be made given this evidence was not available at the time the Tribunal made its orders.

[329] Further, the Tribunal considered the Framework and how it described removals of children in broad and non-exhaustive terms. This was found in line with the Tribunal's findings and orders:

4.2.1. "Necessary/Unnecessary Removal" includes:

- a) children removed from their families and placed in alternative care pursuant to provincial/territorial child and family services legislation, including, but not limited to, kinship and various custody agreements entered into between authorized child and family services officials and the parent(s) or caregiving grandparent(s);
- b) children removed due to substantiated maltreatment and substantiated risks for maltreatment; and
- c) children removed prior to January 1, 2006, but who were in care as of that date.

[330] The Framework explains how the description above applies to the compensation process and identification of potential beneficiaries of the Tribunal's compensation:

4.2. For greater certainty, the following definitions apply for the purpose of identifying beneficiaries:

[331] To be clear, the Panel agrees with the AFN that compensation is linked to the systemic discrimination found by this Tribunal in the provision of services through the Federal FNCFS Program. However, the nuance newly made by the AFN and Canada does not reflect the spirit of the Tribunal's rulings. It transforms the focus from what led to the removals to once removed who pays for this child's care.

B. Estates of caregiving parents and grandparents

[332] Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.

[333] This is a clear derogation from the Tribunal's orders. As such, the key consideration is whether the Tribunal is prepared to accept this derogation, either by amending its orders or granting the AFN and Canada's request to find the FSA satisfies the Tribunal's orders notwithstanding this clear derogation.

[334] The parties to the FSA indicate that they are seeking to achieve proportional compensation commensurate to harm suffered within a historically large, but fixed settlement amount. To achieve this, one area where the parties have taken a more limited approach to compensation than what was ordered by the Tribunal is with respect to the estates of deceased class members: only the deceased members of the Removed Child, Jordan's Principle and Trout Child classes as described in the FSA are entitled to compensation. The AFN and Canada submit in the joint motion that the fundamental principles guiding the parties was that, where compromise is necessary, compensation for children must be given priority. The parties are mindful of the Panel's observation that "the discriminatory practices at stake involved the forced separation of families and communities, and could therefore have intergenerational impacts." Although there are limits on which estates of class members will be eligible for compensation, safeguarding compensation for deceased members of the child classes allows compensation to still flow through to the heirs of those children who were the youngest victims of the discriminatory practices.

[335] The FSA establishes a mechanism for those who do not receive direct compensation to benefit from the terms of the FSA by way of the establishment of a Cy-près fund of \$50 million. The First Nations-led Cy-près Fund will be endowed with \$50 million.

[336] The FSA contemplates that some members of the various family classes may not receive direct compensation but will benefit from the Cy-près Fund.

[337] The Tribunal, encouraged by the AFN, already rejected in its *Compensation Decision* that compensation be paid into a support fund in lieu of direct financial compensation and found this should be paid in addition to financial compensation.

[338] The FSA disentitles the estates of deceased caregiving parents and grandparents to direct financial compensation.

[339] Canada opposed paying compensation to estates. The Tribunal rejected this position as part of its *Compensation Decision* as it would have allowed Canada to benefit from delaying compensation to victims of its discrimination which is not consistent with the objectives of the *CHRA*.

[340] The Tribunal understands why the AFN made this choice and that this choice is a possible option when negotiating a settlement. However, entitlement orders were already made by this Tribunal after evidence-based findings and orders. Agreeing with the AFN's choice would collaterally attack the Tribunal's findings and orders that granted compensation to the estates of deceased parents or grandparents. When the Tribunal entitled those estates to compensation, it did so in light of the evidence and found the orders were warranted under the *CHRA*, quasi-constitutional legislation that confers discretion to Tribunal members to order compensation if justified. This is made even stronger when those orders were found reasonable by the Federal Court. The fact that a cap has now been placed for compensation by Canada and the need to include class action victims/survivors who were outside these proceedings to allow Canada to settle all claims related to its widespread systemic discrimination does not trump the Tribunal's orders. Canada cannot contract out from its obligations under the *CHRA* and Tribunal orders by simply stating this is the AFN's choice. Allowing this would transform the human rights regime and usurp the Tribunal and reviewing Court's roles. Moreover, this is the AFN's

choice because of the added class actions and the fixed funds. Notably, the AFN requested compensation for estates of deceased parents and grandparents. The Tribunal considered their submissions alongside the other parties' submissions and considered the evidence and found this was warranted.

[341] The AFN and Canada have not convinced the Tribunal that its previous orders can be amended to reduce compensation or disentitle victims. Since orders are not simple recommendations, they cannot be disregarded. This could undermine the human rights process and the previous orders made in this case including the orders made in March 2022 that support an end date for compensation. There is a fundamental difference between settlements which may require compromise for financial or other reasons and the Tribunal proceedings. At the Tribunal, when a respondent advances financial hardship, it is allowed to present such arguments and supporting evidence as part of an undue hardship defence under section 15 (2) of the *CHRA*. The Tribunal considers the evidence and arguments of all parties and determines if the complaint is substantiated or if the respondent's defences stand and the complaint is dismissed. This is done through tested and weighed evidence and thorough consideration of the law, the arguments and all materials. Such a defence is not easy to make since it has to be demonstrated with the evidence. This goes to say that the Tribunal makes decisions based on facts, law and evidence. Of note, the Tribunal already found that Canada did not advance such a defence in this case.

[342] This is an important reason why the Tribunal is not convinced by the AFN and Canada's arguments on this point. Canada cannot indirectly do what it could not do before the Tribunal.

[343] Furthermore, settlements often occur prior to orders being made and if orders have already been made, settlements must not find ways to evade the orders.

[344] While estates are not people, the heirs of those estates are and they were signaled by the Tribunal's decision subsequently upheld by the Federal Court that they were entitled to compensation. It is unfair to now remove this from them because of financial choices resulting from merging proceedings and imposing a financial cap. These arguments are insufficient to justify an amendment to the Tribunal's orders on this point. As it will be revisited below, the Tribunal cannot amend its orders to reduce compensation or to disentitle victims/survivors. The Tribunal could accept variations of its orders if it does not remove gains for victims/survivors or a different compensation process and if supported by the evidence, which is a key consideration for this Tribunal for any order.

[345] Finally, while the Tribunal recognizes the importance of respecting the inherent rights of self-governing First Nations who decide for themselves, which has been honored for the reform aspect of these proceedings and also reflected as part of the Tribunal in 2018 CHRT 4 orders, in terms of compensation, the Tribunal would have more latitude if it was not asked to reduce or revoke individual rights of victims/survivors.

[346] There is a real difficulty to have a complainant requesting orders, leading evidence and then changing its mind in part because a respondent controls the process in limiting the amounts of funds for multiple proceedings against it without regard for previous orders.

[347] When the AFN requested the Tribunal's compensation orders it did so on behalf of self-governing First Nations supported by evidence and resolutions.

[348] The Tribunal found it had resolutions and were mandated to request the orders. The Tribunal notes that the AFN also brought these complaints and actively advocated for the individual compensation the Tribunal ordered. It did this on the basis of resolutions by the Chiefs-in-Assembly. Now the AFN changed its mind and now asks this Tribunal to honor a First Nations-led process that rescinds some First Nations Peoples rights because of compromise.

[349] If honoring the inherent right of self-government of First Nations under the *CHRA* means that we must honour the First Nations who change their minds after orders are made with disregard to the evidence that led to those orders, the Tribunal believes it should be clearly expressed in legislative amendments because it is counterintuitive to the current human rights regime and the legitimacy of the

Tribunal's mandate. Otherwise, Tribunal orders must be seen as binding and victims/survivors regardless of their national origin must be able to rely on these orders once they are made. Again, changing one's mind in this case after orders are made is less an issue if rights are not infringed upon and if the evidence supports it and the retention of jurisdiction allows it.

[350] For the above reasons, the Tribunal cannot find the FSA fully satisfies the Tribunal's orders for this category of victims. Moreover, the Tribunal cannot amend its orders to reflect the FSA as it would be rescinding its findings and orders making them meaningless, non-authoritative and fleeting. Further, the arguments in support of the amendments have not convinced the Tribunal that these amendments are justified or that they can be done in this human rights framework.

C. Certain caregiving parents and grandparents will receive less compensation

[351] The AFN indicates there are two points where the removed child family class may deviate from the Tribunal's Compensation Framework. First, caregiving parents and grandparents will receive additional compensation up to \$60,000 in the event they had multiple children removed rather than multiples of \$40,000.

[352] The second change is that if there is an unexpected number of claimants, compensation may be reduced to ensure that all caregiving parent and grandparent victims receive compensation.

[353] The maximum compensation of \$60,000 similarly ensures there are enough funds to compensate all eligible caregiving parents and grandparents.

[354] Further, family class members who are not eligible for direct compensation can still benefit from the Cy-près fund.

[355] Again, the AFN clearly admits a derogation from the Tribunal's orders and the main reason is to ensure there are sufficient funds available for everyone in light of the fixed amount of funds for compensation in the FSA.

[356] The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims/survivors who were retraumatized and suffered greatly. Losing more than one child heightens the presence of a willful and reckless behavior; it does not reduce it. The Tribunal emphasized that, given this was the worst-case scenario, maximum compensation should be paid for the removal of each child. While the harm suffered warrants more than \$40,000 per child removed, the CHRA places a cap on compensation. The FSA chips away at the heart of the willful and reckless discriminatory practice found and the orders that signal to Canada that its behavior was devoid of caution and caused compounded harm to parents and grandparents in removing more than one child.

[357] Those findings were made after carefully considering the evidence and submissions and nothing in this joint motion changes this. While the Tribunal understands the need for compromise as part of the settlement negotiations, the result is that the Tribunal orders that recognized this category of victims/survivors will be significantly reduced not based on evidence but rather to ensure everyone can receive some compensation within the fixed pot of compensation funds.

[358] The Tribunal appreciates that the AFN wanted to prioritize children in the FSA. However, this choice between parent or grandparent and child does not form part of the Tribunal's compensation orders. Under the Tribunal compensation process no one needs to yield compensation to the other. Moreover, the FSA needed to adopt such an approach given the broader number of victims/survivors and the fixed pot of compensation funds. This was not a consideration before the Tribunal when it made its compensation orders. Again, Canada did not make an undue hardship cost defence to limit compensation.

[359] This is the equivalent of asking the Tribunal to change its findings concerning the harms suffered by the parents and grandparents who saw multiple children removed. Similar to the reasons stated above, this is akin to a collateral attack to the Tribunal's compensation decisions. Furthermore, as it will be explained below, amendments cannot be made to reduce the entitlements that were made by this Tribunal based on evidence and the law. Even if we were wrong on this point, no convincing evidence was presented to justify such an amendment.

[360] Again, for the above reasons, the Tribunal cannot find the FSA fully satisfies the Tribunal's orders for this category of victims/survivors.

D. Some Jordan's Principle victims/survivors may receive less compensation

[361] The AFN contends that the process for compensating Jordan's Principle victims generally follows the principles identified by the Tribunal. The FSA aims to ensure that children who suffered discrimination and were objectively impacted are compensated through a process that is objective and efficient and the definition of essential services is reasonable. The process focuses on establishing a confirmed need for an essential service that was the subject of a delay, denial or service gap. Those claimants who are most impacted will receive at least \$40,000 while those who are less seriously impacted will receive up to \$40,000. The FSA dedicates a budget of \$3 billion to the Jordan's Principle child class. The larger budget estimated for the Jordan's Principle class despite the smaller projected size of that class accounts for the intention to ensure—to the extent possible in a class of unknown size—payment of \$40,000 to those Jordan's Principle survivors who would have benefitted from a \$40,000 payment under the Tribunal's Compensation Order.

[362] The AFN also submits the FSA and the claims process described therein which is to be developed by the parties generally follow the principles established by the Tribunal and set criteria that are amenable to objective implementation. The goal in the FSA is to ensure that those children who suffered discrimination and were objectively impacted are compensated consistent with the Tribunal's reasoning that the compensation process should be objective and efficient, and the definition of essential services must be reasonable. The process primarily focuses on a confirmed need for an essential service that was the subject of a delay, denial or service gap within the bounds of reasonableness.

[363] Notably, the AFN submits this accounts for the significant uncertainty in the class size and is expected to result in children who were eligible for Jordan's Principle compensation under the Tribunal's orders receiving at least \$40,000.

[364] The framework to determine what is an essential service will be developed with the assistance of experts.

[365] The starting point is the list of services currently eligible for Jordan's Principle funding. The process aims to treat children as significantly impacted if there is evidence to support such a conclusion. The process is designed to be flexible so that it can consider services that are essential for a particular child but are not generally essential services. The process does not require interviews or examinations of claimants. There is a recognition that the type of documentation required to support a claim might vary.

[366] The AFN explains that only caregiving parents and grandparents of Jordan's Principle and Trout class children who suffered a significant impact will receive compensation. This narrowed eligibility occurred because the number of caregiving parents and grandparents was unknown. Caregivers who do not receive a direct benefit would nonetheless benefit from the Cy-près fund.

[367] There is no dispute on the fact that this also is a derogation from the Tribunal's orders. The AFN clearly submits this approach departs from the Tribunal's orders.

[368] There are outstanding items in the FSA to be determined on which the plaintiffs are actively in conversations with a First Nations-led Circle of Experts. These include finalizing the Jordan's Principle assessment methodology. Members of the Jordan's Principle Class and the Trout Child Class will be determined based on their "Confirmed Need" for an "Essential Service."

[369] Under the Tribunal's approach, all First Nations children eligible for compensation related to Jordan's Principle are entitled to \$40,000 in compensation. However, under the FSA, only children who experienced a "Significant Impact" will be guaranteed to receive \$40,000, although they may receive more than this. The concept of a "Significant Impact" is set out in the Framework of Essential Services.

[370] The definition of a "Significant Impact" will evidently determine whether First Nations children will be guaranteed at least \$40,000 under the FSA or whether they may be in a category that could receive less than \$40,000. "Significant Impact" is defined in the Framework of Essential Services, which was developed after the FSA and made public on August 19, 2022. The Framework of Essential Services defines a service as "essential" if the claimant's condition or circumstances required it and the delay in receiving it, or not receiving it at all, caused material impact on the child.

[371] Canada disagrees with the Caring Society that this motion is premature because there are steps yet to be taken leading to the implementation of the settlement, primarily dealing with the details of the Jordan's Principle assessment methodology and the distribution protocol, which is scheduled to be reviewed by the Federal Court on December 20, 2022.

[372] Canada submits that it is clear from the explanation set out in the September 6, affidavit of Janice Ciavaglia and attached report that the parties are proceeding on a phased basis that includes ongoing consultation with experts, rights holders and claimants in order to ensure that when finalized and approved by the Court, there will be broad acceptance by First Nations and claimants of the process. Canada supports this approach and submits that the motion is not premature as the interests of potential claimants will be adequately considered by the Federal Court in its review of the methodology and protocol.

[373] The Tribunal agrees with the Caring Society that it is impossible at the current point in time to know whether the implementation of Jordan's Principle under the FSA will result in the First Nations children identified under the Tribunal's orders receiving \$40,000 under the FSA. This remains a source of uncertainty and there is little evidence of whether Jordan's Principle eligibility under the FSA will be interpreted in such a manner that it provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders.

[374] While the Tribunal understands the rationale for the FSA's phased approach on this aspect, the Tribunal is at a very different stage in the proceedings and has a different mandate and uses a different approach under the *CHRA*. The Tribunal makes findings based on the evidence before it. The Tribunal ensured it remained seized of the compensation aspects that are not finalized which required additional evidence. For the compensation process as a whole under the Compensation Framework, the Tribunal remains seized of all its compensation decisions, including to ensure the implementation of the Compensation Framework.

[375] The FSA sets out future work that is required before there can be certainty regarding which victims/survivors under the Tribunal compensation orders will be eligible under the FSA. While the way the parties to the FSA are proceeding may be appropriate under the Federal Court process, the Tribunal is asked to accept the end of its jurisdiction on the compensation issue without having the full picture or evidence on this point as opposed to the Federal Court who will supervise the implementation of the FSA.

[376] Further, the Tribunal's role includes making findings on the evidence presented and, on this point, it is difficult to make proper findings to fully assess this important category which indicates that the request may be premature for this Tribunal for this category.

[377] In order to be eligible for a guaranteed \$40,000 Jordan's Principle compensation under the FSA, First Nations children must have both experienced a denial or delay in receiving an essential service and have experienced a "significant impact" because of the delay or denial. Article 6.06(3) of the FSA indicates that a "significant impact" will be defined in the Framework of Essential Services:

3) The Framework of Essential Services will establish a method to assess two categories of Essential Services based on advice from experts relating to objective criteria:

(a) Essential Services relating to Children whose circumstances, based on an Essential Service that they are confirmed to have needed, are expected to have included significant impact ("Significant Impact Essential Service"); and

(b) Essential Services that are not expected to have necessarily related to significant impact ("Other Essential Service").

[378] Nonetheless, the Framework on Essential Services does not provide further guidance on a "significant impact" and what is required to engage the higher level of compensation. Neither is "Significant Impact" a defined term in the FSA. Without this information, individual claimants cannot determine whether they could be entitled to more or less compensation under the FSA than they would be eligible to obtain under the Tribunal's orders.

[379] The uncertainties in benefits from the outstanding definition of an "essential service" reflects the early stages of a negotiated settlement. That is appropriate for an attempt to settle a class action in the early stages but it is not appropriate for the current Tribunal process where entitlements to compensation have already been determined based on the evidence. Moreover, this does not harmonize well with a Tribunal that has already made findings on evidence and corresponding orders. Further, as mentioned above, this may depart from the Tribunal's orders for this category and therefore cannot be considered to fully satisfy the Tribunal's orders. As for the request for amendment of the Tribunal's orders to reflect this departure, the request is premature since there are uncertainties at this time, the amendments are understandably not well defined by the AFN and Canada given the uncertainties and, finally, there is a real potential for reduction in compensation for some victims and disentanglements for others which is not permissible.

E. Conclusion on Derogations

[380] While it is obvious that one of the reasons the AFN and Canada are proposing compromising the compensation ordered to victims/survivors in this case is the fixed amount of funds Canada provided to resolve this issue, the Tribunal is not suggesting that Canada should provide unlimited funding. The compensation orders require finite compensation to a finite class of victims/survivors. While the exact number of victims/survivors eligible for compensation is not known, it is not an unlimited number.

[381] The Tribunal's intent was never to allow parties to bargain away the compensation. Given the serious discrimination in this case, the Tribunal intended to provide the maximum compensation to recognized victims/survivors under the Tribunal's orders and allow them to avail themselves of other recourses should they wish to do so, which would potentially allow them to obtain more than what is possible under the *CHRA* limit of \$40,000 in compensation. The FSA, while advantageous for the majority of victims/survivors, it reduces this already low amount for other victims. The core message of the Tribunal's *Compensation Decision* was received by the AFN and Canada for most children but not for the caregiving parent and grandparent victims, including their estates. Nevertheless, the Tribunal found they are entitled to the maximum compensation permissible under the *CHRA*.

[382] Finally, once the evidence before the Tribunal establishes pain and suffering, remedies must follow. Compromises and caps on fixed funds in negotiations do not change this proposition.

[383] This Tribunal previously found ““when evidence establishes pain and suffering, an attempt to compensate for it must be made”” (see *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, at para. 115, emphasis added). In 2015 CHRT 14 at para. 124, the Tribunal relying on this principle found that

Dr. Blackstock experienced feelings of shame and humiliation resulting from this public professional rejection, in front of the Chiefs of Ontario whom she was seeking to advise, are understandable and warrants some form of compensation. ... \$10,000 constitutes a reasonable award for the prejudice Dr. Blackstock experienced.

[384] Overall, the Tribunal awarded \$20,000 in compensation to Dr. Blackstock for being retaliated against by Canada in this very case. This must be kept in perspective when assessing compensation when parents or grandparents, living or deceased, experienced the painful experience of having children removed from their homes when they could have remained with appropriate prevention services in place and the application of appropriate measures. This is what the Tribunal has done in its compensation decisions.

VI. Opting-out provision

[385] Article 11 of the FSA does not specify the opting out deadline, however, Canada in its submissions indicated the opt out process approved by the Federal Court gives claimants until February 19, 2023, to opt out. Claimants will have the ability to become aware of the full details of the methodology approved by the Court before making the decision as to whether to opt out.

[386] Canada further submits that since acceptance by the Tribunal of the settlement as satisfying its order is a pre-condition to implementation of the settlement, claimants will also be aware of the decision made by the Tribunal before they must determine whether to opt out of the settlement.

[387] The Tribunal finds this point raised by Canada reinforces the importance of victims/survivors having adequate time to consider the FSA and the Tribunal’s decision on this motion and previous compensation decisions with the benefit of an appropriate opt-out period.

[388] The Tribunal agrees with the Caring Society that under the FSA, victims/survivors will need to opt-out of the class action within a short time frame. Further, the short time to make an opt out decision, particularly for child victims, is made more challenging because the FSA has incomplete definitions of terms and criteria that will directly affect compensation entitlements. This situation places some victims/survivors in an unfair position wherein they are being forced to make a decision to opt out without knowing what they can receive under the FSA versus their entitlement to human rights compensation pursuant to the Tribunal’s orders. The unfairness deepens as the FSA seems to force victims/survivors to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims/survivors who are receiving less than their CHRT entitlement of \$40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims/survivors and may revictimize them and is therefore inconsistent with a human rights approach. This is concerning.

[389] Moreover, the evidence in these proceedings has demonstrated many times that some First Nations often lack capacity by no fault of their own to respond rapidly to deadlines. For example, in 2020 CHRT 24, the Chiefs of Ontario objected to a firm, 13-month, deadline imposed by Canada to submit claims for retroactive reimbursement of Band Representative Services and a firm deadline for current-year claims for Band Representative Services. COO argued this period was too short. This Tribunal agreed with the COO.

[390] This is even more of an issue for individual victims/survivors given the incomplete information provided to the public by the AFN and Canada on the Tribunal’s compensation orders.

VII. Informing the public about the FSA

[391] As part of its answers to the Caring Society's cross-examination questions, the AFN provided a link to its website and compensation information page on at least two occasions: August 23, 2022 and August 29, 2022.

[392] On August 23, 2022, the AFN provided Ms. Janice Ciavaglia's answers to the First Nations Child and Family Caring Society of Canada's cross-examination questions in relation to her affidavit affirmed on July 22, 2022. The AFN organized the questions and answers in a clear chart and in item number 36, the AFN wrote as follows:

Question 36: What will AFN's messaging be to those removed children who are eligible under the Tribunal's Compensation Entitlement Order and Compensation Framework Order but are not eligible for direct compensation under the FSA?

Answer: I object to this question on the basis of relevance. However, in the interest of moving this motion along, I will answer it.

The AFN has taken active steps to keep its constituents, including potential class members, aware of the class action proceeding to date, including through traditional media, the AFN's social media, and through the AFN-led website www.fnchildcompensation.ca.

[393] On August 29, 2022, the AFN provided a response to the Caring Society's follow-up questions to Ms. Ciavaglia. The AFN's response is reproduced below:

Question 1: In response to your answers to Questions #50 and #51, can you confirm whether the FSA's eligibility for Jordan's Principle includes "products and supports" as set out by the Tribunal in 2020 CHRT 15 and the Compensation Framework Order or whether eligibility will be restricted to "a service" as set out in the FSA definition of "Essential Service"?

Answer: "Essential Service" includes the provision of a product or service, and is not restrictive. The examples listed in the appendix to the parties' agreed upon Framework of Essential Services, for example # 2 and 3, illustrate the breadth of the term (<http://www.fnchildcompensation.ca/wp-content/uploads/2022/08/Framework-of-Essential-Services-August-19-2022.pdf>).

[394] The above made the AFN compensation webpage and information part of the evidence before the Tribunal. The Panel consulted this webpage as part of its deliberations for the Federation of Sovereign Indigenous Nations' interested party status request motion. The Tribunal referred to the link and contents in 2022 CHRT 26.

[395] The Panel printed the information on the compensation webpage at the time it made its letter-decision in case the contents would be modified and updated later. For ease of reference, the relevant information is reproduced below.

[396] The Panel understands that these public communications solely advise the public how the FSA improves the Tribunal's orders and not where deviations or, more importantly, disentitlements are made in the FSA. The Panel has underlined important sections of the AFN's public message below.

Background

Since 1998, the AFN has engaged with Canada to address significant deficiencies and inequities inherent in the funding from the Government of Canada for the FNCFS Program, and the adverse impacts on the First Nations children and families involved with the FNCFS

Program. The AFN has also been advocating for the full and proper application of Jordan's Principle to ensure that all First Nations children have access to the supports and services they need, no matter where they live.

The AFN and First Nations Child and Family Caring Society of Canada (Caring Society) filed a human rights complaint with the CHRT in 2007. The complaint was substantiated by the CHRT in 2016 and Canada was ordered to reform the FNCFS Program and fully implement Jordan's Principle to eliminate its discriminatory practices.

The AFN was the only Party to the CHRT litigation who requested that compensation be paid directly to survivors. The CHRT agreed with the AFN that compensation was required and ultimately awarded \$40,000, the maximum amount for pain and suffering under the Canadian Human Rights Act (CHRA), to First Nations who faced discrimination in Canada's underfunding of the FNCFS Program and the narrow application of Jordan's Principle. The Government of Canada issued an appeal of the CHRT's Compensation Order, which remains active.

On January 28, 2020, the AFN and the representative plaintiffs, including Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, and Dick Eugene Jackson, filed a proposed class action, dating back to 1991 ("AFN Class Action"). The AFN Class Action sought compensation for First Nations children and family members harmed by Canada's discrimination under the FNCFS Program and narrow application of Jordan's Principle. The AFN, Moushoom class counsel and Canada have engaged in negotiations over the last two years.

While the CHRT's compensation orders were profound, the maximum amount of compensation under the CHRA is limited to \$40,000. The AFN sought to increase both the number of survivors eligible for compensation and the amount of compensation that they may receive, and achieved this by expanding on the CHRT's compensation orders in a number of ways.

First, the CHRT imposed a cut-off point at which a child must have been in care to be eligible for compensation, which is January 1, 2006. The eligibility period under the Class Action begins on the date at which the discriminatory funding system was implemented by Canada: April 1, 1991. It also extends the date of eligibility for Jordan's Principle claimants to the same date, in recognition of the longstanding and persistent gaps in services and supports for First Nations children. This extends the period for compensation by an additional 15 years.

The second extension relates to the whether a child was placed outside of their community. The CHRT compensation order required that a child had to be "placed outside their homes, families and communities" in order to be eligible for compensation. The Final Settlement Agreement includes all First Nations children who were removed under the FNCFS Program, regardless if they were placed within or outside of their community.

The third expansion is the inclusion of enhancement factors to ensure that individuals who experienced the greatest harm as a result of Canada's discrimination are provided with additional compensation. Under the Final Settlement Agreement, Survivors will be entitled to a **\$40,000 base payment** and additional monetary enhancements based on their individual circumstances, which include:

- the age when an individual was removed from their home
- the age at which they exited care

- the amount of time an individual spent in care
- the number of times they were placed in care
- if an individual was removed to receive an essential service
- if an individual was removed from a northern or remote community
- if an individual was subjected to a delay, denial or service gap that resulted in significant harm

Finally, the AFN advocated for additional supports for survivors that are not contemplated under the CHRT's Compensation Order, including mental wellness supports for Survivors, financial literacy and coaching, family and community unification supports, and more. The Final Settlement Agreement is the first of its kind as it is First Nations driven, and First Nations will oversee the implementation of the agreement.

The AFN will continue to provide updates at fnchildcompensation.ca. The AFN has also established an Information Desk which can be reached at 1-888-718-6496 or fnchildcompensation@afn.ca.

We acknowledge that this process may bring up strong emotional responses; support from the Hope for Wellness Helpline is available now at 1-855-242-3310.

[397] This public information available on the AFN's website does not inform the victims/survivors or their families that they may see their compensation reduced or completely removed. For some under Jordan's Principle, there are uncertainties that remain at the time the Tribunal makes this ruling.

[398] Any reasonable person reading this information would think they are entitled to \$40 thousand as a minimum and that the FSA ONLY improves on the Tribunal's orders. This is clearly misleading and lacking in transparency. This could also mean that no one would oppose the FSA.

[399] The Tribunal found no information on the AFN website or filed in evidence that clearly informed members of the public that some of the compromises led to reductions or disentitlements of compensation for some victims/survivors recognized in the Tribunal's orders. The Tribunal was provided with insufficient information as part of this motion that would provide assurances that those who would disagree could opt-out and would have sufficient time to do so.

[400] This is even more concerning when the opt out provision ends as early as February 2023 as per the FSA and, if the Tribunal declares that the FSA satisfies its compensation orders, such individuals would not be able to pursue compensation under the Tribunal's orders.

[401] Further, a media article was filed by the Caring Society as part of the evidence: "'Ottawa releases early details of landmark \$40B First Nations child welfare agreement, reports on Canada's statement on the FSA'", (see Exhibit B to Dr. Blackstock's affidavit dated August 30, 2022). The Tribunal may consider this information given section 50(3)(c) of the CHRA.

[402] Notably, there is no indication Indigenous Services Minister Patty Hadju advised the public that compromises were made and compromises that led to compensation reductions or disentitlements had to be done to achieve a settlement.

[403] The Minister stated: "'Our expectation is that' '\$40,000 is the floor and there may be circumstances where people are entitled to more,'" said Indigenous Services Minister Patty Hajdu.

[404] Any reasonable person reading her statement may think the FSA ONLY enhances the compensation ordered by this Tribunal, not that it diminishes it for some.

[405] Nowhere does the Minister say this may not be the case for all the victims/survivors who form part of the Tribunal's orders. This is still a misleading statement even when setting aside the contested non-ISC funded removed children category.

[406] This information and the Caring Society's arguments on this point were not successfully challenged by Canada as part of this motion.

[407] Media and public information displayed on websites for the purposes of public information on compensation need to inform on the whole truth including how the FSA deviates from the Tribunal's orders to allow the victims/survivors and those who assist them to make an informed decision. There is no issue with highlighting the improvements. The concerning part is omitting that some of the people who are entitled to compensation under this Tribunal's orders may see their compensation reduced or taken away under the FSA.

[408] Given the large number of victims/survivors who were disoriented by the AFN and Canada are children or are deceased, proceeding with speed does not ensure fairness to those victims/survivors. The Tribunal under the *CHRA* must balance expeditiousness with the principles of fairness and natural justice therefore this is a concern for the Tribunal. This justifies an extension of the opt-out period beyond February 2023.

[409] Furthermore, the Tribunal considered the letter from Windsor Law Class Action Clinic (the Clinic), filed in evidence as exhibit E to Dr. Blackstock's affidavit dated August 30, 2022.

[410] The Class Action Clinic has relevant Expertise in terms of class actions:

The Class Action Clinic's central mission is to serve the needs of class members across Canada. Launched in October 2019, we are the first not-for-profit organization designed to provide class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is also dedicated to creating greater awareness about class actions through public education, outreach, and research. The Clinic does not initiate or conduct class actions, and it is not funded by either the plaintiffs' or defence bar, or any industry group. Its sole purpose is to help individual class members, and in doing so, better fulfill the access to justice promise of the class action regime. A more complete description of our services can be found on the Clinic's website: www.classactionclinic.com.

The Clinic is directed by Jasminka Kalajdzic, an Associate Professor of Law at the University of Windsor, and one of Canada's leading class action scholars. She was co-lead researcher with Prof. Catherine Piché of the Law Commission of Ontario's Class Action Project. Andrew Eckart, formerly a class action litigator, serves as the full-time Staff Lawyer and oversees the work of law student case workers. Mr. Eckart also represents Clinic clients in court proceedings.

Since 2021, the Clinic has represented objecting class members in several class action settlements. Justice Belobaba described the Clinic as making a "valuable contribution" in settlement approval hearings and encouraged the Clinic, on the record, to continue this work.

[411] The Clinic provided wise points for consideration which were not accepted by class action counsel:

Class members are entitled to sufficient time to review a proposed settlement of this complexity and magnitude, to seek advice and clarification regarding its contents, and to make an informed decision about participating in settlement approval hearings. Class

members also need the additional time to adequately prepare their objections (if any) and present their views to the court. This right of review is not perfunctory; besides the right to opt-out of a class action, the right to object to a proposed settlement is the only other participatory right a class member has in a class action. *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 at para 3.

A review of a few other class actions highlights the importance of class member participation in and notification of a settlement approval hearing. The parties in the Indian Residential School Settlement Agreement, for example, held nine settlement approval hearings, Canada-wide from late August 2006 to mid-October 2006 (over a period of two and a half months). In the Sixties Scoop Class Action, notice of the settlement approval hearings was disseminated as early as mid-January 2018 in advance of the mid-May 2018 hearings (five months).

Unlike these examples, we understand that the current make-up of the class in this case includes people who are still minors, making the issue of timing critical. In our view, this aspect alone necessitates more, not less, time for class members to seek assistance, review, and assess the provisions of the FSA before the Settlement Approval Hearing.

The right to adequate notice is even more important in class actions involving trauma survivors. Tight timelines have the potential to place unnecessary stresses on an already marginalized and vulnerable population. Class members in this case, First Nations youth subjected to trauma, are highly vulnerable to re-victimization and re-traumatization.

Class members reviewing and then deciding whether to object to the FSA must process traumatic experiences perpetuated by government systems. Asking survivors of trauma to do this in the very short time of one month or to not object at all disregards their healing and needs. To systemically disadvantage traumatized class members runs counter to the broader narrative of reconciliation at the heart of the First Nations Youth Class Action.

Our concerns regarding re-traumatization are heightened given that the majority of the class is made up of people who suffered while they were, or still are, minors. Survivors of childhood trauma are at the highest risk of developing complex trauma. Moreover, minors likely need significant support throughout the process that could further interfere with their ability to object in the 31 days between the issuance of Notice and the Settlement Approval Hearing.

While we recognize that the six-month opt-out period in this case greatly benefits class members, allowing for objections to the FSA for only a small fraction of that time impedes class members' ability to meaningfully flag areas of concern, particularly with respect to the claims process.

...

We have significant concerns that the FSA may fall short of providing access to justice that is so highly deserved for these class members who have suffered from decades of discriminatory and shameful underfunding of services by Canada. The size of the settlement and its impact on so many people who have been systematically marginalized and traumatized requires us all to analyze the FSA thoroughly and with a critical lens.

We commend the parties for crafting an FSA that includes the participation of Indigenous consultants in developing the claims process; provides a lengthy claims period; provides rights of appeal; institutes a system of “navigators” to provide assistance with claims; and does not revert any of the \$20 billion to the defendant. Yet we remain concerned that claims of efficiency, expediency, and cost-effectiveness will prevent some class members from

receiving their entitlement to compensation. The purpose of a class action settlement like this is not to achieve rough justice, but rather to ensure that all those who are entitled to compensation are able to **access it**.

(emphasis ours).

[412] The Tribunal agrees with the Clinic's comments above. The Tribunal recognizes that AFN class counsel stated at the hearing that everywhere in Canada people have told them to move forward with compensation now, to get it done now. While this is not evidence, the Tribunal does not doubt it's true. What the Tribunal is more concerned about is how the message is communicated to those who were considered beneficiaries of the Tribunal's orders who have now been removed from the FSA. Moreover, it is ideal if compensation moves ahead in the near future, however, as mentioned above, akin to the *CHRA* analysis, expeditiousness must be exercised alongside rules of fairness and natural justice. This is the Tribunal's focus as per its quasi-constitutional statute.

VIII. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC), Self-government, AFN resolutions

[413] As previously said in the letter-decision, FPIC is not determinative in disposing of this motion. The AFN also commented on the issue of FPIC and, in response to the Panel's follow-up questions, clarified that this was in response to the Caring Society's comments and encouraged the Panel not to get distracted by this question as it was not necessary to embark on such an analysis. Further, the parties did not provide extensive submissions and supporting documentation to allow the Tribunal to settle this complex question. Upon consideration the Panel agrees with the AFN and finds it is not central to determining the essential aspects of this motion.

[414] While the Tribunal requested further submissions on FPIC and *UNDRIP* after the hearing in light of the AFN raising collective rights during oral submissions, the Tribunal ultimately concludes that it is not necessary to address this issue to dispose of this motion.

[415] Given these aspects are not determinative of this motion, the Tribunal will not embark in a full discussion on FPIC's application in Canada or the AFN's governance. Rather, it will elaborate on the contextual and noteworthy elements to explain why it does not find these elements determinative of this motion except for the opting out portion.

[416] Nevertheless, the Tribunal considered the issues and will elaborate on the reasons provided in the letter-decision here.

[417] The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) is an international instrument adopted by the United Nations on September 13, 2007, to enshrine the existing inherent rights that “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” (Article 43). The *UNDRIP* protects collective rights that may not be addressed in other human rights legislation that emphasize individual rights, and it also safeguards the individual rights of Indigenous People.

[418] The *UNDRIP* stipulates that all Peoples have the right to self-determination, this is partly expressed in the principle known as Free, Prior and Informed Consent (FPIC).

[419] Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*, (see, A/HRC/39/62, para.3). The provisions of the *UNDRIP*, including those referring to free, prior and informed consent, do not create new rights for Indigenous Peoples, but rather provide a contextualized

elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous Peoples (see A/HRC/9/9, para. 86). Free, prior and informed consent is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against Indigenous Peoples, (see, A/HRC/39/62, para.9).

[420] According to section 32 of *UNDRIP*, free, prior and informed consent (FPIC) is required prior to the approval and/or commencement of any project that may affect the lands, territories and resources that Indigenous Peoples customarily own, occupy or otherwise use in view of their collective rights to self-determination and to their lands, territories, natural resources and related properties.

[421] UN human rights bodies have recognized that FPIC is essential to protect a wide range of Indigenous Peoples' fundamental rights, including the right to culture, the right to food and the right to health.

[422] *UNDRIP* contains five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply.

[423] Free, prior and informed consent may be required for adoption and implementation of legislative or administrative measures (See, A/HRC/39/62) and also Article 19 which states:

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[424] *UNDRIP* states that any limitations on rights, including FPIC, must be “determined by law and in accordance with international human rights obligations,” “non-discriminatory” and “strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society” (art. 46(2) of *UNDRIP*).

[425] Moreover, the Tribunal has relied on *UNDRIP* in past rulings and found it is an important instrument to consider in a human rights analysis in First Nations cases especially in this one involving mass removals of First Nations children from their homes, communities and Nations. The Tribunal found that national legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the *UNDRIP*, (2018 CHRT 4 at para. 81).

[426] Canada has moved forward from only accepting the *UNDRIP* without reserve to adopting the *UNDRIP* into domestic law by way of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. There is no doubt that *UNDRIP* and *FPIC* apply to the state of Canada. Canada cannot shield its responsibilities to First Nations rights holders especially when rights holders voice their disagreements on issues affecting them. On this point, the Tribunal agrees with the Caring Society.

[427] The above demonstrates the evolving views on the application of FPIC from strictly land and natural resources issues to a broader spectrum of issues concerning Indigenous Peoples and their involvement and participation in important decisions that concern them. Therefore, the Tribunal agrees with the Caring Society that FPIC is not strictly a lands and natural resources process and therefore rejects the AFN's argument on this point.

[428] The Tribunal agrees with the AFN that FPIC is not entirely settled in Canadian law and finds that, even between different First Nations, perspectives vary on this issue. This is also exemplified in these proceedings where BC Chiefs signatories at the First Nations Summit Chiefs in Assembly adopted resolutions #0622.22 and #0622.23 have expressed that:

Chiefs in British Columbia have not seen the Final Agreement on Compensation and are therefore unable to exercise free, prior, and informed consent on any changes to the compensation orders. Their right to FPIC was not respected in the FSA and That the First Nations Summit Chiefs in Assembly call upon the AFN to conduct any negotiations with Canada on any matters arising from 2016 CHRT 2 and subsequent orders affecting First Nations children, youth, and families in British Columbia in an open and transparent manner consistent with free, prior and informed consent of First Nations in British Columbia.

[429] The AFN does not view FPIC as applying here. The Tribunal does not propose to resolve this complex issue here.

[430] Further, the Tribunal agrees that the AFN is not a state and that FPIC does not impose these obligations on the organization but rather on Canada as a state. The Tribunal also agrees with *UNDRIP* that Indigenous Peoples have the right to make their own decisions, and to engage with other governments and processes through the systems of governance and decision-making that they have freely chosen for themselves. Such essential dimensions of self-determination are clearly affirmed in *UNDRIP* (see e.g., articles 3, 5, 18 and 19). Federal, provincial and territorial governments cannot ignore the decisions made by Indigenous Peoples. Neither can they tell Indigenous Peoples how these decisions should be made.

[431] Furthermore, consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land, even if they have often been dishonoured. Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world, (See, A/HRC/39/62, para. 4).

[432] The Tribunal agrees with these principles and believes they apply to Canada in its dealings with First Nations. The Tribunal therefore agrees with the Caring Society's argument on this point.

[433] ““States are obligated not just to respect, but also to protect, promote and fulfil human rights, and this obligation applies with respect to the rights of indigenous peoples.”” (See, Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples, U.N. Doc A/HRC/24/41 (1 July 2013), at para. 44, online: Human Rights Council <https://www.refworld.org/docid/522db2b54.html>

[434] The Tribunal also has recognized Indigenous rights as human rights in previous rulings.

[435] Taking into consideration the specific needs of First Nations children, families and communities were core findings made by this Tribunal. Further, the Tribunal has continually emphasized in its findings and orders the principle of substantive equality and the importance of taking into account the specific needs of children, families, communities and Nations to give full meaning to this principle. This is an obligation for Canada.

[436] However, the Tribunal's understanding of the AFN's mandate has always been to advance the rights and interests of their members who are First Nations rights holders who provide direction to the Assembly by way of Chiefs-in-Assembly resolutions. This ensures the views of rights-holders and the specific needs of communities are respected and expressed. In a previous hearing, counsel for the AFN explained that he viewed the AFN like the United Nations. The Panel liked the analogy of sovereign nations meeting to make decisions that concern them. The Panel understood that the Chiefs-in-Assembly resolutions adequately reflect this and ensure an effective process to express their consent after meaningful consultation. Chiefs-in-Assembly resolutions are referenced in previous decisions. This

was given considerable weight by the Panel when accepting the AFN's past submissions given the representativity of First Nations through the resolutions made by Chiefs-in-Assembly. In all of the previous rulings made by the Panel, there never was a situation where the Tribunal received evidence of other First Nations disagreeing with the AFN's requested orders. Usually, the AFN provides Chiefs-in-Assembly resolutions which bring assurances to the Panel that the rights-holders agree with the requested orders. This is an efficient way to proceed instead of hearing from each of the over 600 First Nations in Canada who are members of the AFN, which could paralyze the Tribunal's proceedings. Further, the AFN Resolutions are the essential mechanism by which First Nations provide specific mandates and direction to the AFN.

[437] Furthermore, the Tribunal's *Compensation Decision* (2019 CHRT 39), at paragraph 34 clearly relies on the Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System. Moreover, the Tribunal's finding that, pursuant to AFN resolution 85/201, the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada was upheld by the Federal Court (2021 FC 969 at para. 160).

[438] The Tribunal accepts the AFN's explanation that the AFN Executive are "First Nations leadership", being comprised of Regional Chiefs duly elected by the First Nations in each region across Canada and the National Chief who is elected by all the First Nations across Canada. Under the AFN's Charter, the Executive Committee is empowered to take positions on behalf of First Nations consistent with their properly delegated mandates from the Chiefs-in-Assembly. The approval of the FSA was within their delegated purview.

[439] A question remains as to why an important question such as compensation and the FSA was not addressed in a resolution from the Chiefs-in-Assembly. While the AFN indicates the Chiefs-in-Assembly were presented with the FSA and that no objection to the FSA was raised by the Chiefs-in-Assembly at the annual general assembly which immediately followed the FSA's execution, the FSA was already signed at the time that it was presented. Paragraph 52 makes it clear that the FSA was executed on June 30, 2022, prior to the annual general assembly.

[440] The AFN states that the Chiefs-in-Assembly did not object to the FSA. However, little is said on the absence of a resolution from the Chiefs-in-Assembly or the resolutions signed by the BC Chiefs. While the Panel agrees with the AFN that requiring all First Nations to agree may jeopardize any agreement, a resolution from the Chiefs-in-Assembly recognizes this reality and provides some assurances to the Panel on such important questions.

[441] In this case, the Panel does not have a resolution on the FSA from the AFN in the evidence and the Panel has resolutions voted on by some First Nations who have expressed concerns about the FSA to the AFN. Upon a full consideration of the issues since the recent interested party request ruling and, given that the Tribunal's approval of the FSA could result in ceasing the Tribunal's supervision of the financial compensation aspect of the case if the Tribunal later declares the FSA fully satisfies the Tribunal's orders, the opting-out process for First Nations at the Federal Court does not assist the Tribunal in making a determination in this motion. While the Tribunal recognizes the AFN's right to proceed via executive committee decisions and that First Nations rights-holders may agree with this process as part of the AFN charter and rules, the BC resolutions filed in evidence suggest otherwise for some rights-holders. If the AFN now proceeds by way of executive resolutions for important decisions such as the FSA with the agreement of rights holders, the Tribunal would appreciate having a better understanding of this process and how the AFN proposes the Tribunal should deal with those concerns raised by First Nations rights-holders. In this motion, the AFN did not provide a comprehensive response to assist the Tribunal on this issue.

[442] Over the last decade, no First Nations non-party has opposed the AFN decisions as part of these proceedings. Moreover, many resolutions from the Chiefs-in-Assembly were filed in evidence for the Panel to consider. Therefore, the need to question what rights-holders' views were on important issues

such as the FSA was not present before this motion and may not reoccur after it. In sum, the Tribunal's questions and concerns arose out of the new evidence presented in this motion, the arguments presented and the change in the AFN's process in front of this Tribunal to not provide resolutions from Chiefs-in-Assembly for such a major issue. Moreover, some compromises in the FSA do not align with the previous Chiefs-in-Assembly resolution no.85/2018 seeking the maximum compensation under the *CHRA*. Given this resolution, it is reasonable to expect a new or an amended resolution supporting the compromises, namely reductions and disentitlements for some victims/survivors.

[443] The Tribunal also had First Nations rights holders in mind when it wrote in 2018 CHRT 4:

[443] The Panel encourages Canada in the future to provide evidence to the Tribunal if a province, territory or First Nation resists or acts as a roadblock to Canada's implementation of the Panel's rulings. This will assist the Panel in understanding their views and Canada's efforts to comply with our orders and, will provide context and may refrain us to make orders against Canada. Absent this evidence, the Panel makes orders to eliminate the discrimination in the short term while understanding the importance of the Nation-to-Nation relationship.

[444] A Nation-to-Nation relationship is not solely the relationship between the AFN and Canada; it is a relationship between First Nations and Canada.

[445] Further, the evidence that some First Nations were calling upon Canada to immediately pay the compensation owed to eligible victims/survivors and provide necessary supports pursuant to Canadian Human Rights Tribunal orders did not come as a result of Canada or the AFN's evidence to inform the Tribunal that not all were in agreement with the FSA but rather it was advanced by the Caring Society:

That the First Nations Summit Chiefs in Assembly affirm that:

a. the Assembly of First Nations (AFN) and Canada are not authorized to seek a reduction in the compensation amounts for eligible victims who are members of First Nations in British Columbia or modify the compensation framework agreement and compensation entitlement order as set out in 2019 CHRT 39 and 2021 CHRT 7 without the free, prior, and informed consent of First Nations in British Columbia;

b. the AFN and Canada are not authorized to make representations to the Tribunal or any other body implying the consent of First Nations in British Columbia without our free, prior, and informed consent on the Final Agreement and any motions, or any relief made to the Canadian Human Rights Tribunal or Federal Court.

[446] This Tribunal ensured the different perspectives of First Nations rights-holders would be respected and also discussed this in 2018 CHRT 4:

[66] This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII), [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other.

(emphasis changed)

[447] Moreover, the orders in this same ruling reflect the Tribunal’s desire to respect First Nations self-governance and self-determination.

[448] Canada also has a duty to consult and must act honorably in all its dealings with First Nations, Inuit and Metis Peoples (Aboriginal Peoples). Those principles were discussed in the *Merit Decision* and will not be revisited here. Suffice is to say that Canada has many legal obligations in Canadian law to ensure it consults First Nations who are affected by its actions and decisions.

[449] The evidence in this motion includes resolutions from BC First Nations who disagreed with some aspects of the FSA as discussed above and were requiring further consultation which Canada cannot ignore.

[450] Moreover, after the motion hearing, in response to follow-up questions from the Tribunal, further resolutions were filed as Exhibit “C” to the affidavit of Doreen Navarro with the Tribunal and accepted into the evidentiary record. The BC Assembly of First Nations had their Annual General Meeting on September 21, 22, & 23, 2022 and adopted Resolution 33/2022 that was signed by First Nations Chiefs. The subject of the resolution was Compensation For Children And Families Who Suffered Discrimination In The Delivery Of First Nations Child & Family Services And Jordan’s Principle Services.

[451] Notably, the context leading to the resolution is summarized as follows by the BCAFN:

Canada and counsel for both class actions announced an Agreement in Principle on the compensation on December 31, 2021, with an intent to develop a Final Settlement Agreement to resolve the compensation issue for both the human rights damages and the class actions; The AFN Chiefs did not pass any resolutions supporting the Agreement in Principle on compensation or authorizing negotiators to deviate from the CHRT orders on compensation or from the AFN’s resolution calling for the maximum allowable amount for every victim of discrimination under the FNCFS program; The First Nations Summit passed a resolution on June 16, 2022 (FNS Resolution #0622.23) affirming that the AFN and Canada are not authorized to modify the CHRT’s compensation entitlement order without the free, prior and informed consent of First Nations in British Columbia; On June 30, the AFN, class action parties and the Government of Canada reached a Final Settlement Agreement on compensation and immediately (without seeking the free, prior and informed consent of First Nations or their chiefs) filed a motion with the Canadian Human Rights Tribunal seeking an expedited hearing regarding the Tribunal’s compensation orders; Article 10 of the Final Settlement Agreement on compensation requires the AFN, among other things, “to take all reasonable steps to publicly promote and defend the Agreement”; At the Tribunal hearing, which took place on September 15 and 16, 2022, the Caring Society argued that the Final Settlement Agreement negatively impacts the rights of a number of children and families by reducing or eliminating their right to CHRT compensation and by waiving their rights to litigate against Canada for the harms they experienced flowing from Canada’s discrimination—even if they receive no financial compensation under the Final Settlement Agreement; During the Tribunal hearing on September 16, 2022, AFN legal counsel was asked by the Tribunal if there were any objections to the Final Settlement Agreement by First Nations or others, and though they were in possession of the FNS resolution the AFN counsel did not disclose the FNS’s objections in answer to the question. Chiefs in British Columbia have not been consulted on the Final Settlement Agreement and are therefore unable to exercise free, prior, and informed consent on any changes to the CHRT compensation orders.

[452] This led to the resolution that reads as follows:

THEREFORE BE IT RESOLVED THAT:

1. The BCAFN Chiefs-in-Assembly call upon Canada to immediately pay the CHRT-ordered compensation in the amount of \$40,000 plus interest owed to eligible victims and provide necessary supports pursuant to the CHRT orders;

2. The BCAFN Chiefs-in-Assembly affirm that AFN negotiators are not authorized to seek a reduction in the compensation amounts for eligible victims who are members of BC First Nations and must respect the compensation framework agreement and compensation entitlement order as set out in 2019 CHRT 39 and 2021 CHRT 7;

3. The BCAFN Chiefs-in-Assembly express concern regarding the AFN's agreement to Article 10 in the Final Settlement Agreement as it abrogates the AFN's duty to represent the interests of First Nations as authorized by the AFN Chiefs in Assembly and direct that the AFN:

a. withdraw its consent to this section of the agreement or in the alternative

b. fully disclose this obligation to First Nations governments, First Nations experts, the Courts and Tribunal, and the public and that an independent panel of experts and lawyers be appointed by the BCAFN to examine the Final Settlement Agreement and inform positions arising from it; The BCAFN Chiefs-in-Assembly affirm that the AFN is not authorized to sign provisions such as Article 10 of the Final Settlement Agreement on behalf of BCAFN Chiefs-in-Assembly without their free, prior, and informed consent;

[...]

5. The BCAFN Chiefs-in-Assembly direct the AFN negotiators to seek the free, prior and informed consent of BC First Nations Chiefs before making any legal representations on any Final Agreement on Compensation that may have an impact on First Nations children, youth and families in British Columbia; and The BCAFN Chiefs-in-Assembly direct that any negotiations with Canada or class action counsel on any matters arising from 2016 CHRT 2 and subsequent orders or legal proceedings affecting BC First Nations children, youth, and families must be conducted in an open and transparent manner consistent with free, prior and informed consent of First Nations.

[453] Of note, the resolution is signed by Terry Teegee, who is a BC Regional Chief who is also part of the AFN Executive Committee. While the BC Chiefs did not testify at the hearing, the Tribunal finds this official resolution signed by a Regional Chief carries weight and is relevant and reliable evidence. Moreover, the resolution is attached to an affidavit filed in evidence.

[454] The Tribunal heard extensive evidence at the hearing on the merits about the FNCFS Program in British Columbia and made findings that will not be revisited here. However, this is to say that the Tribunal is aware of the fact there are a large number of First Nations and First Nations agencies in BC that benefit from the Tribunal's findings and orders.

[455] Finally on this point, the Panel does not believe that this ruling should be interpreted to preclude self-government or other agreements in the future or as a refusal of this motion based on an AFN executive decision rather than a Chiefs-in-Assembly resolution. While the Tribunal had questions in light of what is explained above, this is not determinative in this motion.

[456] The real difficulty in this joint motion is the fact that entitlements orders were already made for victims/survivors by this Tribunal, the orders were upheld by the Federal Court and the compromises were made subsequently.

A. Individual rights versus collective rights

[457] The Tribunal understood that the AFN was arguing that the Tribunal should consider First Nation collective rights in preference to individual rights at the oral hearing prompting follow-up questions from the Tribunal. However, the AFN subsequently clarified its comments and the Tribunal does not believe that this issue must be resolved as part of these proceedings and, more importantly, while the Tribunal agrees these rights must be balanced, the issue is not determinative of this motion. Further, the parties post-hearing submissions on this issue were brief and, given this was not determinative of this motion, the Tribunal did not require additional submissions.

[458] The *UNDRIP* recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of Indigenous rights is inherent in Indigenous culture and serves as a rampart against disappearance by forced assimilation.

[459] Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of Indigenous Peoples. Therefore, it cannot be held or exercised by individual members of an Indigenous community. *UNDRIP* provides for both individual and collective rights of Indigenous Peoples. Where *UNDRIP* deals with both individual and collective rights, it uses language that clearly distinguishes “indigenous peoples” from “individuals.” Understandably, however, none of the provisions of *UNDRIP* dealing with free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32) make any reference to individuals. To “individualize” these rights would frustrate the purpose they are supposed to achieve, (see, A/HRC/39/62, para.13).

[460] The AFN submits that First Nations collective rights arise from the fact that they are Peoples under customary international law. The criteria defining what constitutes “a people” in customary international law are as follows: first, a group must be a social unit with a clear identity and characteristics of their own; second, the group must have a relationship with a territory and, finally, the group must claim to be something more than simply an ethnic, linguistic or religious minority.

[461] Current international law operates on two levels. On the first level, international law influences how the states of the world interact. Similar to domestic law, the second level of international law is concerned with the relationship between a state and persons within its territory. International law with respect to the second level focuses on human rights abuses and the mistreatment of individuals. The Tribunal agrees with this characterization.

[462] The Tribunal also agrees with the AFN that the status of First Nations collective rights ought to be determined in other fora, where the full scope and context of the nature and source of First Nation rights can be weighed and determined. Much is at stake and the AFN urges this Panel to restrict its ruling to the issue before it – whether the FSA satisfies this Panel’s compensation orders.

[463] However, the Tribunal disagrees with the assertion from the AFN that by solely focusing on the rights of First Nations through a human rights lens, the Caring Society demotes the status of First Nations as Peoples to that of a minority population within the Canadian state.

[464] The Tribunal agrees with the Caring Society’s views that Individual and collective rights are not mutually exclusive in nature. Individual human rights (including the right to effective remedies) and a collectivity’s rights can and should co-exist.

[465] One of the most compelling arguments on this point was advanced by the Caring Society in explaining the Tribunal’s approach in this case. Individuals experienced widespread and deep levels of discrimination by Canada, which also had an impact on rights-holding collectives. In approaching remedies, the Tribunal broadened the consultation required of Canada beyond the Commission, to ensure that the voices of First Nations and those with significant expertise could be heard via representative organizations in order to inform immediate and long-term relief. The Tribunal has also created provisions in its orders for individual First Nations to negotiate more specific arrangements

with Canada. Importantly, the Tribunal has created space for particular First Nations interests to participate on discrete questions through its use of the “interested party” mechanism in the Tribunal’s Rules. The Tribunal believes this is an accurate interpretation of what has occurred in these proceedings.

[466] Finally, this issue will not be resolved as part of this motion and as previously said, is not determinative of this motion.

IX. The request to amend the Tribunal’s compensation orders to reflect the terms of the FSA is denied

[467] The request to amend the Tribunal’s compensation orders to reflect the terms of the FSA is denied.

[468] The Tribunal found this decision very difficult since it was given the hard choice to approve the FSA as it is or amend its orders to reflect the changes in the FSA or reject it and deny timely compensation to a large number of victims/survivors which is not the Tribunal’s goal or desire. Some of those changes improve, enhance and broaden the Tribunal’s orders above what is permitted under the *CHRA* and the Tribunal is pleased with this outcome. The Tribunal is in favor of compensation being distributed sooner rather than later. However, some of those changes are detrimental for some and undermine the Tribunal’s orders.

[469] Canada argues that if the excessively formalistic and limited interpretation of the authority of the Tribunal argued for by the Caring Society and the Canadian Human Rights Commission were accepted by the Tribunal, it would arguably become impossible for parties to negotiate a settlement which differed in any particular way from a prior Tribunal order. This would leave the Tribunal hamstrung and unable to endorse the very thing the dialogic approach and Justice Favel’s reasons seek to encourage.

[470] The Tribunal understands this legitimate preoccupation and can confirm this is not the case here. There are other major differences between the FSA and the Tribunal’s orders that the Tribunal is willing to accept if all recognized victims/survivors in the Tribunal’s orders are included in the FSA. For example, ending the Tribunal’s jurisdiction on compensation by changing who exercises the supervisory role of the compensation process for a single process supervised by the Federal Court. There are other differences in the FSA that the Tribunal also accepts such as the broadened categories of entitled victims/survivors and the increased quantum of compensation above the \$40,000 statutory limit. While the *CHRA* does not allow the Tribunal to amend its orders to reflect this change, the Tribunal can declare/find the FSA fully satisfies the Tribunal’s orders on this point. The Tribunal does not insist on an exact copy of its rulings. Rather, it insists on the respect of final orders on quantum and categories of victims/survivors eligible to compensation under the Tribunal’s orders.

[471] If all the legally recognized victims/survivors as part of the Tribunal’s orders who are the only ones who currently benefit from evidence-based Tribunal findings following adjudication were included in the FSA, the Tribunal could have granted this motion and recognized it fully satisfies the Tribunal’s orders.

[472] The Tribunal’s main reason not to endorse the FSA is that it derogates from the Tribunal’s existing orders in reducing compensation to some victims/survivors to accommodate the fixed quantity of funds under the FSA and the much larger number of victims/survivors in the class actions competing for these funds. No substantive findings or orders have been made concerning the victims in the class actions, yet in the FSA some displace some of the victims/survivors whose rights have been vindicated in these proceedings.

[473] If this is permitted, what message would be sent by the very Tribunal who has a mandate to ensure the protection of the most vulnerable victims/survivors who have now been recognized? Further, how is this a reasonable and legal outcome?

[474] The Tribunal is not a political body in charge of making financial and political choices between people. Once it has reviewed the evidence and made findings and found that orders are warranted, the Tribunal cannot change its mind and rescind this unless it made an error, a reviewing Court overturns a finding or new and compelling evidence justifies it. Consistent with the reasons and case law analyzed above, the AFN and Canada must not be allowed to reopen a final order on quantum in the context of this motion. The Tribunal has not been presented with any evidence of any error in concluding that the victims/survivors in this case suffered the most egregious harms and are entitled to the \$40,000 in recognition of their pain and suffering and Canada's willful and reckless conduct, this being the maximum that the Tribunal is allowed to award under the *CHRA*.

[475] Even if the Tribunal were to leave aside the question of the non-isc children and Jordan's Principle categories, the Tribunal cannot find that the FSA fully satisfies its orders given the other 2 derogations explained above. Moreover, the Tribunal cannot amend its orders to reduce or disentitle the victims/survivors to account for the reasons put forward by the AFN and Canada.

[476] The AFN and Canada provided meaningful arguments imported from the class action process; some have been addressed above. The Tribunal will address other important ones in turn here.

A. The Compromise factor in reaching the FSA and human rights lens

[477] The parties to the FSA submit that every settlement requires compromise. The Tribunal does not dispute that.

[478] The AFN submits that this Panel has jurisdiction to accept all compromises made by the parties to the negotiations, provided any given compromise was made on a principled and rational basis. The Tribunal agrees that the compromises were made on a principled and rational basis for First Nations. The issue is Canada and the AFN's decision to proceed in negotiations with the assumption that it was acceptable to reduce and disentitle victims/survivors already recognized by the Tribunal in its orders. While it is a practical reality of negotiations that they require compromise, that does not elevate the obligation to compromise in settlement negotiations to the same legal force as binding orders issued pursuant to the *CHRA*.

[479] The AFN and Canada rely on a recent Federal Court decision and submit that no settlement is perfect, (see *Tk'emlúps te Secwépemc First Nation v. Canada*, 2021 FC 988 at para. 64). The Tribunal accepts this assertion. Further, the AFN and Canada add that this settlement, however, represents the significant efforts of the parties to engage in the dialogic approach, as encouraged by the Federal Court. Settlements necessarily include balancing of benefits and compromises, and in this case the benefits are clear.

[480] That the FSA has clear benefits is generally true. However, the Tribunal finds whether it is more advantageous depends on which side of the fence you are on as a victim/survivor. For some of the victims/survivors whose rights were recognized by the Tribunal's findings and orders who may now see their compensation reduced or taken away, unfortunately, this is not true and the FSA provides no benefit. The Tribunal's first duty is to the victims/survivors it already recognized and their best interests.

[481] The Tribunal agrees with the AFN that the amounts payable to individuals will be meaningful and the total compensation is historic and reflects the magnitude of the harms. The nuance here for this Tribunal is the fact that some compromises to entitlements were made to account for the fixed amount of compensation agreed to by Canada which suggests the magnitude of the harms may be greater than the impressive \$20 billion amount of compensation.

[482] Furthermore, the AFN and Canada have not convinced the Tribunal that compromise is part of the human rights analysis here once orders have been made or that compromise outweighs the need to preserve the victims/survivors' rights recognized in orders in the Tribunal's proceedings. In other words, the role of compromise in litigation does not extend to derogating from binding Tribunal orders.

[483] If Canada had struck an agreement with the Caring Society and disregarded pleas from the AFN to not reduce compensation to the victims/survivors and disregard hard-fought gains, the AFN could raise this injustice and would be right to do so.

B. New information namely the FSA since the Tribunal rendered its orders

[484] The AFN submits the Tribunal can consider the FSA and can amend its orders to reflect the FSA. The Tribunal for the above-mentioned reasons partly agrees. Again, the Tribunal does not believe it can modify final orders on quantum for the categories already recognized in its orders. Moreover, insufficient evidence was led or submissions provided in terms of what those amendments should look like. The Tribunal agrees with the Caring Society that the AFN and Canada failed to specify the amendments they seek. This lack of specificity undermines procedural fairness. Moreover, this does not allow the Tribunal to reduce or disentitle compensation to victims/survivors already included in the Tribunal's orders.

C. The remedy is forthcoming to the victims

[485] The FSA would proceed more expeditiously if no one judicially reviews this ruling, which is unlikely given the opposing views. Furthermore, the expeditiousness is at the expense of fairness for the victims/survivors in these proceedings. The parties decided to put on hold the last elements of the Tribunal's compensation process to develop the FSA. While the Tribunal understands this, it is not a delay attributable to the Tribunal. The parties can develop the guide for compensation distribution in a short timeframe and submit it to the Tribunal for approval. This could expedite compensation. In terms of Canada's appeal of the compensation decisions and the potential for years before the remedy is forthcoming, the Tribunal notes that this could have been avoided in not removing victims/survivors recognized in the Tribunal's orders from the FSA. Second, there is no guarantee that further delays would not occur with the FSA given the parties who oppose it in these proceedings and the risk of judicial review on either side.

D. The broader scope and enhanced compensation for some victims/survivors

[486] The broader scope and enhanced compensation for some victims/survivors is the most compelling rationale for endorsing the FSA. The Tribunal is entirely in favour of this expansion and recognizes its advantages. This is why the Tribunal seriously considered approving the FSA and found this decision to be a challenging one.

[487] While all compelling and important factors to consider, the Tribunal has a human rights focus. It cannot support reduced or eliminated compensation to victims already recognized in the Tribunal's orders. This negative message is contrary to the Tribunal's function under the *CHRA* to ensure the discrimination found is eliminated and does not reoccur and ensuring the victims/survivors are made whole. These enhancements, no matter how laudable and desirable, do not give the Tribunal authority to reduce or eliminate compensation to victims/survivors currently recognized under the Tribunal's orders.

[488] The AFN and Canada submit that in such circumstances, the Federal Court considers whether the settlement is fair and reasonable and whether it is in the best interests of the class as a whole. This can involve considering the settlement terms and conditions, the likelihood of success or recovery through litigation, the future expense and duration of further litigation, the dynamics of settlement negotiations and positions taken therein, the risks of not unconditionally approving the settlement, and the position of the representative plaintiffs. Of particular significance are the litigation risks of not approving the agreement and the view of the representative plaintiffs.

[489] The Tribunal mentioned above that it is not bound by a class action analysis. While some of the criteria above may be instructive, the Tribunal is governed by the legal framework explained in this ruling.

[490] Further, the AFN's request to proceed expeditiously did not allow the parties or the Tribunal in these proceedings to ask questions to the adult representative plaintiffs to understand their perspective and for this Tribunal to make findings. The AFN offered to introduce the representative plaintiffs at the hearing once the evidence had closed and confirmed it had no intention of having the representative plaintiffs testify at the hearing. The Tribunal enquired if their testimony was requested and offered to schedule hearing dates if this was needed however, the AFN said that it was not.

[491] Further, the AFN and Canada add that this FSA was First Nations led and fosters reconciliation. The Tribunal accepts this and, as explained in this ruling, did consider this in making its decision.

[492] The Tribunal is not stating that it cannot amend its orders if the FSA does not mirror the Tribunal's orders. The Tribunal can amend its orders to clarify, enhance, or reflect the parties' wishes if they consent and do not remove recognized rights.

[493] The Tribunal emphasizes that the *CHRA* is a restorative piece of legislation.

[494] In fact, special programs are permitted in the *CHRA* when it has the policy goal to provide equity for some segments of society who are the subject of discrimination (see section 16 of the *CHRA*). This was discussed in *Action travail des femmes* and relied upon in the Tribunal's *Compensation Decision* in 2021 CHRT 6:

[66] For the SCC, paragraph 2 of the Special Temporary Measures Order, ordering the CN to implement a special employment program, was specifically designed to address and remedy the type of systemic discrimination against women in the case under examination. Therefore, the SCC addressed the specific issue of the scope of the remedial powers established under section 41(2)(a) (now 53(2)(a)) of the *CHRA*, taking into account the power granted to the Tribunal to order measures regarding the "adoption of a special program, plan or arrangement referred to in subsection 15(1) (now 16(1)), to prevent the same or a similar practice occurring in the future" (*Action Travail des femmes*, at p. 1139).

[67] Concurring with the dissenting opinion of Justice MacGuigan of the Federal Court of Appeal in the case under appeal, the SCC held that section 41(2)(a) (now 53(2)(a)) is "designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups" (*Action Travail des femmes*, at p. 1141). In cases of systemic discrimination, the prevention of reoccurrence of discriminatory practices often requires referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes*, at p. 1141). Furthermore, the SCC held that the type of measure ordered by the Tribunal in the case under examination may be the only means to achieve the purpose of the CHRA, that is to combat and prevent future discrimination (*Action Travail des femmes*, at p. 1141, 1145), (emphasis added).

[68] In these cases, remedy and prevention cannot be dissociated, since "there is no prevention without some form of remedy" (*Action Travail des femmes*, at p. 1142). Thus, the remedies available under section 53(2)(a) CHRA are directed toward a specific protected group and are not only compensatory in nature, but also prospective. As a result, with a view to achieve the prevention objective of the *CHRA*, a "special program, plan or arrangement" as referred to in subsection 16 (1) *CHRA* serves three main purposes: (1) countering the effect of systemic discrimination; (2) addressing the attitudinal problem of stereotyping, and; (3) Creating a critical mass, which may have an impact on the "continuing self-correction of the system" (*Action Travail des femmes*, at pp 1143-44), (emphasis added).

[69] In sum, while ruling that the Tribunal had the power to order such a special measure, the SCC summarized its findings as follows:

For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(a) of the Canadian Human Rights Act. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(a). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Lawrence Region by preventing "the same or a similar practice occurring in the future".

(*Action Travail des femmes*, at pp 1145-46).

[70] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in *Action Travail des femmes*, see for example: 2016 CHRT 2 at para. 468; 2016 CHRT 10, at para. 12-18; 2018 CHRT 4, at para. 21-39; 2019 CHRT 39, at para. 97.

[495] Furthermore, no concept of removing ordered entitlements suggested by the AFN and Canada is found in the *CHRA* itself, the spirit of the *CHRA* or a proper human rights analysis. A careful consideration of the Panel's work in this case makes clear the Panel views its role under the *CHRA* as proactive to eliminate and prevent discrimination, not make orders and take them away.

[496] In 2021 CHRT 6, the Tribunal wrote:

[61] To the contrary, in the interpretation of the *CHRA*, it is important to take into account the purpose of the *CHRA*, that is to extend the present laws in Canada as set forth in section 2 in order to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination (*Action Travail des femmes*, at p 1133). It should be recalled that human rights legislations are intended to give effect to rights of vital importance, **ultimately enforceable by a court of law** (*Action Travail des femmes*, at p 1134). As a result, while the meaning of the words of the *CHRA* is important, rights must be given full recognition and effect (*Action Travail des femmes*, at p 1134). This is also in line with the federal Interpretation Act, RSC 1985, c I-21, according to which statutes are deemed remedial and thus, must receive a fair, large and liberal interpretation with a view to give effect to their objects and purpose (*Action Travail des femmes*, at p 1134).

[62] This comprehensive method of interpretation of human rights legislation was first stated in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, where Justice Lamer acknowledged the fundamental nature of human rights legislation: they are "not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law" (*Action Travail des femmes*, at pp 1135-36, citing *Heerspink*, at p. 158). This principle of interpretation was later confirmed and further articulated in *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156, where Justice McIntyre, writing for a unanimous Court, stated that:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

(cited in *Action Travail des femmes*, at 1136).

[65] These principles must equally be applied when interpreting the remedial powers granted to the Tribunal under the *CHRA*.

[497] An analysis of section 53 of the *CHRA* where the Tribunal has recognized victims/survivors in its orders and can change its mind later for the reasons advanced in this motion including unproven financial constraints is not appropriate and does not keep with the SCC's reasons in *Action Travail des femmes*.

[498] The Tribunal cannot make the alternative order requested to amend its previous orders to conform to the FSA or to elevate the FSA over the Tribunal's orders in case of conflict. The Tribunal reaches this conclusion after considering the applicable case law discussed, the *CHRA* and human rights regime all discussed above, its previous findings and its previous orders.

[499] Moreover, the FSA's legal framework is driven by the current class actions. Canada did not ensure that an appropriate human rights lens respecting its current human rights obligations and binding orders against it in this case was applied to allow it to agree to the FSA.

[500] The Tribunal is fully aware that applying a human rights lens and its statutory powers to the issue does not provide statutory authority to change or amend the Tribunal's orders in removing rights to categories of victims/survivors so that the Tribunal's orders conform to the FSA. This is not permissible by law. The Tribunal is not a political body, it is an adjudicative body deriving its authority from statute and it cannot disturb the legal recourses under the *CHRA* regime to deny quasi-constitutional rights.

[501] The AFN's argument that this would result in parties never being able to settle litigation outside of the Courts is not accurate. The issue here is this was done after orders were made and resulted in contracting out some of the victims/survivors' human rights to compensation who were already recognized in legal orders amounting to a collateral attack of the Tribunal's quantum and eligibility orders.

[502] The Tribunal cannot overstate the importance of securing victims/survivors' rights across Canada. This requires the Tribunal to ensure that first the victims/survivors in this case and other victims who may include Indigenous Peoples and Nations, can pursue a human rights case under the *CHRA* through to a final resolution with fair recourse. Victims/survivors must be able to rely on the finality of findings of discrimination and compensation ordered by the Tribunal. Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative proceeding.

[503] The case is quite different with long-term reform where not all issues have been adjudicated by the Tribunal. The Tribunal supports First Nations-led solutions to eliminate discrimination if the evidence advanced proves to eliminate the systemic discrimination found in an effective and sustainable manner that responds to the specific needs of First Nations children, families and also communities. The Tribunal reminds the parties that it is a Tribunal created by statute with a mandate to eliminate discrimination in Canada once findings are made, always based on evidence and not opinion. The

Tribunal is still seized of the matter and will need to make findings before ending its jurisdiction to ensure the racial and systemic discrimination is eliminated and does not reoccur. The First Nations parties' expertise is key in this important task.

[504] Moreover, the *CHRA* does not grant fleeting rights: once entitlements are recognized under the *CHRA*, they cannot be removed. Once a finding and a compensation order is made to vindicate rights, they may not be revoked absent an order from a reviewing court.

[505] The Tribunal does not believe it has a legal basis for granting all the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would disentitle certain victims/survivors from compensation under the Tribunal's orders.

[506] The Tribunal is nonetheless urged to accept the FSA even if it is not identical to the Tribunal's orders because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, this is subject to the Tribunal's conditions below on the opt-out provision and the FSA including all the victims/survivors recognized in the Tribunal's orders.

X. Conclusion

[507] The Tribunal finds as follows:

[508] The Tribunal is not *functus* to consider if the FSA fully satisfies the Tribunal's orders.

[509] The Tribunal finds the FSA substantially satisfies the Tribunal's orders. The FSA can potentially fully satisfy the Tribunal's orders if it is amended to include all the categories of victims/survivors and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is fully responsive and rectifies the areas of concerns mentioned above.

[510] The Tribunal cannot declare or find the FSA fully satisfies the Tribunal's orders given that some victims/survivors who were recognized by and awarded compensation by this Tribunal have been removed or provided with reduced compensation. The Tribunal's orders were upheld by the Federal Court. The evidence currently before the Tribunal does not permit a finding that the FSA fully satisfies the Tribunal's orders. This difficulty is more than technical; it is a real legal one.

[511] The Tribunal finds the FSA respects numerous and many important components of the Tribunal's compensation orders such as not retraumatizing victims, avoiding children testifying and using a culturally appropriate process. The Panel generally accepts the FSA and finds it more advantageous on many aspects and understands the principled choices made by First Nations. The Panel also sees great value in having one process supervised by the Federal Court for the compensation issue. The Panel would likely have approved a settlement along the lines of the FSA if it had been asked to do so prior to issuing its *Compensation Entitlement Decision* or if all victims/survivors already recognized by the Tribunal's orders were included.

[512] The Tribunal always contemplated adding more categories of compensable victims and was open to doing so if it was needed and supported by the evidence but the AFN declined this option in its submissions given that they had concerns that the compensation process with Canada would reach an impasse. The compensation orders were still judicially reviewed. The Tribunal never envisioned removing recognized categories of victims/survivors after it made its findings and orders based on evidence of harm. After the Tribunal makes an order entitling a category of victims/survivors to compensation, those orders have finality and the only options for removing the entitlement is through judicial review. While the Tribunal agrees it did not have the FSA before it at the time it made its orders, the Tribunal finds no legal basis justifying the denial of compensation to categories of victims/survivors recognized by this Tribunal. Moreover, the Tribunal would review the victims/survivors' eligibility for compensation if directed by the reviewing court.

[513] The Tribunal stresses this context to emphasize that it urged the parties to negotiate an agreement on compensation to avoid making very specific orders that First Nations later argue against. This can easily be avoided with deals in earlier stages of proceedings where no compensation has been ordered. The purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders. A careful reading of the Tribunal's decisions makes this clear.

[514] The FSA is driven both by the class action cases and class action law. It does not apply a human rights lens and does not uphold Canada's human rights obligations under the Tribunal's orders. While the AFN in its submissions urges the Tribunal to consider a class action lens, the AFN has not persuaded the Tribunal why the Tribunal should apply this lens instead of an assessment based on existing human rights jurisprudence, especially as articulated in earlier decisions in this case. Even if the Tribunal were to use a class action lens, the AFN and Canada have not sufficiently explained how the factors that apply to a class action analysis would be applicable in the current context where many of the beneficiaries of the class action have an existing entitlement to compensation under valid Tribunal orders. While these orders are under judicial review, this is considerably different from the most typical class action context where none of the class action beneficiaries have any legal entitlement to compensation at the time of a settlement approval hearing. Further, the AFN does not sufficiently address how the class action framework applies when considering victims/survivors who would lose entitlement to compensation that they are currently owed by Canada.

[515] Furthermore, the Tribunal believes that Justice Favel's comments on reconciliation cannot be interpreted to disentitle victims/survivors who were recognized by this Tribunal.

[516] The Tribunal does not believe it has a legal basis for granting the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would reduce or disentitle certain victims/survivors from compensation under the Tribunal's orders. In addition, in requesting an amendment, Canada and the AFN have not addressed how the Tribunal would proceed given that it is being asked to amend its orders to reflect the FSA which includes, laudably, compensation in excess of what the Tribunal can order under the *CHRA*. The Tribunal is nonetheless urged to accept this position because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, the Tribunal is not persuaded the expedited compensation would actually occur given the possibility of challenging the Tribunal's decision on this joint motion by way of judicial review and the possibility the FSA class action settlement is not approved in the Federal Court. Therefore, there is a risk of providing a false hope to those entitled to compensation under the FSA about the timeframe in which they would receive compensation.

[517] This does not dispose of the Tribunal's retained jurisdiction to ensure systemic discrimination is eliminated. Canada cannot contract out the Tribunal's quasi-constitutional responsibility to eliminate the discrimination found and prevent similar discriminatory practices from arising. It has to occur after an evidence-based finding that satisfies the Tribunal that discrimination is eliminated and prevented from reoccurring or on consent of all, not just some, parties in the Tribunal proceedings and based on compelling evidence that the systemic racial discrimination will be eliminated. The Tribunal urges Canada in the spirit of reconciliation to remove the pressure on victims/survivors and First Nations and extend its December 30, 2022, deadline to the agreements to at least March 2023. The Tribunal has requested a minimum of 60 business days to consider outstanding aspects of the long-term reform and will take the appropriate time needed to consider the matter.

[518] The AFN in its oral arguments at the September 2022 hearing submitted that discrimination continues. This can be revisited in the long-term issue.

XI. Order

A. The Tribunal grants the motion in part and Declares/Finds

[519] The FSA substantially satisfies the Tribunal's orders and, given that the Tribunal cannot order non-parties to negotiate or amend the FSA, recommends:

- A. Canada negotiates with the class action and Tribunal parties and allocates funds to cover all victims entitled to compensation under the Tribunal decisions. The amounts already ordered by the Tribunal should be the floor.
- B. For example, Canada can pay compensation funds of \$20 billion or more if insufficient into a trust within 21 days following the letter-decision in order to generate interest until the time it is ready to roll out compensation in order to compensate human rights victims who were included in the Tribunal's orders but excluded under the FSA.
- C. If the Federal Court does not approve the FSA, the funds could revert to Canada.
- D. This may not be sufficient to cover the excluded categories. The parties to the FSA may need to consider other options.
- E. If all the victims/survivors identified and the compensation amounts in the Tribunal's orders are accounted for in the FSA and there is a possibility for them to opt-out of the FSA in a manner that rectifies the areas of concern mentioned above, the Tribunal will be able to find the FSA fully satisfies the Tribunal's orders.

[520] Alternatively:

- A. Given the real potential for delaying compensation from additional litigation and judicial reviews that may arise from either side as a result of this joint motion, the Tribunal recommends removing the Tribunal approval from the FSA and make the necessary amendments to settle all three class actions and move forward at the Federal Court for approval and pay compensation in early 2023 to victims/survivors covered in the class actions. The parties to these proceedings can finalize their unfinished work in a timely manner and come back before the Tribunal to start distributing compensation to victims/survivors in the near future. Again, the Federal Court approved the Panel's compensation decisions and determined that they were reasonable, this is a compelling reason supporting our reasons in this decision. This alternative can be achieved regardless of Canada's judicial review at the Federal Court of Appeal.
- B. Furthermore, the Tribunal notes the comments from the parties during the hearing that they are not yet in a position to distribute compensation under the Tribunal's orders and the Compensation Framework. The Tribunal reminds the parties that, absent a stay of the orders, the parties have an obligation to continue to address outstanding compensation issues so that they are in a position to set the earliest implementation date possible.

[521] The Tribunal's role includes all Peoples in Canada and must protect victims/survivors especially children. The Tribunal signals to all victims/survivors in Canada that once your rights have been recognized and vindicated, they cannot be taken from you by respondents, third parties or the same Tribunal who has vindicated your rights unless ordered by higher Courts.

[522] The Tribunal believes that the great work accomplished by the parties in these proceedings and the parties to the FSA can be kept alive and move forward if all victims/survivors are included or if the Tribunal's full approval is no longer required.

XII. Retention of jurisdiction

[523] The Tribunal retains jurisdiction on the compensation issue within the scope explained in this ruling and will revisit its retention of jurisdiction as the Tribunal sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.

[524] This does not modify the Tribunal's previous decisions/rulings and orders or the retention of jurisdiction on long-term relief, reform or other previous decisions/rulings and orders in this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

December 20, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: December 20, 2022

Date and Place of Hearing: September 15 and 16, 2022

Ottawa, Ontario and videoconference

Appearances:

David Taylor and Sarah Clarke , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Anshumala Juyal, Jessica Walsh and Brian Smith, counsel for the Canadian Human Rights Commission

Paul Vickery and Christopher Rupa , counsel for the Respondent

Maggie Wente and Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Christopher Rapson, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 27

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2023 CHRT 44 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2023-09-26

File number: T1340/7008

Citation:

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2023 CHRT 44 (CanLII), <<https://canlii.ca/t/k3fj4>>, retrieved on 2026-01-02

**Most recent
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Tribunal
canadien
des
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2023 CHRT 44

Date: September 26, 2023

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

Decision

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

I. Introduction 1

A. Context 3

B. Issue to be decided by this Tribunal 13

C. Decision 14

D. Legal framework 14

E. Analysis 15

(i) Has the Revised Agreement addressed the Tribunal's concerns raised in 2022 CHRT 41 and does it now fully satisfy the Tribunal's orders? 15

(ii) The Derogations Regarding Kith Placements and Multiple Removals Have Been Remedied 16

(iii) The Revised Agreement now provides compensation in relation to multiple removals as set out in the Compensation Entitlement Order 23

(iv) Estates of Caregiving Parents and Grandparents 29

(v) The Uncertainties Regarding Jordan's Principle Have Been Addressed 44

(vi) Need for Clarification regarding Parents/Caregiving Grandparents under Jordan's Principle 50

(vii) Opt-out provision 55

(viii) Interest 56

(ix) Caring Society's standing in Federal Court proceedings concerning the Revised Agreement 56

(x) Apology from the Prime Minister 57

(xi) Role of the Federal Court 57

(xii) Tribunal's interpretation of specific points in the Revised Agreement 58

F. Conclusion 59

G. Orders 60

H. Retention of jurisdiction 61

I. Introduction

[1] This is a good day for human rights, First Nations children and families in Canada and a significant step towards reconciliation. The Panel congratulates the parties and all people involved in reaching this milestone and more importantly, the Panel recognizes the First Nations children and families who were harmed as a result of Canada's discriminatory practices and whose lives are paving the way for justice. This is the largest settlement of its kind in Canadian history. Sadly, this stems from the magnitude of harms that were inflicted upon First Nations children, families, communities and Nations. Canada ought to bear this in mind as an important reminder so as to never repeat history. The cycle of harm must be broken.

“History will judge us by the difference we make in the everyday lives of children.”

— Nelson Mandela

[2] The Panel honors the First Nations leadership in Canada who voiced the importance of not leaving anyone behind and the First Nations parties' courage for leading further negotiations. It took great leadership for the Assembly of First Nations (AFN) and Canada to collaborate and arrive at the previous historic Final Settlement Agreement (FSA). It took even greater leadership from the AFN and Canada's Ministers and their teams to receive the Tribunal's criticism of some aspects of the FSA (for example, leaving out some of the victims/survivors already recognized by this Tribunal), consult the Chiefs-in-Assembly, bring the Caring Society back to the negotiation table and arrive at this transformative and unprecedented Revised Settlement Agreement.

[3] The Tribunal declined to fully endorse the previous FSA because it did not fully satisfy the compensation orders the Tribunal found the victims/survivors were entitled to under the *Canadian Human Rights Act*, RSC 1985 c H-6. The Tribunal in rejecting the previous FSA was really hoping for a better outcome as a result of further negotiations. The Tribunal believes that even if this took many additional months to arrive to this Revised Settlement, it was well worth it for the victims/survivors of human rights violations.

[4] According to the parties, this is the largest compensation settlement in Canadian history so far and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister. The Tribunal believes this was an example of grace under pressure and commends the parties to the Revised Agreement and everyone involved for this outstanding achievement that will provide some measure of justice to First Nations children and families who have unjustly suffered because of their race instead of being treated honorably and justly.

[5] First Nations children ought to be honored for who they are - beautiful, valuable, strong and precious First Nations persons. Governments, leaders and adults in any Nation have the sacred responsibility to honor, protect and value children and youth, not harm them.

[6] Complete justice will be achieved when First Nations children will have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have when systemic racial discrimination no longer exists. The compensation in this case is only one component. The Tribunal, assisted meaningfully by the parties, has always focused on the elimination of the systemic racial discrimination found and the need to prevent similar practices from arising. The Tribunal has found this requires a complete reform. Making available to First Nations children and communities the rights, opportunities and privileges they have been denied and ensuring Canada ceases the discriminatory practices at issue in this case requires a transformation that will protect generations to come. This continues to be the Tribunal's focus.

[7] The Panel is grateful for the Commissions' human rights centered contributions and for the Caring Society's courageous leadership ensuring that no child is left behind and that no one loses entitlement to compensation ordered by the Tribunal. The Panel also commends the First Nations Chiefs-in-Assembly at the AFN for their leadership in adopting a resolution in the spirit of reconciliation and prompting further negotiations on compensation to ensure that no child is left behind.

[8] The Panel recognizes the valuable contributions of the Chiefs of Ontario and the Nishnawbe Aski Nation.

[9] The Panel also recognizes Amnesty International's past contributions on this important issue of compensation.

[10] Finally, the Panel recognizes the AFN's and the Caring Society's instrumental role in an effort to obtain meaningful compensation for First Nations children and families.

[11] The Panel wishes to recognize and honor the true overcomers and heroes in this case, the First Nations children and families.

[12] The Panel Chair speaks **peace** to every First Nations child, youth and young adult's heart in Turtle Island (Canada) and, to all First Nations individuals and their Communities and Nations.

[13] The Panel is pleased that Canada demonstrated effective leadership in going back to negotiations and for doing the right thing in reincluding the victims/survivors that were left out of the previous settlement agreement (2022 FSA).

[14] The work is not finished, there is much more to do. Compensation is but one aspect of this case. Racial and systemic discrimination must be eliminated and similar practices must not arise or be perpetuated.

[15] Finally, while there is more to do, this milestone deserves to be celebrated as it will be transformative for thousands of First Nations children and families.

A. Context

[16] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First

Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

[17] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Canadian Charter of Rights and Freedoms*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

(emphasis changed)

[18] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[19] The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

[20] The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

[21] The Tribunal encouraged the parties for years to resolve compensation issues.

[22] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

[23] The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Tribunal who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

[24] Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights.

[25] Indeed, on September 6, 2019, the Tribunal rendered its decision on compensation (2019 CHRT 39), wherein it ordered Canada to compensate and pay interest to: (i) certain victims of discrimination under the FNCFS Program who were removed from their homes, families and communities; (ii) their parents or caregiving grandparents and, (iii) certain victims of Canada's discriminatory application of Jordan's Principle. Included in the decision were First Nations children on-reserve and in the Yukon who were unnecessarily removed from their homes and communities from 2006 onwards (later confirmed to include children in out-of-home placements on January 1, 2006), and First Nations children who were denied the essential services needed, or received the essential services after an unreasonable delay, because the Government of Canada failed to meet the legal requirements of Jordan's Principle (the "Compensation Entitlement Order").

[26] The Tribunal ordered Canada to consult with the Caring Society and the AFN to develop a compensation distribution framework to arrive at a final order for the distribution of the compensation ordered.

[27] On October 4, 2019, Canada applied for judicial review of the Compensation Entitlement Decision and sought a stay of the Tribunal's proceedings. After the Federal Court dismissed the stay motion on November 27, 2019, Canada agreed to work with the Caring Society and the AFN on the framework.

[28] On February 21, 2020, the Caring Society, the AFN, and Canada submitted a first draft compensation framework to the Tribunal (the "Compensation Framework"). From February 2020 to December 2020, the Caring Society, the AFN and Canada worked to finalize the Compensation Framework. While many aspects of the compensation framework were the result of negotiation and consensus, certain issues were resolved through adjudication before the Tribunal.

[29] The Tribunal ultimately addressed the issues raised before it by the parties and issued further orders clarifying various elements of its Compensation Entitlement Order, including: the age of majority, eligibility for those who remained in care as at Jan 1, 2006 and the eligibility for the estates of deceased victims (2020 CHRT 7); the definitions of "service gap", "essential service" and "unreasonable delay" for the purpose of Jordan's Principle compensation (2020 CHRT 15); the definition of a "First

Nations child” in relation to eligibility under Jordan’s Principle (2020 CHRT 20); and that compensation owing to minor beneficiaries and those without legal capacity be held in trust (2021 CHRT 6).

[30] On February 12, 2021, the Tribunal approved the final Compensation Framework as revised by the parties (2021 CHRT 7). While this Order substantively addressed aspects of the distribution process for compensation, the parties understood that a significant amount of future work would be required by the parties to address items which included, but were not limited to, how eligibility would be determined, the operation of the implementation process and the continued role of the Tribunal. This work remained subject to Canada’s judicial review of the Compensation Entitlement Order and the Tribunal’s orders regarding eligibility under Jordan’s Principle (2020 CHRT 20 and 2020 CHRT 36), as addressed in Federal Court File Nos. T-1621-19 and T-1559-20.

[31] The judicial reviews were heard on June 14-18, 2021. On September 29, 2021, the Federal Court dismissed Canada’s applications in their entirety (2021 FC 969).

[32] On October 29, 2021, Canada appealed the Federal Court’s order (2021 FC 969) upholding the Compensation Entitlement Decision to the Federal Court of Appeal (Federal Court of Appeal File No. A-290-21).

The Class Actions and Procedural History of the Revised Final Settlement Agreement

[33] On March 4, 2019, a class action was commenced in the Federal Court seeking compensation for First Nations children who suffered comparable discrimination related to a lack of prevention services leading to the placement of First Nations children in out-of-home care as well as the discriminatory application of Jordan’s Principle, beginning on April 1, 1991 (Federal Court File No. T-402-19) (“Moushoom Class Action”).

[34] On January 28, 2020, a proposed class action was filed by the AFN and other representative plaintiffs seeking compensation for removed First Nations children and those who experienced discrimination under Jordan’s Principle (Federal Court File No. T-141-20) (“AFN Class Action”). A separate class action involving Canada’s discrimination in the provision of essential services, products and supports prior to December 2007 was commenced on July 16, 2021 by the AFN and the representative plaintiff Zacheus Trout (Federal Court File No. T-1120-21) (“Trout Class Action”).

[35] The Moushoom Class Action and the AFN Class Action were consolidated on July 7, 2021 and certified on November 26, 2021 (2021 FC 1225). The Trout Class Action was certified on February 11, 2022 (together, the three class actions are referred to as the “Federal Court Class Actions”).

[36] On December 31, 2021, the parties to the Federal Court Class Actions concluded an Agreement-in-Principle (“AIP”) addressing compensation. On June 30, 2022, a final settlement agreement was reached (the “2022 FSA”) and in July 2022, the AFN and Canada brought a motion to the Tribunal seeking a declaration that the 2022 FSA was fair, reasonable, and satisfied the Compensation Entitlement Order and all related clarifying orders (the “Joint Motion”). In the alternative, AFN and Canada sought an order varying the Compensation Entitlement Order, the Compensation Framework Order and other compensation orders, to conform to the 2022 FSA.

[37] The Panel agreed the victims/survivors have been waiting long enough and emphasized that they could have been compensated at any time since the Tribunal’s decision in 2016 and even more so after the *Compensation Decision* in 2019.

[38] The Tribunal heard the Joint Motion in September 2022 and dismissed the Joint Motion by letter decision on October 25, 2022, with full reasons set out in 2022 CHRT 41 and can be accessed online at: <https://canlii.ca/t/ko8tm>.

[39] The Tribunal in 2022 CHRT 41 on the Joint Motion found that the 2022 FSA substantially satisfied the Compensation Entitlement Order. However, the Tribunal identified three (3) key areas where the 2022 FSA departed from the compensation orders, disentitled or reduced entitlements for certain victims already entitled to compensation which, as it will be explained below, was contrary to human rights principles carefully applied in the Tribunal's findings on compensation and corresponding orders. These derogations included the following:

(a) children removed from their homes, families and communities and placed in non-ISC funded placements were improperly excluded from receiving compensation (2022 CHRT 41 at paras. 283-331);

(b) the estates of deceased caregiving parents and grandparents were excluded from receiving compensation, which was not in keeping with 2020 CHRT 7 (2022 CHRT 41 at paras. 332-350);

(c) certain caregiving parents and grandparents would receive less compensation either in circumstances of multiple removals or if there was an unexpected number of claimants which required a reduction in compensation to the class to ensure that all caregiving parent and grandparent victims received compensation (2022 CHRT 41 at paras. 351-360).

[40] The Tribunal also raised concerns regarding eligibility under Jordan's Principle and the uncertainties introduced in the 2022 FSA regarding the class action approach, with questions around the meaning of "significant impact" and the definition of "essential service". The Tribunal determined that uncertainty existed with respect to whether the implementation of Jordan's Principle under the 2022 FSA would result in the victims identified by the Tribunal receiving \$40,000.

[41] The Tribunal also expressed concern about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390).

[42] The Tribunal said in 2022 CHRT 41 at paragraph 10:

that the same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure in its compensation decision they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions that are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the CHRA regime and the Tribunal's orders.

[43] Notably, in 2022 CHRT 41 at paragraph 169, the Tribunal stated the question of quantum of compensation was never up for discussion and no suggestion was made by the Tribunal or the parties to modify the quantum of compensation or to reduce or disentitle categories already recognized by the Tribunal in its compensation orders. In fact, this aspect was final and supported by findings and reasons and sent a strong deterrent message to Canada and a message of hope to the victims/survivors whose rights were vindicated by those findings and corresponding orders. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. The Tribunal noted the important purpose of individual compensation for victims of discrimination:

was necessary to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

(2019 CHRT 39 at para 14).

[44] The Tribunal reiterated that in the Compensation Entitlement Decision, 2019 CHRT 39, at para. 206, the Tribunal also made clear that its obligations are to safeguard the human rights of the victims/survivors it identified, irrespective of any proposed class proceedings:

The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy discrimination and if applicable, as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[45] The Tribunal in its reasons rejecting the 2022 FSA, the Tribunal mentioned that it is responsible for applying the *CHRA* and the human rights framework reflected in that legislation.

[46] Moreover, in 2022 CHRT 41, the Tribunal reasoned as follows:

More importantly, the Tribunal frowns on reducing compensation or disentitling victims/survivors once they have been vindicated at the Tribunal and upheld by the Federal Court. This dangerous precedent would send a very negative message to victims/survivors in this case and other human rights cases in Canada and could potentially become a powerful deterrent to pursue human rights recourses under the *CHRA*. Victims/survivors would never have the peace of mind that their substantiated complaints and awarded remedies would be forthcoming to them if, at any time before remedies are implemented, these remedies can be taken away from them without the need for a successful judicial review (See at, para. 259).

This is even more troubling when we consider the nature of the complaints before the Tribunal in this case. The very nature of human rights rests upon the protection of vulnerable groups. From the beginning the Tribunal found and wrote that this case is about children and the Tribunal's mandate to eliminate discrimination and prevent similar practices from arising. Permitting reductions or disentitlements of compensation for victims/survivors who have been recognized in evidence-based findings and corresponding orders does not breathe life into human rights. Rather, it takes its breath away, (See at, para. 260).

This cannot be how the human rights regime is administered in Canada (See at, para. 261).

Once rights have been recognized and vindicated (which is no small task for complainants and victims who often face powerful respondents challenging their claim at every turn), they

are no longer up for debate by outside actors or respondents who may disagree with the orders made against them and therefore cannot contract out of their human rights obligations under the *CHRA* (See 2022 CHRT 41. at, para. 236).

The Tribunal cannot overstate the importance of securing victims/survivors' rights across Canada. [...] Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights

legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative

Proceeding, (See 2022 CHRT 41, at, para. 502).

[47] The Tribunal urged the parties to this proceeding and the parties to the Federal Court Class Actions to work together to allocate additional funds to cover all victims/survivors entitled to compensation as already ordered by the Tribunal and to uphold the human rights regime in a manner that respects and acknowledges those orders and the pain and suffering of all victims/survivors identified by the Tribunal in its previous reasons and orders.

[48] On December 7, 2022, the First Nations-in-Assembly unanimously adopted Resolution 28/2022 regarding compensation for the victims of Canada's discrimination. Resolution 28/2022 included the following critical direction:

Support compensation for victims covered by the 2022 FSA on compensation and those already legally entitled to \$40,000 plus interest under the Canadian Human Rights Tribunal (CHRT) compensation orders to ensure that all victims receive compensation for Canada's wilful and reckless discrimination.

Support the principles on which the FSA is built, including taking a trauma-informed approach, employing objective and non-invasive criteria, and ensuring a First Nations-driven and culturally informed approach to compensation individuals.

Continue to support the Representative Plaintiffs and all victims of Canada's discrimination by ensuring that compensation is paid out as quickly as possible to all those who can be immediately identified and to continue to work efficiently to compensate those who may need more time.

[49] With the guidance set out by the Tribunal in 2022 CHRT 41 and the direction and support provided by First Nations leadership, the parties to the Federal Court Class Actions and the Caring Society engaged in negotiations resulting in the Revised Agreement. The Revised Agreement was approved by the First Nations-in-Assembly on April 4, 2023, and executed by the parties to the Federal Court Class Actions on April 19, 2023. As the Caring Society was not a party to the Federal Court Class Actions, the AFN, the Caring Society and Canada executed Minutes of Settlement in this proceeding on April 19, 2023.

B. Issue to be decided by this Tribunal

[50] The parties submitted the following notice of motion to the Tribunal:

MOTION FOR APPROVAL OF THE REVISED COMPENSATION FINAL SETTLEMENT AGREEMENT and CONSENT RELIEF OF THE ASSEMBLY OF FIRST NATIONS, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ATTORNEY GENERAL OF CANADA

THIS CONSENT MOTION IS MADE under Rule 3 of the *Tribunal's Rules of Procedure* (*Proceedings Prior to July 11, 2021*) and is for orders under paragraph 53(2)(b) of the *Canadian Human Rights Act* (the "CHRA") and under Rule 1(6) and 3(2)(d) and pursuant to the Tribunal's continuing jurisdiction in this matter. ...

AND TAKE NOTICE THAT THIS CONSENT MOTION IS FOR orders confirming that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Final Settlement Agreement (the "**Revised Agreement**"), made respecting Federal Court File Nos. T-402-19 (*Moushoom et al v Attorney General of Canada*), T-141-20 (*Assembly of First Nations et al v His Majesty the King*) and T-1120-21 (*Trout et al v Attorney General of Canada*) dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding.

[51] The parties jointly submit that the Revised Agreement presented to the Tribunal on this motion heeds the Tribunal's guidance and the direction from the First Nations-in-Assembly: the derogations have been remedied; the uncertainties in relation to eligibility under Jordan's Principle have been addressed; the approach to compensation in relation to the estates of parents/caregiving grandparents has been varied to ensure a better outcome for children impacted by Canada's discrimination; and compensation to parents and caregiving grandparents under Jordan's Principle has been aligned with the spirit and intent of the Tribunal's finding in this case. The Assembly of First Nations, the Caring Society, the Human Rights Commission, the Chiefs of Ontario, the Nishnawbe Aski Nation and Canada consent to this motion. The Revised Agreement can be consulted online at: <https://afn.bynder.com/m/21fa33f66e9b73d1/original/04-2023-Compensation-Final-Settlement-Agreement-April-17-with-schedule>

C. Decision

[52] After careful consideration, the Panel agrees.

The joint motion is allowed.

D. Legal framework

[53] The Tribunal relies on the same legal framework detailed in length in its reasons in 2022 CHRT 41 to support the finding that it has jurisdiction to determine if the Revised Settlement fully satisfies the Tribunal's compensation orders. The Panel outlined the proper approach to reviewing a request for a consent order in 2020 CHRT 36 at para. 51:

The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[54] Moreover, the legal framework pertaining to the requested orders will be addressed in turn in the analysis below.

E. Analysis

(i) Has the Revised Agreement addressed the Tribunal's concerns raised in 2022 CHRT 41 and does it now fully satisfy the Tribunal's orders?

[55] The Tribunal will not embark on a clause-by-clause comment of a very voluminous document. The Tribunal has carefully reviewed the Revised Agreement and will comment only on the parts that it had found problematic in 2022 CHRT 41 and that needed changes in order to fully satisfy the Tribunal's orders. In sum, the Tribunal agrees that the rest of the Settlement Agreement and claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. The Revised Agreement does not require children to testify and will be culturally appropriate and safe. This formed part of the Tribunal's compensation orders. Indeed, the Tribunal stressed the importance of avoiding the retraumatizing of children in its compensation orders. The Revised Agreement adopts a trauma informed approach best suited in this case. Further, subject to the Federal Court's approval, a Settlement Implementation Committee composed of five members will be established and will include two First Nations members and three Counsel members. As per the Tribunal's orders, subject to some exceptions, the compensation will be paid directly to the victims/survivors or in a trust fund until they have reached the age of majority as determined by law and administered by a Court appointed independent Trustee. Upon

careful consideration and, in applying a human rights lens, the Tribunal finds the Revised Agreement in the best interests of First Nations children and families who are entitled to compensation under the Tribunal's orders.

[56] For the above reasons, the Tribunal only needs to focus on the sections that will be discussed below.

[57] Of note, the Revised agreement now includes a request for an apology from the Prime Minister, standing in Federal Court for the Caring Society, a longer opt-out deadline for victims/survivors and interest on compensation as per the Tribunal's compensation orders. The Tribunal will also discuss these in turn below.

[58] While the Tribunal ruled that a settlement need not mirror all the Tribunal's compensation orders as long as the spirit of its orders is honoured, it cannot disentitle, reduce or strip away the victims/survivors' compensation guaranteed in the Tribunal's orders. Therefore, ensuring this is remedied in the Revised Agreement is the focus and the framework in the Tribunal's analysis of the Revised Agreement.

[59] A summary of joint submissions from the parties is reproduced below. The Tribunal decided that it was wise to use the parties' own description of how they consider having addressed the Tribunal's concerns instead of rewording them. The Tribunal will address them in turn and provide its reasons under each of the parties' descriptions.

(ii) The Derogations Regarding Kith Placements and Multiple Removals Have Been Remedied

[60] In 2022 CHRT 41, the Tribunal found that the 2022 FSA settlement amount of \$20,000,000,000 did not include a budget to compensate First Nations children removed from their homes, families and communities who were placed in placements not funded by Canada ("Non-ISC Funded Placements").

[61] The joint parties submit that the Revised Agreement now includes compensation for First Nations children removed from their homes, families and communities and placed in alternative non-ISC funded placements and compensation for their parents/caregiving grandparents. These placements are referred to as "Kith Placements" in the Revised Agreement. Children placed in Kith Placements, as well as their parents/caregiving grandparents, are entitled to \$40,000 plus applicable interest.

[62] Article 7 of the Revised Agreement sets out the principal eligibility requirements for First Nations children removed from their homes, families and communities, and placed in Kith Placements. Given the challenges with the available documentation for Kith Placements, the parties will craft a separate and unique approach for the verification of eligible class members under this category. The approach will involve the participation of the Caring Society, as well as input from youth in care and youth formerly in care and First Nations Child and Family Services Agencies ("FNCFS Agencies"), (See, Article 7.01(8), Revised Agreement, Exhibit "F" to the AFN Affidavit). No member of the Kith Child Class will be required to submit to any form of interview or *viva voce* (oral) evidence taking and the claims process will be designed with the goal of minimizing risk of causing harm. Further, the joint parties state that compensation in relation to Kith Placements will require a specific approach given that data relevant to Kith Placements is often collected in a different manner than those in ISC-funded placements. The process for determining eligibility will be structured with guidance from records management experts, youth in care and youth formerly in care, and input from the Caring Society. The Revised Agreement fully satisfies the Compensation Entitlement Order in relation to these victims (See, Article 7.01(1) and (2), Revised Agreement, Exhibit "F" to the AFN Affidavit).

[63] The Revised Agreement provides for a budget of \$600 million for the Kith Child Class and \$702 million for the Kith Family Class, (See, Article 7.02 (5) and 7.04(2), Revised Agreement, Exhibit "F" to the AFN Affidavit). These are new amounts being committed by Canada and are not a redistribution of funding under the 2022 FSA. These amounts meet or exceed the Caring Society's estimates of the budget required to compensate the likely number of victims in each category, (See Annex A).

[64] As set out in Annex A, the Caring Society based its estimates on data obtained from iterations of the Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS-2019) providing information on placements for First Nations children. The Caring Society reviewed existing data from the Canadian Incidence Study on Reported Child Abuse and Neglect (2019 FN-CIS) to extrapolate the number of First Nations children in Non-ISC Funded Placements.

[65] This data was used to extrapolate population sizes based on information available regarding children in “ISC-funded” placements, provided by the Parliamentary Budget Officer and experts retained by the class action parties. Recognizing the ongoing gaps in child welfare data, the evidence used for these calculations is the best available. The data is valid and reliable and the Caring Society’s calculation assumptions are conservative, in order to avoid underestimating the number of potential victims.

[66] Table 16 of the 2019 FN-CIS attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as Exhibit “F”, notes that 2,365 First Nations children were removed to placements not funded by Canada in 2019. This amounted to roughly 40% of all placements made in 2019.

[67] The Caring Society also verified the proportion of placements not funded by Canada in the 2003 report *Understanding Overrepresentation of First Nations Children in Canada’s Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003)* (also known as *Mesnmimk Wasatek: catching a drop of light*) (“2003 FNCIS”), which estimated 1,554 First Nations children being removed to placements not funded by Canada in 2003. This amounted to roughly 45% of all placements made in 2003. A true copy of Table 7-6 from the 2003 FN-CIS is attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as Exhibit “G”.

[68] Using these two figures, the Caring Society assessed that the estimated number of children removed to placements funded by ISC under the FNCFS Program from January 1, 2006 to March 31, 2022 (including children already in care on January 1, 2006) would represent roughly 57.5% of all First Nations children living on-reserve who had been removed from their homes.

[69] The Caring Society is of the view that the budgeted amounts for the Kith Child Class and the Kith Family Class are fair and reasonable. These amounts reflect the Caring Society’s own work to extrapolate, based on existing data, the number of First Nations children likely in the Kith Child Class in order to evaluate the sufficiency of proposed budgets, (See Dr. Blackstock’s Affidavit dated, June 30, 2023, at para 40). As a result, the Caring Society is comfortable and confident that the budgets in relation to Kith Placements will fully satisfy the Tribunal’s orders in relation to these children and families.

[70] The Caring Society also received analysis of the 2019 FN-CIS data from Dr. Fallon regarding the proportion of First Nations children resident on-reserve who were removed in 2019 and placed in Non-ISC Funded Placements located more than a 30-minute drive from their residence. A true copy of this analysis is attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as, Exhibit “H”. This data was used to serve as a proxy for children placed outside of their communities. Data regarding unfunded placements with “kith” (adults who do not have a blood relationship to the child, also referred to as “fictive kin”) as opposed to “kin” (a child’s relatives) are unclear. A 2017 Policy Brief from the Children’s Advocacy Alliance in Nevada estimated that 20-30% of children in “kinship” places are placed with “fictive kin” (i.e., individuals to whom the child is not related, but with whom there is a relationship of trust with the family). A true copy of the Children’s Advocacy Alliance Policy Brief is attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as Exhibit “I”.

[71] Furthermore, data in a 2017 report produced by researchers at the University of Melbourne noted that 17.5% of children in statutory kinship care in Australia were placed with non-relatives. A true copy of Table 2 from this report is attached to Dr. Blackstock’s affidavit, dated, June 30, 2023, as Exhibit “J”.

[72] The Attorney General submits that during the negotiations that followed the Tribunal's rejection of the 2022 FSA, Canada agreed to add an additional \$3.34394 billion to the \$20 billion already committed to in the Agreement-in-Principle and June 2022 Final Settlement Agreement. This amount includes additional funds to ensure that: a. Non-ISC funded or "kith" placements are compensated, including children and their caregivers, (See Dr. Valerie Gideon's affidavit dated June 30, 2023, at para. 10).

[73] The victims/survivors forming the Kith Child Class are First Nations children placed with a Kith Caregiver (an adult who is not a member of the Child's Family who lived off reserve and cared for the child without receiving funding in terms of the placement), in a Kith Placement (a First Nations Child residing with Kith Caregiver and the placement was associated with a child welfare authority) during the period between April 1, 1991, and March 31, 2022, thus extending the compensation for these children contemplated by the Tribunal back to the advent of the Direction 20-1, in line with the timeline for compensation for the Removed Child Class. Members of the Kith Child Class are not eligible for enhancements, but will receive the full compensation they would have received under their CHRT entitlement plus Tribunal-directed interest, which has been preserved in the Revised Agreement by way of an Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2), 7.02(2)). The amount of \$600 million with respect to the budget for the Kith Child Class was drawn from the Caring Society's evidence-based consideration of the potential class size for children between 2006-2022. The AFN defers and relies upon the Caring Society's submissions as to the 2006-2022 class size.

[74] With respect to the caregiving parents or in their absence, caregiving grandparents of Kith Child Class members, compensation has been limited to the period of the Tribunal's Compensation Orders, being from January 1, 2006 to March 31, 2022, (See, Revised Agreement art. 7.03(1)). These Kith Family Class Members, (See, Revised Agreement art. 1.01 definition "Kith Family Class"), similar to the Removed Child Family Class, are not eligible for compensation if they abused an eligible child in alignment with the Tribunal Compensation Orders, (See, Revised Agreement art. 7.03(2)). The Kith Family Class members may also receive multiples of compensation where multiple children were removed and placed in a Kith Placement between January 1, 2006 and March 31, 2022, (See, Revised Agreement art. 7.03 (4)). The budget for the Kith Family Class was set at \$702 million in compensation, which was extrapolated from the projected size of the Kith Child Class over the period covered by the Tribunal's compensation orders, (See Dr. Gideon's affidavit dated June 30, 2023, at. para. 55). The AFN again defers to the Caring Society in this regard.

[75] The AFN submits that the collective efforts on addressing the payment of compensation for non-ISC funded placements by way of the establishment of the Kith Child Class and Kith Family Class have resulted in the effective implementation of the Tribunal Compensation Orders. Compensation under the Revised Agreement is predicated on compensating those whose removal was a result of the discriminatory FNCFS Program, not who funded the removal. Thus, the Revised Agreement accounts for the harms these victims/survivors experienced as a result of the infringement of their human rights and dignity when they or their children were deprived of the opportunity for preventative services and least disruptive measures due to Canada's discriminatory conduct. The Kith Class entitlements entirely align with and provide for the effective implementation of the Compensation Orders in relation to these victims/survivors, in a manner which is in the best interests of First Nations children and families. The AFN submits that Revised Agreement fully satisfies the Tribunal's Compensation Orders in relation to these victims/survivors.

[76] Given this category of beneficiaries was found to have been excluded completely under the 2022 FSA, the Tribunal needs to determine 1) Does the Revised agreement now include this category of beneficiaries previously excluded under the 2022 FSA? 2) If the answer is yes, is this category of beneficiaries included in a fair and equitable manner ensuring there are sufficient compensation funds set aside for the compensation ordered by this Tribunal. In order to make this finding, the Tribunal must also look at the evidence provided and determine if the process to locate the beneficiaries is fair and, if this process is reasonable and supported by reliable evidence.

[77] Further, the Tribunal explained its jurisdiction to analyse the 2022 FSA in order to determine if it fully satisfies the Tribunal's orders in 2022 CHRT 41. The Tribunal continues to rely on those legal findings and framework. Briefly, the Tribunal found that it was not functus officio to consider if the 2022 FSA fully satisfies the Tribunal's orders. The same reasoning applies here for the Revised Agreement. In sum, the purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders. A careful reading of the Tribunal's decisions makes this clear (See, para. 513). The Tribunal detailed its reasons at length in the 2022 CHRT 41 and they will not all be repeated here. The Tribunal found this category of victims and survivors was excluded from the 2022 FSA and did not reflect the Tribunal's compensation orders.

[78] The Tribunal stated at para. 297:

(...) the systemic and racial discrimination is focused on how the Federal FNCFS Program adversely impacted First Nations children and families on reserve and in the Yukon, the Tribunal did not focus on ISC funded placements.

(emphasis omitted)

[79] Further, at paragraph 314, the Tribunal found that:

The Panel agrees with the Caring Society that there appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the Tribunal ordered compensation for Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivizing children being unnecessarily moved from their home, family and community during child welfare involvement. The case did not address whether a child was placed in care funded by ISC after their removal. The Tribunal never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC. Canada's funding of actual maintenance costs contributed to the systemic racial discrimination by creating an incentive to place children in care but did not limit discrimination to those children placed in care funded by ISC. The Panel's experience throughout has been to focus on the harm experienced by the affected children based on Canada's discriminatory an underfunded provision of child and family services.

[80] Moreover, at paragraph 317, the Tribunal found:

[317] The Tribunal recognized that removing a child from their family is always a harmful event and particularly problematic when it could have been prevented with appropriate services. The Tribunal found that the discriminatory underfunding of prevention services increased the likelihood of children being unnecessarily removed from their homes (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177). This initial removal was discriminatory regardless of whether the child's subsequent placement was funded by ISC.

[81] Furthermore, at paragraph 472 The Tribunal found that the:

Tribunal's main reason not to endorse the FSA is that it derogates from the Tribunal's existing orders in reducing compensation to some victims/survivors to accommodate the fixed quantity of funds under the FSA and the much larger number of victims/survivors in the class actions competing for these funds. No substantive findings or orders have been made concerning the victims in the class actions, yet in the FSA some displace some of the victims/survivors whose rights have been vindicated in these proceedings.

In others, those victims/survivors had to be included for the Tribunal to make a finding that the FSA fully complied with the Tribunal's orders.

[82] Moreover, the Panel agreed with the AFN that compensation is linked to the systemic discrimination found by this Tribunal in the provision of services through the Federal FNCFS Program. However, the Tribunal found that the nuance newly made by the AFN and Canada did not reflect the spirit of the Tribunal's rulings. It transformed the focus from what led to the removals to who pays for a removed child's care (See, 2022 CHRT 41 at, para. 331).

[83] Upon consideration, the Tribunal accepts the joint parties' uncontested evidence. The data analysis and process to identify this category of beneficiaries is fair and reasonable and while this is untested evidence, all parties consent on this point. Moreover, the Tribunal finds the evidence provided is relevant and reliable and supports a finding on a balance of probabilities in favour of this process adopted on consent of the parties. The Tribunal finds the evidence demonstrates that it is more probable than not that the compensation funds will cover all the victims/survivors included in this category of beneficiaries that is now aligned with the Tribunal's compensation orders.

[84] For these reasons, the Tribunal finds the victims/survivors in this category of beneficiaries have now been included in the Revised Agreement in full compliance with this Tribunal's orders under section 53(2) of the *CHRA* and as identified in 2019 CHRT 39 and further clarified in 2022 CHRT 41. Furthermore, the Tribunal has jurisdiction to make the requested order and finds this fully satisfies the Tribunal's compensation orders on this category of victims/survivors.

(iii) The Revised Agreement now provides compensation in relation to multiple removals as set out in the Compensation Entitlement Order

[85] In 2022 CHRT 41, the Tribunal found the 2022 FSA fell short in terms of the quantum of compensation ordered by this Tribunal for this category of victims/survivors. The Tribunal reasoned as follows:

[356] The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims/survivors who were retraumatized and suffered greatly. Losing more than one child heightens the presence of a willful and reckless behavior; it does not reduce it. The Tribunal emphasized that, given this was the worst-case scenario, maximum compensation should be paid for the removal of each child. While the harm suffered warrants more than \$40,000 per child removed, the *CHRA* places a cap on compensation. The FSA chips away at the heart of the willful and reckless discriminatory practice found and the orders that signal to Canada that its behavior was devoid of caution and caused compounded harm to parents and grandparents in removing more than one child.

[357] Those findings were made after carefully considering the evidence and submissions and nothing in this joint motion changes this. While the Tribunal understands the need for compromise as part of the settlement negotiations, the result is that the Tribunal orders that recognized this category of victims/survivors will be significantly reduced not based on evidence but rather to ensure everyone can receive some compensation within the fixed pot of compensation funds.

[86] Therefore, the Tribunal made orders to ensure that parents or grandparents who had children in their care who were removed as a result of the systemic racial discrimination found would receive the maximum compensation of \$40,000 under the *CHRA* per child removed. This means one child removed: \$40,000, two children removed: \$80,000, three children removed: \$120,000, etc. In the 2022 FSA, there was an amount of maximum \$ 60,000 for multiple removals of children which did not comply with the Tribunal's orders.

[87] In response, the class action parties, with the assistance of the Caring Society, contemplated the number of claimants who could potentially be able to claim for multiple removals and developed a budget in the amount of \$997 million for same, which was accepted by Canada and incorporated into the settlement funds of the Revised Agreement (See Dr. Valerie Gideon's Affidavit dated June 30, 2023, at paras. 57-59 and Revised Agreement art. 6.06(6)). While the Revised Agreement provides for the payment for multiplications for all members of the Removed Child Family Class, it does place some restrictions on those members who do not have an existing entitlement under the Tribunal's Compensation Orders. This does not impact upon those with an existing CHRT entitlement. The restriction for non-CHRT compensation includes a cap of \$80,000 in compensation for those who had two or more children removed between the period of April 1, 1991 and December 31, 2005 (and who were no longer in care on January 1, 2006) and Stepparents, (See, Revised Agreement 6.06(1)-(4)). These are not deviations from the Compensation Orders as these members of the Removed Child Family Class have no pre-existing Tribunal entitlements. The Revised Agreement also contemplates the potential adjustment of eligibility and compensation for these specific members of the Removed Child Family Class who have no existing Tribunal entitlements, including the potential for increases to the \$80,000 cap.

[88] Whether to include stepparents and the appropriate limitations upon eligibility to align with First Nations conceptions of family structures was the subject of a mediation between the Parties to the Revised Agreement in 2022. For clarity:

- a) The Revised Agreement requires that Stepparents, who are not entitled to compensation under the Compensation Orders, be First Nations in order to be eligible for compensation.
- b) The requirement that individuals are First Nations does not apply to caregiving parents and/or grandparents who are entitled to compensation under the Compensation Orders.
- c) Step-grandparents are not eligible for compensation under the Revised Agreement or under the Compensation Orders, regardless of their First Nations status.

[89] The Revised Agreement also places an \$80,000 cap on sequential removals and the potential for adjustment of this compensation on caregiving grandparents where a caregiving parent (not a stepparent) has been approved for compensation under the Revised Agreement with respect to the affected child, (See, Revised Agreement 6.06(4)(c)). The AFN submits that this cap does not amount to a divergence from the Compensation Decision or the Tribunal's related Compensation Orders, but instead acts as a clarification of the Tribunal's intentions, the scope of which was developed by the parties to the Revised Agreement and Minutes of Settlement further to the dialogic process. A minor clarification to the Compensation Framework is required in the following scenario: where a caregiving parent has claimed compensation for the removal of a child, and the child is subsequently removed from the care of a caregiving grandparent, the Revised Agreement limits the multiplication of compensation to \$80,000.

[90] In sum, the joint parties submit that a First Nations parent/caregiving grandparent will receive multiple base compensation payments of \$40,000 plus applicable interest if and when more than one child has been removed from their family and placed off-reserve with a non-family member. The multiplication of the base compensation payment will correspond to the number of children who were removed from the First Nations parent/caregiving grandparent and placed off-reserve. The parties are of the view that the Revised Agreement now fully addresses this derogation.

[91] The parties to the Tribunal proceedings considered the development of compensation in line with the Tribunals direction, ultimately developing the following text in the Compensation Framework as endorsed by the Tribunal in 2021 CHRT 7 at s. 4.4:

Where a child was removed more than once, the parents (or one set of caregiving grandparents) **shall** be paid compensation for a removal at the first instance. A different grandparent or set of grandparent(s) (or the child's parents where they were not the primary caregivers" at the time of the first or prior removal) **may** be entitled to compensation for a subsequent removal where they assumed the primary caregiving role where the parents (or the other grandparents) were not caring for the child, "

(emphasis added).

[92] The joint parties submit that what is clear upon an examination of the provisions related to the payment for sequential removals is the fact that the Tribunal, via its endorsement of the Compensation Framework, expected that the parents, or one set of caregiving parents, would be entitled to for the removal at first instance, as illustrated by the use of "shall". This entitlement for removal at first instance is mirrored in the context of the Revised Agreement, (See, Revised Agreement art. 6.06(1)). The Compensation Framework thereafter establishes the potential for different caregiving grandparent(s) or parents, where not the caregiver at the removal of first instance, to claim compensation for a subsequent removal. To be clear, this provision did not establish an entitlement, but merely the possibility by way of the use of "**may**".

[93] The AFN submits that limiting compensation for caregiving grandparents where a caregiving parent has already advanced a claim for compensation to the affected child is a reasonable clarification of the Tribunal's Compensation Orders, providing certainty to scope of entitlement where none previously existed in the context of the Tribunal's proceedings, as well as reflecting the wishes and efforts of all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly.

[94] The class action parties' and the Caring Society's efforts to address the payment of compensation for multiple removals for the Removed Child Family Class results in the effective implementation of the Tribunal Compensation Orders in this regard. While a clarification by the Tribunal is required, it is supported by the approach as endorsed by the Tribunal in the Compensation Framework and substantially aligns with the Tribunal's previous orders/reasons. Finally, the provisions in relation to multiple removals amount to relief that builds upon the Tribunal's Compensation Orders in a manner that ensures clarity with respect to the entitlement to compensation for victims/survivors and that those with an existing Tribunal entitlement will receive their full due. The Revised Agreement therefore fully satisfies the Compensation Orders in relation to these victims/survivors.

[95] The Tribunal confirms that the joint parties' interpretation of the Tribunal's orders is correct. The Tribunal in its compensation orders envisioned the payment of the maximum compensation amount for each child removed at the first instance. The Tribunal did not envision multiple payments if the same child was removed multiple times. The Compensation Framework adopted by the Tribunal offers this as a possibility however, the parties are correct in their interpretation of the terms "shall" and "may". The Tribunal views the term "shall" as an obligation while the term "may" is only a possibility depending on the specific circumstances that had to be further developed and determined by the parties. The final decision in the event of a disagreement and after the appeal process falls upon this Tribunal under the Compensation Framework in light of the evidence before it. Furthermore, the Draft Compensation Framework includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6). The Tribunal's orders take precedence over the Compensation Framework in the event of any inconsistency.

[96] Moreover, the purpose of the Draft Compensation Framework is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be consistent with, and subordinate to, the Tribunal's orders (1.2).

[97] Further, the AFN submits the Revised Agreement directly ameliorates this derogation. A parent/caregiving grandparent is now entitled under the Revised Agreement to receive multiple base compensation payments of \$40,000 plus applicable interest if and when more than one child has been removed from the family home and placed off-reserve with a non-family member, (See, Article 6.06(1), Revised Agreement, Exhibit “F” to the AFN Affidavit). The Revised Agreement sets out that multiplication of the base compensation payment will correspond directly to the number of First Nations children removed and placed off-reserve with non-family, (See, Article 6.06(2), Revised Agreement, Exhibit “F” to the AFN Affidavit).

[98] Again, all parties consent. Consequently, the evidence provided was not refuted or tested. Upon careful consideration of the Revised Agreement and all related materials, the Tribunal finds the available data analysis, calculations and estimates to be fair and reasonable. Moreover, the Tribunal finds the evidence and arguments relevant and reliable and support a finding that the Revised Agreement fully satisfies the Tribunal’s orders in this category of victims/survivors entitled to compensation.

[99] For example, the Revised Agreement now budgets \$997 million specifically to ensure that parents/caregiving grandparents who have experienced multiple losses of First Nations children from their care will be compensated, (See, Article 6.06(6), Revised Agreement, Exhibit “F” to the AFN Affidavit). Recognizing the limitations of available data, the Caring Society has used the best available evidence to calculate a budget that ought to provide sufficient funds to fully compensate parents/caregiving grandparents for all instances in which their children were removed from their homes, families and communities, (See, Dr. Blackstock’s Affidavit dated June 30, 2023, at para 32). As set out in Annex A, the Caring Society’s calculations are based on estimates of the number of children impacted by the FNCFS Program provided by the Parliamentary Budget Officer and by experts retained by the class action parties, and on Census data noting the approximate overall number of caregivers per First Nations child.

[100] As mentioned above, the estimates were provided by the Parliamentary Budget Officer and experts and on Census data and accepted by the joint parties. The Tribunal finds this information reliable. Section 50 (3) (c) of the *CHRA* allows the Tribunal to consider other information as part of its consideration of matters. This is particularly useful when the evidence is untested and provided on consent and may have a lesser probative value than when the evidence has been tested in a hearing.

[101] This being said, the Tribunal is satisfied that sufficient evidence and other information support the requested orders for a finding that the Revised Settlement Agreement fully satisfies the Tribunal’s compensation orders in this category.

[102] Furthermore, as already mentioned above and in previous rulings, the Tribunal has the authority to clarify its orders. The Tribunal continues to rely on its legal findings and reasons as discussed in previous rulings and further detailed in 2022 CHRT 41.

[103] The Tribunal agrees with the clarification request from the joint parties and in light of the above, finds that it is helpful to provide this further clarification. Therefore, the Tribunal clarifies its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to \$80,000 in total compensation regardless of the number of sequential removals of the same child.

[104] The Tribunal finds that parents/caregiving grandparents are now entitled under the Revised Agreement to receive multiple compensation payments of \$40,000 plus applicable interest if and when more than one child has been removed from their home. Therefore, the Revised Agreement now fully satisfies the Tribunal’s orders on this point.

(iv) Estates of Caregiving Parents and Grandparents

[105] The Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (2020 CHRT 7, at paras. 77-151).

[106] The spirit of this order also highlights the important public interest and deterrent components included in the remedy:

[79] Significantly, Canada ought not benefit from a financial windfall simply because children, youth and family members have died waiting for Canada's discrimination to end. This is particularly so given the Tribunal's findings that Canada's discrimination is wilful and reckless and ongoing in the case of the First Nations Child and Family Service Program. Additionally, the Caring Society contends that one of the purposes of compensation pursuant to the CHRA is to remove the economic incentive for discrimination by ensuring that some measure of the cost savings respondents achieve by discriminating are returned to victims. Indeed, allowing Canada to financially benefit due to its own delays in having this case resolved could set a dangerous precedent and entice other respondents to delay cases in the future where a particularly vulnerable group or individual brings a case forward,

(emphasis added).

[107] In 2022 CHRT 41, the Tribunal found that the 2022 FSA fell short of the compensation ordered by this Tribunal:

[332] Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.

[333] This is a clear derogation from the Tribunal's orders.

[108] In response to the Tribunal's concerns regarding the estates of deceased caregiving parents and caregiving grandparents, the Revised Agreement at, section 14.03(1)-(2), provides for claims to be made on behalf of Removed Child Family Class Members (of a child placed off-Reserve with non-family as of and after January 1, 2006), Kith Family Members, or Jordan's Principle Family Class Members. Specifically for these caregiving parents and grandparents, the Revised Agreement provides that where a claim has been approved, base compensation in the amount of \$40,000 and interest will be paid directly to their living child or children on a pro rata basis. The AFN submits that this entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[109] The Revised Agreement now includes the estates of deceased First Nations caregiving parents and grandparents and specifically provides for \$40,000 in relation to those victims who have passed away while waiting for compensation to be resolved. The joint parties submit this fully aligns with the Tribunal's orders.

[110] However, the Revised Agreement sets out a mechanism to pay compensation owing to the estates of First Nations parents/caregiving grandparents directly to the child(ren) of the deceased. Instead of the \$40,000 flowing into the estates of the deceased First Nations parent/caregiving grandparent, the compensation will be paid directly to the children – a variation that puts children at the centre of this process. If there are no surviving children, the compensation will flow to the estate of the deceased First Nations parent/caregiving grandparent.

[111] Therefore, the joint parties seek a variation of 2020 CHRT 7. All parties in this case consent.

[112] This variation achieves multiple benefits: (i) it acknowledges the compounded harm and suffering experienced by a child victim who has lost a parent/caregiving grandparent by providing additional compensation; (ii) it avoids the complex and lengthy procedural requirements related to estates; (iii) it ensures that the full benefit of the compensation for which the estate is eligible is directed to the surviving children of that First Nations parent/caregiving grandparent; and (iv) ensures that the compensation funds will not be subject to potential estate administration taxes.

[113] The AFN submits that the approach is principled, as it effectively prioritizes the children/grandchildren heirs of these deceased caregiving parents and grandparents at least one of whom would be victims/survivors themselves, and thus the basis for the deceased caregiving parent's or grandparent's claim for compensation. Effectively, the settlement funds to which the deceased's estate would be entitled under the Tribunal's compensation orders would be treated akin to life insurance, allowing it to bypass the estate and be paid directly to the named beneficiary of same (children/grandchildren) with the commensurate benefits. This includes the expedited delivery of compensation, avoiding the potential diminishment of the benefit of settlement funds to surviving First Nations children/grandchildren as a result of the deceased's estate being indebted, as well as the potential levy of estate administration taxes, (See Dr. Valerie Gideon's Affidavit dated June 30, 2023, at para. 64).

[114] This directly accords with the principles enumerated both in the Compensation Framework which sought to avoid the diminishment of victims/survivors' compensation as a result of tax consequences, as well as the efforts of the Revised Agreement to ensure that any compensation payable would remain tax exempt and not negatively impact any social benefits that victims/survivors are receiving (consistent with the Tribunal's guidance in 2019 CHRT 39 at para 265, see also, Compensation Framework at s. 10.9, Revised Agreement art. 10.03).

[115] The AFN submits that this evidence supports the relief sought with respect to varying the compensation entitlement of estates of deceased caregiving parents and grandparents who have an existing entitlement under 2020 CHRT 7, and that it also substantially aligns with the Tribunal's reasons within the context of the related Compensation Orders. It is also in the best interest of the First Nations children and families who are the victims/survivors of Canada's discrimination by ensuring that the children/grandchildren heirs of same receive their undiminished compensation. For the AFN, this amounts to a reasonable variation which has been supported by all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly. The AFN submits that with the adoption of this principled and evidence informed variation of the Tribunal's Compensation Order, which is in the best interest of First Nations class members, the Revised Agreement fully satisfies the Tribunal's Compensation Orders by ensuring that the Tribunal's compensation entitlement for these deceased caregiving parents and grandparents effectively flows to their children or grandchildren.

[116] In addition to providing further compensation to the children of deceased parents/caregiving grandparents, the proposed amendment would facilitate victims' ability to access compensation. Distributing money to beneficiaries when someone passes away can be a complex undertaking, with certain procedural requirements varying across the country. This process can be particularly complex when the deceased fails to leave directions, the deceased lived on reserve, or when the estate that receives the compensation has not already been through the court process of probate. Stringent bank rules and regulations for access to and distribution of the Estate funds add to these procedural hurdles, sometimes making distribution to beneficiaries frustrating, costly, and lengthy, (See, Alberta Law Reform Institute, *Estate Administration: Final Report* (Edmonton: August 2013), at paras. 188-212 (Alberta); Law Commission of Ontario, *Simplified Procedures for Small Estates: Final Report* (Toronto: August 2015), at pp. 16-17, 25-28 and 48-61 (Ontario). See for example *Wills, Estates and Succession Act*, SBC 2009, c 13, s 144 (British Columbia); *Trustee Act*, RSO 1990, c T.23, s 49 (Ontario); *Estate Administration Act*, RSY 2002, c 77, ss 97 (Yukon)).

[117] There are also concerns regarding who the compensation will benefit if directed to the estates of parents/caregiving grandparents. Pursuant to estate laws across the country, creditors take precedence over beneficiaries, (See, for example *Trustee Act*, RSO 1990, c T.23, ss 53, 57-59 (Ontario); *Civil Code of*

Québec, CQLR c CCQ-1991, ss 2644-2659 (Quebec); *Estate Administration Act*, RSY 2002, c 77, ss 96-104 (Yukon). Where an estate is bankrupt, section 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, applies to determine the priority of creditors). For example, in Ontario, an estate trustee is required to pay the debts of the estate in the following order before any distribution can be made to beneficiaries: (i) reasonable funeral expenses; (ii) expenses related to the administration of the estates, including probate fees, professional fees and compensation for the executor/estate trustee; (iii) secured creditors; (iv) taxes; and (v) unsecured creditors, (See, *Trustee Act*, RSO 1990, c T.23, ss 48-59).

[118] The AFN submits that paying compensation directly to the children of the deceased parent/caregiving grandparent avoids many of the complications, costs and delays associated with estate administration. It avoids the complex requirements of probate, circumvents the payment of compensation to creditors, reduces expenses and thus maintains the entirety of the compensation payment and gives control over the compensation directly to the children of deceased parents/caregiving grandparents. It is also entirely in line with the approach taken by Quebec's Tribunal des droits de la personne in *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, in which Quebec's Commission des droits de la personne sought an order that compensation be paid directly to the deceased complainant's children, (See, *Commission des droits de la personne (Succession de Poirier) c. Bradette Gauthier*, 2010 QCTDP 10 at paras 6 and 130).

[119] The Caring Society notes that the Commission's submission of March 9, 2020, suggesting that payments to estates would be appropriate in the context where it was difficult to locate proper beneficiaries does not apply in this context. There is an unquestionable link between the compensation payable to a deceased parent/caregiving grandparent and the lived experience of that person's surviving child(ren).

[120] The Caring Society submits that First Nations children and youth in this case have suffered egregious harms as a result of Canada's discriminatory conduct. This harm is compounded by the loss of a parent/caregiving grandparent, (See Dr. Blackstock's Affidavit dated June 30, 2023 at para 55). Thus, distributing the Tribunal's compensation directly to the children and youth of the deceased parent/caregiving grandparent acknowledges this compound harm, allowing the Tribunal to make an order reflective of the suffering experienced by these victims/survivors.

[121] First Nations children who have lost a parent face compounded harms: the harm inflicted by Canada's discriminatory conduct and the harm of losing a parent. Evidence from the National Inquiry into Missing and Murdered Indigenous Women and Girls (the MMIW Inquiry) and academic literature demonstrates that bereaved children face significant challenges, (See, Dr. Blackstock's Affidavit dated, June 30, 2023, at paras 56-58). The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations who have lost a parent.

[122] In 2019 CHRT 39, at paras 13 and 258, the Tribunal acknowledged that the cap under the *CHRA* may not correspond to the level of suffering experienced by the victims in this case. The variation sought on this motion is a meaningful way that First Nations children and youth who have been impacted by Canada's discrimination along with the compounded harm of losing a parent may be compensated in excess of \$40,000 plus interest. This is in the best interests of the child victims/survivors in this case and is an amendment that reflects both the spirit and scope of the Tribunal's previous compensation orders.

[123] This variation also reflects the spirit and intent of the *Merit Decision*, the Compensation Entitlement Order and the Tribunal's general approach in putting children first.

[124] A consent order sought as part of a Settlement Agreement provides more flexibility for the Tribunal to approve it as long as the orders sought are within the Tribunal's broad – but not unlimited – powers. In other words, the Tribunal cannot issue a consent order if it does not have the power under

the CHRA. Further, as already said many times in 2022 CHRT 41, settlements and or consent orders are not a means to disentitle or reduce compensation already ordered. They are a firm foundation to be built upon.

[125] The Tribunal finds this consent order is not a mere clarification request. It is a variation of an order made by this Tribunal. This Tribunal already explained at length in 2022 CHRT 41 why it was not prepared to disentitle compensation to victims who had passed away waiting for the discrimination to be remedied. However, the consent order request does not propose to disentitle or reduce the compensation ordered by the Tribunal. The Tribunal finds the request does not propose a fundamental change of the order. Rather, it proposes a different first step in the process.

[126] The criteria to vary an order were discussed in 2022 CHRT 41:

[344] While estates are not people, the heirs of those estates are and they were signaled by the Tribunal's decision subsequently upheld by the Federal Court that they were entitled to compensation. It is unfair to now remove this from them because of financial choices resulting from merging proceedings and imposing a financial cap. These arguments are insufficient to justify an amendment to the Tribunal's orders on this point. As it will be revisited below, the Tribunal cannot amend its orders to reduce compensation or to disentitle victims/survivors. The Tribunal could accept variations of its orders if it does not remove gains for victims/survivors or a different compensation process and if supported by the evidence, which is a key consideration for this Tribunal for any order.

(emphasis added)

[127] The Tribunal continues to rely on this legal finding and other legal findings discussed in 2022 CHRT 41, at paras. 155-201 and in all its other compensation orders.

[128] For example, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. This analysis and factors continue to apply here:

[36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc.

(emphasis added).

[129] Furthermore, the main points gravitate around the following questions: Is there new evidence and compelling argument to consider that would support a finding to vary an order or a new process that would add and/or help refine the orders? Will this void the previous order and/or reduce the quantum of compensation or disentitle victims or simply add and refine the order in light of the new evidence, information and arguments provided in the best interest of First Nations children and families? The Tribunal believes it is the latter.

[130] Dr. Blackstock affirms in her affidavit that parental estates are now included in the Revised Agreement. The Caring Society set out to extrapolate, based on existing data, the number of parents whose children were removed from their homes, families, and communities, who would not have survived to the date of settlement approval.

[131] The Caring Society selected April 1, 2006 to March 31, 2023 as the date range over which it would estimate the number of parents whose children were removed from their homes, families and communities who passed away prior to the date of settlement approval. The Caring Society selected this period, as the First Nations-specific mortality information that it had access to was based on annualized statistics, making it difficult to select “partial year” periods to reflect deaths between January 1, 2006, and March 31, 2006, or from April 1, 2023 to settlement approval.

[132] More specifically, Dr. Blackstock affirms that the Caring Society’s estimation of the number of parents of First Nations children removed from their homes, families and communities who passed away between January 1, 2006 and March 31, 2023 was based on a 2018 paper authored by Randall Akee, of the University of California, Los Angeles’ Department of Public Policy and by Donna Feir, of the University of Victoria’s Department of Economics, titled *First People Lost: Determining the State of Status First Nations Mortality in Canada Using Administrative Data*. A copy of Professor Akee and Professor Feir’s paper is attached to Dr. Blackstock’s Affidavit, dated June 30, 2023, as Exhibit “K”.

[133] The Caring Society did not conduct similar estimates for parents of children who experienced discrimination related to Jordan’s Principle who themselves experienced a “worst case scenario” of compensation. Given that the piloting exercise has not yet been conducted, there is insufficient information to establish the “cohort” of parents from which to calculate the number of parents who would not have passed away prior to settlement approval. However, the Caring Society’s view is that mortality within this cohort can be considered by the Federal Court, on submissions from all parties including the Caring Society, as one of the factors in determining the reasonableness of the claims process proposed to distribute the \$2,000,000,000 budget established for compensation to the parents of victims falling within the Jordan’s Principle and Trout Classes.

[134] For the Caring Society, an important aspect of the Revised Agreement (which we acknowledge is a deviation from the Tribunal’s order in 2020 CHRT 7) includes the provision that compensation that would otherwise be paid to the estates of deceased parents will be paid directly to the children of those deceased parents.

[135] Dr. Blackstock affirms that privileging children as beneficiaries of parental estates is an important and sacred component of the Revised Agreement.

[136] Dr. Blackstock’s evidence refers to the National Inquiry into Missing and Murdered Indigenous Women and Girls (the “MMIWG Inquiry”), where she served as an expert witness, where evidence was shared regarding the harmful impacts on First Nations children who lose a parent, particularly when that loss is the result of a violent death. Experiencing loss of a parent or caregiver, particularly to violence, can result in children and youth harbouring intense feelings of loss and anger, unresolved trauma, depression and, at times, suicide.

[137] The MMIWG Inquiry also noted these children can face an increased risk of experiencing mental health challenges, substance misuse, involvement in the criminal justice system, becoming a young parent, and dying while young. Additional harmful impacts include weakened or permanently ruptured ties with siblings, extended family, and home communities; loss of culture, language, and sense of identity; risks of abuse or neglect; and an increased risk of homeless and poverty. The relevant sections of the MMIW Inquiry Report are attached to Dr. Blackstock’s Affidavit dated June 30, 2023, as Exhibit “L”.

[138] Dr. Blackstock affirms that academic literature also demonstrates that bereaved children face significant challenges.

[139] Evidence suggests that bereaved children are vulnerable for increased risk for social impairment – not only during the immediate post bereavement period but extending into adulthood. They also face educational challenges, social challenges, and mental health challenges. Moreover, depending on the family’s circumstances at the time of the death, children and youth may face housing instability, family

instability and a significant loss of love and nurturing required for healthy development. A selection of academic literature on this topic is attached to Dr. Blackstock's Affidavit dated June 30, 2023, as Exhibit "M".

[140] Throughout this case, the Caring Society's primary focus has been on supporting and advocating for the rights of First Nations children, youth and families harmed by Canada's discrimination. The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations children and youth who have lost a parent – a traumatic experience for all children but an experience compounded by their experiences of discrimination in this case.

[141] In Dr. Blackstock's view, taking a child centered approach to directly compensating these children aligns with the spirit of the Tribunal's work and honours the memories of the children and youth who have passed on. Most children and youth who died during the long history of this case were surrounded by loving families and the child's estate ought to benefit those left behind.

[142] The Tribunal has carefully considered all evidence and arguments and it finds the MMIWG report relevant to this question. As found in previous rulings, the MMIWG Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls vol. 1a and vol. b, report is reliable. This National inquiry heard hundreds of witnesses and experts and this led to calls to justice in the form of recommendations that were accepted by Canada.

[143] The MMIWG report also found that when failure to find continuity or a sense of belonging can lead youth to adopt addictive lifestyles or to adopt unhealthy self-images leading to suicidal thoughts or attempts, (See MMIWG report at page 426). Importantly, the same analysis also showed that the strongest protective influence against Indigenous youth suicide was "“high support, whether social or familial”", (See MMIWG report at page 427).

[144] Further, Dr. Blackstock was recognized as an expert in child welfare before this Tribunal, she testified and/or provided affidavits for the Tribunal multiple times and her evidence was of great assistance to the Tribunal. Her resume filed in evidence has 50 pages of relevant experience and expertise. In other words, her evidence is reliable. More importantly, Dr. Blackstock has demonstrated throughout this case her quest for the best interest of children and her child-centric approach which is in line with the Tribunal's focus.

[145] The Tribunal finds the process, estimations and calculations part of the evidence and referred to above to be reasonable and accepts this evidence.

[146] Further, on a principled basis, the Tribunal finds it is more probable than not that First Nations children harmed by the systemic racial discrimination found by this Tribunal who lose a parent, experience compound harm - even if the scientific articles filed in evidence as part of this joint motion - are inconclusive and do not support such a finding. The Tribunal agrees with Dr. Blackstock's position on compound harm and her evidence. However, the Tribunal prefers the MMIWG report and other evidence in the record than the scientific articles provided. The Tribunal does arrive at the same conclusion as Dr. Blackstock without the articles. The Tribunal has already made findings of harms linked to the separation between a child and a parent. In 2019 CHRT 39:

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

(emphasis added)

[155] [...]

[...]

As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people, (see 2016 CHRT 2 at, para. 394. 2019 CHRT 39, at para. 155),

(emphasis changed).

[147] The trauma of losing a parent or grandparent through separation was found by this Tribunal to cause serious harm and suffering to a child and, as found by the Tribunal above, is in addition to the other aspects of the systemic racial discrimination. The Tribunal finds this also applies to the death of a parent or grandparent or family member. Moreover, Marie Wilson, former Truth and Reconciliation Commissioner, provided affidavit evidence on the harm of separating a child and a parent that was considered by this Tribunal:

She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.

(see 2018 CHRT 4 at para. 122).

Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system.

(see 2018 CHRT 4 at para. 123).

[148] Moreover, losing the hope of an opportunity of reunification with a deceased parent or grandparent for example, can add further suffering to the child. Another example would be of a child who was removed and later finally reunited with a parent or grandparent who then passes away. It is reasonable to find that it is more probable than not that these situations would add further harm and trauma to a child's soul.

[149] The Tribunal made findings on the MMIWG report in previous rulings. Therefore, the full MMIWG report is part of the Tribunal's record. This supports Dr. Blackstock's evidence discussed above:

Noting the inequities, participants across all four Guided Dialogues also emphasized the negative impact that foster care experiences have on the long-term safety and well-being of Indigenous women, girls, 2SLGBTQIA people, and families as a whole. These impacts include:

- weakened or permanently ruptured ties with parents, siblings, extended family, and home communities, (See MMIWG report vol. 1 b at page 113).

(...) allow parents and children to remain together throughout the healing process, and provide specialized support for children experiencing trauma, violence, or neglect in their family home;

“Keep the families together during times of healing and a transition. Provide them with the support they need to work out their issues and rebuild their life.”, (See MMIWG report vol. 1 b at page 115).

[150] Furthermore, the evidence and findings discussed above demonstrate the suffering and negative consequences associated with the separation between children and their parents. Therefore, it is reasonable to find that permanent separation caused by the death of a parent or of a grand parent can amount to compound harm for their children.

[151] Moreover, the administrative burdens referred to by the AFN are a factor to be considered by the Tribunal in the compensation process as explained above. The evidence supports the AFN’s position and qualifies as a refinement of the order for an optimal implementation of the compensation orders. However, the Tribunal does not view the evidence as new evidence that was unavailable at the time the Tribunal heard the compensation matter and that now arises justifying a reopening of a final matter. This would be an incorrect characterization of the facts and of the evidence. This qualifies more appropriately as new considerations and examples of hardship forming part of the process and the implementation of the order. The Tribunal has remained seized of the implementation of its compensation orders and has made clear that refinements and additions during the compensation process and its implementation could be made if justified. This is the case here.

[152] In other words, the authority to vary the Tribunal’s order as found in 2022 CHRT 41 flows from its ongoing supervisory role of the implementation of its orders and its retained jurisdiction. Moreover, this consent order request does not remove gains for victims/survivors which is in line with the Tribunal’s 2022 CHRT 41 ruling.

[153] The Tribunal finds the quantum and spirit of the order honouring deceased victims of Canada’s systemic racial discrimination remains unchanged under the Revised Agreement. Rather, it is a different compensation process at the first step that is requested here and placing the living First Nations children of the deceased victims at the forefront. Further, the compensation payment to estates remains as a second step when the deceased victims do not have living children.

[154] This important information on the administrative burdens and the compound harm was not put before the Tribunal when it arrived at its findings and orders regarding estates. While this is not sufficient to reopen a final matter according to the case law, it is sufficient according to the Tribunal’s previous orders, its retained jurisdiction on the compensation process and implementation and the Tribunal’s clear intent to leave the door open for possible improvements, refinements and additions to further the implementation of its orders in the best interest of First Nations children and families.

[155] The requested order does not modify final orders on quantum. Moreover, the requested order does not deny, reduce or disentitle compensation to the deceased victims rather it provides a priority rank for their living child or children to receive compensation on a pro rata basis. The Tribunal finds this recognizes both the harms borne by the deceased and their living children and avoids unnecessary administrative burdens and costs.

[156] Moreover, as seen above, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. The Tribunal also specified that the compensation process ought to be informed by the First Nations parties in this case. The full paragraph is reproduced below:

[36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc. Consequently, the Panel finds the compensation process remedy in this case can be viewed as a “special program, plan or arrangement” that is informed by First Nations parties in this case and a broad and liberal interpretation of sections 16 (1), 53(2)(a), 53 (2)(e) and 53 (3) of the *CHRA* and Supreme Court and Tribunal decisions discussed in 2021 CHRT 6 at paras. 51-79. Finally, on this point, the Panel determined that the *CHRA* analysis and reasoning found in the scope of *CHRA* remedial provisions section in 2021 CHRT 6 at paras. 51-79 and 80 applies to the *Draft Compensation Framework* as a whole and supports the Panel’s approval of the *Draft Compensation Framework* dated December 23, 2020,

(emphasis added).

[157] Both the AFN and the Caring Society refer to some of the above factors to be considered by the Tribunal namely, administrative burdens and the vulnerability of victims/survivors who are minors.

[158] For the above reasons, the Tribunal finds the Revised Agreement provides a base compensation in the amount of \$40,000 and interest to be paid directly to the living child or children on a pro rata basis. When there are no living children, the compensation is to be paid to the victims’ estate similar to the Tribunal’s original order. This entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[159] In the case at hand, focusing on the children’s compound harms first, is in line with a human rights approach and, the spirit of the Tribunal’s views in this case.

[160] The same reasoning can be applied here to justify the variation requested.

[161] Moreover, the Tribunal discussed compensation flowing to the heirs of the victims in 2020 CHRT 7 at para. 140:

In these circumstances, it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[162] Adopting a priority rank that focuses on children who are heirs of the deceased victims is a reasonable variation of the Tribunal’s order justifying such an amendment.

[163] For the above reasons, the Tribunal finds there is compelling evidence and arguments in support of the variation in the best interest of First Nations children and families. The requested variation will remove many administrative burdens resulting in an effective implementation of the Tribunal’s compensation orders for this category of victims. The Tribunal finds that it has the jurisdiction to vary the order found in 2020 CHRT 7:

[152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering (\$20,000) and s. 53(3) wilful and reckless discriminatory practice (\$20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision Order*, including the referenced period in the Order above mentioned in Question 2.

[164] The order varying 2020 CHRT 7 in the order below now provides that compensation of \$40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under 2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent.

[165] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(v) The Uncertainties Regarding Jordan's Principle Have Been Addressed

[166] The Tribunal in assessing the 2022 FSA in 2022 CHRT 41 made a number of findings that highlighted some uncertainties for the Jordan's Principle compensation category:

[373] ... it is impossible at the current point in time to know whether the implementation of Jordan's Principle under the FSA will result in the First Nations children identified under the Tribunal's orders receiving \$40,000 under the FSA. [...] there is little evidence of whether Jordan's Principle eligibility under the FSA will be interpreted in such a manner that it provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders.

[...]

[375] The FSA sets out future work that is required before there can be certainty regarding which victims/survivors under the Tribunal compensation orders will be eligible under the FSA.

[...]

[377] In order to be eligible for a guaranteed \$40,000 Jordan's Principle compensation under the FSA, First Nations children must have both experienced a denial or delay in receiving an essential service and have experienced a "significant impact" because of the delay or denial. Article 6.06(3) of the FSA indicates that a "significant impact" will be defined in the Framework of Essential Services:

[...]

[378] ... the Framework on Essential Services does not provide further guidance on a "significant impact" and what is required to engage the higher level of compensation. Neither is "Significant Impact" a defined term in the FSA. Without this information, individual claimants cannot determine whether they could be entitled to more or less compensation under the FSA than they would be eligible to obtain under the Tribunal's orders.

[379] The uncertainties in benefits from the outstanding definition of an "essential service" reflects the early stages of a negotiated settlement. ... there is a real potential for reduction in compensation for some victims and disentitlements for others which is not permissible.

[167] The Tribunal found this may depart from the Tribunal's orders for this category and therefore cannot be considered to fully satisfy the Tribunal's orders and the request is premature since there are uncertainties at this time (See 2022 CHRT 41 at para. 379).

[168] This differed from the Tribunal's approach, which awarded \$40,000 plus interest to a First Nations child who experienced a denial, gap, or unreasonable delay in the delivery of "essential services" that would have been available pursuant to a non-discriminatory definition and approach to Jordan's Principle.

[169] Moreover, the definition of “Delay” did not accord with the requirements of the Compensation Framework and instead were to be defined as “a timeline to be agreed to by the Parties and specified in the Claims Process”.

[170] The joint parties submit the Revised Agreement addresses these uncertainties and the overall approach to Jordan’s Principle has been refined in harmony with the Tribunal’s orders.

[171] The joint parties submit that the 2022 FSA did not include final criteria for determining eligibility for Jordan’s Principle compensation. The parameters for determining eligibility for Jordan’s Principle compensation in the Revised Agreement now more clearly reflect the Tribunal’s approach pursuant to Jordan’s Principle. The approach for determining eligibility for Jordan’s Principle in keeping with this approach is to be subject to robust piloting before implementation.

[172] The definition of Jordan’s Principle Class Member has been revised and now states: “Jordan’s Principle Class Member” means an Essential Service Class Member who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the Delay, Denial, or Service Gap of an Essential Service that was the subject of a Confirmed Need. The Parties intend that the way that the highest level of impact is defined, and the associated threshold set for membership in the Jordan’s Principle Class fully overlap with the First Nations children entitled to compensation under the Compensation Orders” who will receive a minimum of \$40,000 in addition to interest (See, Revised Agreement, Article 1.01, Exhibit “F” to the AFN Affidavit). This aligns with the Tribunal’s language in the Compensation Decision, specifically accounting for the harms and the impacts of Canada’s discrimination.

[173] The definition of the Jordan’s Principle Class explicitly provides for the class action parties’ and the Caring Society’s intention that those with a Tribunal entitlement will receive it. Based on the estimate of 65,000 approved claimants for Essential Services Class and the Jordan’s Principle Class, all members of the Jordan’s Principle Class would be able to receive at least \$40,000. The Jordan’s Principle Class is also entitled to interest in accordance with the Tribunal’s orders, which has been ring-fenced in the Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2)).

[174] If the number of claimants was unexpectedly higher, the Revised Agreement provides that Jordan’s Principle Class Members (those who suffered the highest level of impact, which is intended to overlap with all the Jordan’s Principle children entitled to compensation under the Tribunal’s Compensation Orders) will receive a minimum of \$40,000, in addition to interest. The remaining funds in the budget would be shared pro rata by the lesser impacted Essential Service Class Members, (See, Revised Agreement, Art. 6.08(10)-(12)). Conversely, if the number of claimants is lower, upon the advice from the Federal Court-appointed Actuary, Jordan’s Principle Class Members may be entitled to enhancement payments, (See, Revised Agreement, art. 6.08(15)). The Revised Agreement’s primary focus in relation to the Essential Service Class is to ensure that Jordan’s Principle Class members receive their entitlements as directed by the Tribunal.

[175] The term “Compensation Orders” is defined in the Preamble of the Revised Agreement as 2019 CHRT 39, 2020 CHRT 15, and 2020 CHRT 7, thus encompassing the terminology, guidance and approaches set out by the Tribunal in those orders. The Caring Society agrees with the AFN’s submission on Jordan’s Principle that there is no intention or requirement for a “jurisdictional dispute” in order for compensation to be paid to victims.

[176] The joint parties submit the definition of “Delay” has been amended to reflect the 12-hour and 48-hour timeframes ordered by the Tribunal in the Compensation Framework Order. While the 2022 FSA had left the definition of “Delay” as something to be determined in the future, the Revised Agreement is now directly in line with the Tribunal’s orders, (See, Article Revised Agreement, 1.01, Exhibit “F” to the AFN Affidavit).

[177] The AFN submits that while the Revised Agreement still provides for the need to develop the threshold by which the highest level of impact will be objectively determined, it now specifies that the underlying basis for developing this threshold necessary for inclusion in the Jordan's Principle Class is ensuring full overlap with those children entitled to compensation under the Tribunals Compensation Orders, which is set out within the definition of the Jordan's Principle Class, (See Revised Agreement art 1.01 Definition "Jordan's Principle Class").

[178] This underlying principle informs each element of the means by which the threshold of impact level shall be determined under the Revised Agreement, and thereby whether an individual falls under the Essential Services Class or the Jordan's Principle Class, including the framework for essential services, accompanying instruments, such as the claims forms and questionnaire, as well as the associated robust and broad piloting, (See, Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3), 6.08(10)(a)-(b)).

[179] The "framework of essential services", as developed with the assistance of experts, facilitates the streamlining of the compensation process and facilitates professional confirmation of the individual's need for an essential service. The framework is designed to allow claimants to identify whether they had a confirmed need for a service that was essential for the purposes of compensation. These objective criteria allow for the expedient administration of claims, avoiding the need for case-by-case individual and subjective inquiry for inclusion in the Essential Service Class, (See, Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3)).

[180] The Revised Agreement continues to provide for instruments such as culturally sensitive claims forms and a questionnaire, which will assist the Administrator at the second stage of the analysis, being a determination of whether a child's circumstances indicate the highest level of impact and thereby eligibility for inclusion into the Jordan's Principle Class, with the accompanying minimum compensation of \$40,000 and interest, in alignment with their Tribunal entitlement under the Compensation Orders, (See, Revised Agreement, art. 6.08(10)(a)). Critically, these instruments and questionnaire remain subject to Jordan's Principle expert consultations, which are First Nations-led and continue to be facilitated by the AFN.

[181] The AFN states that the Revised Agreement also provides that the threshold of impact for qualification as a member of the Jordan's Principle Class is subject to the results of piloting of the method developed in accordance with the framework of essential services. The AFN is currently involved with advancing these piloting efforts, which will include a number of potential Essential Service Class and Jordan's Principle Class members, in a manner that respects the need for full overlap with those with an existing entitlement under the Tribunal's compensation orders, and which minimizes any burdens on the victims/survivors. The piloting efforts will also assist in refining the framework of essential services, as well as the supporting instruments, such as the claims forms and questionnaire, (See Dr. Valerie Gideon's affidavit dated June 30, 2023, at paras. 73-75).

[182] Further, the pilot is to be evidence-based, premised on the efforts of the AFN's circle of experts, as well as additional independent researchers. All are of the view that the finalization of an effective approach premised on the framework of essential services, as well as the development of the threshold for inclusion in the Jordan's Principle Class premised on the highest level of harm, requires piloting. This pilot is intended to gauge the quality and efficiency of the approach to compensation established for Jordan's Principle in the Revised Agreement, allowing for the refinement of each component of the claims assessment process and ensuring that it is in alignment with the Tribunal's Compensation Orders. This is the central component of these efforts, and is the primary outcome measured. The pilot will also assist in other important aspects of the compensation process, including gauging the effectiveness of the cultural and trauma-informed supports. All of these efforts and the ultimate determination remain subject to Federal Court approval and oversight.

[183] Finally, the Caring Society submits that with respect to the budget of \$3,000,000,000 for compensation to children eligible for compensation under the Tribunal's orders regarding discrimination related to Canada's implementation of Jordan's Principle, the Caring Society's view is that, based on available evidence, this budget is sufficient. As detailed in Annex A, the Caring Society's best estimate of the number of children eligible for compensation under the Tribunal's Jordan's Principle orders is approximately 61,500 (based on demographic data from ISC regarding the number of individual children accessing services through Jordan's Principle in FY 21-22). However, there is significant uncertainty regarding that number, such that the \$3 billion budget is an essential element of the Revised Agreement's ability to satisfy the Tribunal's compensation orders. This budget allows for base compensation for up to 75,000 First Nations children, and possibly more with growth on the portion of the settlement funds that will remain in trust.

[184] The Tribunal finds the evidence supports the joint parties' methodology described above. The Tribunal finds the calculations to set aside sufficient compensation funds for all eligible claimants to be thoughtful, reasonable and fair. Consequently, the Tribunal accepts those calculations and this methodology.

[185] Furthermore, the Revised Agreement ensures that those who suffered a worst-case scenario of discrimination in relation to Jordan's Principle receive \$40,000 plus interest. This is directly in keeping with the guidance of the Tribunal in the Compensation Entitlement Order and the Eligibility Decision.

[186] The Tribunal finds that all the uncertainties described above have now been carefully addressed in the Revised Agreement in a manner that fully satisfies this Tribunal. There is now a clear methodology, clear definitions and clear criteria. There is no reduction in compensation for any victims/survivors, nor any disentitlements. There will be sufficient funds set aside to cover all eligible claimants. There is evidence that Jordan's Principle eligibility under the Revised Agreement will be interpreted in a manner that provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders. The future work that is required is clearly identified and accompanied by a defined and reasonable process and oversight by the Federal Court if the Revised Agreement is approved by the Federal Court.

(vi) Need for Clarification regarding Parents/Caregiving Grandparents under Jordan's Principle

[187] The AFN, the Caring Society and Canada seek a clarification of the Compensation Entitlement Order in relation to parents/caregiving grandparents under Jordan's Principle.

[188] In the case of a removed child, both the First Nations child and First Nations parent/caregiving grandparent are directly impacted by the lack of equitable FNCFSS services available to the family. When a child is removed from a parent/caregiving grandparent, both experience direct discrimination, pain and suffering of the worst kind.

[189] Conversely, where a child experienced discrimination as a result of Canada's failure to fully implement Jordan's Principle, the First Nations parent/caregiving grandparent may not have a derivative experience of harm that equates to their child's experience. The parties are of the view that the Tribunal intended to compensate adults who were directly impacted at the highest level by Canada's discriminatory conduct.

[190] In order to capture the true intention of the Tribunal, the Revised Agreement provides that parents/caregiving grandparents of a child eligible for compensation pursuant to Jordan's Principle will receive compensation if they experienced the highest level of impact, including pain, suffering, or harm of the worst kind. The Revised Agreement contemplates different measures of impact to parents and the child who experienced a Jordan's Principle delay, denial or service gap.

[191] This approach is consistent with the Tribunal's overall approach in its Compensation Orders, which target the worst-case scenarios of discrimination in this case. Removals, by their very nature affect a parent's individual dignity in a fundamental way. Denials, service gaps, and the impact of

unreasonable delays with respect to essential services are not necessarily interchangeable as between parents and children. To be sure, many First Nations parents (or caregiving grandparents) of a Jordan's Principle child have experienced worst-case scenarios resulting from discrimination against their children, such as: the death or removal of a child, and a family's forced relocation off-reserve. Therefore, the Revised Agreement contemplates differential criteria for assessing impacts to parents as opposed to those experienced by the impacted child.

[192] The impact that Caregiving Parents or Caregiving Grandparents have experienced will be assessed through objective criteria and expert advice, as developed through Schedule F: Framework of Essential Services and through piloting. These criteria will be subject to the Federal Court's approval, wherein the Caring Society will have standing.

[193] The Tribunal has already explained its authority to clarify its orders above. In sum, this flows from the Tribunal's retained jurisdiction and supervisory role for the effective implementation of its orders.

[194] The Tribunal finds that providing clarity as requested by the joint parties would be helpful.

[195] In a previous ruling, the Tribunal determined that some measure of reasonableness is acceptable:

[147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. The Panel also agrees that a conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering should be compensable whenever it occurred, and not only when it had an adverse impact on the health or safety of a First Nations child.

[148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.

(2020 CHRT 15 at paras. 147-48).

[196] The Tribunal further explained that compensation should accord with a reasonable interpretation of what is "essential":

The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the

Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.

(2020 CHRT 15 at para. 151).

[197] The Tribunal agrees that some measure of reasonableness is also acceptable in the eligibility criteria applicable for caregiver parents/grandparents. The Tribunal agrees to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation (\$40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps. This is in line with the Tribunal's reasoning and orders, (*see Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 at para.115 recently cited in *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183, at para. 29.). The reasoning above continues to apply and applies to caregiving parents (or caregiving grandparents).

[198] The Tribunal cautions parties not to import the stricter criteria of causal link/connection in human rights cases which was rejected by the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (CanLII), [2015] 2 SCR 789, at paras 50-51. Indeed, the Supreme Court wrote: "It is therefore neither appropriate nor accurate to use the expression "causal connection" in the discrimination context" (para. 51). This legal criteria has a different connotation than the terms used in other disciplines such as social work. The legal term causal link or causal connection is applied in medical malpractice and many litigation cases. Further, it is applied often in considering wage loss under the *CHRA*. For the Tribunal, the balance of probabilities and analysis to assess harm evaluates whether it is more probable than not that there exists a connection between the discrimination and the pain and suffering. In terms of assessing the pain and suffering (and Canada's wilful and reckless conduct), the Tribunal performs a principled and purposive analysis keeping in mind that the maximum compensation is reserved for the worst-case scenarios.

[199] The Tribunal believes that it is more probable than not that a parent or grandparent witnessing the child in their care suffering greatly would also suffer greatly. Perhaps not to the same degree as the child - sometimes less and sometimes more. The Tribunal believes this does not discount the parent or grandparent's resilience, courage, and dignity. They often are heroes who are so focused on the well-being of their child that they often discount their own feelings in order to be strong for that child. For example, a young child with terminal cancer who receives pain medication that effectively controls the pain and who does not comprehend the concept of death, suffers on many levels but not because of the concept of permanence attached to death. Their parents or grandparent's while not physically suffering, have to watch their child suffer and have this added moral and psychological pain of losing their child. In this situation, it is reasonable that both have experienced similar levels of pain and suffering.

[200] While this differs a little from the parties' arguments on this point, it is not in complete contradiction. The Tribunal also accepts that many caregiving parents/grandparents will not experience the same level of pain and suffering as their children. The approach adopted by the parties to the Revised Agreement includes flexibility to consider who has experienced the highest amount of suffering.

[201] The Tribunal accepts to clarify its order. However, the Tribunal does not rely on the articles filed in evidence to do so given they were not particularly helpful or conclusive. Moreover, there seems to be a disconnect between a reasonable understanding of human behaviour and what is found in some scientific studies. Further, the Tribunal is often asked to make compensation orders without the benefit of scientific evidence to support harms. If this were required, many complainants would not get justice.

[202] The Tribunal agrees that not all caregiving parents and grandparents under this category have suffered harm in the worst-case scenario akin to when a child has been removed from their care. In this category, there are some that suffered immensely and others who have suffered less. Not applying reasonableness here could result in some measure of unfairness and discount tremendous harm experienced by some parents/grandparents who, for example, lost children that died versus some parents/grandparents who did not obtain sporting equipment when their children needed it. Such evidence forms part of the Tribunal's record. Further, some of the tremendous harms mentioned above were discussed in previous rulings.

[203] Moreover, the Tribunal is satisfied that the process, explained by the parties above, will ensure that a reasonableness criterion is applied for this category of claimants in a fair manner, ensuring that those who suffered the most receive fair compensation.

[204] For those reasons, and given the Tribunal's previous orders and reasons, the clarification request aligns completely with the Tribunal's approach to the compensation remedies.

[205] Furthermore, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(vii) Opt-out provision

[206] The Tribunal was clear in the 2022 FSA Motion Decision on the importance of ensuring that victims/survivors have adequate time to consider the 2022 FSA and the Tribunal's 2022 FSA Motion Decision and previous Compensation Orders with the benefit of an appropriate opt-out period. It was of the view that the initial opt-out date of February 19, 2023, as described within the AFN's and Canada's materials on the 2022 FSA Motion Decision was too short and placed the victims/survivors in an untenable situation:

The unfairness deepens as the FSA seems to force victims/survivors to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims/survivors who are receiving less than their CHRT entitlement of \$40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims/survivors and may revictimize them and is therefore inconsistent with a human rights approach. This is concerning. (See 2022 CHRT 41, at para. 388).

[207] The Tribunal's concerns about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390) have now been addressed. The parties to the Federal Court Class Actions have addressed the Tribunal's comments regarding the opt-out deadline. The opt-out deadline has already been extended to August 23, 2023 by the Federal Court (See, Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit and February 23, 2023, order of Justice Aylen in T-402-19), and, in the Minutes of Settlement, the AFN and Canada have agreed to seek a further extension to October 6, 2023, subject to Federal Court approval. Therefore, the Tribunal is now satisfied with this outcome.

[208] The Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(viii) Interest

[209] The Tribunal's Compensation Entitlement Order directed victims to receive interest to the date of judgment pursuant to subsection 53(4) of the *CHRA* at the Bank of Canada rate in keeping with the approach in *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20. The 2022 FSA did not contemplate the payment of interest to the victims identified by the Tribunal. The Tribunal finds that

this has been addressed in the Revised Agreement and now all victims/survivors identified by the Tribunal are entitled to receive interest to the date the settlement approval order is final in addition to their base compensation of \$40,000.

[210] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(ix) Caring Society's standing in Federal Court proceedings concerning the Revised Agreement

[211] The Caring Society will have standing at the Claims Process hearing and therefore, should an issue arise with the applicability of the eligibility criteria, the Caring Society will have the opportunity to provide submissions to the Federal Court regarding the parameters of pain, suffering or harm of the worst kind for Jordan's Principle parents.

[212] The Caring Society will have ongoing involvement in the Federal Court proceedings (in which it will have standing on matters related to the Tribunal's orders, pursuant to the Revised Agreement). The Caring Society will be entitled to notice of proceedings before the Federal Court related to matters impacting the rights of the beneficiaries of the Tribunal's compensation orders, as well as the standing to make submissions on any applications pertaining to the administration and implementation of the Revised Agreement on compensation as it relates to those matters, (See, Article 22.05, Revised Agreement, Exhibit "F" to the AFN Affidavit).

[213] The Revised Agreement also provides for the Caring Society's involvement and participation following the end of the Tribunal's jurisdiction. Specifically, the Caring Society will have standing to make submissions to the Federal Court regarding the administration and implementation of the Revised Agreement after the Settlement Approval hearing, including approval of the Claims Process and distribution protocol, to the extent that issues impact the rights of the victims identified by the Tribunal. The Tribunal finds this provision provides for the ongoing role the Caring Society would have had under the Compensation Framework Order.

(x) Apology from the Prime Minister

[214] As mentioned above, according to the parties, this is the largest compensation settlement in Canadian history and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister.

[215] The terms of the Revised Agreement continue to call for an apology by the Prime Minister, (See, Revised Agreement at art. 24). The Tribunal cannot order apologies. However, the Tribunal completely agrees with this approach included in the Revised Agreement. The Tribunal also agrees with the Caring Society that the best apology Canada can offer is changed behaviour, so that this may be the last generation of First Nations children and youth that have to recover from their childhoods. This Tribunal believes this is true measurable reconciliation and the very reason as to why the Tribunal has remained, and continues to remain, seized of the implementation phase of its orders, and to monitor the reform ensuring the systemic racial discrimination is eliminated.

(xi) Role of the Federal Court

[216] The Revised Agreement is subject to the Supervisory role of the Federal Court should the Federal Court approve the Revised Settlement. This is an optimal approach given the class actions and the representative plaintiffs who are parties to the Revised Agreement. The Tribunal does not have jurisdiction over those class actions - the Federal Court does. This is why the Federal Court is asked to approve the Revised Agreement. Otherwise, the Tribunal alone could not approve it. Federal Court approval of the Revised Settlement would end the Tribunal's jurisdiction on the compensation orders. The Tribunal agrees with this outcome. The details are included in the order below.

(xii) Tribunal's interpretation of specific points in the Revised Agreement

[217] The Panel also wishes to address two points about its interpretation of the Revised Agreement.

[218] First, the Tribunal notes that Canadians cannot prospectively renounce their rights under the *CHRA*. Accordingly, the release in s. 10.01 of the Revised Agreement cannot release Canada from human rights violations for subsequent actions. The Tribunal wishes to explicitly note its observation that any human rights complaints for events post-dating the end of the Revised Agreement (2017 for Jordan's Principle; 2022 for removed children) are not precluded by the releases. The Tribunal understands the releases to intend to prevent Class Members who have not opted-out – as well as their estates, heirs, Estate Executors, estate Claimants, and Personal Representatives – from the Revised Agreement from claiming further compensation from Canada for harms described in the Revised Agreement even after 2017 and 2022.

[219] For non-class members, the Tribunal does not view the release as limiting liability for any discrimination that may occur subsequent to 2017 or 2022 should Canada fail to eliminate the systemic racial discrimination identified in this case and prevent the emergence of similar practices. Finally, the Revised Agreement cannot bar claims of discrimination in other federal programs or services.

[220] The Tribunal does not anticipate that its interpretation of the release differs from that of the parties. Further, the Tribunal clarifies that it has only considered the release from the perspective of the *CHRA*, not a civil or class action claim. The Tribunal intends its comments on the release to confirm what already appears obvious from the language of the release itself. This does not reflect hesitation on the Tribunal's part in finding that the Revised Agreement fully satisfies the Tribunal's compensation orders but the Tribunal's experience that it is often valuable to make wording abundantly clear. These comments should not cause the parties any hesitation in seeking the Federal Court's approval of the Revised Agreement.

[221] Second, the Tribunal finds that the Revised Agreement does not resolve the issue of long-term remedies, reform, eliminating the systemic discrimination found and preventing similar practices from recurring. Accordingly, this ruling does not address those issues.

F. Conclusion

[222] As explained above, the Tribunal finds that all categories of victims/survivors who were originally disentitled or had their entitlements reduced or who were not considered under the 2022 FSA have now been included in the Revised Settlement. This inclusion is done in a manner that fully accounts for the Tribunal's compensation orders on quantum, categories of victims/survivors and interest on compensation. The compensation will also be done in a manner that is culturally appropriate and safe for children and all victims/survivors and avoids having children testify. Therefore, the Tribunal finds the Revised Agreement fully satisfies all the Tribunal's compensation orders.

[223] As part of their submissions for this motion the Caring Society has described the Tribunal's approach in this case:

Throughout this sacred and important case for First Nations children, youth and families, the Canadian Human Rights Tribunal ("Tribunal") has focused on the human rights of First Nations children and youth, placing their right to substantive equality at the forefront of its analysis. The remedies ordered by the Tribunal acknowledge the egregious and harmful nature of the discrimination flowing from Canada's flawed and inequitable provision of child and family services and its discriminatory definition and approach to Jordan's Principle. The Tribunal awarded individual compensation to victims of Canada's wilful and reckless conduct to recognize the harm, trauma and victimization of First Nations children and families stemming from Canada's systemic violations of the *Canadian Human Rights Act* ("CHRA").

The Tribunal finds this is an appropriate characterization of the spirit of the Tribunal's compensation ruling.

[224] Further, the Tribunal emphasizes that its analysis has always placed the right of First Nations children and families to substantive equality at the forefront of all its rulings and orders including those related to Jordan's Principle, reform, cessation of the discriminatory practice and preventing it from reoccurring; and immediate, mid-term and long-term remedies. This continues to be the Tribunal's focus.

[225] Finally, the Panel looks forward to the next steps to be completed in this journey - namely complete reform; sustainable, long-term remedies for multiple generations to come; and the cessation of the discriminatory practice and the prevention of its reoccurrence.

G. Orders

[226] Pursuant to section 53(2) of the *CHRA*, the Tribunal makes the following orders:

A) The Tribunal finds that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding;

B) The Tribunal finds that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; First Nations caregiving parents/grandparents who experienced multiple First Nations children removed from their homes, families, and communities; and, First Nations children eligible for compensation due to denials, unreasonable delays, and gaps in essential services due to Canada's discriminatory approach to Jordan's Principle;

C) The Tribunal makes an order clarifying its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to \$80,000 in total compensation regardless of the number of sequential removals of the same child.

D) The Tribunal makes an order varying 2020 CHRT 7, providing that compensation of \$40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under 2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent;

E) The Tribunal makes an order clarifying its order in 2019 CHRT 39, to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation (\$40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps;

F) The Tribunal makes an order finding that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (including the Caring Society) and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. This order supersedes the Tribunal's order in 2021 CHRT 7;

G) The Tribunal makes an order that, conditional upon the Federal Court's approval of the Revised Agreement, the Tribunal's jurisdiction over its Compensation Orders will end on the day that all appeal periods in relation to the Federal Court's approval of the Revised Agreement expire or, alternatively, on the day that any appeal(s) from the Federal Court's decision on the approval motion for the Revised Agreement are finally dismissed;

H) The Tribunal makes an order that the parties will report to the Tribunal, within 15 days of each of the following: (1) the result of the Federal Court's decision on approval of the Revised Agreement; (2) the expiry of the appeal period relating to the Federal Court's decision on the Revised Agreement or of an appeal having been commenced.

H. Retention of jurisdiction

[227] This ruling does not affect the Panel's retention of jurisdiction on other issues and orders in this case other than as specified in A) and G). Consistent with the approach to remedies taken in this case, the Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief and reform, whether on consent or otherwise, that is found to be satisfactory by this Panel in eliminating the systemic discrimination found and preventing its reoccurrence or, after the adjudication of outstanding issues, if any, leading to final orders or, as the Panel sees fit considering the upcoming evolution of this case.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

September 26, 2023

Canadian Human Rights Tribunal

Parties of Record

Motion dealt with in writing without appearance of parties

Written representations by:

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Stuart Wuttke, Dianne Corbiere, D. Geoffrey Cowper K.C. and Adam Williamson , counsel for Assembly of First Nations, the Complainant

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Julian Falconer and Christopher Rapson and Natalie Posala, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 28

First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2025 CHRT 6 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2025-01-29

File number: T1340/7008

Citation:

First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2025 CHRT 6 (CanLII), <<https://canlii.ca/t/kc7s3>>, retrieved on 2026-01-02

**Most recent
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mention**

Tribunal
canadien
des
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2025 CHRT 6

Date: January 29, 2025

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Nishnawbe Aski Nation

- and -

Amnesty International

- and -

First Nations Leadership Council

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

I. Context 2

II. Summary of the Parties' submissions 9

III. Applicable Law 9

IV. Analysis 18

A. The purpose of Indigenous Services Canada and the improvements under Jordan's Principle 19

B. Substantive equality and shift in Jordan's Principle requests 20

(i) Clarification of the Tribunal's definition of urgent services 23

C. Canada's evidence on the causes of the backlog 23

D. Processing of requests and addressing the backlog: 44

E. Urgent Timelines: 52

F. Triaging of urgent requests 55

G. Other orders on urgent requests 65

(i) Relevant contact and other information provided to the public 68

H. Timelines for non-urgent Jordan's Principle cases 68

(i) Determination clock for Jordan's Principle cases 74

- (ii) Reimbursements 78
- (iii) Social prescription: 86
- (iv) Coordination of Federal Programs, gaps analysis, referrals, and elimination of gaps and barriers: 88
- I. First Nations-led service coordination. 114
- J. ISC Programs process 115
- K. Contribution agreements and sufficient resources 117
- L. The Financial Administration Act 133
- M. Inherent rights of First Nations and the FNLC submissions 136
- (i) Appeals mechanism and Complaints mechanism 137
- N. Re-reviews 138
- O. Appeals Process 138
- V. Order 154
- A. Dialogic approach and reconciliation 164
- B. Updates since the summary ruling was released: 164
- VI. Conclusion and Retention of Jurisdiction 168

I. Context

[1] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [Merit Decision] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families, and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve, and in the Yukon in a systemic way, not only by underfunding the FNCFS Program, but also in the manner that it designed, managed, and controlled it. One of the worst harms found by the Tribunal was the FNCFS Program creating incentives to remove First Nations from their homes, families, and communities. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practices in the best interests of children. The Tribunal ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term, and long-term relief so as to allow immediate change followed by adjustments and finally, sustainable long-term relief, informed by data collection, new studies, and best practices as identified by First Nations experts, the specific needs of First Nations communities and of First Nations Agencies, the National Advisory Committee on child and family services reform and the parties.

[2] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings.

[3] On December 12, 2023, the First Nations Child and Family Caring Society of Canada (Caring Society) brought a notice of motion for further relief from the Tribunal, alleging Canada's non-compliance with some of the Tribunal's orders on Jordan's Principle, and to ensure that this Tribunal's orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16), May 26, 2017 (2017 CHRT 14, as amended by 2017 CHRT 35), February 21, 2019 (2019 CHRT 7), July 17, 2020 (2020 CHRT 20) and November 25, 2020 (2020 CHRT 36) are effective.

[4] This motion was made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure* (Proceedings Prior to July 11, 2021), pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction in this matter.

[5] The Caring Society seeks an order that Canada immediately include in its definition of "urgent requests," requests from First Nations children who:

- a. Have recently experienced the death of a caregiving family member, biological parent(s), and/or siblings, or are reasonably anticipated to experience such a death; or
- b. are impacted by a state of emergency proclaimed by a First Nations government, a provincial/territorial government, or the federal government.

[6] The Caring Society seeks an order that Canada immediately revise its National Call Centre calling tree and other contact mechanisms that may exist to ensure that requestors can immediately and easily indicate that their request is urgent or, in the case of an existing request, has become urgent and ensure that ISC staff with authority to review and determine urgent requests are available in sufficient numbers during and outside of business hours;

[7] The Caring Society seeks an order that Canada will, within 45 days of this Tribunal's order, appoint sufficient persons in each ISC region and nationally who are responsible for managing urgent Jordan's Principle cases to ensure that the determinations are made in a manner consistent with the Tribunal's orders;

[8] The Caring Society seeks an order that Canada will, within 7 days of this Tribunal's order, adopt the following measures related to its backlog of unaddressed Jordan's Principle requests:

- a. Report back to this Tribunal and the parties to identify the total number of currently backlogged cases, including information regarding the cumulative number of backlogged cases at month's end, dating back 12 months;
- b. Contact all requestors in the backlog by email or phone setting out the Tribunal's timeline orders, noting Canada's non-compliant backlogs, and urging requestors with urgent or time-sensitive requests, or non-urgent requests that have become urgent, to contact specific personnel who will, including over the holiday season, determine such requests within 12 hours. The notice should also include timeframes for resolving the backlogs, information on requesting retroactive payments for requestors who had to pay for services, products, or supports due to Canada's non-compliance, and information on measures being taken to prevent backlogs from recurring.
- c. Triage all backlogged requests for urgency and communicate with all requestors with undetermined urgent cases to take interim measures to address any reasonably foreseeable irreparable harms; and
- d. Report back to this Tribunal and the parties regarding the number of urgent cases identified in the backlog, including the intake backlog, the in-progress backlog, and the reimbursement backlog, and the timeframe by which all urgent and non-urgent backlogged requests will be determined.

[9] The Caring Society seeks an order requiring Canada to adopt the following measures with respect to its National, Regional and other Jordan's Principle contact centres including its call-in lines:

- a. Restrict the National Jordan's Principle Contact Centre's practice of referring urgent cases to ISC regional offices (or vice versa) to only situations wherein ISC staff conduct a live transfer of the requestor and can confirm that the Regional Office (or National Jordan's Principle Contact Centre) has sufficient capacity to determine the case within the timeframe required under the Tribunal's orders;
- b. Provide the National and Regional contact centres with the capacity to determine the case within the timeframe required under the Tribunal's orders;
- c. Provide the National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services;
- d. Within 7 days, Canada must establish, and publicly post on its website and on social media, contact phone numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for both requests and payment inquiries;

[10] The Caring Society seeks an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately "begin the determination clock" when they are in receipt of a letter of recommendation from a professional with relevant expertise or, in the case of requests relating to culture or language, a letter from a community-authorized Elder or knowledge keeper and stop the clock when the requestor is advised of the determination of the case;

[11] The Caring Society seeks an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay funding for approved services in a manner that creates discrimination for First Nations children, youth, and families including by placing undue hardship on families and service support, or product providers in a manner that risks a disruption, delay, or inability to meet the child's needs.

[12] The Caring Society seeks an order clarifying that, consistent with the reasoning in 2021 CHRT 41, this Tribunal's orders have primacy over any interpretation of the *Financial Administration Act*, R.S.C., 1985, c. F-11 (FAA) and related instruments such as "terms and conditions," agreements, policies and conduct that limits the Tribunal's remedial authority, and that Canada shall not rely on the *Financial Administration Act* to justify departures from this Tribunal's orders.

[13] The Caring Society seeks an order that Canada report to the Tribunal, within 7 days of this Tribunal's order, regarding which of the proposed solutions (and timelines for implementation of those solutions) contained in the Caring Society's "Jordan's Principle Work Plan" (attached to this Notice of Motion as Schedule "A") it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution Canada is not prepared to adopt, the reason why not and what effective alternative measure Canada proposes to take (and the timeline on which such effective alternative measure will be implemented).

[14] The Caring Society seeks an order convening a case conference within 7 days of Canada's having submitted its response to the Caring Society's "Jordan's Principle Work Plan", at which the Tribunal may make orders, including consent orders, and provide direction and establish a schedule with respect to any matters contained within this Notice of Motion, the Caring Society's "Jordan's Principle Work Plan" and/or Canada's responding report that remain in dispute.

[15] The Caring Society seeks an order that within 45 days, Canada provide a report confirming to the Tribunal that First Nations and First Nations organizations receiving, and/or determining, and/or funding Jordan's Principle requests have sufficient and sustainable resources, including funding, to do so.

[16] The Caring Society further added a request for any additional relief the Tribunal may award to give full effect to its orders; and an order that the Tribunal retain jurisdiction until such time as measures are in place to end the discrimination and prevent its recurrence.

[17] On March 15, 2024, Canada brought a cross-motion in support of reconciliation with a specific view to reducing the existing backlog in Jordan's Principle requests received by Indigenous Services Canada (ISC), while also ensuring that urgent requests can be properly identified and prioritized by applying objective criteria. It also supports ensuring the well-being of First Nations children by allowing Canada to refer requestors to applicable community-based supports that are better suited to determining First Nations children's needs.

[18] Canada requests an order requiring that the complainants, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, the respondent Attorney General of Canada, and the interested parties including the Chiefs of Ontario and Nishnawbe Aski Nation, seek to co-develop objective criteria, within sixty (60) days of the order, to be used to identify requests, for example those requests for products, "urgent" Jordan's Principle services and supports directly linked to the needs of a First Nations child who requires urgent medical assistance or is at risk of reasonably foreseeable irreparable harm.

[19] Canada further requests an extension to the Tribunal-ordered deadlines to deal with urgent cases, clarification of the Back-to-basics approach, and the possibility of referring Jordan's Principle requestors to First Nations to an existing and applicable Jordan's Principle group request approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada. Furthermore, Canada proposes a safeguard where a request is deemed urgent in accordance with the objective criteria identified by the parties, Canada will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

[20] Canada also seeks an order that where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan's Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the procedural terms of any of the Tribunal's Jordan's Principle orders that are directed at Canada.

[21] The Tribunal in 2024 CHRT 95 granted limited interested party status to the BC First Nation Leadership Council (FNLC).

[22] The Cross-examinations of some affiants (witnesses) took place on April 2-3, 2024 and the Tribunal heard the motion and cross-motion (the motions) on September 10-12, 2024.

[23] On November 21, 2024, the Tribunal released a summary ruling with reasons to follow. The Tribunal believed that the summary ruling would be helpful to the parties to start their discussions immediately while waiting for the full reasons. This summary ruling was in response to the parties' request for clarification and to enable the parties to start their consultations. This was the Tribunal's response to pressing matters in the context of a large number of issues and materials.

[24] The Tribunal mentioned in its summary ruling that it believes it would be beneficial to have all the parties at the table including the Commission and for the parties to be advised by the parties' respective experts (First Nations who are not part of the proceedings, members of local, regional and national Jordan's Principle committees, grassroots experts, First Nations service providers, First Nations Health professionals, etc. They would not be at the negotiations unless all parties agree but the parties could request them to share their valuable input with all the parties). The Tribunal hopes for consent order

requests. However, if this is not possible, the Tribunal orders the parties to return to the Tribunal with their respective views and to provide interim options to the Tribunal supported by a plan with clear rationale and supported by available evidence.

[25] The Tribunal released a summary ruling and crafted orders to help the parties begin their consultations immediately and also indicated that its detailed reasons would take more time. The Tribunal included a process to expedite solutions while keeping the door open for adjustments. Moreover, the parties were also invited to return to the Tribunal if they had any significant issues with the wording and/or deadlines set out in the orders. The Tribunal in keeping with the dialogic approach envisioned that this process would be the most expeditious way for parties to voice any challenges with the interim orders while they started working on solutions. Given the need to expedite matters while remaining conscious of possible challenges, the Tribunal found a manner to move things forward and minimize risk by allowing parties to let the Tribunal know if an order was too challenging or unclear. The Tribunal extended a similar invitation in the past and the parties did return to the Tribunal with wording suggestions for orders and the Tribunal accepted them. This was a positive and expeditious process in keeping with reconciliation and the best interest of First Nations children.

[26] This process was subsequently used by the parties and will be discussed in the update since the Tribunal's summary ruling at the end. The update does not form part of the Tribunal's reasons but is illustrative of the expeditious process for amendments and/or clarifications envisioned in the Tribunal's summary ruling.

[27] The Tribunal is currently looking at interim solutions to address the backlogs and other aspects of Jordan's Principle.

The Motion is granted in part, the Cross-motion is granted in part.

[28] The full reasons supporting the summary ruling and orders are explained below.

II. Summary of the Parties' submissions

[29] Given the length of this ruling and the numerous topics covered, the Tribunal, having thoroughly considered all the parties' extensive submissions, will, for ease of reference, summarize some of the parties' submissions under each topic in the analysis section and will provide reasons at the same time.

III. Applicable Law

[30] At paragraph 207 of 2023 CHRT 55, and paragraph 18 of 2021 CHRT 41, the Tribunal explained the following regarding the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA):

2023 CHRT 55

[207] Section 53(2)(a) of the CHRA gives the Tribunal broad discretion in the making of remedial orders, in keeping with the broad purposes and goals of human rights legislation:

53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(emphasis omitted)

2021 CHRT 41

[18] ...Constructing an effective remedy in a complex case such as this one often demands innovation and flexibility. Section 53(2)(a) and (b) of the *CHRA* provide for this flexibility... Section 53(2)(a) is designed to address systemic discrimination which requires addressing discriminatory practices and attitudes which requires considering historical patterns of discrimination.

[31] The Tribunal reviewed the scope of the *CHRA* remedies and the purpose of the legislation in earlier decisions and more recently summarized it in 2021 CHRT 41, at paragraphs 10-46. The Panel continues to rely on the approach it set out in these previous decisions.

[32] The Tribunal remains seized of all its previous orders except its compensation orders to ensure that they are adequately implemented to eliminate the systemic racial discrimination found and that it does not reoccur in the future.

[33] In retaining jurisdiction, the Tribunal cited *Grover v. Canada (National Research Council)*, 1994 CanLII 18487 (FC), 24 CHRR D/390 at paras 32-33, (Grover), for the proposition that retaining jurisdiction on complex orders designed to address systemic discrimination ensures discrimination is effectively remedied. Moreover, this is especially helpful where the task of determining “effective” remedies was characterized as demanding “innovation and flexibility on the part of the Tribunal...” “the *CHRA* is structured so as to encourage this flexibility” (2016 CHRT 10 at para 15).

[34] In 2016 CHRT 16, the Panel noted that it is Indigenous Services Canada (ISC) and the federal government’s responsibility to implement the Tribunal’s orders and remedy the discrimination found in the case. ISC must also communicate its response to the other parties and the Tribunal so they can ensure the discrimination has been remedied (para 9). The Panel also indicated that while it shared the desire to implement a remedy quickly, this is a complex matter and the Panel is committed to ensuring all parties have an opportunity to fully present their positions (para 13).

[35] The Panel set out why the unique circumstances of this case required Canada to consult with the other parties in the remedial stage (2017 CHRT 14 at paras 113-120). Section 53(2)(a) sets out the authority to order consultation with the Commission. The Panel distinguished the current case from *Canada (Attorney General) v. Johnstone*, 2013 FC 113 that found that ordering consultation with other parties was not appropriate. The other parties’ expertise in this case is invaluable. Furthermore, the Crown has a trust-like relationship with Indigenous peoples which requires Canada to act honourably in its dealings with First Nations and to treat them fairly. This relationship also manifests as a fiduciary relationship and in the duty to consult. Section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30 confirms that the *CHRA* does not derogate from this relationship. In addition, the best interests of the child are central to this case. The other parties in this case include professionals with specific expertise in First Nations child and family services. These organizations have the knowledge to make recommendations to improve the cultural appropriateness of Canada’s response. Finally, consultation with First Nations is consistent with Canada’s stated remedial approach in this case.

[36] In 2019 CHRT 7, the Panel described the remedial provisions of section 53(2)(a) of the *CHRA* as an injunction-like power to order that a discriminatory practice cease (paras 45-55).

[37] The Panel reviewed key case law interpreting the remedial scope of the *CHRA* with a particular focus on *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, (*Action Travail des femmes*) and *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84, (2021 CHRT 6 at paras 59-75). These cases indicate that the Tribunal has significant discretion in awarding remedies but that this discretion must be guided by the purpose of the legislation to prevent and remedy discrimination. The remedies must be effective. It is not to be read narrowly to limit the Tribunal's remedial tools given both general legislative interpretation principles and its quasi-constitutional status. Systemic remedies, such as those supported under section 53(2)(a) of the *CHRA* by reference to section 16(1), are often required in cases of systemic discrimination. The main purpose of such a systemic remedy in *Action Travail des femmes* is to counter the effects of systemic discrimination including addressing the attitudinal problem of stereotyping.

[38] In 2021 CHRT 12, the Panel reviewed the remedial purpose of the *CHRA* in a consent order (paras 25-41). The Panel reviewed a number of its prior rulings and findings, some of which are summarized above. In addition, the Panel referred to *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839. In that case, the Divisional Court approved of the Panel's reasoning in this systemic discrimination case that found that "governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated" (*Association of Ontario Midwives* at para 189), (emphasis added):

[189] The Tribunal's findings in this regard are reasonable. Indeed, they are consistent with the SCC's decision in *Moore* and the Canadian Human Rights Tribunal's decision in *Caring Society*, two cases concerning systemic discrimination in government funding policies. *Moore* and *Caring Society* make clear that governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH's position that it can wait before acting until midwives – a deeply sex-segregated profession that is highly susceptible to systemic gender discrimination in compensation – have proven that the MOH's conduct constitutes sex discrimination.

(footnotes omitted).

[39] The Federal Court, in a judicial review initiated by Canada in this case, in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, in dismissing all of Canada's arguments, made important comments on the Tribunal's approach to remedies in this case:

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

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

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

[138] I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [Grover] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal..." (2016 CHRT 10 at para 15). Furthermore, I agree that "the [CHRA] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

...

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

...

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

...

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

...

[302] I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the CHRA to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was

addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the CHRA. (emphasis added)

[40] Moreover, the above follows the original approach to remedies taken by this Panel in all its rulings.

[41] The Tribunal's powers to make the requested orders are grounded in section 53(2) of the CHRA; Rules 1(6), 3(1), and 3(2) of the *Canadian Human Rights Tribunal Rules of Procedure* (Proceedings prior to July 11, 2021); the Tribunal's implied jurisdiction to control its own processes, the Tribunal's authority under the CHRA, its retained jurisdiction on its previous rulings and orders and the dialogic approach affirmed by the Federal Court as explained above. The Tribunal will now turn to the Tribunal's definition of Jordan's Principle included in 2020 CHRT 20 and 2020 CHRT 36 that are part of the applicable legal principles. Further, in 2020 CHRT 20, a decision upheld by the Federal Court in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 (CanLII), [2022] 2 FCR 614, this Tribunal stated that:

[89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the CHRA, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim. (emphasis omitted; emphasis added)

...

[92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4). (emphasis omitted)

[93] Moreover,

[t]he discrimination found in the [Merit] Decision is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,

(2017 CHRT 14 at para 73).

(emphasis added)

[94] There is a need to take a closer look at the differences between the FNCFS Program and Jordan's Principle which is not a Program rather it is a legal rule and mechanism meant to enable First Nations children to receive culturally appropriate and safe services and overcome barriers that often arise out of jurisdictional disputes within Canada's own organization of Federal Programs and within Canada's constitutional framework including the division of powers. (emphasis added)

...

[96] Moreover, the Panel agrees with Canada that the evidentiary record and findings focus on Federally funded programs, the lack of coordination and gaps within Federal Programs offered to First Nations children and families and that this is also one important aspect of the service analysis under section 5 of the CHRA that Canada was ordered to remedy. (emphasis added)

...

[99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.

[100] The focus is on the child and is personalized to the child's specific needs to receive adequate services in a timely fashion without being impacted by jurisdictional disputes or other considerations not in line with what the child requires. First Nations children experience those barriers because of race, national or ethnic origin. This is what causes governments and departments to dispute who pays for the service.

2020 CHRT 36 Annex A

6. Urgent cases – Where the child requires urgent assistance or the risk of irremediable harm is reasonably foreseeable, ISC will take positive measures to verbally confirm recognition with the First Nation's Designated Official/Organization. Where applicable, ISC may work with the Jordan's Principle navigator or service coordinator that submitted the request. Where no designation has been made, or where the designated official or organization is unavailable, the First Nation's Deemed Official(s) may provide verbal confirmation to be followed with written confirmation.

[42] The Tribunal in past rulings has discussed its authority to clarify its rulings and to make further orders to ensure its orders are effective to address the systemic racial discrimination found. The Tribunal continues to rely on its previous rulings.

[43] Moreover, the Tribunal discussed the possibility to refine, clarify orders, if need be, to ensure they effectively compensate the victims (2022 CHRT 41 at para 269).

[44] This remedial phase requires a complete knowledge and understanding of all the evidence in the record and rulings over the years in this case to properly consider the effectiveness of the Tribunal's orders and their implementation.

IV. Analysis

[45] The Tribunal finds that the evidence in the motions while large in terms of size does not necessarily compensate for its lack of quality. Both Canada and the Caring Society challenge each other on the quality of the evidence put forward and mention that there is double hearsay and triple hearsay, a lack of detail and information, and new evidence provided in reply as opposed to in chief.

[46] However, section 50(3)(c) of the *CHRA* expressly allows the Tribunal to "... receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims, or other witnesses. While the Tribunal can accept hearsay evidence and other information, the evidence still needs to be weighed appropriately.

[47] On the specific issues brought forward in the motions, the Tribunal is doing the best that it can with the evidence at its disposal on the motions. Unlike the evidence previously filed in relation to Jordan's Principle, the evidence filed in support of this motion is of lower quality. Some of the missing information and deficient evidence may be cured by the Tribunal's decision to notify the parties prior to its deliberations that, if the Tribunal has questions while it reviews the evidence, the Tribunal may return to the parties. Another way is to rely on the dialogic approach and permit the parties to report back to the Tribunal to answer the Tribunal's questions and/or further clarify and provide additional information to assist the Tribunal in ensuring that its orders to eliminate systemic discrimination are doing just that. The motions are not viewed by this Tribunal as a stand-alone matter. The Tribunal views this as an interim aspect in the continuity of a series of rulings and orders and the dialogic approach to ensure the Tribunal's orders are effective, flexible, creative, and informed by the parties' expertise and evidence. The end goal is to ensure the orders of this Tribunal are effective in the long-term and not just in the interim. The interim informs what ought to be adjusted and/or what is working well or not. The interim allows for studies and data collection and parties' views for potential improvements. This was always the case and was repeated multiple times in previous rulings. The Tribunal panel is more concerned about doing it right than being right. This means that the Tribunal panel, as demonstrated in the past, has agreed to clarify and amend, when possible, its orders. The Tribunal, as mentioned above, has followed direction and clarification from the Federal Court on the dialogic approach and complex matters.

[48] Further, this also means that this Tribunal has allowed time for studies to be completed informing the long-term aspect of the reform and has kept the openness and flexibility, as instructed by the Federal Court in *Grover*, to make the required changes to ensure the long-term orders are effective and in the best interest of First Nations children.

[49] A very large amount of evidence has been accumulated in the record over the years and informs the Tribunal's approach and decision-making. This process has been ongoing for over 8 years and this Tribunal panel is committed to seeing the fruition of all the parties' work and the Tribunal's to achieve long-term reform and finality in these proceedings.

[50] The Tribunal is hopeful that the parties will all continue to consult on long-term solutions to reform Jordan's Principle and will return to the Tribunal, in the near future, to request final orders that will effectively eliminate the systemic discrimination found and prevent its recurrence.

A. The purpose of Indigenous Services Canada and the improvements under Jordan's Principle

[51] ISC's legislative mandate is to work collaboratively with partners to improve access to high ISC quality services for First Nations, Inuit, and Métis peoples. Its vision is to support and empower Indigenous peoples to independently deliver services and address the socioeconomic conditions in their communities.

[52] The Panel recognizes and agrees with Canada that ISC has made fundamental, foundational changes towards the ending of systemic discrimination against First Nations children. As detailed below, ISC has established an entire operational sector within ISC to deliver, administer, and support Jordan's Principle including an arms-length appeal mechanism to ensure that requests are dealt with fairly and in keeping with the Tribunal's orders.

[53] ISC now determines more requests on an annual and daily basis than ever before.

B. Substantive equality and shift in Jordan's Principle requests

[54] The Tribunal is quite concerned by the apparent shift in some of Jordan's Principle requests that are reported by Canada and some of the evidence in the motions record.

[55] There are modelling headshots and gaming consoles that are being paid for under Jordan's Principle. Even if the Tribunal can appreciate their value in a child or youth's culture, dignity, self-regulation, mental health, etc., this was never what the Tribunal envisioned under Jordan's Principle. It is troubling to know that some communities are living in poverty leaving children in precarious conditions and others would use Jordan's Principle to access services a thousand miles away from the normative standard.

[56] Moreover, the Tribunal read in the evidence that a family who needed to be relocated was authorized to buy furniture in a furniture store with no limits on costs. This is not reasonable. The Tribunal appreciates Canada's argument that it is enticing to use Jordan's Principle in this manner."

[57] The Federal Court in *Federal Court in Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, stated that Jordan's Principle was not open ended:

"[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child"... (emphasis added)

[58] The Tribunal not only agrees with the Federal Court on this, it relied on its 2016 Merit Decision. The Tribunal determined that an assessment of programs and services based on the needs of First Nations children needed to be done by Canada.

[59] When the Tribunal removed the eligibility requirement of the normative standard it was well aware that this would bring a large influx of requests given the lack of coordination and multiple gaps in Federal programs. Working towards better coordination and closing gaps while implementing Jordan's Principle was necessary. The Tribunal did not envision only one of the two.

[60] The Tribunal's orders on substantive equality are to ensure that the real needs of First Nations children in the context of intergenerational trauma, colonization, and poverty would be met. The Tribunal heard evidence on the intergenerational trauma effects of residential schools and the sixties scoop.

[61] Some First Nations children as a result of the intersection of many contributing health, special education, and social factors may need more services than other non-First Nations children. As discussed in the Tribunal's previous rulings, for example, more mental health services than a province's normative standard may be required.

[62] Fetal Alcohol Spectrum Disorder (FASD) is a condition that is frequently seen in First Nations children because of intergenerational trauma. Provinces and territories may not have normative standards that would address the real needs of First Nations children with FASD, thus the need to go above the normative standard.

[63] Remoteness, lack of surrounding services, the lack of free safe drinking water, lack of road access, safe housing, lack of safe schools or special education services and screenings, assessments, and tools that will impact a child's learning abilities are some important examples that impact the needs of First Nations children. The Tribunal cannot provide an exhaustive list.

[64] This is what the Tribunal had in mind when it ordered services to go above the normative standard. This was based on the best evidence in the record and meant to respond to the real needs of First Nations children.

[65] The Tribunal was asked by the parties to define essential services based on needs (See 2020 CHRT 15), not wants, aspirations, or anything that could improve well-being without any limit.

[66] The Tribunal finds it is unreasonable to interpret substantive equality in a way that could include just about anything, and at the same time, demand Canada to pay for it and to expedite the process for those requests. This places Jordan's Principle at risk and First Nations children with real pressing needs in jeopardy. This was not the evidence supporting the Tribunal's deadlines for non-urgent services. The Tribunal is not against modelling headshots and gaming consoles under Jordan's Principle if this is justified. However, requiring Canada to process all these types of cases in a 48-hour timeline is not what the Tribunal had in mind in 2017. This supports further consultations on the non-urgent timelines under the Tribunal's orders.

[67] Canada had based its definition on the situation of Jordan River Anderson and the Tribunal explained why it was too restrictive.

[68] The Tribunal provided further clarifications in subsequent rulings.

[69] The Tribunal recognized that culture and language were robbed from First Nations as a result of colonization. The Tribunal recognizes the importance of culture and language as at the core of First Nations identity. However, the Tribunal did not envision that any type of cultural event must now be approved in 48 hours under Jordan's Principle. This impacts the deadlines ordered by the Tribunal. When the deadlines were ordered, the very broad services discussed above were not envisioned.

[70] Under the Back-to-Basics approach, all that is needed is a letter from an Elder to access cultural services. Again, this was not properly put before the Tribunal and could not have been considered by the Tribunal as part of its deadline orders.

[71] While Canada must redress the historical harms in culture and languages as a result of colonization, this was not the Tribunal's focus when it made its deadline orders under Jordan's Principle. The Tribunal wonders if this could also be done through redirections or referrals under First Nations programming, another education or cultural program, or with a transfer of funds to First Nations.

[72] The Tribunal finds this is one of the factors impacting the backlog of Jordan's Principle requests. The Tribunal will also touch on the evidence of false claims under Jordan's Principle services below.

[73] The Tribunal finds it may be beneficial for parties to work on eligibility criteria and timelines for cultural services. The parties will be asked to provide their views on such possible consultations.

(i) Clarification of the Tribunal's definition of urgent services

[74] The parties all agreed that a clarification of the Tribunal's definition of urgent services would be beneficial and would assist them in moving forward to resolve their divergent opinions on what is urgent and what is not urgent under Jordan's Principle. The Tribunal finds there is a need for clarification given the parties' different interpretations. The Tribunal will return to this point below.

C. Canada's evidence on the causes of the backlog

[75] According to Canada's affiant, Dr. Valerie Gideon, Deputy Minister in the Department of Crown-Indigenous Relations and Northern Affairs and former Associate Deputy Minister of the Department of Indigenous Services Canada (ISC), Jordan's Principle requests have grown exponentially since the Tribunal rendered its *Merits Decision*, from 15,887 requests in the 2018-19 fiscal year to 104,193 requests in just the first three quarters of the 2023-24 fiscal year. In accordance with the Tribunal's previous orders, Canada, the First Nations Parties and the Caring Society have successfully raised awareness of Jordan's Principle, resulting in an extraordinary increase in the number of requests. The growth in requests may also be due to needs arising during and after the COVID-19 pandemic, increases in the cost of living, and public safety emergencies such as wildfires. Despite the substantial growth and efficiency of ISC's Jordan's Principle operations, ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions.

[76] The Back-to-Basics Approach has resulted in the redirection of requests into Jordan's Principle and the misclassification of Jordan's Principle requests as urgent. This has added to and complicated a backlog of correspondence and requests.

[77] In the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage urgent requests is to consider them in the order in which they were received. With ISC determining an average of 386 requests per day, it is not feasible from ISC's perspective, to both triage and determine urgent requests, based on individual or group circumstances, within 12 or 48 hours, while continuing to process non-urgent requests.

[78] ISC approved 1,593,787 products, services, and supports through Jordan's Principle in the first three quarters of the 2023-2024 fiscal year, compared to 140,332 products, services, and supports in the entire 2018-19 fiscal year, demonstrating exponential growth. Due to this increase, ISC has added over 400 additional full-time-equivalent staff to Jordan's Principle since 2018 and has implemented and enhanced the Jordan's Principle Case Management System to accelerate data entry and processing. ISC now determines more requests on an annual and daily basis than ever before. Between July 2016 and January 31, 2024, more than 4.4 million products, services, and supports have been approved under Jordan's Principle by ISC. ISC has seen an exponential growth in the volume of Jordan's Principle requests it has determined since 2018.

[79] The range of approved expenses has shifted notably from Jordan's Principle's initial trend of requests related to health and education to socioeconomic supports like groceries and rent payments, mortgage payments, requests for new homes and renovations, as well as items such as personal vehicles and recreational requests such as sports camp fees. This has contributed to an increased complexity of Jordan's Principle requests and processing times. Case managers must be able to properly determine a wide range of products, services, and supports without the benefit of standardized operating procedures or a pre-determined list of eligible products, services, and supports.

[80] Dr. Gideon's evidence, corroborated by Candice. St-Aubin's evidence, is that there has been a significant increase in correspondence and requests to ISC's Jordan's Principle operations.

[81] The Panel accepts that this evidence, while not sufficiently detailed to attribute the percentage growth to each cause, partly explains the exponential growth of Jordan's Principle. Exponential growth is not surprising to the Tribunal who found that the number of cases is linked to the definition and

eligibility criteria (2017 CHRT 14). In 2020, the Tribunal expanded the eligibility criteria to include First Nations children recognized by their First Nation. This was challenged by Canada at the Federal Court. The Federal Court upheld the Tribunal's decision. The Tribunal believes that this also impacts growth.

[82] Canada has advised the Tribunal that it does not retrieve funds from provinces and territories for Jordan's Principle even after the services have been approved. The Tribunal believes this may be another factor for the exponential growth given that provinces may be more inclined to refer children and families to Jordan's Principle if they have no financial part to play in this. Because this hypothesis was not advanced by the parties and is not part of the evidence, the Panel does not base its decision on this point. However, it is yet another example of factors influencing the growth of requests.

[83] Dr. Gideon's evidence is that in about 2018, ISC developed Standard Operating Procedures (SOPs) in response to concerns highlighted by the Caring Society in the context of the parties' discussions at the Jordan's Principle Oversight Committee (later renamed the Jordan's Principle Operations Committee). The SOPs, an evergreen document, communicated standard processes for review, processing, and reporting of all Jordan's Principle requests. The comprehensive approach to the development of the SOPs took into account comments and recommendations from key stakeholders including Regional focal points, First Nations Child and Family Caring Society, Assembly of First Nations, Chiefs of Ontario, and Nishnawbe Aski Nation.

[84] All ISC employees responsible for Jordan's Principle were required to adhere to the SOPs and report on deviations.

[85] However, the Tribunal finds that another significant and plausible cause for an influx of Jordan's Principle requests is the Back-to-Basics policy that was developed by the Caring Society and was implemented by Canada in 2022.

[86] The parties agreed in 2021 that ISC would adopt a Back-to-Basics Approach worksheet, codeveloped by Canada and the Caring Society, with comments from the AFN and ISC implemented in early 2022. The Back-to-Basics Approach replaced the SOPs pending a final agreement on a long-term approach for Jordan's Principle.

[87] The AFN expressed some reservations about the Back-to-Basics policy and disputes the fact that it was co-developed with them.

[88] The Back-to-Basics Approach was meant to reduce any administrative burden on families seeking support through Jordan's Principle until the parties agreed to a final settlement on a long-term approach for Jordan's Principle. Pursuant to the Back-to-Basics Approach, ISC's operational model takes the following approach:

- ISC starts with a presumption that substantive equality applies when a request is submitted;
- ISC does not deny requests based on a normative standard;
- ISC's determination of requests centers on the needs and best interests of the child, including consideration of distinct community circumstances; and
- the inclusion of costing information with the request is not required and there are no predetermined caps on the cost of a product, service, or support.

[89] Canada asserts that the Back-to-Basics Approach has led to requests for services accessible through existing government programs being directed instead to Jordan's Principle. Back-to-Basics read with the Tribunal's Jordan's Principle decisions, situates Jordan's Principle as a preferred and accessible option for requests for funding for services for First Nations children that may otherwise be available and accessible under other government programs. Back-to-Basics' minimal documentation requirements, individual needs-based approach for each individual child, rapid determination

timelines, and the prohibition against clinical case conferencing are factors that make Jordan's Principle a particularly attractive option, even when accessible government services already exist. The government department of first contact must pay for the services without engaging in administrative case conferencing or service navigation. Therefore, ISC is not permitted to redirect requestors to existing accessible services, even when that service is available in First Nations communities or through an existing approved group request administered by First Nations partners and community organizations via a contribution agreement with ISC. Redirection into Jordan's Principle may also result in ISC duplicating funding in some instances because ISC cannot navigate requestors to existing programs such as Non-Insured Health Benefits, on-reserve income assistance, or education programming. Being unable to redirect requestors to existing accessible services contributes to the backlog for Jordan's Principle correspondence and requests. Instead of determining requests that require products, services, or supports through the Jordan's Principle initiative, ISC must spend time servicing requests that could be addressed through other programs.

[90] The Tribunal finds that it is understandable that families would turn to Jordan's Principle to seek help and access services, especially since the Tribunal found gaps, delays, and denials that amount to systemic discrimination and approved a settlement agreement for compensation for this racial systemic discrimination amongst other systemic discriminatory practices. The Tribunal, in 2017, stated that Jordan's Principle would be the most effective means to eliminate discrimination until the long-term reform is completed.

[91] The Tribunal has cautioned more than once to avoid separating the orders from the findings that led to the orders and has ordered Canada to close gaps as well as coordinate its federal programs to ensure the children do not experience gaps, delays, and denials in services. The elimination of the lack of coordination and the elimination of the rest of the systemic discrimination and Jordan's Principle orders were meant to work together. The Tribunal's plan and previous orders took into consideration that if programming coordination was improved and gaps were assessed and closed, this would assist children and families. This is what the Tribunal found in the evidence and that informed some of its findings.

[92] Aside from the unintended consequences related to substantive equality referred to above and the false claims that will be discussed below, the Panel appreciates that it may very well be appealing to many given the findings of numerous reports in the record (Auditor General, INAC internal reports) that led to the Tribunal making findings of gaps in services and a lack of coordination in Federal Programs offered to children. For example, the Tribunal heard evidence as part of the hearing on the merits that a Federal program funded a wheelchair for a First Nation child without considering the child's growth and needs as part of their eligibility criteria. The eligibility criteria did not consider that the child would eventually outgrow the chair before the child would become eligible for another chair under the program's eligibility criteria. The Tribunal was provided with ample evidence to find that Health Canada and First Nations and Inuit Health Branch (FNIHB) fell short in situations for First Nations children and families.

[93] The list of programs found at page 11 of the AGC's reply submissions includes the names of the programs and other information. While the Tribunal does not dispute that there are other Federal programs that may cover some of the Jordan's Principle requests, the evidence in this case is that they are often too restrictive and narrow and result in gaps and denials. For example, the first program listed at page 11 is dental services. This has been a significant issue in the evidence leading to the findings in this case. The Tribunal heard evidence of children diagnosed for and who should have received orthodontic services and were still denied services under the program. While their condition was listed as a criterion for eligibility under the federal program, children were still denied services under the FNIHB program and even under Jordan's Principle prior to the Tribunal's rulings. The Tribunal also heard evidence that emergency dental services needed to be pre-approved which defeats the purpose of an emergency service. The Tribunal found that the rationale for denials was not based on the best interest of children.

[94] The same can be said about mental health and medical supplies listed on page 11. The Tribunal has discussed this subject at length in previous rulings. All the listed services on page 11 are part of FNIHB. The Tribunal found that First Nations children were adversely affected by the denials and gaps including in the FNIHB program. The Tribunal does not have sufficient evidence or information to make a finding that the listed program and services eligibility criteria have been improved and no longer adversely affect children.

[95] The AGC may overestimate the eligibility and responsiveness of the other federal programs because this is not what the Tribunal has heard in these proceedings over the years and this is why Jordan's Principle has been so needed. A full analysis of the programs and what they cover in order to adequately determine what are the real gaps is necessary and the Tribunal believes this is underway under the IFSD. While the timing of the study is much later than the Tribunal expected, this is still a positive development. The Tribunal agrees that if there are safeguards in place, referrals to other federal programs could be made if children are eligible.

[96] The Tribunal will return to this point in much greater detail in the coordination section below.

[97] This said, the Tribunal finds there is an immediate need for a shift in Canada's practice as it will be explained below.

[98] The Tribunal agrees with Canada and finds that the Back-to-Basics approach to implementation of the Tribunal's orders, agreed to by the parties in 2021 and implemented in early 2022, has had unintended consequences on Canada's capacity to effectively triage matters and provide support for those individuals facing more serious circumstances.

[99] Dr. Gideon's evidence establishes that the Back-to-Basics Approach also changed how ISC intake officers identify requests as urgent or not. Under the Standard Operating Procedures (SOP) previously in place, urgency was based on an initial assessment by the regional focal point, and urgent requests were defined as "a child requires urgent assistance, is in palliative care, or a risk of irremediable harm is reasonably foreseeable."

[100] Pursuant to the Back-to-Basics Approach, however, the intake officer is required to accept the requestor's identification of the request as urgent and is not permitted to reassign the request to a lower level of urgency notwithstanding the circumstances. Under the Back-to-Basics Approach, the classification of urgent requests has expanded to include requests that do not align with what the Tribunal originally intended.

[101] The Tribunal agrees with Canada and the AFN that the importance of prioritizing and urgently determining a request for a child in palliative care, who may suffer adverse impacts should they not receive medical products, services, or supports as soon as possible, is clear. However, it is difficult to imagine that there is a serious and immediate risk to a child should ISC take longer than 12 hours, or even 48 hours, to determine requests received in the summer for school supplies, hockey equipment, and winter gear. Several examples of requests identified as urgent can be found in Dr. Gideon's revised affidavit dated March 28, 2024, for example Laptops, desktop computers, printers, Zipline kit, Modeling headshots, lawnmower, outdoor play structures, trampolines and playgrounds, social/recreational activities (e.g., movie passes, museum tickets, fair tickets, gym memberships).

[102] The Caring Society cautions the Tribunal to place little weight on these examples given the lack of context. Taking a categorical approach as opposed to a needs-based approach grounded in substantive equality risks failing to meet the unique needs of unique First Nations children.

[103] Dr. Blackstock, in her reply affidavit, sets out a clear example of when a categorical approach can have devastating consequences:

I have previously raised the dangers of dismissing items as ineligible on their face with ISC, and with Dr. Gideon in particular, after ISC denied requests for a backpack, generator, fridge, and other items recommended by a physician for a child in Walpole Island. The child had cystic fibrosis. The generator and fridge were to store medication that required reliable cold storage. The backpack and laptop were for her to participate in schools. [...] The child tragically passed away without the requested services ever being approved. Dr. Gideon commissioned a review of this tragic case when she was Assistant Deputy Minister responsible for Regional Operations at the First Nations and Inuit Health Branch at ISC.

[104] The Tribunal entirely agrees that a needs-based approach is necessary and that the example above is a relevant yet sad example. Another important point is the fact that the request was made by a physician and was still denied.

[105] However, the same cannot be said about the other examples mentioned above. The Caring Society also raised a few examples that appear different with added context, some of which will be discussed in the social prescription section below. However, many of their examples would not justify a 12-hour or 48-hour urgent timeline. For example, even with added context such as poverty, compliance with city bylaws, etc. the need for a lawn mower, could never be justified as an urgent need and is questionable for a deadline compliance of 48 hours under non-urgent requests. The Panel does not see these types of needs as urgent requests.

[106] Moreover, while Annex A to Candice St-Aubin's revised affidavit dated March 28, 2024, does not provide sufficient information to determine the entire situation of the listed cases, the Tribunal disagrees with the Caring Society's position that the Tribunal ought to give it little to no weight. The Tribunal finds that while it is insufficient to determine requests or establish the merits of approval or denial or the substantive equality analysis, a number of important aspects can be found useful to support a trend in ISC's responses. The Tribunal has no reason to doubt the veracity of what is included in Annex A. Annex A appears like a login type of chart prepared by staff on a daily basis with summaries of decisions and updates in numerous cases.

[107] The information in Annex A, allows the Tribunal to find that many cases involving a lack of supporting documentation for the request were the reason for causing delays in approvals.

[108] Further, the Tribunal finds that several cases of requests that were deemed urgent by the requestors or the Caring Society were not deemed urgent from ISC's perspective.

[109] The Tribunal found at least one case where ISC was unable to reach the requestor even when calling multiple times.

[110] The Tribunal found at least one case where the requestor was reported admitting that they did not contact ISC for their request.

[111] The Panel agrees with Canada that many of the examples, some mentioned above, do not involve circumstances where the child had a need for a product, service, or support within either a 12- or 48-hour timeframe.

[112] This means that potentially no education support would fit into that urgent category. Moreover, in social services, examples of urgent needs are children at risk of being removed from their families that same day would be considered urgent or caregivers fleeing domestic violence with their children because of an immediate threat. Similarly, children or youth with an imminent plan to commit suicide would also be considered urgent. It is impossible to list all the different situations here or to determine an exhaustive list.

[113] The Panel also agrees that these examples above demonstrate that, following the implementation of the Back-to-Basics Approach, a significant number of “urgent” requests likely do not meet objective criteria for the identification of urgency. Miscategorized “urgent” requests pose a significant challenge to the overall administration of Jordan’s Principle, as they may be prioritized over other urgently needed requests.

[114] Canada is interested in working with the parties to enable the identification of objectively urgent requests, to ensure that those that are objectively most urgent are actioned first. The Panel agrees and is open to hearing any reasonable suggestion as part of the parties’ negotiations as part of their development of objective criteria for urgent.

[115] Canada’s evidence demonstrates that since the implementation of the Back-to-Basics Approach, there has been an immediate and rapid increase in “urgent” labelled requests. Urgent requests grew by over 900% between the 2021-22 and 2022-23 fiscal years, compared to non-urgent requests which only grew by 88%. The number of urgent requests has continued to increase at a pace far greater than that of non-urgent requests. Due to the increased number and complexity of requests, most of which have arisen since the introduction of Back-to-Basics, a backlog has developed. As a result, ISC must reconsider how best to ensure that First Nations children’s ongoing needs can be determined, with a particular focus on those whose individual circumstances are truly and objectively urgent. What is key to addressing the existing backlog is that any definition of “urgent” embraces the spirit and intent of the Tribunal’s order in 2017 CHRT 35, wherein objectively urgent requests receive swift attention.

[116] ISC agrees with the Panel Chair and the AFN that when setting timelines for processing Jordan’s Principle requests, “urgent meant urgent”. ISC also agrees with the AFN that high-priority, objectively urgent requests involve life-threatening, life-limiting, or life-altering needs.

[117] The AFN submits that the importance of prioritizing and urgently determining a request for a child in palliative care, who may suffer adverse impacts should they not receive medical products, services, or supports as soon as possible, is clear. However, it is difficult to imagine that there is a serious and immediate risk to a child should ISC take longer than 12 hours, or even 48 hours, to determine requests received in the summer for school supplies, hockey equipment, and winter gear.

[118] Pursuant to the Back-to-Basics Approach, however, the intake officer is required to accept the requestor’s identification of the request as urgent and is not permitted to reassign the request to a lower level of urgency notwithstanding the circumstances. Under the Back-to-Basics Approach, the classification of urgent requests has expanded to include requests that do not align with what the Tribunal originally intended.

[119] Canada further adds that to ensure the best interests of First Nations children are met in a proper and timely way, Canada requires the ability to reassign the priority of requests to meet the most objectively urgent needs. The Tribunal agrees that this is necessary.

[120] Canada submits that while recognizing that requestors may be in the best position to identify a subjectively urgent request, presently, under the Back-to-Basics Approach, ISC may not re-assign the request to a lower level of urgency. Canada treats all self-identified urgent requests with the same level of priority. This is of great concern to the Panel and was not the intent of the Tribunal’s orders. The Tribunal agrees with Canada further that to ensure the best interests of First Nations children are met in a proper and timely way, Canada must have the ability to reassign the priority of requests to meet the most objectively urgent needs.

[121] Dr. Gideon’s evidence shows that from a sample of 31,258 urgent requests between January 1, 2022, and December 31, 2023, ISC identified 5,800 (18.5%) requests which were likely misclassified as “urgent” following the implementation of the Back-to-Basics Approach.

[122] Canada submits that notwithstanding the backlog, those First Nations children with urgent needs continue to receive the products, services, and supports that they need. ISC has made and will continue to make every effort to ensure the safety and protection of every First Nations child in a culturally safe and appropriate manner informed by experts, especially First Nations.

[123] While this may be true, this does not account for all the potential urgent requests that may be found in the backlog of unreviewed and unopened requests.

[124] Canada's evidence shows that with the increased volume of requests and follow-up correspondence, ISC is experiencing backlogs in:

Reviewing incoming email correspondence, and determining requests that have been entered into Jordan's Principle Case Management System.

[125] Furthermore, Canada's evidence shows backlogs in email correspondence and requests awaiting determination vary at any given time and across regions. Overall, approximately 55% of backlogged correspondence in Jordan's Principle general request inboxes are new requests, while approximately 45% are other correspondence related to existing requests. All regions report a steep and continuing increase in the volume of requests. Most regions have noted a further increase in volume following the implementation of the Back-to-Basics Approach in 2022 and a growing public awareness of Jordan's Principle.

[126] As set out in the Tribunal's order in 2017 CHRT 35, ISC must determine requests on the following timelines:

- 12 hours for urgent individual requests;
- 48 hours for all other individual requests;
- 48 hours for urgent group requests;
- and 1 week for all other group requests.

[127] Canada agrees with the Caring Society that ISC has been unable to maintain compliance with these timelines for reasons that include the increased volume. Canada has developed and is implementing operational initiatives to address this issue.

[128] ISC's analysis demonstrates that its timeline compliance rate declined following the implementation of the Back-to-Basics Approach. ISC's timeline compliance rate has been negatively affected by the increase in the volume of requests (both urgent and non-urgent) and the increase in the rate of urgent requests. For example, between the first quarter of the 2022-23 fiscal year and the third quarter of the 2023-24 fiscal year, the number of determined requests increased from 21,918 to 34,877 and the rate of urgent requests increased from 2% to 26%.

[129] During that same timeframe, ISC's compliance rate decreased from 41% to 29%.

[130] Notwithstanding declining timeline compliance, ISC submits that they determine the majority of requests without unreasonable delay. For the first three quarters of the 2023-24 fiscal year, 62% of all requests were determined in a 15-day timeframe, while 70% of all requests were determined within 30 days. The Panel finds that this also means that 30 % of all requests wait for more than a month.

[131] During cross-examination, when asked by AFN counsel Kassis, Ms. St-Aubin could not speak to the other 30% of requests that were determined in more than 30 days.

[132] Candice St-Aubin, Senior Assistant Deputy Minister in the Department of Indigenous Services Canada (ISC), First Nations and Inuit Health Branch (FNIHB), asserts that the Tribunal's timelines imposed in 2017, were not based on objective evidence such as standardized child welfare service timelines or standard claims processing industry timelines. Given the significant evolution and expansion in the number and complexity of requests stemming from the Tribunal's orders in relation to Jordan's Principle, the initial timelines are not realistic.

[133] The Panel reiterates that the timelines were not imposed but agreed on consent of all the parties including Canada, so this assertion is simply not true. Moreover, Candice St-Aubin's assertion that the timelines were not based on objective evidence is also incorrect. Ms. St-Aubin, when asked questions by the Panel Chair, showed that she had limited knowledge of the Tribunal's rulings and evidence that led to the Tribunal's findings. The Panel finds it peculiar that Ms. St-Aubin would refer to standardized child welfare service when most urgent requests envisioned by the Panel are health-related. Moreover, even Canada refers to terms like palliative care and medical products, services or supports as opposed to summer camps, school supplies, hockey equipment and winter gear. Many of Jordan's Principle findings were supported by evidence that were health-related and that involved Health Canada, FNIHB, and ISC. The Tribunal's interim 2019 CHRT 7 relied on medical evidence, leading to the term life-threatening, a term that even ISC uses in its submissions and evidence.

[134] As it will be demonstrated below, Ms. St-Aubin was successfully challenged by the Caring Society on the standardized child welfare and industry points during cross-examination.

[135] The Caring Society contends that to the contrary, the evidence led by the Caring Society and Ms. St-Aubin's admissions on cross-examination demonstrate that ISC's proposed changes are unjustified. Canada argues that the Tribunal-ordered determination timelines should be modified as they were not based on objective evidence such as child welfare standards.

[136] However, the Caring Society further submits that this argument ignores the evidence that Canada's senior official gave in 2017. It also fails to note that child welfare standards do not support Canada's approach to timeframes for determining urgent cases.

[137] First, contrary to the assertion in Ms. St-Aubin's revised affidavit dated March 28, 2024, the current CHRT timelines were based on the evidence of Robin Buckland, a senior ISC official.

[138] Ms. Buckland was cross-examined during an earlier stage of this proceeding, in February 2017. Notably, she advised that ISC sought to deal with urgent cases within 12 hours. In general, however, Ms. Buckland's evidence on her cross-examination demonstrates that, prior to the Tribunal's orders in 2017 CHRT 14 and 2017 CHRT 35, ISC's service standards were to determine:

- a. Urgent individual cases within 12 hours, non-urgent individual cases within 5 days, and cases "outside the normative standard" within 7 days; and
- b. Large group requests within 7 days, though in reality, it was closer to 14 days.

[139] Ms. St-Aubin was unaware of Ms. Buckland's evidence in these proceedings. During her cross-examination, Ms. St-Aubin admitted that she was not aware that it was the First Nations and Inuit Health Branch's practice to try to deal with urgent Jordan's Principle cases in 12 hours. Nor was she aware that Ms. Buckland's evidence was that ISC's voluntarily adopted non-urgent service standard for Jordan's Principle was 5-7 days. Given that Ms. St-Aubin was unaware that Canada's own evidence informed the Tribunal-ordered timelines, the views on the appropriateness of the Tribunal-ordered timelines expressed in the St-Aubin revised affidavit should be given little weight.

[140] Second, Ms. St-Aubin criticizes the Tribunal's timeline as "not based on objective evidence" such as standardized child welfare service timelines or standard claims processing industry timelines ("child welfare standards"). However, the present timelines are indeed aligned with, and supported by many child welfare standards, while Canada's suggested timelines ignore the very same objective evidence it

sought to use to undermine the Tribunal's timeline. Numerous child welfare standards support prompt action to address urgent situations, with the majority requiring action within 24 hours, rather than the longer 48-hour (for individuals) and one-week (for groups) periods that Canada now seeks.

[141] This is the rationale that the Panel used to arrive at its urgent timelines. The Parties subsequently agreed to the same timelines on at least two occasions namely, 2017 CHRT 35 and 2020 CHRT 36.

[142] The Panel agrees with the Caring Society on this and rejects Ms. St-Aubin's evidence on these points.

[143] The Tribunal found that the evidence supported an order for an Independent Appeals process for Jordan's Principle with an Independent Committee composed of health professionals and other professionals that can review denials of Jordan's Principle requests (see 2019 CHRT 7 at paras 55 and 75). Canada's evidence shows that in the 2022-23 fiscal year, 1,258 appeals were determined under the new appeals process, and 59% of the determinations under appeal were overturned by the Chief Science Officer, on the recommendation of the Appeals Committee. Between April 1 and December 31, 2023, 625 appeals were determined, with 46% of those determinations overturned by the CSO, on recommendation of the Appeals Committee. This illustrates the Panel's point well.

[144] Canada has submitted that in the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage urgent requests is to consider them in the order in which they were received.

[145] Canada points to their factum dated May 24 for the point that triaging self-identified urgent requests is not feasible, given the current volume of urgent requests and the 12-hour timeline. They submit that the answer is not to create categories of urgency, thus adding a further layer of complexity and decision-making to request administration. Instead, ISC must be able to easily identify and prioritize objectively urgent requests. While the Panel agrees with ISC on most of this assertion, the Panel disagrees that this distinction cannot be made. Canada itself mentions the complexity of the requests and the need for attention to each one with some requiring escalation and discussion and that each First Nations child is deserving of and receives individual consideration, taking into account their distinct needs and circumstances. Canada requests the Tribunal to allow them to reassign a request labelled urgent to a lower level of priority if the ISC staff believes it is not urgent.

[146] The Panel agrees that Canada ought to be allowed to do this and this exercise will need a minimum of assessment from the ISC staff allowing for an immediate and 12-hour triage with the benefit of objective criteria. The Panel is open to hearing the parties' negotiated solutions.

[147] Canada strongly supports an approach in which the parties co-develop objective criteria to identify urgent Jordan's Principle requests. Co-development is consistent with Canada's approach to reconciliation with Indigenous people and ensures a focus on solutions. Co-developed solutions also reduce the risk that any one party's proposal would have adverse unintended outcomes. The Panel agrees that this co-development is needed.

[148] The Panel is open to hearing the parties' negotiated solutions.

[149] The Tribunal agrees with Canada and further finds there is a need to develop objective criteria to be used to identify requests, for example, those requests for products, "urgent" Jordan's Principle services and supports directly linked to the needs of a First Nations child who requires urgent medical assistance or is at risk of reasonably foreseeable irreparable harm as it will be explained below. No one opposes this.

[150] The Tribunal in accordance with the dialogic approach in this case and recognized by the Federal Court and pursuant to section 53(2)(a) of the *CHRA* and the Tribunal's previous Jordan's Principle orders and retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) to arrive at consent order requests if possible and if

not, with options for orders supported by rationale and available evidence and to report back to the Tribunal by January 9, 2025. The FNLC may only participate on the consent of all the parties. The parties' consultations will include but are not limited to the aspects outlined in the following paragraphs.

[151] Parties will seek to co-develop objective criteria to be used to identify urgent Jordan's Principle requests by January 9, 2025.

[152] Furthermore, the parties will also include in their consultations, all the Tribunal's consultation orders found below.

[153] The Tribunal, on the consent of the parties, has determined two levels of urgent services in 2020 CHRT 36, referred to above:

1. urgent cases involving reasonably foreseeable irreparable harm (requiring immediate response); and
2. the other urgent ones requiring action within 12 hours (see 2020 CHRT 36 Annex A).

[154] This urgent Jordan's Principle timeline is not meant to replace 911 or paramedics or other emergency services.

[155] The Tribunal confirms that "life-threatening cases", and cases involving end-of-life/palliative care, risk of suicide, the risk to physical safety, and no access to basic necessities (the Tribunal orders that this must be defined by the parties as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests), or risk of entering the child welfare system are urgent. The Tribunal has also been clear that the "time-sensitive nature" of a case could also make it urgent. Some life-threatening situations may require immediate response while others may require a timely response.

[156] The Tribunal agrees with the Caring Society that urgent must include caregivers and children fleeing from domestic violence in the definition of other urgent cases requiring action within 12 hours. Cases of domestic violence involving children already form part of the Tribunal's evidentiary record. Canada was cautious to redact identifying information. Moreover, while other services such as shelters for people fleeing domestic violence may best respond to the immediate needs of the caregivers and children, the Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol. 1 a. (MMIWG report) also states that some shelters may not accept those who also have mental health issues or addictions and that gaps and delays exist at the community level:

... For example, according to the most recent Statistics Canada Transition House Survey, there were 627 shelters for abused women operating across Canada on a snapshot on April 16, 2014. On that day, 338 women and 201 accompanying children were turned away from shelters. In 56% of these cases, the reason for being turned away was a lack of space, though other reasons included drug and addiction issues, and mental health issues. (MMIWG report, p. 575)

...

In other cases, witnesses testified about how there weren't enough services, or they didn't know how to navigate them, which forced some people to stay in unsafe situations. Josie Nepinak explained that in 2015–16, 16,359 women were turned away from shelters in Alberta and, of these, 65% identified as Indigenous women. Sandra Montour, the executive director of Ganohkwasra Family Assault Support Services in Ontario, likewise talked about how a lack of services for Indigenous women and children experiencing violence means that they are often turned away or forced to wait sometimes for months in order to get services.

Our women's community counselling program has 20 to 30 women waiting every single month. Our men's counselling program, Saho[^] nikonrí:ione, "his mind has been healed," that has a waiting list usually about anywhere from 15 to 20. Our children's program, Gaodwiyá:noh, they have a waiting list usually in the 20s and 30s. We cannot keep up. And this has been like this for years. I lay awake at night and I worry about losing our people to death as they're waiting on our waiting list.

(MMIWG report at p. 576)

[157] The MMIWG report is in the Tribunal's evidence and was relied upon by this Tribunal in previous rulings. The Tribunal finds this report relevant and reliable. Moreover, Canada accepted the report.

[158] The Tribunal appreciates that other social programs at the federal, provincial, and community levels may be available and responsive to caregivers and children fleeing domestic violence and ISC may be able to assist and refer them to those existing services.

[159] However, this requires an understanding of the services that are available in the community or elsewhere and the gaps in services. Jordan's Principle services should bridge some of those gaps. A simple referral because a list of other services exists, may not be responsive to the children's needs.

[160] The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests.

[161] The Tribunal agrees that a child with no access to food or other basic necessities is considered an urgent case requiring action within 12 hours. The Tribunal also agrees that once food or other basic necessities have been provided it is appropriate to refer the family to other non-discriminatory services and, if the services include barriers, to eliminate those barriers. The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[162] The Tribunal accepts Canada's evidence that there are other services meant to support fire evacuations but Jordan's Principle may still be engaged. However, a clear coordination between Jordan's Principle and the other services ought to be established. In other words, referrals to other services are acceptable if the services are culturally appropriate, timely, effective, and address needs in a meaningful way. The Tribunal accepts that a request could be multifaceted involving some aspects under Jordan's Principle and other aspects under other emergency response services.

[163] The Tribunal agrees that an entire region such as British Colombia experiencing tragedies such as emergency fire evacuations should not use Jordan's Principle as a first resort when other effective mechanisms and services are available. This being said some requests may qualify under Jordan's Principle.

[164] Therefore, the Tribunal orders Canada to consult with the parties and to seek to co-develop guidelines on this coordination aspect and on how to triage and respond to the multifaceted requests that also involve Jordan's Principle aspects as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[165] The Tribunal agrees that bereavement is a sacred time for First Nations children and that the passing of a parent, sibling, or close relative can be particularly traumatic. The Tribunal agrees that in some cases urgent services may be required and in other cases, it may be time-sensitive (more than 12 hours) but not urgent. The Tribunal also recognizes that cultural ceremonies of many forms are important services in line with substantive equality and also agrees with the AFN that all types of ceremonies should be considered, not only potlaches. The Tribunal agrees that First Nations children

who lose a parent face numerous life-altering risks and may need Jordan's Principle services even in the absence of a child welfare removal. The Tribunal will review the objective criteria to be used to identify urgent Jordan's Principle requests developed by the parties and will revisit this request at that time.

[166] The Tribunal confirms that Canada is not bound by the Back-to-Basics policy under the Tribunal's orders and clarifies that some of the main aspects are in line with the Tribunal's orders and some are not. For clarity, the Tribunal does not discuss every aspect of the Back-to-Basics policy, only some that stand out.

[167] Aspects that are in line with the Tribunal's orders: presumption of substantive equality*, supporting documentation kept minimal**, and professionals identifying urgent cases. (However, the Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria to determine who is a qualified professional with relevant competence and training as part of their consultations to develop objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025).

[168] The Tribunal clarifies the above should be maintained.

[169] * A presumption of substantive equality is a means to break down accessibility barriers and remove burdens on requestors of having to prove how their requests meet the substantive equality test. The Tribunal has no intention to deny ISC's right of rebuttal or say in assessing the requests.

[170] ** While documentation should be kept minimal, this does not mean that it is unreasonable to request some supporting documentation. The higher the complexities or costs the more reasonable it is to require supporting documentation.

[171] Aspects that are not in line with the Tribunal's orders:

- Self-declaration of urgent cases when no health or other qualified professional is involved (the Tribunal will revisit this once the parties have defined the terms "qualified professional" as they co-develop objective criteria to be used to identify urgent Jordan's Principle requests).
- Canada's interpretation that there is no possibility of re-classifying an urgent case as a non-urgent case.
- The requirement that once identified, every request must be dealt with in the same way with zero flexibility for escalating matters whose facts, on their face, could justify increased attention.
- The inability of ISC to prioritize matters.

[172] The Tribunal clarifies the above should be eliminated.

D. Processing of requests and addressing the backlog:

[173] Dr. Gideon's revised affidavit evidence clearly describes the Jordan's Principle requests' Intake Process. The Tribunal accepts her evidence as reliable generally and on this point.

[174] When Jordan's Principle was initially implemented in 2016, requests were submitted through email and fax only. General inquiries, initial contacts, and Jordan's Principle requests may now be received by ISC in one of the following ways:

- a. by phone call to the National Call Centre; or
- b. by phone call, fax, or email to an ISC regional office, often referred to as a "regional focal point;" or
- c. through a "service coordinator" (a First Nation or First Nation organization funded by Canada

to assist requestors in making group or individual requests).

[175] ISC uses Jordan's Principle Case Management System to process and approve all requests submitted under Jordan's Principle and Inuit Child First Initiatives, as well as to submit approved requests to its financial SAP program to issue payment.

[176] ISC staff use Jordan's Principle Case Management System to provide 24 hours a day, 7 days a week critical services to Indigenous children in response to requests submitted by email, phone, fax, and mail.

[177] In February 2018, ISC announced the creation of Jordan's Principle 24/7 bilingual National Call Centre (Call Centre). The Call Centre is currently staffed by employees including a manager, supervisor, quality assurance staff, a technical specialist, and call agents, who are scheduled 24/7. ISC has also brought in contracted call agents from time to time, to supplement services when required (for example, during the Public Service Alliance of Canada labour disruption in 2023).

[178] The Call Centre is intended to provide support and assistance to requestors in making their requests, but Call Centre agents do not determine requests. Requestors receive one-on-one service through the Call Centre, where call agents work with the requestor to complete their requests. After a request is received via the Call Centre, it is transferred to the ISC regional focal point for determination.

[179] Other than submitting a new request or seeking a status update on an existing request, callers may not know exactly what products, services, or support they want to request through Jordan's Principle to meet the child's needs. Since requests can involve multiple components, call agents often engage in lengthy conversations to help callers identify the child's needs, including providing information on the available supports in their region and general information about Jordan's Principle.

[180] The Call Centre has designated overnight call agents. Outside of regular business hours, if a case is urgent or a consult is required, a national on-call designated decision maker is available to make a determination. When a request falls outside the Call Centre's scope (being intake, information, and possible updates), callers are redirected to the appropriate regional focal point.

[181] While urgent requests for products, services, and supports may be submitted via the Call Centre, the Call Centre is not intended to provide emergency medical or public safety response in the nature of police, firefighting, or paramedic response. It does not provide 911 services and does not function like a 911 service, nor is it intended to do so. Call Centre staff are not trained to handle emergency situations. In any situation involving a child in immediate danger, the Call Centre redirects callers to 911 and/or local emergency services.

[182] Regional intake officers are responsible for the intake and triage of all incoming requests, according to applicable regional practices. Each ISC regional office operates as a "focal point" for Jordan's Principle requests. Most focal points maintain Jordan's Principle call lines that are available during regular business hours in their region, as well as generic e-mail boxes for email requests. Regional call lines currently forward calls to the Call Centre after hours. While the Quebec regional focal point does not have its own phone line, it works closely with the Call Centre and supports intake and after-hour calls.

[183] The ISC regional focal point receives individual requests by phone, email, fax request form, or through Service Coordinators (discussed below). If the request has come through the Call Centre, the focal point is to contact the requestor by phone or email within one calendar day to acknowledge receipt of the request. A regional intake officer will then review the request to ensure all supporting information has been provided and complete an Intake Form. For urgent requests, requestors are not required to provide documentation at this intake stage.

[184] The regional focal point is permitted to approve requests where the eligibility criteria are met and the supporting documentation sufficiently links the requested product, service, or support to the child's unmet need. Focal points may approve individual requests for products, services, or supports under \$100,000, and group requests for products, services, or support under \$500,000.

[185] When individual or group requests exceed these amounts, the regional focal point escalates the request to the National Review Team for determination. The regional focal point notifies requestors when their request is escalated for determination.

[186] Canada submits that the Back-to-Basics Approach has led to requests for services accessible through existing government programs being directed instead to Jordan's Principle. Back-to-Basics read with the Tribunal's Jordan's Principle decisions, situates Jordan's Principle as a preferred and accessible option for requests for funding for services for First Nations children that may otherwise be available and accessible under other government programs. Back-to-Basics' minimal documentation requirements, individual needs-based approach for each individual child, rapid determination timelines, and the prohibition against clinical case conferencing are factors that make Jordan's Principle a particularly attractive option, even when accessible government services already exist.

[187] Therefore, Canada seeks orders that permit service navigation in appropriate circumstances, and orders to facilitate the transfer of control over Jordan's Principle administration and other services to willing First Nations and First Nations community organizations.

[188] As mentioned above, the AGC submits that there has been a significant increase in correspondence and requests to ISC's Jordan's Principle operations as a result of multiple factors, including successful awareness campaigns, impacts related to the COVID-19 pandemic, increased costs of living, and public safety emergencies (Dr. Valerie Gideon Affidavit at para 7; ISC's Response to Request for Information, Appendix A at 7 and 9). Despite the substantial growth and efficiency of ISC's Jordan's Principle operation and corresponding funding, ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions, (Dr. Valerie Gideon Affidavit at paras 6, 12, 29–74; St-Aubin Affidavit at para 8).

[189] Canada submits that despite over \$5 billion in Jordan's Principle expenditures by Canada since 2016, and the development of ISC's Jordan's Principle operations in collaboration with the parties, Canada cannot determine all Jordan's Principle requests within the consent timelines set out in 2017 CHRT 35: 12 hours for urgent individual requests; 48 hours for all other individual requests; 48 hours for urgent group requests; and 1 week for all other group requests. Current circumstances have led to a backlog of Jordan's Principle correspondence, including requests.

[190] Canada has proposed several measures in its cross-motion, supported by the affidavit evidence, which Canada submits are necessary to address the backlog. These include a proposal for the collaborative development of an objective definition of the word urgent in the context of Jordan's Principle requests and additional time to make determinations on requests for which a longer determination time will not have an immediate adverse impact on the child.

[191] Canada contends that ISC has implemented ongoing operational initiatives in an effort to address the backlog, such as call volume initiatives, updated contact information, surge teams, additional staffing, staff retention initiatives, and technology initiatives, which have led to significant progress.

[192] From ISC's perspective, there is no readily available formula that can determine the number of sufficient staff required to administer ISC's Jordan's Principle initiative, given the constantly fluctuating level of complexity and volume of incoming requests. Nonetheless, ISC has grown from 65 full-time-equivalent staff in the 2018-19 fiscal year to approximately 476 full-time-equivalent staff administering Jordan's Principle in the 2023-24 fiscal year. This is an increase of over 600%. Each staff member must

receive the training necessary to fulfill their job responsibilities with compassion and cultural sensitivity, and all hiring must be done in accordance with the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13, applicable bargaining agreements, and departmental hiring policies.

[193] ISC has implemented ongoing operational initiatives in an effort to address the backlog, which Canada submits have led to significant progress. These include:

Call volume initiatives: ISC has updated the National Call Centre's technological systems, including by implementing an automated callback system and a separate urgent callback queue with an average callback time of 20 minutes. National Call Centre agents now enter all requests into ISC's Jordan's Principle Case Management System, and the Quality Assurance team evaluates calls and provides surge support. Further call tree enhancements are planned for the 2024-25 fiscal year to shorten the call tree and redirect callers to live agents as needed. ISC is also consolidating all ISC regional offices (or focal points) into the National Call Centre's toll-free number in 2024. This will allow warm transfers and is expected to reduce the administrative burden on requestors. ISC has also increased staffing for the 24/7 Call Centre shift schedule.

Updated contact information: As recommended by the Caring Society, ISC has already updated its website to include contact phone numbers, e-mail addresses, and hours of operation for regional offices and headquarters, for both requests and payment inquiries.

Additional staffing: From ISC's perspective, there is no readily available formula that can determine the number of sufficient staff required to administer ISC's Jordan's Principle initiative, given the constantly fluctuating level of complexity and volume of incoming requests. Nonetheless, ISC has grown from 65 full-time equivalent staff in the 2018-19 fiscal year to approximately 476 forecasted full-time-equivalent staff administering Jordan's Principle in the 2023-24 fiscal year. In an effort to address the growing volume of requests and backlogs, ISC has also needed to increase overall Jordan's Principle staffing. For example, in the 2022-23 fiscal year, ISC planned to employ 252 full-time equivalent staff, however, it employed 360 full-time equivalent staff, which is approximately 43% higher than anticipated. The total number of full-time equivalent staff reported here support both Jordan's Principle and the Inuit Child First Initiative. These additional full-time equivalent employees provide a temporary solution to managing increased volume and complexity, while other operational modifications are considered.

[194] Canada submits that this is an increase of over 600%. Each staff member must receive the training necessary to fulfill their job responsibilities with compassion and cultural sensitivity, and all hiring must be done in accordance with the *Public Service Employment Act*, applicable bargaining agreements, and departmental hiring policies.

[195] From Canada's perspective, the Caring Society's proposed solution of appointing "sufficient staff" within 45 days for urgent determination purposes, set out on page 3 of their Notice of Motion, is not feasible for several reasons: there is no readily available formula that can determine the number of sufficient staff, giving the constantly fluctuating level of complexity and volume of requests.

[196] ISC must abide by budget allocation and is fully expending its annual salary envelope for full-time equivalent employees, and hiring federal public servants must be done in accordance with the *Public Service Employment Act*, applicable collective bargaining agreements, and departmental hiring policies. These administrative steps are inherent to the federal public service and are more time-consuming than when First Nations communities hire and train staff directly, and all new staff must receive appropriate training prior to working in the Jordan's Principle initiative. Training timelines are variable and depend on the individual's position, experience, learning speed, approach, and adaptability. Very generally speaking, required training takes from 4 to 6 weeks. However, some positions require significantly longer training of up to 6 months.

[197] Further initiatives from ISC to address the backlog include:

- A. Surge team support: ISC has and will continue to mobilize surge teams, consisting of existing staff within ISC and the Department of Crown-Indigenous Relations and Northern Affairs Canada, to assist with the backlog, facilitate faster determinations and provide ongoing support to ISC's regional offices. Surge teams review backlogged correspondence and provide data entry support so that regional offices can focus their efforts on determining requests and other matters that require their greater knowledge and expertise. Surge teams have been making progress in addressing the backlog and will continue to do so moving forward.
- B. Staff retention initiatives: ISC's Jordan's Principle operating environment is extremely difficult and emotional. To address the high rate of employee turnover, ISC has approved 100% remote work for Call Centre staff and has introduced new technological system capabilities.
- C. Technology initiatives: ISC has launched a series of operational initiatives to improve the intake process, including the implementation of enhancements to the Jordan's Principle Case Management System to accelerate data entry and processing, which represents 80% of frontline staff workload. By fall 2024, ISC expects that its notification process will be enhanced to provide requestors with automated updates on the status of their requests. ISC is also working to develop new technological solutions, including automatic entry of request forms sent by fax or email, web-based request submission, status updates for community service providers, and interoperability between ISC's financial systems and the Jordan's Principle Case Management System. ISC is undertaking a comparative analysis of regional implementation methodologies to identify best practices and improve timeliness, consistency, and effectiveness. ISC is also streamlining payment processes across regions to facilitate automation. In addition, ISC is working on automating determinations.

[198] The Caring Society has also requested several other measures to address the backlog. The Caring Society requests an order for Canada to revise its National Call Centre calling tree, within 45 days of this Tribunal's order, and appoint sufficient persons in each ISC region and nationally who are responsible for managing urgent Jordan's Principle cases. The Caring Society also seeks an order that Canada report to the Tribunal, within 7 days of this Tribunal's order, regarding which of the proposed solutions (and timelines for implementation of those solutions) contained in the Caring Society's "Jordan's Principle Work Plan" (attached to this Notice of Motion as Schedule "A") it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution Canada is not prepared to adopt, the reason why not and what effective alternative measure Canada proposes to take (and the timeline on which such effective alternative measure will be implemented).

[199] The Tribunal, while understanding the Caring Society's requests and without determining that they would be effective or not, prefers to avoid dictating all the management details and instead orders consultations amongst the parties to arrive at the best workable solutions. Therefore, the Tribunal focuses its reasons on the requests that the Tribunal finds are supported by sufficient evidence and relevant information and that it agrees to incorporate as part of its orders. In terms of the issue of having sufficient staff and triaging the urgent requests in the backlogs, the Tribunal will return to this below.

E. Urgent Timelines:

[200] Canada requests an order extending the timelines set out in the Tribunal's order in 2017 CHRT 35, subparagraph 135(2)(A)(ii) and (ii.1):

i. for individual requests:

- 1. from 12 hours to 48 hours for urgent individual requests, or such other timeline as Canada and the First Nations Parties may from time to time agree;

2. from 48 hours to without unreasonable delay for all other individual requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and

ii. for group requests:

1. from 48 hours to one week for urgent group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and

2. from one week to without unreasonable delay for all other group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree.

[201] Canada submits that despite the substantial growth and efficiency of ISC's Jordan's Principle operations ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions. As already mentioned, Canada submits that urgent requests grew by over 900% between the 2021-22 and 2022-23 fiscal years and the number of urgent requests has continued to increase at a pace far greater than that of non-urgent requests. Due to the increased number and complexity of requests, most of which have arisen since the introduction of Back-to-Basics, a backlog has developed. As a result, ISC must reconsider how best to ensure that First Nations children's ongoing needs can be determined, with a particular focus on those whose individual circumstances are truly and objectively urgent.

[202] Canada submits that ISC has carefully considered the problems and has already introduced operational measures to help address backlogs. These measures have been specifically designed to take into account the operating environment and government-wide policies and practices including privacy, information technology, and ongoing staffing requirements including hiring, training, and employee wellness.

[203] The Tribunal does not agree to change timelines for urgent services at this time. The Tribunal believes that adjusting Jordan's Principle operations, with the Tribunal's clarifications explained in this ruling, would reduce and help to reclassify some of the allegedly urgent cases that are not truly urgent and allow Canada to manage the truly urgent cases in the Tribunal-ordered timelines. Canada will be able to report following the Tribunal's clarifications and other orders and the parties' consultations and, if needed and supported by the available evidence, the Tribunal can make additional orders.

[204] The Tribunal agrees with Canada that what is key to addressing the existing backlog is that any definition of "urgent" embraces the spirit and intent of the Tribunal's order in 2017 CHRT 35, wherein objectively urgent requests receive swift attention.

[205] Therefore, instead of making extensions to the urgent timelines ordered on consent that no other party than Canada agrees to extend, it appears far more prudent to clarify previous orders, co-develop objective criteria for urgent requests, remove, at Canada's request, the self-identification of urgent requests and other problematic policy aspects than to accept Canada's unilateral decision to extend the urgent timelines without sufficient reasonable evidence that this is in the First Nations children's best interests. The Tribunal finds that one of the significant contributors to the backlog is the application of the Back-to-Basics policy discussed above. Canada identified several solutions that as a whole would help reduce the pressures and backlogs in Jordan's Principle. Moreover, the Tribunal has agreed to most of Canada's initiatives and order requests including referrals that will be discussed below but does not agree to the extension of the urgent timelines.

[206] Moreover, the Tribunal believes that it is unreasonable to place this burden on children and families with real urgent needs, especially without sufficient evidence that establishes that it is not feasible for Canada to process urgent requests with the staff that it has currently if all other proposed measures and clarifications are put in place. The urgent timelines are evidence-based as discussed above

and should be linked to real urgent requests not subjectively urgent requests. This is what the Tribunal had in mind when it made its orders. Furthermore, if all the changes are put in place in sum, co-develop objective urgent criteria, no self-identification unless supported by a qualified professional, the right to reclassify urgent requests, etc., this may alleviate the pressures identified by Canada. An assessment following the implementation could inform any needed changes to timelines.

[207] Moreover, analyzing the source of the spike in urgent cases is more important than simply extending timelines. Canada admits that urgent requests have exponentially increased for several reasons and that a lot of requests have changed in nature. Canada submits that the COVID-19 pandemic and states of emergency fire evacuations also have played a role in the higher number of requests. The Tribunal appreciates that this could not have been anticipated by ISC. At the same time, we are now in a post-pandemic period and Canada contends that other emergency response services are far more effective to respond to needs than ISC. Therefore, some COVID-19 context requests may not reoccur, and referring and even redirecting many states of emergency and fire evacuation requests to existing local and regional services can reduce some of those urgent requests.

[208] Once the immediate and short-term measures are put in place and if an analysis shows that the problem persists such that Canada is still unable to meet the urgent timelines and has the evidence to support this, the Tribunal is open to receiving the parties' evidence and amendments suggestions. The parties can discuss this during their series of future negotiations. Moreover, the mechanism to leave the door open for parties to report and return to the Tribunal in the absence of agreements or with new agreements will ensure that needed clarifications or amendments are evidence-based and dealt with in a comprehensive manner and as expeditiously as possible.

[209] In this analysis, one must not forget that this is a human rights case involving vulnerable First Nations children in need of urgent services. Therefore, the Panel has opted to grant several of Canada's other order requests such as the elimination of the potentially miscategorized urgent requests that will help to focus on the truly urgent ones. Considering truly urgent requests as such and implementing the Tribunal's clarifications and other orders, followed by monitoring and analysis could inform the next steps. Canada could consult with the parties and return to this Tribunal. The Tribunal is open to hearing Canada and the parties on this issue.

[210] Given that there is insufficient evidence and rationale supporting that extending the urgent timelines will truly resolve the current issues and the other solutions will not work without the extension to urgent timelines, such an argument for an amendment to the Tribunal's urgent timeline orders is unconvincing at this time.

[211] Finally, on this point, Canada describes their cross-motion in support of reconciliation and the importance of First Nations decision-making; however, none of the First Nations parties agree to amend the Tribunal's ordered timelines for urgent requests.

F. Triage of urgent requests

[212] Canada submits that in considering the Caring Society's proposed solutions, the Tribunal should consider whether ISC has the ability to both triage and determine all requests labeled as urgent within the prescribed timelines (particularly given the high number of requests labelled as urgent since the Back-to-Basics approach was adopted). In the first three-quarters of the 2023-24 fiscal year alone, ISC determined 20,715 urgent individual and group requests and 83,478 non-urgent individual and group requests. That breaks down to approximate averages of 6,905 urgent requests and 27,826 non-urgent requests every quarter; or 2,301 urgent requests and 9,275 non-urgent requests every month; or 77 urgent requests and 309 non-urgent requests every day, for a total of 386 determinations every day.

[213] Canada submits that the Caring Society's proposed solutions to triaging urgent requests are not practical or feasible. In the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage

urgent requests is to consider them in the order in which they were received. With ISC determining an average of 386 requests per day, it is not feasible for ISC to both triage and determine urgent requests, based on individual or group circumstances, within 12 or 48 hours, while continuing to process non-urgent requests.

[214] The Commission submits that the Caring Society has also pointed to evidence that backlogs have developed, spread across all stages of the process, from intake to determinations, to redeterminations, to appeals. The Commission relies on the Caring Society's Submissions at paras 129-131, 137-138 and 143-144. Of primary concern is the backlog at intake, as there are requests that sit unopened, without having been screened for potential urgency. Requests that would genuinely qualify as urgent may be sitting unopened in intake backlogs.

[215] Based on the evidence filed with the Tribunal, there is a legitimate concern that genuinely urgent cases may be languishing or even sitting unopened in intake backlogs.

[216] The Commission agrees that ordering Canada to take the required triage steps with respect to backlogged urgent cases is appropriate to ensure the effective implementation of the Tribunal's rulings regarding Jordan's Principle.

[217] The Commission notes that depending on the volume of backlogged cases at the time the Tribunal's order is made, it may or may not be possible for Canada to complete these tasks within just seven days. However, if the Tribunal is inclined to make the requested orders, it would be appropriate to direct best efforts to accomplish the tasks as quickly as possible.

[218] The Caring Society submits that the current "in progress backlog" is significant and of serious concern, particularly as it is leading some requests to linger for many months.

[219] However, according to the Caring Society numbers, the backlog amounts to less than one month of ISC's processing capacity, regardless of whether the low-end or high-end estimates more accurately capture the realities of this backlog.

[220] The Caring Society submits that ISC's evidence does not reveal the full picture respecting the scope of its intake backlogs. As a result, it is unclear how many urgent cases are awaiting determination in unopened emails in regional inboxes.

[221] As of March 27, 2024, it is estimated that Jordan's Principle has between 40,000 and 82,000 backlogged requests.

[222] Therefore, the Caring Society submits that the fact that ISC's estimated request-in-process backlog as of March 27, 2024, was between 34,116 on the low end and 75,397 on the high end suggests that the Parties' and the Tribunal's concerns about this specific backlog should be modulated.

[223] The Tribunal accepts that requests require more than ticking a box and that many of these requests were complex and required escalation and discussion and that each First Nations child was deserving of and received individual consideration, taking into account their distinct needs and circumstances. This said, in 2022-2023, the Jordan's Principle staff went up to 360 and was forecasted to be 476 for 2023-2024. Dr. Gideon provided a detailed description of the different teams and their tasks, as explained above. Moreover, Dr. Gideon's evidence shows the important fact that one requestor may have multiple requests in the same request that ISC counts as separate requests.

[224] Furthermore, ISC submits that it cannot process more requests and triage at this capacity. As stated by Dr. Gideon during her cross-examination, to meet existing Tribunal timelines based on current demands, ISC would likely need to double the amount of full-time equivalent staff, if not more.

[225] Aside from explaining the exponential growth in urgent requests and the need to potentially double the amount of full-time staff or more to deal with the large increase in requests, there is insufficient evidence as to how ISC arrives at this calculation. The Tribunal reserved the right to ask questions and will do so as part of future reporting.

[226] The Tribunal finds that it is unclear how many urgent cases are awaiting determination in unopened emails in regional inboxes. With these uncertainties, the Tribunal is unable to make a finding that Canada cannot process and triage urgent requests in an expedited manner.

[227] The Caring Society had the following exchange with Candice St-Aubin during her cross-examination about the possible different categories in the backlog:

(...) would you agree that at one point where there could be a backlog is at the initial stage when a case comes in which is the email intake stage?

A. Yes.

Q. So that would be an email that's essentially unopened in an inbox and it's waiting to be processed?

A. It could be, yes.

Q. And then a second possible backlog point would be after the email has been opened and intake has been completed and the request is then waiting with a focal point to make a recommendation about what to do with it?

A. I assume, yes, it could be. But sorry, just to clarify, you mean to make determinations?

Q. Yes. So essentially my understanding of how the process works is someone will email, they will do an intake email, and then it goes to a focal point for a determination?

A. Correct.

Q. And so the focal point will have to, you know, look at the intake, complete an intake, make a recommendation (...).

[228] The above is helpful in understanding the potential locations of backlogs.

[229] Moreover, Candice St-Aubin affirmed in her revised affidavit dated March 28, 2024, that given the increased volume of requests and follow-up correspondence, ISC is experiencing backlogs in reviewing incoming email correspondence, and determining requests that have been entered into the Jordan's Principle Case Management System.

[230] Backlogs in email correspondence and requests awaiting determination vary at any given time and across regions. Overall, approximately 55% of backlogged correspondence in Jordan's Principle general request inboxes are new requests.

[231] Furthermore, in the evidence, affirmed by the AFN's affiant, Craig Gideon, in his amended affidavit dated March 22, 2024, the (AFN) Social Development Sector has heard concerns from multiple callers about the challenges contacting Indigenous Services Canada at the national and regional levels, particularly in the context of making an urgent request or updating the urgency of a request.

[232] Moreover, there is some evidence showing that urgent requests are waiting in the backlog as indicated in an email from Debra Bear, Director Jordan's Principle services, Council of Yukon First Nations, to Brittany Mathews, dated March 26, 2024, attached to the affidavit of Cindy Blackstock dated

March 27th, 2024 as Exhibit 22, and included in the AGC's compendium. Debra Bear reported that: "some applications have been waiting in the queue for over a year and some were marked as urgent. In our region, we have noted previous significant backlog on adjudication of applications."

[233] During Dr. Gideon's cross-examination, Caring Society counsel asked her if she agreed the backlog requests could include urgent requests for a child. Dr. Gideon responded that she agreed.

[234] While Canada submits that urgent requests are being addressed, there is evidence that this is not always the case. The Tribunal finds that there may be urgent requests in the backlog queue justifying the need to triage the backlog on an expedited basis and to start this immediately. Furthermore, there may be non-urgent requests that become urgent because of the passage of time. The Tribunal finds that applying the Tribunal's clarifications immediately to the current backlog will assist with the triage of urgent requests.

[235] The Tribunal believes that if the timelines/deadlines to triage the requests ordered by the Tribunal are too ambitious, Canada is provided a way to quickly return to the Tribunal to adjust those timelines if they encounter significant issues with the wording and/or deadlines set out in the orders. The same applies to the other parties. Given the nature of the services involved and those who receive them, the children, the Tribunal prefers to order tighter deadlines first and reassess later if parties provide sufficient reasons to amend those deadlines.

[236] The Tribunal will not be making orders to hire more staff. The Tribunal panel does not desire to dictate the specifics of the daily operations of Jordan's Principle or how Canada ought to reduce the backlogs as this is not its expertise. Rather, this Tribunal panel has in-depth knowledge of the tens of thousands of pages of evidence in this case considered over a period of more than 8 years leading to its numerous Jordan's Principle rulings that cannot be dissociated from the motions. This Tribunal panel has in-depth knowledge of the systemic racial discrimination found, the findings and orders to remedy it and prevent its reoccurrence, and of the Jordan's Principle system as ordered by this Tribunal panel. This Tribunal panel remained seized over the years to ensure that while data was collected and new First Nations processes were developed, the parties could come back to this Tribunal panel for further orders, preferably on consent when possible. The goal is to ensure the orders are effective and are adjusted as the quality of the information improves, and new studies and best practices are developed, (see 2018 CHRT 4, at para 237). The Tribunal panel's expertise is on the Jordan's Principle system and the cumulated evidence over the years not the daily operations within ISC especially if sufficient evidence is lacking. The orders in the summary ruling take this into consideration and are meant to be flexible.

[237] The ultimate objective is to achieve sustainable long-term reform informed by the many studies, expert committees, First Nations, the parties, etc. for generations to come. The Tribunal has always hoped for a settlement on long-term reform by way of consent order requests, if possible, similar to the compensation settlement agreement for both Jordan's Principle and the FNCFS Program. However, if this is not possible, the Tribunal can make systemic long-term orders informed by the parties to eliminate the systemic discrimination found. This is not optimal without the expert input of the parties including the First Nations Chiefs' knowledge and decisions expressed in the Chiefs-in-Assembly resolutions.

[238] The Tribunal consistently found that reform must reflect the specific different needs of First Nations and that they are best positioned to determine what this should look like in the long-term. The long-term aspect is not the object of the Tribunal's interim orders here.

[239] Furthermore, there is evidence that Jordan's Principle may be abused and play a role in the backlog and there may be a need for the development of objective criteria and guidelines in consultation with the parties to avoid false claims and/or abuses under Jordan's Principle.

[240] Exhibit “41” attached to the Affidavit of Cindy Blackstock dated January 12, 2024, and included in the AGC’s compendium, includes an email from Rhoda Hallgren to Brittany Mathews dated Thursday, August 10, 2023:

Subject: RE: Jordan’s Principle.

Hello Brittany, At our last meeting with ISC, they did indicate that they are short-staffed and that they had put in for additional staffing, but that has to go through the treasury board.

Samantha was in attendance and they indicated that they are severely short staffed because there has been a 400% increase in applications coming in. Only 46% of those applications go through service coordinators which means that the review staff in Vancouver are assisting families with the application process.

As of July 28th, they had 1000 applications in queue and 2000+ applications that are unopened in their inbox waiting for review.

There are also issues arising from misinformation being spread through social media where people are making false claims regarding what Jordan’s Principle will cover – this takes up ISC reviewers time as well because clients are calling into ISC for coverage based on Facebook posts (i.e. Facebook post stated that if you call ISC and show them your insurance and registration, Jordan’s Principle will pay for your vehicle insurance for one year). Ultimately, the backlog is due to short staffing and the increase in applications.

[241] The Tribunal finds this problematic and that it does impact backlogs.

[242] Exhibit 42 attached to the Affidavit of Cindy Blackstock dated January 12, 2024, and included in the AGC’s compendium, includes a letter from Karen Isaac, Executive Director, BC Aboriginal Child Care Society to Cindy Blackstock, undated. This letter references potential “abuses” of Jordan’s Principle services for basic necessities.

Jordan’s Principle has become known in BC to be slow but effective. This means that families are making multiple repeat applications for services and items. There is a concern by stakeholders in the Network that families are not utilizing already in place systems.

As an example, within the request queue there are multiple requests for ‘necessities of life’ support in the form of food, rent, and utilities from the same family. Families could be repeatedly accessing Jordan’s Principle to actively by-pass in place systems, or to supplement income as a letter of recommendation is all that is required to substantiate need. Jordan’s Principle is faster in these cases as ‘necessities of life’ are considered ‘Urgent’ requests.

There is a concern that Jordan’s Principle is being/could be ‘abused,’ thus delaying or denying access to children for whom Jordan’s Principle would be a necessity. Those needs that are ‘Urgent’ for other reasons may not be addressed in a timely manner.

Regional disparities in approvals.

It is generally known that BC Region, and other regions in Canada, do not share the same adjudication ‘criteria.’ Communication has expanded between the various delivery regions of Jordan’s Principle and there is solid evidence that each region ‘approves’ uniquely. This is a concern because the argument of ‘unique’ regional differences has been used to justify not approving items or services that have been recommended and that have been approved in other regions.

Recommendations

1. First Nations leadership of BC to empower a body to designate a set standards of practice that Service Coordinator's in BC are to follow. This will allow management in partnership with the Hub to support delivery and Service Coordinators. Service Coordinators have recognized this need and have begun their own process. It would be beneficial if they had leadership's support. ISC is currently looking to the Network and the Hub, as its support, to develop policy around standards of practice.
2. First Nations leadership of BC to have a direct role in policy development, delivery planning and oversight and the monitoring of the Network and ISC BC.
3. Aggregated regional data to be collected and analysed so that a detailed understanding of BC's 'needs' can be achieved independent of ISC shared data. This would support policy development and advocacy for local communities and organizations.

[243] The Tribunal finds that this example supports the need for adequate referrals to existing community services once an emergency situation has been handled. As discussed further below, the Tribunal agrees that referrals to existing community services would assist Jordan's Principle operations if referrals are done appropriately with safeguards in place. The Tribunal hopes that the parties will co-develop proactive solutions as part of their consultations.

[244] The Caring Society requests immediate changes to address the backlog to protect children and families, while Canada requests that no orders be made on that end and for it to be left to work through this in discussions with the parties. It has been almost a year since the notice of motion was filed in December 2023 and the evidence shows that the issues have been going on for quite some time. Canada was aware of the issues and admitted the existence of backlogs and this formed part of the hearing in September 2024. Given that the evidence shows that there is a real possibility that there are urgent requests in the backlogs, there is a need to go through the backlog as soon as possible in the best interest of the children involved. The Tribunal believes that it is more prudent to order immediate to short-term measures with a possibility of adjustments if the parties face significant issues implementing them than to not make any orders or to make orders with an indefinite timeline. The issues of backlogs have been ongoing for quite some time and an order to ensure that the Tribunal's orders are effective is required. Jordan's Principle is meant to also eliminate delays in accessing services. Long delays to be approved for Jordan's Principle services can sometimes be considered as denials, especially if the requests were urgent or time-sensitive and were left unaddressed. While the Tribunal is very pleased with Canada's implementation of Jordan's Principle orders and the huge success that Canada's implementation efforts have yielded, the thousands of backlogged cases undermine the Tribunal's orders to ensure that all First Nations children have access to Jordan's Principle services when they need them.

[245] Therefore, the clarifications on the Tribunal's orders and the Back-to-Basics policy above should be implemented immediately to assist in reducing the backlogs. The Tribunal also agrees that Canada's other efforts mentioned above should be continued immediately and other solutions developed in consultation with the parties in the short-term and on an interim basis. The Tribunal agrees with Canada that they should be allowed to continue their efforts above to reduce the backlog while removing the aspects of the Back-to-Basics policy that the Tribunal finds have largely contributed to a large influx of urgent requests.

[246] The orders in this ruling are interim in nature to allow the parties to ideally arrive at a resolution of the long-term reform of Jordan's Principle. The orders are very flexible to allow the parties to quickly come back to the Tribunal with any issues and need for quick adjustments to optimize the dialogic approach upheld by the Federal Court. This coupled with negotiation orders is an efficient way to move the parties away from litigation as much as possible while correcting the issues in a timely fashion in the best interest of children.

[247] Canada shall monitor cases after implementing the Tribunal's clarifications of urgent requests and report back to the Tribunal by January 9, 2025.

[248] The backlog was admitted by Canada and, while parties may have different views on the number of backlogged cases, the existence of a backlog is undisputed. There is a backlog of cases and some of them may very well be urgent and this will be established when Canada reviews the email requests in the backlog.

[249] Moreover, the Tribunal finds there is insufficient evidence to determine the exact number of urgent and non-urgent requests in the backlog and there is a need to understand this.

[250] The Tribunal believes that if Canada immediately applies the Tribunal's clarifications and referral orders when it goes through the backlog, this will eventually help reduce the backlog.

[251] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, the Tribunal orders Canada to:

- A. Immediately deal with the backlog with the assistance of the Tribunal's clarifications mentioned above and return to the Tribunal with its detailed plan with targets and deadlines by December 10, 2024.
- B. Report back to the Tribunal and the parties by December 10, 2024, to identify the total number of currently backlogged cases both nationally and in each region, including the intake backlog, the in-progress backlog, and the reimbursement backlog, including with information regarding the cumulative number of backlogged cases at month's end, dating back 12 months.
- C. Triage all backlogged requests for urgency with the assistance of the Tribunal's clarifications mentioned above. ISC shall review all self-declared urgent requests and evaluate if the requests are in fact urgent as per the Tribunal's clarifications and, if not, reclassify them as non-urgent by December 10, 2024. If a qualified professional with relevant competence and training has deemed them urgent, and until such time as the parties develop a definition for a qualified professional with relevant competence and training, ISC shall deem the requests urgent.
- D. Communicate with all requestors with undetermined deemed urgent cases as per the Tribunal's clarifications to take interim measures to address any reasonably foreseeable irreparable harms within fourteen days of the Tribunal's order and report back to the Tribunal by December 10, 2024.
- E. Consult and work with all parties to co-develop solutions to reduce and eventually eliminate the backlog that are efficient and effective and that can work within a government context (this does not mean that red tape should be excused or permitted in this system) and report back to the Tribunal by January 9, 2025.

[252] However, the Panel is mindful that this may not be possible in the immediate term and, therefore, the Tribunal has provided a way in the summary ruling and these full reasons to combine returning to this Tribunal for extension requests of the orders and/or word changes in the orders to adjust to developments. The orders to provide a report and plan to assist the Tribunal and the parties to understand the corrective measures and their evolution to ensure the children and families have access to the services they need. This may be useful as part of the ordered consultations.

G. Other orders on urgent requests

[253] The Caring Society seeks an order that Canada immediately revise its National Call Centre calling tree and other contact mechanisms that may exist to ensure that requestors can immediately and easily indicate that their request is urgent or, in the case of an existing request, has become urgent. ISC should also ensure that staff with the authority to review and determine urgent requests are available in sufficient numbers during and outside business hours.

[254] Canada objects to the Caring Society's requested orders. ISC has implemented ongoing operational initiatives in an effort to address the backlog, which have led to significant progress.

[255] The Tribunal understands the merit of this requested order in light of the backlog evidence discussed above. The Tribunal has reviewed ISC's ongoing operational initiatives and finds them to be proactive. The Tribunal, in light of the nature of the requests involving children, requests confirmation that indeed staff have the authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[256] The Tribunal prefers leaving the operational aspect of this to Canada without dictating the manner in which to implement it. The Tribunal orders Canada to report and confirm that this is in fact in operation.

[257] The Tribunal, pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm by December 10, 2024, that staff have authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[258] The Caring Society seeks an order for ISC to enable requestors to flag when their request has become urgent while awaiting determination. Requests may become urgent after they have initially been made for a variety of reasons, including urgency created by time passing while a request is backlogged in one of the regions, by a change in the child's condition, by a state of emergency, or by the death of a caregiver. Accordingly, requestors should be able to flag to ISC that the level of urgency of their request has changed because of changed circumstances.

[259] Canada objects to the Caring Society's requested orders. ISC has implemented ongoing operational initiatives in an effort to address the backlog, which have led to significant progress.

[260] Again, the Tribunal understands the merit of this requested order in light of the backlog evidence discussed above. The Tribunal has reviewed ISC's ongoing operational initiatives and finds them to be proactive. The Tribunal finds that it is unclear, in the context of the backlog, if requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[261] The Tribunal finds that it is necessary to ensure that requestors who have placed a non-urgent request that now has become urgent can rapidly indicate the change in status of their request. However, given the many proactive measures already put in place by Canada, the Tribunal prefers leaving the operational aspect of this to Canada without dictating the manner in which to implement it.

[262] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to ensure that by December 10, 2024 requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[263] The Caring Society seeks an order requiring Canada to provide the National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services.

[264] However, in 2017 CHRT 35, the Tribunal already ordered that, in cases where irremediable harm is reasonably foreseeable, Canada must make "all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented." The Tribunal finds the requested order is consistent with this previous ruling and there is no need to make additional findings in support of another order here.

(i) Relevant contact and other information provided to the public

[265] Canada submits that they have updated their public information on Jordan's Principle following the Caring Society's suggestions. The Tribunal believes this is a great initiative to improve accessibility for families and other requestors such as organizations who assist First Nations children. The Tribunal would appreciate confirmation with the level of details that is publicly available on their website and social media pages.

[266] In previous rulings, the Tribunal made similar orders in terms of posting public information to ensure accessibility. The Tribunal continues to rely on the same intent expressed in its previous orders.

[267] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm if its website and social media pages clearly indicate the relevant contact phone numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for requests and payment inquiries. Canada will provide this information to the Tribunal by December 10, 2024.

H. Timelines for non-urgent Jordan's Principle cases

[268] Canada requests an order extending the timelines for non-urgent requests set out in the Tribunal's order in 2017 CHRT 35, subparagraph 135(2)(A)(ii) and (ii.1):

- i. (...) for individual requests from 48 hours to without unreasonable delay for all other individual requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and ii. (...) for group requests: from one week to without unreasonable delay for all other group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree.

[269] With respect to Canada's position on adjustments to all other individual requests and group requests to a timeline of "without unreasonable delay", the AFN is concerned with the indeterminate nature of such an order.

[270] While some comfort may be drawn from Canada's commitments to engaging with the First Nations Parties in the context of adjustments thereto, the AFN notes its preference for a fixed period as a starting point, designed to provide sufficient flexibility to address the backlog, while ensuring that as the backlog is addressed, the timeline will be commensurately tightened, all on an interim basis and subject to the completion of a final settlement agreement on the long-term reform of Jordan's Principle.

[271] The point is to ensure a path forward that will allow for the back-log to be appropriately addressed, and after it is addressed, the return to a tightened reasonable period for the determination of requests which will provide certainty for requestors. Based on this approach, the AFN submits that the Tribunal should aim for an interim order that seeks to achieve a middle ground between the extremes presented by the Caring Society (no flexibility or consideration for the context giving rise to the backlog) and Canada (too much flexibility, no consideration for re-tightening the timeline after back-log addressed other than consultation with the First Nations parties).

[272] The AFN also highlights its preference that such interim changes to the existing orders be informed by discussions between the Parties further to the dialogic approach and suggests that any interim order addressing said points provide an opportunity for such engagement.

[273] For non-urgent requests, Canada requested in its cross-motion that the timeline be changed to "without unreasonable delay." However, Canada in reply, acknowledges the AFN's preference that a fixed period of time be used instead. ISC is prepared to consider and discuss an alternative fixed period while maintaining its request that any fixed period that is ordered must be subject to change by way of agreement between ISC and the First Nations Parties.

[274] Canada agrees that timeliness and responsiveness are key values to be respected and implemented in Jordan's Principle administration, including for non-urgent requests. However, in determining timelines for non-urgent requests, the specifics and nature of requested products, supports and services should also be taken into consideration.

[275] Further, due to the complexity, scale, and scope of group requests – whether urgent or non-urgent – ISC requires sufficient time to review proposals to avoid duplication or diversion of funding. This will ensure that funding through Jordan's Principle group requests remains prioritized for direct services and supports to First Nations children.

[276] Canada would be pleased to discuss these points and others in the context of mediation, as well as long-term reform discussions. This willingness to sincerely consider other parties' concerns highlights the need for a cooperative approach between the parties, involving compromise and a genuine openness to addressing concerns as partners.

[277] The Caring Society submits that for non-urgent requests, ISC proposes eliminating the timeline by replacing the existing 48-hour (individual) and one-week (group) timeframes with an aspirational goal based on the undefined objective of avoiding "unreasonable delay".

[278] Instead of leading evidence in support of its proposal, ISC criticizes the evidentiary basis for the current timeframes and points to its inability to keep up with current demand, despite having led no evidence on why timeline modification is the appropriate option for responding to its operational challenges.

[279] The Tribunal's stated approach to amending its orders makes clear that Canada has simply not provided the Tribunal with a basis for granting the relief sought. In 2022 CHRT 41, the Tribunal was clear that "[o]nce it has reviewed the evidence and made findings and found that orders are warranted, the Tribunal cannot change its mind and rescind this unless it made an error, a reviewing Court overturns a finding or new and compelling evidence justifies it." No such new and compelling evidence justifies the relief sought on ISC's cross-motion.

[280] The Caring Society contends that, to the contrary, the evidence led by the Caring Society and Ms. St-Aubin's admissions on cross-examination demonstrates that ISC's proposed changes are unjustified. Canada argues that the Tribunal-ordered determination timelines should be modified as they were not based on objective evidence such as child welfare standards. However, the Caring Society further submits this argument ignores the evidence that Canada's own senior official gave in 2017. It also fails to note that child welfare standards do not support Canada's approach to timeframes for determining urgent cases. This evidence was discussed in greater detail above.

[281] In any event, the Caring Society advances that Canada has failed to indicate why the child welfare standards referred to in Ms. St-Aubin's revised affidavit provide a compelling reason for changing the current approach. Instead, when specifically asked on cross-examination what was meant by the reference in paragraph 13 of her affidavit to standardized child welfare timelines, Ms. St-Aubin indicated that the comment was "more around just the uses to – standards within and timelines within the systems related to children" but did not provide further clarification than that. This generalized assertion does not provide the Tribunal with solid ground on which to modify timelines that have been in place for seven years.

[282] In addition to Canada not having provided any evidence to support this timeline, the Caring Society submits the Tribunal should reject this "without unreasonable delay" determination timeline for three reasons.

[283] First, Ms. St-Aubin, Canada's Senior Assistant Deputy Minister proffered to give evidence regarding Canada's current implementation of Jordan's Principle, rejected the proposed service standard on cross-examination, saying: "I would never use [that] as a standard." She agreed that

Canada's proposed service standard was not clear, measurable, or ambitious. The Tribunal should have no confidence in a service standard that is not supported by the federal official called to give evidence in support of it.

[284] Second, irrespective of Ms. St-Aubin's views, Canada's proposed standard flies in the face of the Treasury Board's own Guideline on Service and Digital ("the Treasury Board Guideline"). The Treasury Board Guideline applies to the federal government as a whole, including ISC. Ms. St-Aubin agreed that it should have informed Canada's approach on this cross-motion. Accordingly, Canada's failure to comply with its own voluntarily-adopted Treasury Board Guideline, which should be the bare minimum against which its proposal should be evaluated, should give the Tribunal serious concerns regarding the viability of Canada's proposed approach.

[285] On cross-examination, Ms. St-Aubin agreed that establishing a timeline within which cases should be dealt with is a service standard. Pursuant to the Treasury Board Guideline, such service standards usually have "three key components": (1) a service standard, being a clear and measurable statement on the level of service a client can expect; (2) a service performance target, which is a clear and measurable statement on the extent or frequency to which the standard will be met; and (3) a service performance result, which is the actual performance against the standard target and which is to be reported. Moreover, one of the characteristics of a good service standard is that it is measurable, in the sense that it is quantifiable and linked to the monitored activities.

[286] The "without unreasonable delay" metric does not meet any of the Treasury Board's three components for a service standard. It is not measurable. Being undefined, it cannot lend itself to producing measurable accounts of the extent or frequency with which a performance target could be met. Accordingly, it does not enable performance results to be measured against standard targets. It is therefore too vague to operationalize.

[287] Third, there is no evidence of any consultation by ISC on the proposed "without unreasonable delay" determination timeline. This is also contrary to the Treasury Board Guideline, which provides that service standards should be "developed or reviewed in consultation with clients, managers, staff and other partners in service delivery to ensure that they are meaningful to clients and match the organization's mandate and capacity". No such consultation process has occurred. Instead, in her cross-examination, Ms. St-Aubin's evidence was that Canada's proposal is "based on discussions internally and then partners have proactively come to us to say that they're also challenged to meet the timelines". The Tribunal should reject Canada's "amend first, consult later" approach.

[288] The Tribunal entirely agrees with the Caring Society's explanation of the evidence above on this point and what led to the Tribunal's timeline findings under Jordan's Principle.

[289] As discussed above, including in the urgent timeline section, the Tribunal places little weight on Ms. St-Aubin's evidence on this point. This is concerning to hear for the Tribunal from a Senior Assistant Deputy Minister in the Department of Indigenous Services Canada (ISC), First Nations and Inuit Health Branch (FNIHB) and why this prompted the Panel chair to ask her a series of questions on the Tribunal's previous rulings on Jordan's Principle. Having full knowledge of the immensity of evidence and orders in this case since 2016, the Panel chair easily identified Ms. St-Aubin's incorrect assumptions expressed in her affidavit and testimony and her lack of knowledge of the evidence that led to the multiple rulings in this case.

[290] In all fairness, Ms. St-Aubin had been in the position that she is in for only a few months at the time that she was cross-examined.

[291] This said, Canada advances the evidence of rapid growth in Jordan's Principle requests and their inability to respect the Tribunal's ordered timelines for non-urgent cases at all times. Canada advanced several contributing factors and, as explained above and below, the Tribunal agrees to many of Canada's proposed measures that are directly linked to the evidence and are reasonable.

[292] The Tribunal also agrees with the AFN's principled approach above and with Canada's request for discussions with the parties.

[293] Without ordering a change in timelines at this time, the Tribunal agrees to receive options from the parties that would arise from their discussions in the format that they so choose (mediation, negotiations, conflict resolution, etc.) and in light of the Tribunal's clarifications.

[294] The Tribunal, pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop potential options supported by rationale and available evidence to present to this Tribunal in regards to timelines for non-urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[295] However, the Tribunal rejects the proposed terms "without unreasonable delay". This concept is vague and does not align with the best interest of the child or any reasonable practice standard. As even immediately and urgent were not understood the same way by everyone, the term "without unreasonable delay" would likely cause other misunderstandings.

(i) Determination clock for Jordan's Principle cases

[296] The Caring Society requests an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately: (a) "begin the determination clock" when a request on behalf of a First Nations child or youth is received, and (b) stop the clock when the requestor is advised of the determination of the case.

[297] In the alternative, an order that the determination clock shall start to run when ISC has received a recommendation/authorization from a professional or a letter of support from a community-authorized Elder/knowledge holder.

[298] The Caring Society is concerned that ISC only starts the "clock" on the timeframes for determination when ISC is satisfied that it has the documentation required as opposed to when the requestor first submits their request. ISC is skirting its compliance with the Tribunal's orders, which require meeting First Nations children's needs in a timely manner. It does this by creating and relying on systems that make it very difficult for requesters to have their requests considered. Its 24-hour line results in calls that are unreturned or receive significantly delayed callbacks. Its email intake has resulted in many thousands of requests that remain unopened or unentered into ISC's database. ISC then does not count these requests in its timeline compliance as ISC has not "satisfied itself" that the required documentation has been included. Indeed, when asked on cross-examination when ISC starts the determination clock on Jordan's Principle requests, Ms. St Aubin's evidence was as follows:

Q. Do you know when they're starting the clock on that? When does the day count starts?

A. So when does the clock start and when the request begins to –

Q. Yes.

A. -- process, for lack of a better word?

Q. For the purpose of this, you know, how old a request is –

A. Right. So it's when the file is completely entered into the case management system with the relevant information (indiscernible).

Q. And that would be the end of the intake process?

A. Yes.

Q. So if a file is in the email queue, the time that's spent in the email queue isn't counted towards that 15 or 30-day standard?

A. As far as I know it's not. (...).

[299] The Caring Society submits that ISC's approach to "starting and stopping the clock" amounts to a public relations response. It does not account for the real needs of children, youth, and families who are in good faith trying to contact ISC to make requests and have their cases determined in a timely manner. This echoes the evidence heard during the hearing on the Merits, which described similar strategies used by Canada to shield itself from allegations of discriminatory conduct. This old mindset approach focuses on how the Department looks and deflects energy from meeting the real needs of those who are the primary beneficiaries of the Tribunal's orders. Indeed, there was a time when Canada's position was simply that it was upholding Jordan's Principle because there were no Jordan's Principle cases. Grounded in its longstanding concerns about when ISC "starts the clock", the Caring Society's position is that the determination clock should start to run when the requestor first attempts to make a request. Such an approach is grounded in the following:

- A. Children, youth, and families cannot control how and when ISC receives or reviews a request – the Tribunal's timeline orders are in place to protect and promote the substantive equality rights of First Nations children and their families. The administrative burden of processing a request ought to be borne by the government and not those seeking to access a needed service, product, or support;
- B. The Back-to-Basics Approach stipulates that Jordan's Principle must be implemented in a way that minimizes the administrative burden on families. Urgent requests can be determined before all documentation is submitted and ISC only needs a minimum amount of information to determine a request. To this end, the timelines ought to be for the benefit of First Nations children and not be defined in a way that provides an administrative shield that protects the government in relation to compliance issues;
- C. Using the date a request is made also fosters a collaborative relationship between ISC and the requestor, ensuring that ISC will raise any concerns with the documentation in a timely way while avoiding multiple requests for additional documentation so that the requestor can either address those concerns at once or submit a new request; and
- D. Using the date a request is made also more accurately captures the time the child is waiting. Indeed, when a professional makes a professional recommendation for a particular service, product, or support, that child is entitled to receive the same at the time the professional makes its recommendation, in line with the Tribunal's orders.

[300] The Commission submits that it would be helpful for the Tribunal to clarify the directions in its prior ruling regarding the starting and stopping of the determination clock. For example, the Tribunal's consent order on Jordan's Principle implementation says urgent individual requests shall be determined "within 12 hours of the initial contact for a service request," but also acknowledges that clinical case conferencing may take place where more information is reasonably necessary to the determination of a request. It is not entirely clear how the timeline would apply in such situations. Similarly, the ruling says non-urgent individual cases shall be determined "within 48 hours of the initial contact for a service request," but adds that where reasonably necessary information cannot be obtained within that timeframe, Canada will work with the requestor to enable the determination to be made as close to the 48-hour time frame as possible. Again, the precise operation of the timeline is not entirely clear.

[301] In the Commission's view, it would be reasonable to start the determination clock once Canada receives a request supported by a professional or community-authorized Elder or knowledge holder. If the Tribunal adopts that approach, it should also clarify that if a requestor submits a request that is

missing the required proof of support, Canada will promptly work with the requestor to make clear what additional documentation would be required to allow the determination clock to start and the request to be determined.

[302] The Tribunal finds that while Ms. St-Aubin did testify on her knowledge of when the day count clock start request begins to process or in other words when the determination time starts on Jordan's Principle requests. She also mentioned: As far as I know, it's not, however, [indiscernible]. Like that's the information [indiscernible].

[303] The transcripts of the audio record mention inaudible. The Tribunal recalls that she did have hesitation. Therefore, at best, Ms. St-Aubin's evidence is inaccurate and does not reflect ISC's practice. At the worst, ISC's practice is non-compliant with the Tribunal's previous orders. The Tribunal cannot repeat all its findings of how Jordan's Principle functions here; nor is it necessary for the time being given that the Tribunal cannot make the worst-case scenario finding. The same can be said about a finding of the best-case scenario.

[304] The Tribunal can confirm that its consent orders in 2017 CHRT 14 and 2017 CHRT 35 were originally meant to start the determination clock at the reception of a request except in the circumstances where further information is reasonably necessary to assess the clinical needs appropriately. The Tribunal's orders include the specific wording: (...) when clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs information was required.

[305] The Tribunal finds all the above shows the need for clarification of the Tribunal's orders and the need for consultations between the parties to elaborate formal and clear guidelines/procedures to address this issue. The Tribunal is open to suggestions from the parties, hopefully on consent, to clarify when and how the determination clock starts if coordinated with formal and clear guidelines agreed to by the parties and rooted in the available evidence.

[306] Again, when the orders were made, they were supported by the evidence presented at the time and did not envision pandemics, fire evacuations, and many requests that are non-urgent such as false claims, gaming consoles, etc. that impact Jordan's Principle services and could be processed in a much longer time frame without the clock starting at their reception. The Tribunal is concerned that non-urgent requests now have such a large spectrum that it would be unreasonable to require the clock to start at the reception every time. The Tribunal is concerned that a child in need of an important assessment to access special education for example would be treated on the same level as the request for a lawnmower. For example, if requests are questionable and require more information, the determination clock could be paused. Therefore, the Tribunal finds there is a need to establish clear guidelines on this aspect and will revisit this issue once the parties consult and return to the Tribunal.

[307] Given the current backlog and the Tribunal's clarifications on the term urgent and the Tribunal's other consultation orders, the Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties and seek to co-develop guidelines on this aspect and return to the Tribunal with their options by January 9, 2025.

(ii) Reimbursements

[308] Canada submits that ISC has established service standards for payment of approved Jordan's Principle requests and a variety of mechanisms to process payments. These include direct payments to vendors, acquisition cards, gift cards, and contribution agreements. In some regions, ISC has also partnered with third parties to improve payment processing.

[309] Canada submits that to increase the efficiency of the reimbursement process, ISC must work directly with the First Nations Parties to find solutions. This will also require that First Nations support ISC in its efforts to ensure that the necessary information is obtained from requesters in a timely manner. This includes supporting invoices, and the establishment of practices and procedures to ensure that the necessary information can be provided and transmitted in a form that can be readily processed by Canada's financial systems.

[310] ISC does not favour imposing a specific timeline. As a reminder, with regard to both First Nations children and their families, it may be an option for ISC to make a direct payment for any requested product, service, and support that may be required. With respect to First Nations service providers, ISC agrees that any long-term agreement on Jordan's Principle should address invoice processing issues, possibly by reducing reliance on federally-driven processes and increasing First Nations service providers' capacity.

[311] Canada also submits that ISC works collaboratively with regional and First Nations partners to support First Nations-led service coordination of Jordan's Principle requests. The Jordan's Principle service coordination function is delivered by one of several service delivery organizations regionally (for example, First Nations communities, Tribal Councils, Health Authorities, and Indigenous Non-governmental Organizations), funded through almost 600 separate contribution agreements with ISC.

[312] Canada further submits that ISC is also streamlining payment processes across regions to facilitate automation.

[313] According to Canada, some of the issues raised in the Caring Society's submissions are indirectly related to the backlog problem, such as reimbursement. In some cases, requestors pay for a product, service, or support upfront, while in other cases ISC pays vendors directly or purchases gift cards for requestors. While requestors or vendors may have to wait for the reimbursement process to be completed, that issue is separate and apart from the issue of whether the child has received the product, service, or support under Jordan's Principle.

[314] ISC submits that paying in advance for certain products, supports, or services and seeking receipts or other documentation from the requestor later fully complies with this Tribunal's decisions, which have focused on ensuring that administrative requirements do not prevent a child from receiving the support in a timely manner. ISC is permitted to seek information from requestors after the fact, to confirm that payments made by ISC resulted in the child obtaining the approved product, service, or support.

[315] The Caring Society submits that even if ISC regularly abided by its 15-business day timeline, it would still be too long to meaningfully assist families in need who are often living in deep poverty. For example, a 15-business day standard may not meet the urgent needs of children whose guardians may be required to expend significant amounts of money upfront and await reimbursement. Financially vulnerable families, or those fleeing domestic violence and natural disasters, may feel this strain more acutely when, following Jordan's Principle approval from ISC, they purchase everyday essentials such as clothing, diapers, or food, and must wait 15 business days, or more, to be reimbursed. These families may lack control or certainty over their cash flow and therefore may be unable to "cash manage" when their money is tied up in services, products, or supports that the federal government has agreed to provide pursuant to Jordan's Principle because they are important to their children's needs. As one Indigenous family and child support agency put it, "if [families] had the money, they would not have applied to Jordan's Principle for the assistance."

[316] During Dr. Gideon's cross-examination, Panel Chairperson Marchildon and Dr. Gideon shared the following exchange:

THE CHAIR: [...] Would you agree with me that if a family is poor and that's been recognized earlier, and in your evidence that we are -- you're dealing with families that are poor, that could be extremely difficult for them to even advance for three days, seven days and wait for reimbursement, even if it takes the 14 days that you've mentioned? Would you agree that poverty can [make] this very difficult for a family?

DR. GIDEON: I would agree with that, that's why we've set up some advanced payment options, including gift cards in some context, but there are value limits to those payments. The best is for us to set up a direct arrangement or, if it's the landlord, we can issue a payment to the landlord. If it's the grocery store and they will take a direct billing from us. Could be Home Depot, right, we set-up arrangements with Home Depot. Like, that is the preferred mechanism for supporting a family that is living in poverty.

[317] The Tribunal finds that a system that requires poor or low-income families to assume the costs of services is essentially displacing Canada's obligations to the people in need of services. Even if for a short time, this may be too onerous for some. In the long-term, this should be fixed. When considering that Jordan's Principle exists to avoid governments or departments within governments fighting over who should pay for the service and rather approve and pay for the service and recover the funds later, it is somewhat strange that it would shift into the government approving but asks First Nations requestors to pay and seek reimbursements later.

[318] In the interim, some solutions must be implemented. The Tribunal finds that Canada has already started to develop solutions and should continue with the assistance of the other parties as part of consultations.

[319] The Tribunal agrees with Dr. Valerie Gideon's preferred mechanism for families living in poverty if this mechanism is available for them.

[320] However, the AFN's evidence demonstrates that the Social Development Sector was contacted by a parent several times between January and May 2023 regarding payment delays that resulted in extreme financial hardship for the family. The parent noted that requests were approved but payments took several weeks to several months to be received.

[321] Craig Gideon also affirms that the AFN's Social Development Sector was contacted by a parent who had the approval to purchase and then be reimbursed for a costly service for their child through Jordan's Principle. The parent paid for the service on their credit card in September 2023 but was still awaiting reimbursement in March 2024. The balance of the credit card was causing the parent financial hardship. The parent had tried several times to contact ISC to inquire about the status of their reimbursement but was unable to reach anyone through the call centre.

[322] Craig Gideon's evidence is that the Social Development Sector was contacted by a service provider in January 2024 inquiring about the status of a reimbursement for services rendered to clients under Jordan's Principle that were several months past due. After multiple unsuccessful attempts to contact ISC, they sought the AFN's help. The service provider noted that they continued to provide services on good faith but shared concerns about the sustainability of doing so.

[323] Similarly, Craig Gideon affirms that the Social Development Sector was contacted by a different service provider in July 2023 regarding outstanding payments owed by Jordan's Principle for services rendered over 12 months prior, despite multiple attempts to contact ISC.

[324] The Social Development Sector was contacted by a parent in August 2023, who had a request for services approved in March 2023 but the vendor had not yet received payment and was thus not able to render the services.

[325] The Tribunal accepts the AFN's uncontested evidence above. The Tribunal finds it relevant and reliable especially that, while it is hearsay and must be given the appropriate weight, these affirmations originate from the Social Development Sector that has extensive experience in assisting First Nations families' requestors and Jordan's Principle on a regular basis. Nothing in the affiant's affirmations gives this Tribunal reasons to find it unreliable or to give it little to no weight. Moreover, in reviewing the evidence as a whole, Canada did not challenge this specific evidence as opposed to similar evidence provided by the Caring Society.

[326] Canada had the opportunity to cross-examine the other parties' affiants including Craig Gideon and chose not to. While this is not a guarantee that the unchallenged evidence will be relied upon by the Tribunal, it remains evidence that can be considered and weighed by the Tribunal. The Tribunal finds this evidence supports a finding that some issues with payment reimbursements occurred and caused hardships to some families and some service providers.

[327] The Tribunal finds this concerning and far from the intent of its rulings.

[328] The Tribunal agrees with the Caring Society that Dr. Valerie Gideon's ideas discussed above such as advanced payment options, including gift cards and direct payments, while helpful for some families, as demonstrated by the AFN's examples above, are not currently in place or sufficient for all families.

[329] This raises the question of what happens to parents who do not have the assistance of the AFN or the Caring Society or another organization and are in the same situation as the examples above where they cannot reach anyone at ISC or, even if they reach someone, have to wait for long periods?

[330] In risk management complaints or the AFN's examples are helpful to improve the quality of service and should not be ignored. They are symptomatic of underlying issues in a system.

[331] The AFN submits that the FNLC highlights the issues in terms of payment processing for individuals and service providers and supports the Caring Society's relief sought in relation to same. The AFN agrees that the issue of timely reimbursement is not somehow "separate and apart" from the Tribunal's orders as provided by Canada and, as noted, supports an interim order providing a 10-business day standard for individual reimbursement, and a 15-business day standard for service provider reimbursement.

[332] The Tribunal agrees that the issue of timely reimbursement is not separate and apart from the Tribunal's orders. If families cannot financially support the advance payment costs while they wait to be reimbursed, they may have to stop using the services. As demonstrated above, some have experienced serious hardships in supporting payments and waiting to be reimbursed. In many cases, the timely reimbursement is directly linked to accessing the service, especially if it's on a recurring basis. This risks causing a disruption, delay, or inability to meet the child's needs. Further, this can become a barrier to accessing services for children when Jordan's Principle is meant to remove those barriers.

[333] The Caring Society requests that the Tribunal order interim relief in relation to reimbursement, including within 10 business days for individual requestors and 15 business days for service providers.

[334] The Caring Society submits that the 15-business day service standard does not consider the financial realities of Jordan's Principle requestors, who often cannot wait three weeks for reimbursement. Shorter reimbursement timelines are required to provide certainty, confidence, and public trust in Jordan's Principle, in line with the spirit of the Tribunal's focus on the impacts on First Nations children.

[335] The Caring Society submits that a shorter service standard of five calendar days is required for individual requestors to ensure that families are not put under financial strain. This revised timeline respects the fact that many First Nations families accessing Jordan's Principle do not have the funds to

pre-purchase necessary products, services, and supports. It also provides certainty and bolsters trust in Jordan's Principle by reassuring First Nations parents that they will have the supports their children need in hand at a pre-determined time.

[336] The Caring Society requests an order clarifying that consistent with 2017 CHRT 14 and 2017 CHRT 35, ISC cannot delay paying for approved services in a manner that creates hardship by imposing a financial or administrative burden on families that risks a disruption, delay, or inability to meet the child's needs.

[337] The Tribunal finds that an order is required to ensure that First Nations families, especially those who are in difficult financial situations, do not experience financial hardships in supporting advance payments in order to receive the services that their children need. This runs contrary to what Jordan's Principle is all about: provide the service and deal with the funding later. In a lot of cases, the advance payments are borne by the requestors themselves rather than ISC or a province or Territory, which for the Tribunal is concerning and is not in line with the Spirit of Jordan's Principle or the Tribunal's orders.

[338] The Tribunal is not applying this analysis to potential false claims, or questionable or unreasonable requests that may require further investigation.

[339] The *CHRA* is structured in a way to protect vulnerable groups and provide for special programs, plans, or arrangements designed to prevent or eliminate disadvantages suffered by any group of individuals by improving opportunities respecting goods and services:

[340] Special programs

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

[341] In 2018 CHRT 4, the Tribunal made findings on section 16(1) of the *CHRA* and relied on *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31) and *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]). The Tribunal continues to rely on those findings.

[342] As part of their consultations, the parties can discuss solutions for First Nations families that protect their privacy, do not require proof of poverty or cause embarrassing situations for the families.

[343] The Tribunal, pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop interim practical and operational solutions supported by rationale and available evidence to redress the hardship imposed on individuals and families (requestors) by reimbursement and payment delays and report back to the Tribunal by January 9, 2025.

[344] The Tribunal, pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, clarifies that consistent with its orders in 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay paying for approved services in a manner that creates hardship by imposing a burden on families that risks a disruption, delay or inability to meet the child's needs.

[345] The Tribunal finds the current standard deadlines for service providers to be reasonable if there are no delays. The evidence discussed above confirms that, in some cases, service providers experience long delays that go well beyond 15 days.

[346] The Tribunal is unaware if ISC's procedures include safeguards against unnecessary delays.

[347] As a matter of good practice, guidelines should be in place to avoid unnecessary delays in reimbursements. Canada will report back to the Tribunal to inform the Tribunal if they have such guidelines/procedures and if so, provide a copy of the guidelines/procedures by December 10, 2024. The Tribunal will revisit this once it has received Canada's information and/or guidelines.

(iii) Social prescription:

Social prescribing is a means for trusted individuals in clinical and community settings to connect people who have non-medical, health-related social needs to non-clinical supports and services within the community through a non-medical prescription. Evaluations of social prescribing programs for the pediatric population have demonstrated statistically significant improvements in participants' mental, physical, and social well-being and reductions in healthcare demand and costs. Experts have pointed to the particularly powerful impact of social prescribing on children's mental health, suggesting that it may help to alleviate the strain on the overburdened mental health system. Social prescribing shows promise as a tool to move pediatric care upstream by addressing non-medical, health-related social needs, hence why there is an urgent need to direct more attention towards the pediatric population in social prescribing research, policy, and practice. This demands rapid action by researchers, policymakers, and child health professionals to support advancements in this area, (Commentary by Caitlin Muhl, Susan Bennett, Stephanie Fragman, and Nicole Racine, Exhibit 1 – 2024 to Ryan Rioux's M.D. affidavit dated March 27, 2024).

[348] With respect to social prescription, the AFN highlights the fact that evidence being uncontested does not necessarily make it good evidence, nor indicative of an approach that the Tribunal should adopt when it comes to the identification of urgent matters, as put forward by the Caring Society and endorsed by the FNLC without the opportunity to negotiate its role amongst the Parties. Its acceptance in the context of weighing urgency will ultimately undermine the spirit and intent of the Tribunal's existing directions and the principle that "urgent means urgent". The AFN would instead recommend that the Parties consider the role of social prescription in the context of non-urgent Jordan's Principle requests and the negotiations of long-term reform of Jordan's Principle. The AFN would therefore caution the Tribunal in considering social prescription's applicability in the context of weighing the scope of misclassified requests under Back-to-Basics. The Tribunal agrees with the AFN on this point.

[349] Canada objects to this evidence given that it was filed in the Caring's Society's reply evidence and, therefore, it is prejudicial to Canada who was not able to test this evidence, nor provided an opportunity to respond. The Tribunal accepts this and believes that Canada is not prejudiced here given that no order is made based on this evidence.

[350] This information is interesting and could be used by the parties in their consultations. This being said, even if little weight is placed on the information found in the article and affirmed by Ryan Rioux M.D. in regards to requested orders and clarification of the Tribunal's orders, the Tribunal will make a few comments for the benefit of children that are not prejudicial to any party and may assist the parties in their consultations.

[351] Dr. Rioux affirms that, in his practice, he may recommend enrolment in a sports camp for a child as part of management for childhood obesity. Dr. Rioux may also recommend the removal of mold or carpet in a home in which a child who has poorly controlled asthma lives. Both of these examples would be within the treatment guidelines for these conditions and fall under the concept of social prescribing. Furthermore, in those two examples, pediatricians can look further upstream for the root causes of higher obesity rates and higher rates of asthma in, for example, First Nations communities – and we may find that poor access to healthy foods, poor access to centres that promote activity, and inadequate housing can be the root cause of the higher rates of obesity or asthma.

[352] However, in Dr. Rioux’s opinion, a holistic understanding of a First Nations child’s individual needs through social prescribing brings to the forefront that many of these needs may be urgent.

[353] For example, a child with Autism Spectrum Disorder may have sensory needs that include visual stimulation to self-regulate. For that child, a glowstick may be a tool used by their family to calm them. Additionally, a gaming console that provides a displaced teenager with the ability to reconnect with their online gaming community may provide stability and mental wellness in a time of crisis.

[354] The Tribunal generally agrees that social prescribing which takes into account the social determinants of health is an excellent principle to determine and analyze substantive equality in non-urgent Jordan’s Principle cases. The Tribunal accepts that social supports (i.e. social prescribing) are a key tool for redressing those health and social inequities.

[355] However, in urgent cases, there is insufficient evidence and information to support orders given the only reply affidavit and the brief description of examples of urgent cases that are unconvincing. Furthermore, it was not previously considered by this Tribunal to arrive at its findings when the Tribunal made its urgent orders under Jordan’s Principle. While the Tribunal is not against exploring such an important process, it is not prudent to include this concept in the current definition of urgent cases at this time. The examples provided by Ryan Rioux M.D. at paragraph 20 of his affidavit mentioned above have merit but do not fit the Tribunal’s urgent definition requiring a resolution within 12 hours. In a time of backlogs that may include truly urgent requests that are left unaddressed, it would be unwise to expand the definition of urgent services to include services such as glowsticks to help a child in crisis regulate or a gaming console that provides a displaced teenager with the ability to reconnect with their online gaming community and that may provide stability and mental wellness in a time of crisis under the Tribunal’s urgent orders. The Tribunal would need more details and information to decide otherwise for urgent cases.

(iv) Coordination of Federal Programs, gaps analysis, referrals, and elimination of gaps and barriers:

[356] The Tribunal will elaborate at length on this issue given its multiple previous orders, Canada’s mischaracterization of the Tribunal’s orders and Canada’s slow progress on closing gaps in federal programs that are funding services to First Nations children. Canada uses the Tribunal’s Jordan’s Principle orders to support its position despite the fact that the Tribunal’s orders and findings were to be read and implemented together as it will be further explained below.

[357] This issue was raised by Canada as part of the motion/cross-motion proceedings. As mentioned above, Canada asserts that there is a redirection of service requests to Jordan’s Principle that may result in ISC duplicating funding in some instances, because ISC cannot service navigate requestors to existing programs such as Non-Insured Health Benefits, on-reserve income assistance, or education programming. Being unable to redirect requestors to existing accessible services contributes to the backlog for Jordan’s Principle correspondence and requests.

[358] While Canada knows their federal programs and knows best how government systems operate, the evidence established over the years in this case is that Canada is not an expert in efficiently eliminating barriers, gaps, or denials of services to First Nations children and families.

[359] As part of the Tribunal’s past rulings, the lack of coordination between social programs, the First Nations Indigenous Health Branch, and Health Canada was addressed, and eliminating the lack of coordination in federal social programs findings was part of the cease-and-desist order in 2016 CHRT 2. Moreover, the Tribunal’s findings and orders address the need to close gaps in federal programs offering services to First Nations children. Some of those findings are reproduced below as a reminder and for ease of reference.

[354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [2009 MOU on Jordan's Principle]; see also testimony of C. Baggle, Transcript Vol. 57 at pp. 9-13, 23, 40-41, 84-85). In the 2009 MOU on Jordan's Principle, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "...ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (2009 MOU on Jordan's Principle at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see 2009 MOU on Jordan's Principle at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the 2009 MOU on Jordan's Principle provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated \$11 million to fund goods/services while the dispute is being resolved (see 2009 MOU on Jordan's Principle at p. 2). The funds were provided annually, in \$3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggle, Transcript Vol. 57 at pp. 123-125).

[357] According to the 2009 MOU on Jordan's Principle, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "...supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (2009 MOU on Jordan's Principle at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "...crucial to ensuring that funding disputes do not disrupt services provided to a child (2009 MOU on Jordan's Principle at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [2013 MOU on Jordan's Principle]). Again, signed by an Assistant Deputy Minister from each department, the 2013 MOU on Jordan's Principle acknowledges that Health Canada and AANDC "...have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (2013 MOU on Jordan's Principle at p. 1). The 2013 MOU on Jordan's Principle now provides that during the resolution of a Jordan's Principle case, the

federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggeley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the 2012 *National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

[362] In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan Principle on the following basis, at page 16:

Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children [...] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.

(Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.

...

4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.

4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. For example, it took nine months for a First Nations agency to receive confirmation that an \$11,000 piece of equipment for a child in care would be paid for by INAC.

(Emphasis added)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (see Annex, ex. 49 [Intake Form]; see also Annex, ex. 50; and, testimony of C. Baggle, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks "[p]lease provide details on the barriers experienced to access the required services" it states at page 8:

Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said "absolutely not".

AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.

Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.

Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.

Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line "Jordan's Principle: Parallel work with HC", the document represents the views of AANDC's British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program, (emphasis added).

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms;

where to send the forms and who to call for questions given the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.

4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development

Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

Approach A: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.

Approach B: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to play in improving outcomes for children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.

Approach C: In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the *2010 AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that “[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services” (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

...

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC's position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the \$11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggeley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

...

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps, delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.

...

[458] ... Non-exhaustively, the main adverse impacts found by the Panel are:

(...) The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.

The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

...

[481] (...) AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[360] Canada admitted at the motions' hearing that the Jordan's Principle operation, as ordered by this Tribunal, is a completely new path for them. In all fairness, after multiple orders over the years, they have done a great job approving millions of services to First Nations children and families. This is to be celebrated. The complete story is told when a review of all the findings and supporting evidence from this Tribunal in the multiple rulings is achieved. This is what the Tribunal is keeping in mind in assessing the effectiveness of its orders and the level of implementation achieved.

[361] Many years after the Jordan's Principle definition and consent orders in 2017 CHRT 14 and 35, Canada was still denying sufficient capital funding for buildings needed to support Band Representatives and Jordan's Principle: 2021 CHRT 41. The Chiefs of Ontario brought the issue to the Tribunal because Canada was not in agreement with them. This required the Tribunal's intervention. All parties except Canada agreed that capital funds were often required for the purchase of buildings to offer Jordan's Principle but Canada refused.

[362] Canada needed to be ordered to fund those services to ensure that children would not be denied the services. Even when Canada was fully aware of the gaps and put on notice by numerous First Nations, Canada did not always act without orders.

[63] Further, the Tribunal ordered a complete reform of the FNCFS Program to cease and desist from the discriminatory practice found in the decision including to move away from the lack of coordination of federal programs causing gaps, denials and delays in services to First Nations children and families.

...

[65] Canada's expressed its goal to move away from Canada's previous approach to programs that the Tribunal found to be working in silos. Canada stated it is focusing on a holistic, intersectional and First Nation community driven approach which if fully implemented would address the systemic racial discrimination found by the Tribunal and would align with the United Nations Declaration on the Rights of Indigenous Peoples in the long-term. The Panel entirely agrees with this goal if it materializes.

...

[67] This is the ideal approach as long as the systemic racial discrimination is satisfactorily addressed and communities and agencies are not denied when they express real measurable needs connected to service delivery including during transition (...), (2021 CHRT 41, at paras 63, 65 and 67).

[363] The Tribunal is familiar with submissions from Canada such as the one in the motions stating that they have complied with orders and should be left alone to continue their work. The Tribunal is seeing similar arguments from Canada in the motions than the ones already argued in previous motions. Of note, Canada relied on the need to consult with First Nations while denying justified requests made by First Nations. This is something that the Tribunal considers in assessing the effectiveness of its orders.

[364] Furthermore, the Tribunal found in 2021 that Canada was falling short including on Jordan's Principle, and needed to improve. The Tribunal's previous findings inform the issues in the motions and Canada's argument that service requests that could be addressed by other federal programs are redirected into Jordan's Principle:

[102] In sum, Canada submits that it has complied with the Tribunal's orders and there are no outstanding issues of compliance. There is no evidence of ongoing discrimination. The motion for non-compliance should be dismissed. Canada should be given time to follow the democratic structures in place to ensure the accountability of public funds. Further, Canada should be provided an opportunity to continue the current system that involves collaboration with Indigenous governing bodies.

...

[113] Canada contends that a long-term capital plan requires ongoing consultation and time. Consultation is ongoing on this issue and it is important that the consultation involves First Nation communities.

(2021 CHRT 41)

[179] This structure is a governmental choice in the way it functions and administers programs. Since the *Merit Decision*, INAC became ISC and a major merger and reorganization was made. While it may have addressed some issues identified in the *Merit Decision*, the Panel is still presented with arguments from Canada that show the silo mindset is still present. In Canada's submissions responding to the purchase or construction of capital assets that support the delivery of FNCFS services motion, a focus is made on the Community Infrastructure Program instead of the FNCFS Program and its Terms and Conditions or the findings made in the *Merit Decision*. The Panel was clear in the *Merit Decision* that reform needed to be informed by the findings in the *Merit Decision*. Major Capital was part of those findings.

...

[194] The history in this case and the evidence demonstrate that when Canada applies criteria and uses discretion, it is not necessarily using a substantive equality lens responsive to real needs of First Nations children and families.

...

[237] This ruling and orders are necessary given that the *Act respecting First Nations, Inuit and Métis children, youth and families* only refers to funding in the Preamble and does not guarantee adequate funding according to specific needs of Nations. While the legislation refers to substantive equality, no link is made between funding according to need and substantive equality in the obligations. The Panel will possibly revisit this with the parties' assistance as part of the long-term phase and reform implementation. This being said, the Panel believes that if sustainable and adequate funding is provided to First Nations who decide to exercise jurisdiction over child and family services, it is the best possible outcome for those children, families and Nations. This option is included in 2018 CHRT 4 orders.

...

[261] ...

Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of Jordan's Principle services

Jordan's Principle services are part of this claim and have been the subject of numerous orders by the Tribunal in these proceedings. Divorcing the services from provincial requirements for safe, confidential spaces to offer the services would amount to discrimination. It would also perpetuate gaps, denials and delays in hindering the delivery many services that can only be offered indoors. In other words, denying funding for safe, confidential and culturally appropriate spaces respecting provincial requirements would be the equivalent of refusing services otherwise allowed under Jordan's Principle.

...

[279] The argument of looking into other programs to delay or deny funding for building purchase or construction does not stand here. Canada ought to look at Nation specific building needs and requests at the time they are made not the time all First Nations have been consulted and have provided their views as this is unfair to First Nations that have pressing needs and are ready to proceed.

[280] For Jordan's Principle, Canada ought to provide a holistic view as to how it will respond to those needs and eliminate barriers, especially if those barriers arise from the administrative divide of federal programs. If building purchase or construction can accommodate social services under the FNCFS Program, Jordan's Principle services and early childhood intervention and others, this is ideal. This should only be done when it is possible. In the end, the FNCFS Agencies and First Nations communities decide on their plan.

[281] Canada was ordered to cease and desist its discriminatory practices including this one. Multiple arguments pointing to other federal programs that are specialized in community infrastructure or ongoing discussions does not convince the Tribunal that real needs of First Nations children and families are met.

...

[298] With respect, the need for sufficient office space to offer services is so intertwined with the actual provision of services and so self-explanatory, the Panel did not envision the need for orders in that regard at the time. While there clearly was a timeframe to adapt to a large influx of new cases following the 2017 orders, we are now in the latter part of 2021. Canada continuously submits it should be given latitude to comply to remedy the systemic discrimination. This is a clear example where too much latitude risks perpetuating the unnecessary delays resulting in systemic discrimination. Moreover, the lack of sufficient funding for buildings to offer services on-reserve constitutes denials contravening the Tribunal's orders under Jordan's Principle.

...

[304] Given this concern, the Panel considers that one way that Canada can demonstrate that it is on track to comply with the Tribunal's orders would be for it to expeditiously engage in adequate consultations in regard to building needs for FNCFS Agencies and First Nation communities including with the parties in this case and prepare a plan with specific targets and deadlines to complete those consultations. In the Panel's view, Canada should be in a position to share this plan within three months of today's date or as otherwise agreed by the parties. An appropriate plan would be highly detailed with clear steps and goals. Through these details, the plan would demonstrate how Canada is being responsive to the Tribunal's orders including addressing the lack of coordination between federal programs affecting First Nations children, substantive equality, the challenges faced and solutions envisioned.

[365] On multiple occasions, the Panel Chair asked Canada's witnesses about their plan to eliminate the gaps and the lack of coordination in federal programs offered to First Nations children. A clear detailed plan with targets and deadlines was never provided. This is concerning when the Tribunal now hears from Canada that it believes federal programs may be responsive to several Jordan's Principle requests.

[366] Dr. Gideon, in response to the Panel chair's question on whether the department has done any systemic analysis on the other programs and how they would bridge gaps for children, testified that ISC had started a systemic analysis of the gaps in federal programs around 2022 but she was unsure if it has been completed. Dr. Gideon deferred to Ms. St-Aubin for more information.

[367] In her revised affidavit, Candice St-Aubin affirmed that growth in the volume of requests and level of expenditures is forecasted to continue, as First Nations families increasingly turn to Jordan's Principle for essential products, services, and supports. However, responding only through growth in the federal implementation of Jordan's Principle could have unintended consequences, such as inadvertently shifting funds and services away from First Nations-led programs thereby creating a greater dependency on Jordan's Principle. Maintaining the current federal implementation approach also facilitates prioritizing federal decision-making over that of First Nations in the delivery of services to First Nations children. While the current approach is based on Tribunal orders, a response solely through operational growth does not address gaps in products, services, and supports through core programming or community-level service delivery.

[368] The Tribunal agrees with this statement; however, the Tribunal never directed a response based only on growth in the federal implementation of Jordan's Principle. On the contrary, the Tribunal directed an analysis of the gaps in an effort to close them and the need for proper coordination amongst the federal programs since the evidence demonstrated the lack of coordination and the existence of gaps. The Tribunal has always been in favour of First Nations community programs responding to First Nations children's needs as long as they had sufficient resources to do so. In other words, Canada cannot off-load its legal responsibilities on First Nations if they lack the resources to offer the services. This is in the best interest of First Nations children.

[369] Canada submits that the continued expansion of the public service for Jordan's Principle administration may shift funds and services away from existing First Nations programs, prioritize federal decision-making over First Nations decision-making, and fail to allow supports for First Nations children to be provided through core programming or community level service delivery. This is not in the best interests of First Nations children.

[370] As stated by Dr. Gideon during her cross-examination, some of the potential negative consequences of focusing on growth in the public service include:

- a. investing in the public service instead of investing in First Nations capacity;
- b. competing with First Nations to recruit staff; and
- c. competing with First Nations to recruit contractors and service providers, leading to bidding wars and increased fees for services needed by First Nations children.

[371] The Tribunal entirely agrees Dr. Gideon on this point.

[372] Ms. St-Aubin further affirms that looking forward, it is incumbent upon ISC to fulfill its legislative mandate to work collaboratively with partners to improve access to high-quality services and to support and empower Indigenous peoples to independently deliver services and address the socio-economic conditions in their communities. The ultimate goal is to transfer funds and control to First Nations communities and organizations for culturally appropriate and comprehensive service delivery to First Nations children.

[373] The Tribunal entirely agrees with this if First Nations communities and organizations have sufficient sustainable resources to thrive and to offer culturally appropriate and comprehensive service delivery to First Nations children.

[374] During Ms. St-Aubin's cross-examination, counsel David Taylor for the Caring Society read the following two paragraphs of the Tribunal's 2017 Jordan's Principle ruling:

With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the Jordan's Principle – Child First Initiative presentation, presented to the Innu Round Table on October 6, 2016 (Affidavit of Cassandra Lang, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, Jordan's Principle – Child First Initiative, presentation dated October 12, 2016 (Affidavit of Cassandra Lang, January 25, 2017, Exhibit 2, Annex I, at p. 12). (2017 CHRT 14, at para 105)

There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions. (2017 CHRT 14, at para 106)

[375] Ms. St-Aubin was asked if she was aware that at the same time that the Tribunal was setting the timelines, the Tribunal was calling for this gaps analysis to happen and be done in a broader way. Ms. St-Aubin was also asked if she agreed that the gap analysis was called for by the Tribunal panel to be done on an expedited basis:

Q. But there was, as early as 2017, calls from the panel to take on this kind of gap analysis approach on a on a more expedited basis. Would you agree with that?

A. Yes.

[376] Ms. St-Aubin was also asked questions about the Tribunal's previous rulings:

Q. So again, would you agree this is another example of the panel kind of calling for that more comprehensive

approach?

A. Yes

[377] When asked if she agreed that the panel was not calling for a response solely through operational growth but also gap closing, Ms. St-Aubin agreed that this was the direction asked in the Tribunal's orders.

[378] Ms. St-Aubin admitted that ISC was supposed to be looking into gaps and doing an analysis.

[379] When asked about her affidavit where she affirms that "ISC is leading a project to systematically identify the present overlaps, gaps, and/or opportunities for ISC funded community-based programs to provide similar access to the most frequent Jordan's Principle requests," Ms. St-Aubin testified that this was underway, however, she could not confirm if it was completed or when it would be completed.

[380] Further, counsel for the Caring Society asked Ms. St-Aubin about the panel chair's question to Dr. Gideon in the context of socioeconomic supports and issues of poverty, about whether the department had undertaken a systemic analysis of other programs and whether they could bridge gaps. Dr. Gideon noted that this is something that started in 2023 and that Ms. St-Aubin might be able to speak to this.

[381] Counsel for the Caring Society asked: Does this sound like the project you're referring to at paragraph 77 [in her affidavit]? Ms. St-Aubin replied that it seems to align with that.

[382] The Tribunal finds that while the gaps analysis is underway and a first phase of the IFSD has been completed, the gaps analysis has not been completed 8 years after the Tribunal's *Merit Decision* and 7 years after the Tribunal's Jordan's Principle specific rulings and orders in 2017 CHRT 14 and 35.

[383] Without sufficient evidence that Canada has in fact done or has completed a thorough evaluation of federal programs that are intended to respond to First Nations children's real needs and gaps in services, the same questions and findings from the *Merit Decision* remain. Only a proper and complete evaluation that analyzes all federal programs offered to First Nations children and clearly identifies gaps or overlaps will establish this. This evaluation would be in the best interest of First Nations children and families and would also be responsive in the assessment of Jordan's effectiveness and costs.

[384] Moreover, other federal programs may use an eligibility criterion that is different and less inclusive than that of the Tribunal's eligibility criteria ordered in 2020 CHRT 20. Federal programs may be more in line with the *Indian Act*, therefore excluding non-status First Nations children who are recognized by their First Nations. The latter is included in the eligibility criteria under Jordan's Principle as ordered by this Tribunal and challenged by Canada who strongly disagreed, but it was upheld by the Federal Court.

[385] Furthermore, when the AFN was asked by the Panel Chair who was referring to the evidence in this case, what their position on other federal programs was, they answered that there are inequities in all of them but that if another federal program can be responsive, it should be accessed. The Tribunal is not taking the AFN's position as evidence that there are in fact inequities in all federal programs - this is not the objective. In this case, a few programs were found to have unreasonably denied services to First Nations children and this forms part of the evidence supporting the Tribunal's orders. The Tribunal agrees there may be other responsive federal programs for some of the Jordan's Principle requests. However, the Tribunal, considering the previous findings in this case, some referenced above, is not convinced that they are easily accessed and that there are no barriers in terms of eligibility. Further, the Tribunal had to order the publicity of Jordan's Principle to inform First Nations families on how to access Jordan's Principle services.

[386] Moreover, Craig Gideon, Interim Chief Executive Officer since March 21, 2024, and former Senior Director of the Social Branch, affirmed in his March 22, 2024, amended affidavit, that regarding the increase in requests to Jordan's Principle, the AFN is deeply concerned by the volume of Jordan's Principle requests. The AFN notes that the flood in applications highlights deep, systemic gaps and barriers to accessing federal supports elsewhere. The AFN remains concerned by reports of denials of urgent requests for life necessities, including housing, utilities, and transportation, for example. In the AFN's view, the volume of requests to Jordan's Principle to provide for such necessities is a symptom of Canada's discriminatory underfunding of other programs and services for housing, clean drinking water, infrastructure and transportation, accessibility, income assistance, etc. Jordan's Principle alone cannot solve the systemic discrimination and challenges in other programs and services, and reform of ISC and other federal departments is imperative to reduce the high volume of requests to Jordan's Principle.

[387] In 2022 CHRT 8, the Tribunal received evidence from the parties and made findings (see for example, paras 74-93, 142 and 160). In terms of coordination and closing gaps in Federal Programs, the Tribunal made specific findings some are reproduced below:

[90] As set out in Ms. Wellman's affidavit of March 7, 2022:

Moreover, the AFN Chiefs-in-Assembly unanimously supported the Spirit Bear Plan during the 2017 Special Chiefs Assembly through AFN Resolution 92/2017, Support the Spirit Bear Plan to End Inequities in all Federally Funded Public Services for First Nations Children, Youth and Families, attached to [Stephanie Wellman's affidavit dated March 7, 2022] as "Exhibit R".

[91] The Spirit Bear Plan is set out as Exhibit J to Dr. Blackstock's affidavit dated March 4, 2022 and as Exhibit Q to Stephanie Wellman's affidavit dated March 7, 2022:

Spirit Bear calls on:

1 CANADA to immediately comply with all rulings by the Canadian Human Rights Tribunal ordering it to immediately cease its discriminatory funding of First Nations child and family services. The orders further require Canada to fully and properly implement Jordan's Principle (www.jordansprinciple.ca).

2 PARLIAMENT to ask the Parliamentary Budget Officer to publicly cost out the shortfalls in all federally funded public services provided to First Nations children, youth and families (education, health, water, child welfare, etc.) and propose solutions to fix it.

3 GOVERNMENT to consult with First Nations to co-create a holistic Spirit Bear Plan to end all of the inequalities (with dates and confirmed investments) in a short period of time sensitive to children's best interests, development and distinct community needs.

4 GOVERNMENT DEPARTMENTS providing services to First Nations children and families to undergo a thorough and independent 360° evaluation to identify any ongoing discriminatory ideologies, policies or practices and address them. These evaluations must be publicly available.

5 ALL PUBLIC SERVANTS, including those at a senior level, to receive mandatory training to identify and address government ideology, policies and practices that fetter the implementation of the Truth and Reconciliation Commission's Calls to Action.

[92] The Panel notes that included in the MMIWG report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, filed in evidence in support of this motion, there is a specific call to justice concerning the Spirit Bear Plan:

12.13. We call upon all governments and child welfare agencies to fully implement the Spirit Bear Plan.

[93] Furthermore, Canada publicly accepted the MMIWG report and findings. Consequently, the Panel believes this should inform long-term reform.

...

[103] Furthermore, in its *Merit Decision* and subsequent rulings, the Panel stressed the importance of ceasing the mass removal of First Nations children from their homes, families, communities and Nations now. The Panel made clear that the discriminatory underfunding,

especially the lack of funding for prevention including least disruptive measures was a big part of the issue. However, it was never the sole issue that led to findings of systemic discrimination. Other structural and systemic changes ought to be made for the Panel to consider the systemic discrimination is eliminated in the long-term.

[388] The Tribunal agrees that the best programs are First Nations designed and delivered if the First Nations have all the resources they need. However, given Canada's own evidence that it will remain involved in Jordan's Principle, reforming its federal programs offered to First Nations children and properly coordinating them to ensure there are no gaps, denials, and delays is necessary to improve Jordan's Principle service delivery.

[389] During her cross-examination, Dr. Gideon explained her views on Canada's continued role in Jordan's Principle:

I've always said that I think because of the off-reserve component and the rising number of off-reserve requests, which isn't captured in IFSD's report, but is captured in the deep dive 2021-22 administrative data with 52 per cent of individual requests came from off-reserve individuals. Although, I fully respect and support First Nations wanting to serve their members off reserve, I think realistically it will be a challenge to be able to make all of those service delivery connections. So, I believe, this is my opinion, that the federal government will need to continue, or someone that is designated, would need to continue to be able to receive individual requests, particularly because of individuals that are living (inaudible/off mic).

[390] The Tribunal, given the above, rejects Ms. St-Aubin's response to AFN counsel, Ms. Kassis's question concerning the Spirit Bear plan being outside or not of the four corners of the complaint before the Tribunal. Furthermore, as mentioned above, Ms. St-Aubin lacked the necessary knowledge of the Tribunal's rulings and of the evidence supporting previous orders to provide a reliable response to this question.

[391] During her cross-examination, Dr. Gideon provided a meaningful response on the Spirit Bear Plan, the AFN Chiefs-in-Assembly, and gap closing:

Q.

(...) in terms of the gap closing and finding other pathways to services.

Would you agree that the Spirit Bear Plan that was passed by the Chiefs-in-Assembly in 2017 spoke to a lot of those themes and elements well?

A.

I would agree.

[392] In September 2022, the Institute of Fiscal Studies and Democracy at the University of Ottawa (IFSD) provided a report to Canada and the parties and forms part of the evidence before the Tribunal. The Tribunal finds this report relevant and reliable and that it provides a path forward that the Tribunal agrees with if it is accepted by First Nations as part of long-term reform of Jordan's Principle. If not, their inherent rights should be respected. However, for Canada, who will continue to have a role in Jordan's Principle, this report remains relevant.

[393] The IFSD's report, titled, Data Assessment and Framing of an Analysis of substantive equality through the application of Jordan's Principle, September 1, 2022, is attached as Exhibit J to the amended affidavit of Craig Gideon, dated March 22, 2024. The Tribunal agrees with the findings of the report and finds it is entirely in line with the Tribunal's vision of substantive equality and approach in this case as mentioned above. Canada cannot implement Jordan's Principle without assessing the gaps

in other federal programs and then relying on the existence of those programs to limit access to Jordan's Principle. It might have been different if Canada had started its analysis of the federal programs when the Tribunal made its orders to eliminate gaps and the lack of coordination in federal programs that impact service delivery in 2016 or 2017 or even in 2021 when the Tribunal made its orders. The Tribunal made further findings on this point in 2021 CHRT 41:

[56] Nevertheless, it may be less compelling for Cabinet and Treasury Board to approve authorities if there is a belief that other programs may be responsive to needs. However, to date while efforts are made to collect information, the information remains unclear on the elimination of the lack of coordination found that impacts service delivery. There is insufficient evidence about different programs offered to First Nations children and families on-reserve and how each really address the real needs of children and families. In other words, the Tribunal is unaware of the existence of a completed thorough analysis of all programs on-reserve, how they interrelate, intersect and ensure that there are no gaps in services to First Nations children. There is insufficient evidence to date to establish that the gaps in services to First Nations children and families on-reserve or ordinarily on reserve have all been addressed and accounted for by other programs when the FNCFS Program's authorities do not include items or place a funding cap. The Tribunal raises this point to illustrate that referring to other programs when a legitimate request is made for service delivery may not be sufficiently responsive to the Tribunal's orders (...).

[394] The Tribunal in 2022, made additional findings to that effect as explained above. This could have assisted in focusing on Jordan's Principle and closing gaps based on the real needs of First Nations children and families.

[395] The IFSD report concluded as follows:

As with any major program change, implementation will take time. The gaps in programs are broad and would benefit from bottom-up cost analysis immediately. Addressing the gaps in programs could then be triaged based on areas of need. While it would be desirable to have programs change in tandem, the likelihood of broad-based programmatic change would be resource intensive and potentially, challenging for the department to manage. Identifying acute areas of need based on requests and gap analysis, the department and First Nations could work to develop an approach to remedying inequities in services.

If gaps are closed in existing programs through the Spirit Bear Plan, it is expected that recourse to Jordan's Principle should decline. This is not to suggest that needs will be eliminated or change quickly, but that the nature of requests through Jordan's Principle should change, trending toward exceptional circumstances. Substantive equality through Jordan's Principle is achievable. It requires recognizing, quantifying, and addressing existing gaps in programs and services.

This analysis of Jordan's Principle should serve as a warning sign. In its current form, Jordan's Principle's serves as evidence of the broader gaps in programs and services for First Nations children. A long-term sustainable approach for Jordan's Principle will require remedying existing gaps in adjacent program areas to ensure recourse to Jordan's Principle is a last resort and not a first (or only) source of products and services.

ISC programs would benefit from renewal and restructuring to align to the provision of substantive equality. Programs to reduce gaps by equalizing points of departure will require new governance relationships with First Nations, linking actual needs and realities to program design.

The cost of inaction on Jordan's Principle is high for First Nations children and Canada. A long-term sustainable approach should be premised on a clear understanding of root causes of need in First Nations.

Governments typically do not design programs without ceilings, unless in an emergency situation or when there is an unknown or undefined end to the matter, e.g., war. When there is clarity around an outcome, funding and program parameters should frame the approach. Closing underlying gaps in services in First Nations would ensure Jordan's Principle can work as it was originally intended, by serving as recourse in exceptional circumstances (pp.76-77).

[396] With the above in mind, the Tribunal is cautious when told by Canada that other federal programs may address the needs of First Nations children instead of Jordan's Principle. The Tribunal is not saying this is not the case. Rather the Tribunal is saying that if this is the case, ISC should demonstrate how they arrived at this conclusion and that the systemic discrimination found has ceased and is not reoccurring. When answering this question, the high number of approved Jordan's Principle requests demonstrates the magnitude of the needs but not necessarily how those needs would be addressed by other programs, especially since many examples in the evidence over the years demonstrated the opposite.

[397] Canada was made aware of the above over the years and has not demonstrated that it has fully complied. Canada now raises this very issue in support of its cross-motion seeking further orders. This prompts the Tribunal to have further questions and make orders for a detailed report including a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have to be met, to ensure that any orders made to refer requestors to other federal programs are in the best interest of First Nations children. Did Canada accept the IFSD's report referred to above? If so, did Canada act on the report's recommendations, and, if so, in what ways?

[398] The Tribunal agrees to allow Canada under Jordan's Principle to refer requestors to other federal services however, given the large evidentiary record that children experienced gaps, delays, denials, and interdepartmental disputes it is prudent, to ensure that safeguards are put in place to avoid what happened to First Nations children in the past which Canada was ordered to pay compensation for (see 2019 CHRT 39, 2022 CHRT 41 and 2023 CHRT 44).

[399] Such further and other relief that the circumstances may require and this honourable Tribunal may permit was included in the motion and cross-motions' order requests sections. This order falls in this category to ensure the Tribunal's orders are effectively implemented.

[400] Jordan's Principle was clearly defined by this Tribunal as having a substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. The Tribunal has the authority to make further orders to ensure that the orders are effective in eliminating the systemic discrimination found.

I. First Nations-led service coordination.

[401] Dr. Gideon's evidence describes First Nations-led service coordination under Jordan's Principle. She affirms that in addition to processing Jordan's Principle requests itself, ISC also works collaboratively with regional and First Nations partners to support First Nations-led service coordination.

[402] The Jordan's Principle service coordination function is delivered by one of several regional service delivery organizations (for example, First Nations communities, Tribal Councils, Health Authorities, and Indigenous Non-governmental Organizations).

[403] There are a variety of service delivery organization models across the regions to address individual community needs. Generally speaking, the service coordination function supports families as they navigate systems, linking them to existing resources, and informing regional focal points of identified service gaps to help facilitate access to support children.

[404] ISC currently has 599 contribution agreements in place with First Nations and other organizations across Canada.

[405] As just one example, and as noted above, ISC's Alberta region has a contribution agreement in place with the First Nations Health Consortium (FNHC), which is a partnership of 11 First Nations from each Treaty area in Alberta. ISC funds FNHC to support service coordination in Alberta.

[406] Regional service coordinators provide navigation support throughout the Jordan's Principle application process. Regional Service Coordinators also have in-depth knowledge of the other services that may be available at the community level and would benefit the child to ensure a continuation of supports and services are available.

[407] Currently, the Alberta Region also has Contribution Agreements in place with approximately 123 recipients, including First Nations Communities, School Districts/Schools, and other Indigenous and non-Indigenous Partners.

[408] Moreover, the Caring Society submits that Back to Basics specifically contemplates connecting families to First Nations Service Coordinators, who are recognized as having detailed knowledge of available services at the community level and can assist with future requests. Referrals to existing services are also consistent with the Tribunal's order in 2017 CHRT 35.

J. ISC Programs process

[409] Dr. Gideon affirms that all ISC Programs (e.g. Non-Insured Health Benefits, Education, Mental Wellness, etc.) must put into place a process to expeditiously refer any requests for First Nations children received by the existing ISC program to a Jordan's Principle Focal Point where the request is not covered by the existing program. Focal Points receiving requests transferred from existing programs are to evaluate and determine requests according to CHRT timelines and the Standard Operations Procedures.

[410] Requests known to be covered by existing ISC programming (e.g. Non-Insured Health Benefits, Mental Wellness, Education, Maternal Child Health, etc.) are processed in the following manner, only if they can be processed within CHRT Timelines:

- Send request to the Regional or National Directorate of the existing program for review (Contact List to come), in order to: Seek coverage:
- If approved under existing program:
- Focal Point to communicate this to requester.
- Existing program to process request through their systems.
- An approval from an existing program indicates a closed case to the Focal Point and is to be tracked as a Jordan's Principle request funded under existing programs; or
- If the request is denied, or if a denial has already taken place by existing program:
- Focal Point will evaluate and determine the request under Jordan's Principle.

- Document the denial in the case file by appending either the denial letter, an email from existing program confirming the denial, or written documentation that the program has verbally confirmed denial with Focal Point.

[411] Dr. Gideon further affirms that the burden must not be placed on the requester to navigate through existing ISC programs. A referral to an existing program by a Focal Point is not permitted if doing so will breach the timeframes for determination in the CHRT Orders, as this is considered administrative case conferencing.

[412] The Tribunal finds this demonstrates improvements in service coordination and some level of accessibility to services in First Nations communities or via federal programs facilitated by service coordinators and focal points. The Tribunal believes that this is very positive. However, the Tribunal does not have sufficient evidence to determine their effectiveness to ensure that First Nations children do not fall into gaps or experience long delays in receiving services. Furthermore, at this time, there is insufficient evidence that the coordination of federal programs offered to First Nations children has been fully implemented.

[413] A combination of allowing referrals on an interim basis and receiving reports on implementation could ensure the effectiveness of the Tribunal's orders and be useful information for long-term reform of Jordan's Principle.

[414] The parties have indicated that the SOP was set aside and replaced with the Back-to-Basics policy. The SOP contains a process for navigators. The Tribunal finds that this could inform the parties' discussions and be a good basis for the elaboration of a comprehensive referral process. The Tribunal also is open to hearing the parties' views on their definition of what is considered an administrative case conferencing. The Tribunal views administrative case conferencing as bureaucracy, unnecessary delays, etc.

[415] If there is a way for the parties to clarify this further and elaborate a process, there could be a way to improve expedient referrals to federal programs while at the same time ensuring that layers of bureaucracy are removed. This would be ideal. The Tribunal's interrogation here flows from past findings reviewed alongside the evidence in the motions. The Tribunal is not imposing its views on the details of the process since it focuses on the broader systemic picture but simply providing guidance and requesting information to ensure the Tribunal's orders are effective.

[416] Moreover, in follow-up with the implementation of previous orders, the Tribunal also requests a report on Canada's progress on the broader coordination of federal programs funding services for First Nations children. As explained above, this impacts Jordan's Principle service delivery.

[417] The Tribunal in light of the above makes the following order:

- A. The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction orders Canada to report back to the Tribunal with a detailed report on its progress in coordinating its federal programs, especially since 2022 CHRT 8. The detailed report shall include a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have been met. The information provided shall be sufficient to assist this Tribunal and allow the Tribunal to understand Canada's progress so far. Canada will file its report with the Tribunal and copy all the parties by January 9, 2025.

K. Contribution agreements and sufficient resources

[418] Canada objects to the request made by the FNLC and supported by the Caring Society.

[419] Canada submits that the FNLC has gone beyond the limitations of their participation, as ordered by this Tribunal.

[420] The FNLC's request for an order requiring Canada "to provide sufficient and sustainable resources to First Nations and First Nations organizations for the administration of Jordan's Principle" goes well beyond the relief requested by the Caring Society, which was limited to a request that Canada provide a report on resourcing.

[421] Canada submits that this order request is outside the FNLC's role as a late-arriving interested party, which is "limited to the issues currently before the Tribunal by way of the motions at issue." The Caring Society's support for this order, indicated in their factum of August 8, 2024, is similarly beyond the scope of their motion.

[422] Canada further submits that as a new issue being raised for the first time by the late-arriving interested party, the Panel should show restraint and this issue ought not be considered.

[423] Canada also submits that it is prejudiced by this late request, as it had no opportunity to provide relevant evidence on the funding being provided through its 599 existing contribution agreements. Nor has any party provided evidence on how much funding might be sufficient in each particular circumstance.

[424] Canada submits that the Panel has no evidence on which to ground such an order, which was not requested in the Caring Society's notice of motion. As a result, this issue should not be considered and this requested order should be denied.

[425] The Commission submits that as the Caring Society and FNLC have pointed out that while the Panel cannot make orders that directly bind First Nations and affiliated organizations, it can make orders that impose obligations on Canada in its dealings with such third parties – and should do so, if satisfied on the evidence that such orders are needed to effectively eliminate and prevent the recurrence of discriminatory practices.

[426] The Commission further submits that in this regard, all parties aim to find long-term solutions that would allow the Panel to relinquish its retained jurisdiction. In the context of Jordan's Principle, the Commission believes this will require Canada to have funding and systems in place to ensure First Nations children can access the products, services, and supports they need, when they need them – consistent with substantive equality, the best interests of the child, and the Panel's rulings identifying discriminatory practices.

[427] The Commission submits that as the Tribunal explained in a ruling released recently, its focus on eliminating systemic discrimination "...will be achieved in the long-term especially if programs and services are prevention-oriented and are designed and delivered by First Nations themselves in respecting their inherent right of self-governance and if the programs and services are sustainably and adequately funded and resourced by Canada who has a legal obligation to cease and desist the systemic discrimination found under the Tribunal's orders ... Canada still has an important role to play and legal and positive obligations toward First Nations and First Nations peoples regardless of whether they decide to deliver services or not" (2024 CHRT 92 at para 1).

[428] The Commission thus agrees with the Caring Society and FNLC that the Panel can properly require Canada to ensure any willing First Nations or affiliated organizations that agree to administer Jordan's Principle are properly resourced and supported to achieve that outcome.

[429] While the Caring Society and the FNLC request an order for Canada "to provide sufficient and sustainable resources to First Nations and First Nations organizations for the administration of Jordan's Principle", this is not what the Tribunal relies on to make an order. Canada requested that when ISC is the government department of first contact, Canada may refer requestors to an existing and applicable that has already been Jordan's Principle group request approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada. This is an order

request from Canada that the Tribunal has to consider in terms of the evidence that Canada chose to bring forward in support of its request and the history, findings, and previous orders in this case. Canada filed two affidavits and raised the issue of contribution agreements in Dr. Gideon's March 28, 2024, Revised Affidavit and Candice St-Aubin's Revised Affidavit dated March 28, 2024.

[430] It would be unreasonable to expect the Tribunal to make a determination without the necessary evidence that in referring requestors to First Nations, the order will be effective not only on Canada's end but also on the Child, the family, and the First Nation delivering the service. This forms part of the Tribunal's authority to ensure the effectiveness of the Tribunal's orders. The Tribunal in granting Canada's request must be assured that the systemic discrimination is not perpetuated and that First Nations children are not harmed. On one hand, Canada submits that the Tribunal has no evidence to grant the FNLC's order, and on the other, Canada requests an order that could greatly impact children without bringing the supporting evidence about its contribution agreements to demonstrate to the Tribunal that Canada's order request is grounded in evidence and is perfectly safe for children. This must also be Canada's concern as the one who has legal obligations toward First Nations children and families. Any prudent person would want to ensure the referrals are effective and they may be so but the Tribunal does not know for the time being. What the Tribunal knows is that Canada has 599 contribution agreements.

[431] The Tribunal does not question the existence of Canada's contribution agreements. There is some evidence that contribution agreements are in place in Yukon and have positive impacts. The Tribunal does not have sufficient evidence and information to determine if the agreements are responsive to the Tribunal's orders. However, the example below is supportive of the position that a contribution agreement may be beneficial in reducing backlogs and improving service delivery.

[432] Exhibit 22, Attached to the affidavit of Cindy Blackstock dated March 27, 2024, and included in the AGC's compendium includes an email from Debra Bear, Director Jordan's Principle services, Council of Yukon First Nations, to Brittany Mathews, dated March 26, 2024, and providing comments on the backlog and positive impacts of their contribution agreements with ISC.

In our region we have noted previous significant backlog on adjudication of applications.

Some applications have been waiting in the queue for over a year and some we marked as urgent.

(...) We now have contribution agreements which provides the opportunity to approve certain requests internally.

This has been exceptionally helpful in providing support to the children when they need them without delay or disruption.

Our office is also in a position to cash flow approved reimbursements without delay.

Presently, new applications we are submitting can take a few months for a decision for non-urgent requests.

For urgent or time-sensitive requests, we can often get a decision sooner but many times the decision comes at the last moment.

This can impede the process of supporting our families and children with their urgent requests such as emergency medical travel or treatment.

[433] The Tribunal finds this is sufficient to justify an interim order accompanied with a request for additional evidence and information on Canada's contribution agreements. This allows the Tribunal to grant Canada's order request immediately to help reduce backlogs while allowing for a process to permit

Canada to answer the Tribunal's questions on contribution agreements and how Canada ensures that First Nations have sufficient resources to adequately operate under a contribution agreement. The Tribunal finds it is more reasonable than not that allowing referrals with the appropriate safeguards described in this section would help reduce the backlog and may improve Jordan's Principle service delivery.

[434] The Tribunal agrees with Canada that when ISC is the government department of first contact, ISC cannot direct a family requesting respite service through Jordan's Principle individual request back to their community, even if respite care is already being delivered through community-based programming funded by Jordan's Principle or other programs. This may unintentionally create competition in the hiring of finite local human resources as well and perpetuate a 'one-off' approach to service delivery, rather than a 'system-based' approach. Further, the respite care provider employed by the community usually operates in a more supportive environment, as part of a team, receiving training and making sure performance standards are met, with the oversight of a First Nations health manager. It is not guaranteed that these factors would be present when families contract their respite care provider funded through Jordan's Principle individual request. The Tribunal finds this argument compelling when reviewed alongside the available evidence to allow referrals with the appropriate effectiveness safeguards.

[435] A legalistic argument to prevent the Tribunal from making orders that would ensure the referrals are effective is not helpful. As mentioned above, Canada resisted paying for funding for buildings to offer Jordan's Principle even after repeated requests from First Nations and orders had to be made. This was recent.

[436] Moreover, the Tribunal finds that Canada is not prejudiced in "not having the opportunity to provide relevant evidence on the funding being provided through its 599 existing contribution agreements" for the following reasons: 1- Canada's affidavit evidence mentions the contribution agreements; 2- The Tribunal has crafted a way for Canada to bring additional evidence on its contribution agreements for the Tribunal's consideration; 3- The issue of First Nations having sufficient resources to do adequate and safe service delivery to First Nations children has been discussed multiple time by this Tribunal in previous rulings and more recently in a ruling related to the motions; 4- The Tribunal is granting Canada's order request to have the right to refer Jordan's Principle requests to First Nations who have a contribution agreement with Canada in the interim and will revisit it once more information is provided on the contribution agreements.

[437] Regardless of the FNLC's request, the Tribunal's focus is on the effectiveness of its Jordan's Principle orders past and present. This focus on the effectiveness of the Tribunal's orders is mentioned in the Caring Society's motion. Moreover, Canada in making this request ended it with the following: Such further and other relief that the circumstances may require and this honourable Tribunal may permit.

[438] This strikes at the heart of the systemic discrimination found in this case. This case is a case where the Tribunal found that services were underfunded and this led to harms to children and families. Jordan's Principle was also part of the findings as discussed above. If Canada negotiates agreements with First Nations to deliver Jordan's Principle themselves, Canada has to ensure that First Nations will have sufficient resources to do so. Otherwise, it would displace Canada's responsibilities under the Tribunal's orders to the First Nation level. Furthermore, if the First Nation is without sufficient resources this could harm children. This would allow the systemic discrimination to continue in a similar way. This concern was discussed in the Wen: De reports with a focus on child welfare and is also relevant for Jordan's Principle services. The Wen: De reports form part of the Tribunal's previous findings.

[439] This is not a new rationale in these proceedings that is taking Canada by surprise. The Tribunal mentioned this multiple times in previous rulings in terms of child welfare/child and family services. The same applies for Jordan's Principle. First Nations having sufficient resources to offer services to

First children is directly linked to substantive equality and the ability to respond to the real needs of First Nations children and is also directly linked to eliminating the systemic and racial discrimination in this case. In other words, regardless of how Canada offers the services, through First Nations themselves or other service providers, the focus is to ensure this is done in the best interest of the children receiving the services.

[440] In 2019 CHRT 7, in paragraph 25, the Tribunal made the following finding:

Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018, at exhibit 4, on page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

**No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement, not a program and thus there will be no sun-setting of Jordan's Principle (...)
There cannot be any break in Canada's response to the full implementation of Jordan's Principle.**

[441] The reasoning from 2020 CHRT 20 is also relevant for Jordan's Principle services. There are ample findings in this Tribunal's previous rulings in this case that demonstrate that the issue of First Nations having sufficient resources to provide services to First Nations children forms part of the Tribunal's focus on ensuring the effectiveness of its orders.

[442] In 2022 CHRT 8 the Tribunal stated that:

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] Furthermore, recently, the Quebec Court of Appeal in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, recognized the Tribunal's concern that funding only formed part of the Preamble and did not create an obligation for sustainable funding under An Act Respecting First Nations, Inuit and Metis children, youth and families, SC 2019, c 24 (see paras. 271-272, 274). The Court at para. 562 states: "Ainsi, une nouvelle approche s'impose, ayant pour piliers la collaboration fédérale-provinciale et la prise en compte des peuples autochtones en tant qu'acteurs politiques et producteurs de droit. Cette approche doit prévaloir tant pour ce qui est des initiatives législatives que de leur mise en œuvre, y compris leur financement" (emphasis ours).

[6] The Panel is pleased with this helpful finding that will guide governments in the future. Moreover, as part of this motion, in her affidavit dated March 4, 2022, Dr. Cindy Blackstock asserts that:

25. [she] is concerned that First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families may not benefit from the Tribunal orders, including this consent order. Canada has taken the position, and has repeatedly advised her, that it does not have obligations under the Tribunal's orders to First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families. Dr. Blackstock affirms the Agreement in Principle reached on December 31, 2021(AIP),

also excludes such First Nations. However, the AIP does state that these First Nations will not receive less funding than they would have received under the Reformed CFS Funding Approach for the services in question.

[7] Dr. Blackstock adds that:

25. ... Respecting the right of First Nations to be self-determining, I believe that First Nations ought to have the right to make a free, prior and informed choice about which funding approaches, policies and practices, including those arising from the Tribunal proceedings, ought to apply.

[8] The Tribunal agrees and is satisfied the AIP ensures First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families will not receive less funding than they would have received under the reformed First Nations Child and Family Services [FNCFS] Funding Approach for the services in question.

[9] This is significant to ensure that First Nations do not have to face the unacceptable choice between adequate and sustainable funding under the reformed FNCFS Program or the exercise of their inherent right to self-government to develop and offer their own child and family services with the uncertainty of adequate sustainable funding especially upon the date of renewal of the agreements between the First Nation and Canada.

...

[13] The Tribunal made findings in the Merit Decision where Canada had concluded a funding agreement with the Attawapiskat First Nation:

[122] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

(emphasis omitted)

[14] When the Tribunal expressed its concerns about sustainable and adequate funding not being guaranteed under the *Act Respecting First Nations, Métis and Inuit children, youth and families*, it did so with the above in mind and not in any way to hinder First Nations' inherent rights that this Panel has recognized on multiple occasions.

[15] The Tribunal's focus is on Canada not repeating its past discriminatory practices or creating new ones that would harm First Nations children, families and Nations.

[16] Finally on this point, the Tribunal is pleased to hear that the AFN sought, and achieved, recognition within the AIP that such First Nations exercising their jurisdiction would receive no less than the funding provided under the eventual reformed FNCFS Program. In her March 4, 2022, affidavit Dr. Valerie Gideon, Associate Deputy Minister of ISC, asserts that:

15. [t]he Agreement-in-Principle notes that First Nations that have chosen to avail themselves of the framework offered by *An Act respecting First Nations, Inuit and Métis children, youth and families* ... to facilitate the exercise of their jurisdiction will “not receive less funding than they would have received under the reformed FNCFS Funding Approach for the services for which they have assumed jurisdiction.” ISC [Indigenous Service Canada] will ensure that enhancements to the FNCFS Program, including those sought through this motion, are made available to those First Nations retroactive to April 1, 2022.

[17] Dr. Valerie Gideon further affirms that:

16. ... ISC and the Assembly of First Nations will discuss how to adjust the [*Act respecting First Nations, Inuit and Métis children, youth and families*] interim funding framework to reflect these enhancements. By April 1, ISC will also have reached out to the two Indigenous Governing Bodies who have signed or are on the cusp of signing coordination and fiscal relationship agreements. It will propose to discuss the enhancements available to those two entities. Regardless of the time required to have those discussions, ISC will make retroactive to April 1, 2022, any adjustments to the Indigenous Governing Bodies’ agreements.

[18] This is extremely positive news and with the understanding that this commitment is reflective of what will also be included in the Final Settlement agreement for long-term reform addresses the Tribunal’s concerns on this point.

...

[30] The AFN insisted that discussions on compensation also include a separate track on long-term reform. The Panel believes this was instrumental and necessary. Moreover, it is in line with the Panel’s approach to remedies in this case and the Panel’s goal to remain seized of this case until sustainable long-term reform orders on consent or otherwise have been made that will eliminate the systemic racial discrimination found and prevent it from reoccurring.

...

[75] Further:

42. IFSD has agreed to take on this Jordan’s Principle research and, pursuant to this consent motion, Canada has agreed to fund it.

[76] The Panel agrees with the Caring Society and finds this is in line with the Panel’s approach, findings and orders to eliminate systemic discrimination and prevent the same or similar discriminatory practices to emerge. Moreover, recently filed evidence in support of this motion substantiates Dr. Blackstock’s assertions. The Panel finds this order is necessary to achieve evidence-based meaningful and sustainable long-term reform informed by the real needs of children, youth and families. This is consistent with the Panel’s orders to provide services according to the First Nations children’s real needs.

...

[149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.

[443] Under the Tribunal's orders, Canada is already able to consult with First Nations and professionals if reasonably necessary. See 2017 CHRT 35:

Paragraph 135(1)(B)(iii)

When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1), where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government.

Paragraph 135(2)(A)(ii)

The initial evaluation and a determination of requests by individuals shall be made within 48 hours of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii). For non-urgent cases in which this information cannot be obtained within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain the needed information so that the determination can be made as close to the 48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.

Paragraph 135(2)(A)(ii.1)(iii)

Canada shall cease imposing service delays due to administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii).

[444] Moreover, prior to a historic agreement reached in June 2024 between Canada and the Assembly of Manitoba Chiefs (AMC), the AMC provided insight into Canada's delegation of Jordan's Principle responsibilities without adequate resources and the unintended negative impacts of the Back-to-Basics policy.

[445] The AMC wrote a letter on January 11, 2024, found at Exhibit 59 attached to the Affidavit of Cindy Blackstock dated January 12, 2024.

This is a letter of support in response to your request on behalf of the First Nations Child & Family Caring Society for insights into the experiences, concerns, and challenges faced by First Nations in Manitoba accessing Jordan's Principle.

Specifically, this letter is intended to provide perspectives and endorse the First Nations Child & Family Caring Society Notice of Motion to the Canadian Human Rights Tribunal (the Tribunal) on December 12, 2023, seeking relief to ensure that Canada complies with the Canadian Human Rights Tribunal's orders (2016 CHRT 2) which ordered Canada to immediately and properly implement Jordan's Principle to ensure First Nations children have timely access to culturally relevant services, supports and products as stipulated by the Tribunal.

The information and perspectives shared herein are presented from the unique standpoint of AMC member First Nations, aligning with the AMC's ongoing commitment to creating a comprehensive understanding of the improvements necessary to address the challenges faced by First Nations in Manitoba when accessing

Jordan's Principle. Our intent is to share information we have gathered on and off-reserve to contribute to the Caring Societies' efforts to enhance the accessibility and effectiveness of Jordan's Principle for AMC member First Nations.

AMC member First Nations have raised concerns with the AMC Jordan's Principle Implementation Team

through Knowledge Translation Engagement sessions in First Nations in Manitoba throughout 2023.

Additional consultation was provided by AMC Jordan's Principle off-reserve service delivery within urban

settings.

The following concerns have been identified by First Nations in Manitoba in relation to the non-compliance motion respecting Canada's approach to Jordan's Principle:

a. ISC's practice of having First Nations and First Nations service coordinators accept and fund Jordan's

Principle cases without providing adequate resources at the local level;

b. ISC's non-compliance places serious pressure on First Nations and First Nations service coordinators

as families are not having their child(ren)'s needs met regardless of where they live;

c. ISC's non-compliance has resulted in families losing confidence in their First Nation and First

Nations service coordinators as they ultimately do not understand that it is Canada's non-compliance

that is placing service coordinators in a position of not being able to meet the child(ren)'s needs in a

timely manner;

d. ISC does not proactively fund liability coverage for all First Nations and First Nations coordinator

organizations, placing individual employees, First Nations organizations and First Nations at serious

risk;

e. Children experiencing significant delays or disruptions in professional recommended services and

supports, or not receiving any services and supports due to limited access as a result of remoteness

and/or human resources and;

f. Children not receiving services, supports or products due to Canada's failure to adhere to reasonable

timeframes for approved services, which appears to be exacerbated by ISC's implementation of Back

to Basics.

ISC implemented the Back to Basics (B2B) approach in early 2022. Some AMC member First Nations feel

that B2B has been exclusively defined by ISC without local consultation and many feel ISC has overstepped, undermining local efforts. In Manitoba, Jordan's Principle has developed in each First Nation as a locally defined program, with funding directly provided to each Nation with a service coordinator guiding the development. As a result of B2B, there has been an observed decrease in the service coordinator's involvement at the local level, as many families are not connecting at the local level and are contacting ISC directly for requests. First Nations service coordinators feel the Manitoba approach to B2B is diminishing their role and impacting local autonomy in decision-making. It is felt that B2B is creating increased dependence on the government. B2B has impacted local Jordan's Principle programs in Manitoba by shifting the focus of the supports and services. B2B has created many more requests, altering the role and responsibilities of First Nations service coordinators and contributing to Canada's failure to adhere to reasonable timeframes for approved services.

First Nations service coordinators in Manitoba continue to raise concerns about Canada's delegation of Jordan's Principle responsibilities without adequate resources, disclosure of liability, nor a long-term plan to ensure First Nations service coordinators can meet the needs of children and families in a manner that is compliant with the Tribunal's orders. As identified by First Nations service coordinators, they feel directly impacted by Canada's non-compliance with the Tribunal's orders.

[446] The Tribunal reserved the right to ask questions to allow it to make a determination on the motions. The Tribunal has incorporated this aspect into its orders below.

[447] Therefore, the Tribunal, pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, allows Canada to refer Jordan's Principle requestors to First Nations or First Nations community organizations engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada as per the Tribunal's orders below in i and ii. Canada can do so immediately and in the interim for ii (see details below for ii), and, until such time as either:

1. New criteria, guidelines, and a new process are developed by the parties and approved by the Tribunal;
2. If it is already in existence and in conformity with the Tribunal's requirements above (the Tribunal does not yet know and would like to find out), the existing criteria, guidelines, and process are provided to the Tribunal by way of an affidavit for the Tribunal's review and approval. This should be filed no later than December 10, 2024, and parties will have an opportunity to file responding affidavits, and cross-examine the affiant and Canada will have an opportunity to file a reply affidavit and to cross-examine the other affiants. All parties will have an opportunity to file written submissions before the Tribunal makes a determination on this specific point; or
3. The parties may propose any other option to the Tribunal that may be more expeditious in addressing this specific point and that would allow the issue to be dealt with efficiently, adequately, fairly, and in the best interest of First Nations children viewed through an Indigenous lens.

[448] The parties will report back to the Tribunal on their views on the 3 options above by December 10, 2024.

[449] This is to ensure that children referred in this manner do not fall into gaps, long delays, and other unforeseen hardships.

[450] The Tribunal confirms that First Nations are not bound by the Tribunal's ordered timelines or other procedural terms of the Tribunal's Jordan's Principle orders. The *Canadian Human Rights Act* (*CHRA*) is clear that the orders are made against those who are engaging or have engaged in the discriminatory practice.

[451] Section 53(2) of the *CHRA* states:

If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate ...

(emphasis added)

[452] However, an interim mechanism should be put in place to ensure that children and families referred to the services are not waiting in another long queue to receive services. Parties will discuss how to put in place an interim mechanism including a culturally appropriate streamlined risk management system to ensure that requestors referred to First Nations for Jordan's Principle services have their needs met in a timely manner and without barriers such as underfunding, a lack of coordination including of programs or program restrictions. This may be very helpful in gathering evidence to inform long-term reform. The Tribunal in clarifying its orders to allow Canada to refer Jordan's Principle requestors to First Nations wants to ensure that First Nations and First Nations organizations receiving, and/or determining and/or funding Jordan's Principle requests have sufficient resources, including funding, to do so and sustainable resources, including funding, to do so.

Furthermore, given that First Nations, as sovereign nations and rights holders, have an inherent right to govern their peoples, lands, and resources, it may be helpful to include these considerations in the parties' negotiations.

[453] The Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and if not, with options for orders on an interim mechanism as referred to above and supported by rationale and available evidence and to report back to the Tribunal by February 12, 2025.

[454] Pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, the parameters on Canada's obligations under the *CHRA*, and the Tribunal's Jordan's Principle orders mentioned above, including the interdiction to underfund in a similar fashion than the one found in the *Merit Decision* and/or off-load its legal obligations to First Nations, the Tribunal orders that, when ISC is the government department of first contact, Canada may refer requestors:

- i. to an existing and applicable Jordan's Principle group request that has already been approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or
- ii. to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada; (this ii. order is an interim order which will be revisited by the Tribunal, once the Tribunal has received more information from Canada on the contribution agreements and the criteria, guidelines, and process as explained above).

[455] However, where a request is deemed urgent in accordance with the objective criteria to be developed by Canada, the AFN, the Caring Society, the COO, the NAN, and the Commission, ISC will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

[456] For greater clarity, where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan's Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the Tribunal-ordered timelines or procedural terms of any of the Tribunal's Jordan's Principle orders that are directed at Canada.

L. The Financial Administration Act

[457] In sum, the Caring Society submits that Dr. Blackstock's uncontested Affidavit evidence indicates that ISC has used its interpretation of the *Financial Administration Act (FAA)* as a basis to deny Jordan's Principle group requests in the Alberta Region and to deny a reimbursement request from an organization.

[458] The Caring Society submits that this evidence reflects exactly the scenario that concerned the Tribunal in 2021 CHRT 41 when it identified the distinction between Canada "applying its discretion in the *Financial Administration Act's* interpretation to facilitate the implementation of the Tribunal's orders" or interpreting the *FAA* "in a way that hinders the Panel's quasi-judicial statutory role under the *CHRA*."

[459] Moreover, the Caring Society adds that the evidence also demonstrates that ISC denied an organization's reimbursement request following the approved purchase of two gift cards, due to the lack of an itemized receipt. This indicates that ISC has invoked the *FAA* as a basis to depart from the Tribunal's orders. ISC adopts a bureaucratic approach that runs contrary to the Tribunal's reasonings and orders.

[460] According to the Caring Society, ISC has already acknowledged that its requirement of itemized receipts creates an administrative burden on First Nations children and families. Families also report being questioned by ISC for making certain purchases.

[461] Furthermore, the Caring Society argues that ISC has stated that the itemized receipt is requested due to a reporting requirement imposed on ISC, not on the end user. As such, even if ISC requires itemized receipts to complete its reconciliation, this does not justify denying reimbursement, in particular, due to the Tribunal already having ruled that the government should not engage in administrative procedures before the service is approved and funded. ISC's internal requirement to reconcile grocery gift cards is predicated on the notion that they are "advance payments", and thus that a payment has already been made. The Caring Society submits that the evidence they have led shows that the receipt requirement is preventing the effective implementation of the Tribunal's orders. Service providers face difficulty in collecting itemized receipts from end users.

[462] Canada and the AFN submit that there is no evidence to support the Caring Society's position that ISC's interpretation of the *FAA* has resulted in a departure from the Tribunal's orders on certain occasions.

[463] The Tribunal agrees with the Caring Society that the ultimate question on this motion is whether the Tribunal's orders are being implemented effectively to resolve discrimination at the level of the child and their family. The issues raised on the examples raised under the *FAA* are relevant to determining the reimbursement issue in this ruling. However, the Tribunal finds that the evidence including the examples provided do not clearly demonstrate that Canada used the *FAA* to limit the Tribunal's orders.

[464] The Tribunal discussed the *FAA* extensively in previous rulings and more recently in 2021 CHRT 41 and the Tribunal continues to rely on those findings. As mentioned, in 2021 CHRT 41 at paragraphs [376] and [377]: "The *Financial Administration Act* should be interpreted harmoniously with quasi-constitutional legislation such as the *CHRA* including orders made under the *CHRA* ... Further, the Tribunal's orders are to be read harmoniously with the *Financial Administration Act* and, in the event of conflict, the orders made under the *CHRA* have primacy over an interpretation of the *Financial Administration Act* that limits the Tribunal's remedial authority."

[465] Therefore, the Tribunal reiterates that a case-by-case approach must be applied to find that Canada has applied the *FAA* in a way that hinders the Tribunal's orders under the *CHRA*. Furthermore, there is insufficient evidence in the motion/cross-motion to make a finding that Canada used the *FAA* to derogate from the Tribunal's orders.

[466] Disputes between the parties relating to the *FAA* have arisen from time to time in these proceedings. In order to prevent misunderstandings between the parties, the Tribunal will clarify its previous orders. As a general matter and for clarification purposes, the Tribunal's orders have primacy over any conflicting interpretation of the *Financial Administration Act* and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders.

[467] The Panel relied upon Kelso in determining the merits of this case (see *Merit Decision* at para 42 and 2021 CHRT 41 at paras 155-156):

No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act* (...).

[468] This principle still applies in this case.

M. Inherent rights of First Nations and the FNLC submissions

[469] The Tribunal appreciates the FNLC's thorough submissions and agrees the inherent rights of self-determination and self-governance of First Nations must be respected and an approach focused on their real needs, unique perspectives, and culture will ensure this. The FNLC's submissions on the requirements to respect the *UNDRIP* including the First Nations' free, prior, and informed consent are in line with the Tribunal's findings in previous rulings.

[470] However, the Tribunal has also discussed the impossibility of hearing from every First Nation in Canada before making its rulings. The Tribunal is not a commission of inquiry. Canada has the duty to consult. This duty was explained in the Tribunal's *Merit Decision*. The Tribunal takes great comfort that the AFN Chiefs-in-Assembly make resolutions of the majority of Chiefs and proxies present and those resolutions that have carried are filed and form part of the Tribunal's record.

[471] The Tribunal from the beginning has rejected the one size fits all approach. Such an approach does not take into account the specific and distinct needs of a child, the child's family, community, and Nation. That is why a Potlatch ceremony may be important to a family and another type of ceremony is preferred for another. Two children may have the same health condition but different needs. This is why remoteness and higher costs of living must be considered by Canada when a First Nation is isolated from surrounding services for example. The lack of hospitals nearby is a consideration. Calling 911 may mean something very different for a family living in a community near a hospital than a family living in a community with no surrounding hospital and the need to fly out to access it. The costs of capital buildings to offer Jordan's Principle services for remote communities are likely higher to ensure appropriate insulation and account for transportation of materials for example.

[472] In an approach based on needs, there is less of an issue of breaching the inherent rights of First Nations since the First Nations are to be consulted to understand their specific needs. Individual rights are also respected with this approach based on the real needs of First Nations children. The Tribunal understood that it would be challenging to achieve a complete consensus of all First Nations in the delivery of services to children and families. Resolutions from the majority of the Chiefs in Assembly provide direction in these proceedings but the inherent rights of each First Nation remain and can be respected by Canada in tailoring services based on their specific needs.

[473] Jordan's Principle is not to be viewed as a program. It is intended to be a means to achieve substantive equality.

[474] The services are intended to be child-centric and can differ from one child to another and one family to another. They are also intended to be First Nations-centric and can differ from one First Nation to another.

[475] If services are based on needs as repeatedly ordered by this Tribunal, the Tribunal need not hear from every First Nation in Canada to make orders that affect them. Their unique perspectives are accounted for in the orders. Inherent rights and unique perspectives of every First Nation should already be taken into account by Canada in the funding and service delivery. The Tribunal relies on its numerous previous findings and orders that cannot all be repeated here.

[476] Canada has the duty to consult the First Nations involved in these proceedings and those who are not.

[477] The above is considered in all of the Tribunal's orders.

[478] Moreover, for those reasons, the Tribunal will leave it up to the parties to decide if the FNLC can participate in the consultations for the interim orders especially given their voiced preference for a Tribunal-assisted mediation which must be voluntary. Furthermore, the Tribunal included a process for parties to consult with other First Nations and other experts on the interim orders.

(i) Appeals mechanism and Complaints mechanism

[479] Dr. Gideon described in detail the re-review and appeals process and the Tribunal finds this evidence reliable.

N. Re-reviews

[480] Re-reviews may be initiated by individual Jordan's Principle employees, requestors or First Nations partners or parties advocating for or acting on behalf of a child or family, or service coordinators/navigators. Re-reviews were introduced as part of the operationalization of the Back-to-Basics Approach as an informal mechanism to reconsider requests previously denied, prior to an appeal.

[481] A request may be re-reviewed when new information becomes available that has rendered the product, service, or support(s) eligible for approval, or if the Back-to-Basics Approach was not previously applied. If either of these criteria are identified and the request has not yet been appealed, it may be approved and considered a re-reviewed decision. Re-reviews may be conducted by any employee in the regional focal point or ISC Headquarters with authority to approve requests.

O. Appeals Process

[482] Previously, ISC formed an appeals committee composed of the Associate Deputy Minister and the Senior Assistant Deputy Minister, Regional Operations, both with ISC. In response to the Tribunal's order in 2017 CHRT 14 and Canada's commitment to the parties in 2018 to form an external arm's length Appeals Secretariat, the parties collaborated towards an improved appeals process based on the principles of transparency, accessibility, fairness, and independence. In agreement with the Assembly of First Nations and the Caring Society, ISC implemented the new Jordan's Principle appeals process in 2022.

[483] The new appeals process includes an arm's length secretariat function and an External Expert Review Committee (Appeals Committee). The Appeals Committee is an external nongovernmental panel of experts from regulated and certified disciplines in health, education, and social sectors. The objective of the Appeals Committee is to provide ISC with recommendations on appeals utilizing their professional knowledge and expertise.

[484] Currently, the Appeals Committee consists of nine consultants who have been contracted through a request for proposals process. All of these consultants are either Indigenous, have lived and worked with Indigenous communities, or have longstanding expertise in serving Indigenous communities across Canada. The inter-professional collaboration among these experts provides a fuller consideration of children's needs. ISC is working to expand the Appeals Committee membership, having launched an external Request for Proposals process in February 2024.

[485] From November 2021 until February 2022, the old appeals process overlapped with the new appeals process, such that appeals were heard by one of the two committees. As of February 2022, the new appeals process is fully in place, replacing the former internal ISC committee.

[486] Dr. Gideon affirms that the non-governmental Appeals Committee is supported by the Appeals Secretariat situated within ISC, but outside of the Jordan's Principle Initiative. The Appeals Secretariat, agreed upon by the parties, serves as an advocacy office to support families in bringing appeals forward. To avoid a conflict of interest with the Jordan's Principle implementation teams, the Appeals Secretariat reports directly to the Chief Medical Officer of Public Health within ISC, who is often referred to as the Chief Science Officer (CSO), who in turn reports directly to the Deputy Minister in exercising this authority.

[487] The Appeals Committee makes a recommendation to the CSO regarding whether ISC's determination should be upheld or overturned, based on their specialized knowledge, professional expertise, cultural awareness, and lived experiences. The CSO then renders an appeal determination based on that recommendation, which replaces ISC's earlier determination.

[488] The new appeals process, as agreed by the parties, is designed to be an easy-to-access, timely, and independently determined function, which provides support to those individuals and groups seeking an appeal. The Appeals Committee and CSO strive to make determinations on all appeals within 30 days.

[489] The Appeals Committee provides a clear avenue for complaint resolution. When a first instance of Jordan's Principle request is denied by ISC, ISC notifies the requestor of the reasons for the denial and of the right to appeal the decision to the Appeals Committee within one year of the denial.

[490] When an appealed determination is upheld by the Appeals Committee, ISC advises the requestor of the decision in writing, together with a written rationale. ISC also advises the requestor that they have the option of filing an application for judicial review to the Federal Court within 30 days.

[491] In the 2022-23 fiscal year, 1,258 appeals were determined under the new appeals process.

[492] Moreover, 59% of the determinations under appeal were overturned by the CSO, on the recommendation of the Appeals Committee. Between April 1 and December 31, 2023, 625 appeals were determined, with 46% of those determinations overturned by the CSO, on recommendation of the Appeals Committee.

[493] ISC's final Jordan's Principle determinations are subject to Federal Court oversight pursuant to the *Federal Courts Act*, RSC 1985, c F-7, s 18.1.

[494] The Caring Society submits that despite having agreed in the December 2021 Jordan's Principle AIP Work Plan that a complaints mechanism should be developed with respect to Jordan's Principle, ISC argues that broader First Nations collaboration would be required if a complaints mechanism were to be developed and that imposing one could have unintended consequences. The AGC also argues that it is not necessary given the appeals mechanism and the Federal Court oversight. The AGC also submits that over 50% of denied Jordan's Principle requests are reversed in appeal showing the appeals mechanism is working.

[495] The AGC submits that the Caring Society desires a complaints mechanism, not for appellate purposes, but for people to raise complaints about requests that have not yet been determined. The imposition of a new and untested complaints mechanism without broader First Nations collaboration could have serious negative and unintended consequences, such as further levels of bureaucracy, backlog, and delay in Jordan's Principle administration.

[496] Canada highlights that this issue should be tabled for discussion before Jordan's Principle Operating Committee (JPOC) and/or as part of the discussions to take place on long-term reform.

[497] Canada submits that the Caring Society's position that the Tribunal must impose a complaints mechanism, even where all parties excluding the Caring Society wish to negotiate the issue, does not reflect the collaborative approach needed to achieve effective outcomes. In fact, it deprives the parties of the opportunity to identify a jointly acceptable, flexible, and collaborative approach that takes all views into account.

[498] In the interim, Canada submits that requestors are not without recourse if a timely response has not been provided. It is open to all requestors to contact the National Call Centre to follow up on the status of any requests made under Jordan's Principle. ISC will also continue to work with its First Nations partners should they raise concerns about delayed responses. Further, ISC has been actively exploring an interim complaints mechanism at JPOC, including the potential for an online complaints form, pending long-term reform negotiations. ISC is open to discussing this and any other proposed interim solutions with the parties, as part of the proposed mediation process.

[499] The main concern for Canada remains that the imposition of a new mechanism, without collaboration, could have unintended consequences that might otherwise contribute to the existing backlog and delay in Jordan's Principle administration while adding further levels of bureaucracy. Moreover, Canada prefers focusing its efforts on reducing the backlog rather than diverting its energy into creating a complaints mechanism.

[500] The AFN argues the specific requested relief has not been the subject of discussion or negotiations with the AFN and accordingly, the requested complaints mechanism/accountability measures would only serve to undermine efforts to negotiate a long-term approach in relation to disputes. As noted, a final settlement agreement would be endorsed by the First Nations Parties, who represent rights-holders, and further to the mandates of the AFN, be subject to approval by the First Nations-in-Assembly.

[501] Therefore, the AFN submits that the Tribunal must be wary of endorsing a complaints approach that has not been subject to the dialogic approach or reconciliatory negotiations with the First Nations parties.

[502] In reply to ISC, the Caring Society submits that given ISC's existing commitments in the AIP Work Plan and the evidence of its own witnesses on this motion, there can be no question about "if" or whether a complaints mechanism is to be developed. There is broad agreement that this is required.

[503] In reply to the AFN, the Caring Society submits that their request for a complaints mechanism is an example of the dialogic approach in action. The AIP Parties agreed to the need for a complaints mechanism in the AIP Work Plan on December 31, 2021, but no such complaints mechanism was implemented by December 12, 2023, when the Caring Society brought its non-compliance motion, nor in the roughly six months since the motion was filed. To be clear, the relief sought in the Caring Society's motion does not seek the imposition of a particular complaint process. The Caring Society seeks parameters for an effective independent process consistent with access to justice to identify and remedy any discrimination arising from Canada's conduct. The details of the proposed complaints process would, of course, have to be determined in consultation with experts and First Nations. The Caring Society is looking for action. The status quo endorsed by Canada and the AFN cannot persist as children are being seriously harmed and, in some cases, tragically, dying.

[504] The Commission submits that Tribunal rulings in 2017 required Canada to establish an independent appeals mechanism for Jordan's Principle determinations. There is currently a committee of independent professionals who can decide appeals of ISC decisions denying requests. However, ISC has no formal national complaints mechanism for dealing with other types of concerns that might be raised, for example with respect to the conduct of staff in processing requests, or delays in making determinations or payments. The record shows the Caring Society and others have stepped in by (i) receiving complaints and inquiries from families, service providers, and communities, (ii) tracking and reporting on trends, and (iii) raising concerns with Canada in efforts to find solutions. However, the Caring Society has also said it was never intended to fill this role on a long-term basis and does not have the capacity to keep up with demand.

[505] In 2020, the Caring Society and ISC jointly commissioned a report from three experts that recommended the creation of independent accountability mechanisms. However, the Commission submits it does not appear any of the resulting recommendations have been implemented to date.

[506] Moreover, the Commission agrees that establishing a credible, transparent, and effective Jordan's Principle complaints mechanism within a reasonable time period would assist in the effective implementation of the Tribunal's rulings.

[507] The Commission submits that the Tribunal has repeatedly held that Jordan's Principle is a necessary component of achieving substantive equality in the delivery of critical services to First Nations children and youth. If Jordan's Principle is not implemented properly in a given case, the potential

result is a denial of substantive equality. In such circumstances, it is a best practice to have a responsive complaints mechanism in place that would allow potential issues to be raised and addressed quickly and efficiently. The Tribunal agrees with the Commission on this point.

[508] The Commission agrees with the Caring Society that analogies can appropriately be drawn to the workplace context, where it is common for the Tribunal to order the creation of policies that include formal procedures for receiving, investigating, and resolving complaints.

[509] The Commission submits that the Caring Society has asked that the complaints mechanism be independent. Human rights decision-makers have made such orders on occasion. For example, the Human Rights Tribunal of Ontario has ordered the appointment of third-party monitors and/or the use of external investigators where compelling evidence showed a respondent was unwilling or unable to respond appropriately to internal complaints over time.

[510] The Commission provided relevant case law examples to support their position. For example: *Ontario Human Rights Commission v. Ontario (Correctional Services)*, 2002 CanLII 46519 at “Orders – B.8” (directing external investigation of workplace complaints); *McKinnon v. Ontario (Correctional Services)*, 2005 HRTO 23 (generally clarifying the order for external investigation); and *McKinnon v. Ontario (Correctional Services)*, 2007 HRTO 4 at paras 7(B)(8) and 207-208 (describing non-compliance issues with respect to the external investigation orders, and stating the orders were based on “...the well-founded mistrust in both the ability and the integrity of managers regarding WDHP matters”). See also *Lepofsky v. Toronto Transit Commission*, 2005 HRTO 21 at paras 1-2, and *Lepofsky v. TTC*, 2007 HRTO 23 (appointing a third-party monitor based on evidence since “...the TTC has failed to provide a reliable accommodation for in excess of 10 years, notwithstanding numerous complaints and internal documents showing that the accommodation was not being properly provided”).

[511] If the Tribunal is satisfied such circumstances exist in this case, the Commission contends that the Tribunal could consider making a comparable order.

[512] The FNLC does not entirely agree with the AFN that the establishment of a complaints and accountability mechanism is outside of the mandate provided by the Chiefs-in-Assembly, at least from the BC context. For example, the British Columbia Assembly of First Nations (BCAFN) passed a resolution asking the AFN to support and adopt the submissions of the Caring Society in respect of the Motion, which included submissions related to a complaints mechanism.

[513] The FNLC’s position is that a balanced approach is necessary to ensure Canada meets its obligations to First Nations children, including upholding their inherent rights, while also ensuring that First Nations rights to self-government and self-determination are respected and upheld. Such an approach is necessary and supported in the Doing Better Report, which recommends a complaints mechanism for Jordan’s Principle be established and the complaints mechanism draws on Indigenous laws and dispute resolution processes to resolve complaints wherever possible.

[514] For these reasons, the FNLC respectfully submits that it is within the Tribunal’s jurisdiction to grant relief relating to the development of a complaints mechanism and that the Tribunal should make an order requiring the parties to move toward the development of a complaints mechanism, with specific timelines for that work. However, the Parties must consult with First Nations rights and title holders, including those who are not parties to this proceeding, regarding the development of a complaints mechanism and the timelines should be reflective of that requirement.

[515] The Tribunal finds that the Jordan’s Principle Appeals mechanism is very important and is necessary. However, to access the Appeals mechanism, requestors must have received a denial of their request.

[516] The Tribunal agrees with the Commission’s position explained above including that while there is an Appeals mechanism that can be triggered where a request has been denied, ISC, does not have a formal complaints mechanism that can be used in other situations for example, if there are concerns

about processing timelines, staff conduct, or delays in paying service providers or reimbursing families who have paid out of pocket. Furthermore, as discussed above, the Tribunal found that the evidence established that some families experienced delays in reimbursements.

[517] The AFN argued that it is their honor to assist families to access Jordan's principle and the Tribunal finds this commendable, and the same comment can be made to the Caring Society, the COO, the NAN, the FNLC and every First Nation and First Nation organizations in Canada that helps families access Jordan's Principle services. However, these ad hoc interventions may not be sufficient and do not provide formal recourses.

[518] The Tribunal understands Canada's point about the administrative recourses that families have however, those recourses are administrative and not formal independent recourses. Moreover, there is evidence in the motions record brought by the AFN's affiant Craig Gideon who held an important role as Senior Director of the Social Branch at the Assembly of First Nations (AFN) from March 28, 2022, to March 2024, that some requestors have experienced some difficulties in bringing their complaints forward at ISC's level. Craig Gideon affirms in his amended March 22, 2024, affidavit that a family had not received a response for over 5 months, despite following up at the regional level on at least one occasion following the initial submission. The requestor only received a response and a decision was rendered after the AFN intervened by contacting ISC Headquarters requesting an urgent follow-up. Furthermore, Craig Gideon affirms that the AFN was contacted by a parent who experienced extreme difficulty contacting ISC at the regional and national levels.

[519] Moreover, Craig Gideon, affirmed in his March 22, 2024, amended affidavit, that he has heard concerns from multiple callers about the challenges contacting Indigenous Services Canada at the national and regional levels, particularly in the context of making an urgent request or updating the urgency of a request. The Social Development Sector was contacted by a parent in September 2023 regarding a request submitted in June 2023. The parent had not received any follow-up from ISC and was unable to reach anyone at the Jordan's Principle Call Centre as they had already requested a call-back and couldn't leave a second request for a call-back until the first had been returned. The parent had waited over 1 week for a call-back when they contacted the AFN.

[520] The Tribunal finds that this is precisely why an independent complaints mechanism would be helpful.

[521] Again, the Tribunal accepts the AFN's uncontested evidence above. The Tribunal finds it relevant and reliable especially that, while it is hearsay and must be given the appropriate weight, these affirmations originate from the Social Development Sector which has extensive experience in assisting First Nations families' requestors and Jordan's Principle on a regular basis. Nothing in the affiant's affirmations gives this Tribunal reasons to find it unreliable or to give it little to no weight. Moreover, in reviewing the evidence as a whole, Canada did not challenge this specific evidence from the AFN. Furthermore, Canada even refers to the Amended Affidavit of Craig Gideon, affirmed March 22, 2024, at paras 8–9 in their factum submissions.

[522] The Tribunal finds that the ISC Appeals process does not have a focus on identifying systemic issues aside from some aspects that are evaluated in the random audits. Moreover, the ISC Appeals process is not intended to act as a complaints mechanism. The Appeals Committee deals only with requests that have already been determined and may be re-examined by the Appeals Committee.

[523] Ms. St-Aubin affirmed in her revised affidavit that a complaints mechanism is duplicative and conflicts with the appeals process already established by way of agreement with the parties. However, Ms. St-Aubin agreed on cross-examination that complaints regarding issues that arose either (a) prior to a determination, or (b) following an approval, would not go through the appeals committee and that a complaints mechanism receiving those complaints would not be duplicating the appeals process. Ms. St-Aubin admitted on cross-examination that such a complaint mechanism, and an independent office for ensuring compliance, would be important.

[524] Furthermore, Canada admits that 1 out of 2 denied requests is reversed in appeal, in other words, every two denied requests ought to have been approved. This speaks volumes in terms of the importance of the arms-length Appeals mechanism to allow corrections of unfounded denials of services for First Nations children.

[525] In Canada's Executive Summary of Agreement-in-Principle on Long-Term Reform posted online, updated July 2023, and filed as part of the Caring Society's motion materials, Canada mentions that it will take urgent steps to implement the measures set out in a work plan to improve outcomes under Jordan's Principle, based on ISC's compliance with the Tribunal's orders. The work plan specifically includes commitments to: Identify, respond to, and report on urgent requests; Develop and implement Indigenous Services Canada internal quality assurance measures, including training on various topics, a complaint mechanism, and an independent office to ensure compliance (...).

[526] Dr. Gideon also had the following exchange with the Caring Society counsel at her cross-examination:

Q. "Develop and implement Indigenous Services Canada internal quality assurance measures, including training on various topics, complaint mechanism, and an independent office to ensure compliance;"

Do you see that?

A.

I do.

Q.

And would you agree that the Complaint mechanism in the independent office to ensure compliance that was discussed there, would be something that was separate from the Appeals Committee?

A. Yes.

[527] ISC committed to the development and implementation of a complaints mechanism, alongside an independent office to ensure compliance, in the AIP Workplan in 2021. Dr. Gideon testified that this complaints mechanism and independent office would be separate from the Appeals Committee. As Dr. Gideon describes in her affidavit, the Appeals Committee's role is to assess denied Jordan's Principle requests. On cross-examination, Dr. Gideon agreed that the Appeals Committee could only be an avenue for complaints regarding requests that had been determined and denied, in whole or in part. Dr. Gideon could not even see how the Appeals Committee would receive complaints regarding issues that arose (a) prior to a determination or (b) following an approval, such as failure to make a timely reimbursement.

[528] The Tribunal finds that contrary to what Dr. Gideon affirmed, the role of the Appeals Secretariat, is not one of advocacy supporting families in bringing appeals forward, rather it is a role of administrative support and it prepares summary-style documents for the External Expert Review Committee's review in its determinations of appeals. Moreover, the quality assurance team performs random audits at ISC's Call Centre and while it may assist in improving the quality of services, it does not supplant the need for an effective complaints mechanism.

[529] The Tribunal finds that in applying a systemic lens supported by the available evidence and the evolution of Jordan's Principle, establishing a credible, transparent, and effective Independent Jordan's Principle complaints mechanism within a reasonable period through consultations among the parties would assist the effective implementation of the Tribunal's orders. The arms-length Appeals mechanism is now implemented and is effective. This was done successfully in these proceedings with the assistance

of all the parties. However, the process does not account for multiple other issues such as processing timelines, delays in paying service providers, or reimbursing families who have paid out of pocket that may arise in the process of seeking services under Jordan's Principle.

[530] The Tribunal finds that the evidence supports the clear need for a credible and independent national and effective Jordan's Principle complaints mechanism and there is no doubt that the Tribunal has the authority to order it under section 53 (2) of the *CHRA*.

[531] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease and desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]]. In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141).

(...)

Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future (...), (at page 1142),

(The Tribunal applied the above in these proceedings in 2018 CHRT 4).

[532] The Tribunal has made numerous findings on section 53(2) of the *CHRA* in previous rulings in these proceedings including in the above and continues to rely on those findings. In sum, the Tribunal finds that it has sufficient evidence to support an order for an interim Independent complaints mechanism under section 53(2) of the *CHRA* especially under subsection (a) as explained above, and that the *CHRA* is structured so as to encourage this innovation and flexibility in fashioning effective remedies, (see Grover). Moreover, the Jordan's Principle's Independent Appeals mechanism was already called for by this Tribunal. The Tribunal found that while Canada already had an internal appeals process, the evidence supported the need for an independent appeals process for Jordan's Principle where some of the decision-makers are composed of health professionals who act in concert with other professionals and are independent from the government.

[533] In 2017 CHRT 14 at paragraph 103, this Tribunal ordered Canada:

Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

(...)

[133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the Decision and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

(...)

v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

[534] In 2019, the Tribunal reiterated the importance of a timely and independent appeals mechanism involving health professionals and other professionals, to address such requests under Jordan's Principle, (see 2019 CHRT 7 at paras 55 and 75).

[535] Canada in response to the Tribunal's orders has now implemented an arms-length Jordan's Principle appeals mechanism that is impactful.

[536] More recently, in *Andre v. Matimekush-Lac John Nation Innu*, 2021 CHRT 8, the Tribunal ordered the creation and implementation of a mechanism to allow for the lodging of official complaints:

[236] In addition, the Tribunal orders the Respondent to draft, create and implement, in consultation with the Commission, one or more policies concerning harassment and discrimination in the workplace and the duty to accommodate, including procedures or a mechanism for officially lodging complaints regarding workplace harassment and discrimination or reporting it, and another mechanism for its administration to respond to and process such reports and complaints.

[537] Ms. St-Aubin identified in her cross-examination that one of the reasons the Caring Society can be helpful in assisting families and children, and in identifying systemic issues, is that there is a level of comfort that requestors may have with the Caring Society, their community, or their service coordinator. The Tribunal finds that the same could be said about First Nations requestors having a level of comfort with the AFN, the COO, the NAN, or the FNLC since they are First Nations organizations.

[538] The Tribunal agrees with the Caring Society that this creates a vehicle for additional information to flow in problematic cases. Comfort and trust help ISC do its job and benefit First Nations children.

[539] The Tribunal finds the complaints mechanism should aim to fill a similar role. This would ensure that requestors feel comfortable relying on the accountability mechanism.

[540] Moreover, according to the evidence found at Exhibit 7 attached to Ms. Brittany Mathews' affidavit dated January 12, 2024, the JPOC identified on May 9, 2023, that the complaints mechanism must be established in a way that "ensures requestors and their families will not fear reprisal for submitting a complaint, and instills trust, recognizing the power dynamic individuals face when interacting with the federal government. (...) Tracks trends in complaints to address systemic issues families may be facing when accessing Jordan's Principle Multiple streams may need to be established for different types of complaints, for instance, complaints from Individuals/Requestors Service Coordinators, and Service Providers."

[541] The Tribunal finds that given the above, a complaints mechanism ought to be independent.

[542] Moreover, it has now been over 7 years since the Tribunal has crafted its detailed Jordan's Principle and substantive equality orders and the Tribunal must ensure the effectiveness of its orders. The Tribunal finds that it is paramount that Jordan's Principle requestors do not fall into gaps within a process that is intended to remove gaps and accessibility barriers in services for First Nations children. An Independent complaints mechanism would be responsive to those gaps and would improve Jordan's Principle's effectiveness. There comes a time when discussions need to lead to action.

[543] The Tribunal in keeping with the dialogic approach orders consultations amongst the parties rather than dictating all the details concerning the interim complaints mechanism. The parties will return to the Tribunal to seek further guidance or with their consent order requests, if possible, or with their views on possible options supported by available evidence. The Tribunal made findings in previous rulings about the reasons justifying the need for an independent appeals mechanism those findings can inform consultations on the interim complaints mechanism.

[544] The Tribunal agrees that broad consultations with rights holders First Nations are important for the implementation of a permanent complaints mechanism and that the First Nations should not only have a voice in all aspects of its creation but also in the composition of the complaints mechanism.

[545] The BCAFN have already adopted a resolution and the AFN Chiefs-in-Assembly may do the same. If the First Nations reject such a recourse and prefer another one, the AFN can advise the Tribunal. However, no such thing was done prior to the creation of the arms-length Appeals mechanism that has now been implemented. Further, Canada admitted that it will remain involved in Jordan's Principle even if many First Nations assume service delivery. Therefore, a complaints mechanism for ISC's involvement has merit.

[546] The Tribunal agrees with Canada that the Jordan's Principle Operations Committee (JPOC) is an excellent forum to bring discussions on the complaints mechanism however, according to the parties, the last meeting was in the spring of 2024. Furthermore, the evidence shows that JPOC had a discussion on the complaints mechanism in May 2023. Therefore, it may be more expeditious to have the parties consult on an interim complaints mechanism in the near future and then submit their ideas to the JPOC. Without making a determination on this aspect, the JPOC may be of assistance to the creation of an interim independent complaints mechanism.

[547] The Tribunal also agrees with the AFN and Canada that the backlogs need to be addressed, and objective criteria for urgent cases must be developed as a priority and parties should focus their efforts on this until at least January 9, 2025.

[548] Again, the Tribunal agrees it would be best to have broad consultations with First Nations for the creation of a permanent independent Indigenous-led complaints mechanism. This may take a long time to achieve to ensure First Nations are involved in its design, creation, and composition.

[549] In the interim, especially given that Canada will remain involved in Jordan's Principle even if First Nations assume greater Jordan's Principle roles, the Tribunal believes that a non-complex but effective independent complaints mechanism can be implemented until a permanent independent Indigenous-led complaints mechanism is developed and established or a long-term alternative is included in Jordan's Principle long-term reform settlement agreement and accepted by this Tribunal or, another long-term alternative is put forward as a result of the parties' meaningful consultations and involvement with First Nations, First Nations experts and organizations in Canada and proposed by the parties and accepted by this Tribunal. The long-term aspect of the independent complaints mechanism will be revisited at a later date by this Tribunal. The parties may choose to develop different mechanisms as part of their long-term reform negotiations and the Tribunal remains open and flexible in that regard.

[550] The AFN and Canada have indicated that they are determined to enter negotiations for a long-term reform agreement on Jordan's Principle by March 2025 and until then, they would prefer to use their energies and focus to address the backlogs. The Tribunal agrees on the need to focus on the

backlogs. However, the Tribunal is not convinced that an agreement on long-term reform of Jordan's Principle will be completed by March 2025. These proceedings contain multiple examples of deadlines that needed to be extended for different reasons. Moreover, even if a long-term agreement was reached in March 2025, it would need to be approved by the AFN Chiefs-in-Assembly and then by this Tribunal. This may take several months. Refraining from interim orders that ensure the effectiveness of the Tribunal's orders in the hopes of a potential future agreement does not assist the First Nations children and families in need of essential services.

[551] Therefore, the Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and, if not, with options for orders supported by rationale and available evidence to establish an interim independent, non-complex but effective, credible, national Jordan's Principle complaints mechanism and to report back to the Tribunal by February 24, 2025.

V. Order

[552] The Tribunal in accordance with the dialogic approach in this case and recognized by the Federal Court and pursuant to section 53(2)(a) of the *CHRA* and the Tribunal's previous Jordan's Principle orders and retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) to arrive at consent order requests if possible and if not, with options for orders supported by rationale and available evidence and to report back to the Tribunal by January 9, 2025. The FNLC may only participate on the consent of all the parties. The parties' consultations will include but are not limited to the following aspects:

- Parties will seek to co-develop objective criteria to be used to identify urgent Jordan's Principle requests by January 9, 2025.

[553] Furthermore, the parties will also include in their consultations, all the Tribunal's consultation orders found below.

[554] The Tribunal, on the consent of the parties, has determined two levels of urgent services in a 2020 CHRT 36, referred to above:

1. urgent cases involving reasonably foreseeable irremediable harm (requiring immediate response); and
2. the other urgent ones requiring action within 12 hours (see 2020 CHRT 36 Annex A).

[555] The Tribunal confirms that "life-threatening cases", and cases involving end-of-life/palliative care, the risk of suicide, the risk to physical safety, and no access to basic necessities (the Tribunal orders that this must be defined by the parties as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests), or risk of entering the child welfare system are urgent. The Tribunal has also been clear that the "time-sensitive nature" of a case could also make it urgent. Some life-threatening situations may require immediate response while others may require a timely response.

[556] The Tribunal agrees to include caregivers and children fleeing from domestic violence in the definition of other urgent cases requiring action within 12 hours. The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests.

[557] The Tribunal agrees that a child with no access to food or other basic necessities is considered an urgent case requiring action within 12 hours. The Tribunal also agrees that once food or other basic necessities have been provided it is appropriate to refer the family to other non-discriminatory services and, if the services include barriers, to eliminate those barriers. The Tribunal orders Canada to consult

with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[558] The Tribunal accepts Canada's evidence that there are other services meant to support fire evacuations but Jordan's Principle may still be engaged. However, a clear coordination between Jordan's Principle and the other services ought to be established. In other words, referrals to other services are acceptable if the services are culturally appropriate, timely, effective, and address needs in a meaningful way. The Tribunal accepts that a request could be multifaceted involving some aspects under Jordan's Principle and other aspects under other emergency response services. Therefore, the Tribunal orders Canada to consult with the parties and to seek to co-develop guidelines on this coordination aspect and on how to triage and respond to the multifaceted requests that also involve Jordan's Principle aspects as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[559] The Tribunal agrees that bereavement is a sacred time for First Nations children and that the passing of a parent, sibling, or close relative can be particularly traumatic. The Tribunal agrees that in some cases urgent services may be required and in other cases, it may be time-sensitive (more than 12 hours) but not urgent. The Tribunal also recognizes that cultural ceremonies of many forms are important services in line with substantive equality and also agrees with the AFN that all types of ceremonies should be considered not only potlaches. The Tribunal agrees that First Nations children who lose a parent face numerous life-altering risks and may need Jordan's Principle services even in the absence of a child welfare removal. The Tribunal will review the objective criteria to be used to identify urgent Jordan's Principle requests developed by the parties and will revisit this request at that time.

[560] The Tribunal confirms that Canada is not bound by the Back-to-basics policy under the Tribunal's orders and clarifies that some of the main aspects are in line with the Tribunal's orders and some are not. For clarity, the Tribunal does not discuss every aspect of the Back-to-basics policy, only some that stand out.

[561] Aspects that are in line with the Tribunal's orders: presumption of substantive equality, supporting documentation kept minimal, professionals identifying urgent cases. (However, the Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria to determine who is a qualified professional with relevant competence and training as part of their consultations to develop objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025).

[562] The Tribunal clarifies the above should be maintained.

[563] * A presumption of substantive equality is a means to break down accessibility barriers and remove burdens on requestors of having to prove how their requests meet the substantive equality test. The Tribunal has no intention to deny ISC's right of rebuttal or say in assessing the requests.

[564] ** While documentation should be kept minimal, this does not mean that it is unreasonable to request some supporting documentation. The higher the complexities or costs the more reasonable it is to require supporting documentation.

[565] Aspects that are not in line with the Tribunal's orders:

- Self-declaration of urgent cases when no health or other qualified professional is involved (the Tribunal will revisit this once the parties have defined the terms "qualified professional" as they co-develop objective criteria to be used to identify urgent Jordan's Principle requests).
- Canada's interpretation that there is no possibility of re-classifying an urgent case as a non-urgent case.

- The requirement that once identified, every request must be dealt with in the same way with zero flexibility for escalating matters whose facts, on their face, could justify increased attention.
- The inability of ISC to prioritize matters.
- The Tribunal clarifies the above should be eliminated.

[566] Pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, the Tribunal orders Canada to:

1. Immediately deal with the backlog with the assistance of the Tribunal's clarifications mentioned above and return to the Tribunal with its detailed plan with targets and deadlines by December 10, 2024.
2. Report back to the Tribunal and the parties by December 10, 2024, to identify the total number of currently backlogged cases both nationally and in each region, including the intake backlog, the in-progress backlog, and the reimbursement backlog, including with information regarding the cumulative number of backlogged cases at month's end, dating back 12 months.
3. Triage all backlogged requests for urgency with the assistance of the Tribunal's clarifications mentioned above. ISC shall review all self-declared urgent requests and evaluate if the requests are in fact urgent as per the tribunal clarifications and if not, reclassify them as non-urgent by December 10, 2024. If a qualified professional with relevant competence and training has deemed them urgent and until such time as the parties develop a definition for a qualified professional with relevant competence and training, ISC shall deem the requests urgent.
4. Communicate with all requestors with undetermined deemed urgent cases as per the Tribunal's clarifications to take interim measures to address any reasonably foreseeable irremediable harms within fourteen days of the Tribunal's order and report back to the Tribunal by December 10, 2024.
5. Consult and work with all parties to co-develop solutions, to reduce and eventually eliminate the backlog that are efficient and effective and that can work within a government context (this does not mean that red tape should be excused or permitted in this system) and report back to the Tribunal by January 9, 2025.

[567] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm by December 10, 2024, that staff have authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[568] The Tribunal pursuant to section 53(2) (of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to ensure that by December 10, 2024, requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[569] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm if its website and social media pages clearly indicate the relevant contact phone numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for requests and payment inquiries. Canada will provide this information to the Tribunal by December 10, 2024.

[570] The Tribunal confirms that where Canada has agreements with First Nations for service delivery under Jordan's Principle or under other programs that can address the child's needs in a timely manner, Canada may refer the Jordan's Principle requestors to the First Nations as long as Canada does not transfer its legal obligations to them or set them up to fail. For example, as a principle, insufficient resources including insufficient funding, and unsustainable resources including funding under the agreements would be similar to the systemic discrimination found and would likely be considered a transfer of Canada's obligations setting First Nations up to fail the children they serve. The Tribunal in clarifying its orders to allow Canada to refer Jordan's Principle requestors to First Nations wants to ensure that First Nations and First Nations organizations receiving, and/or determining and/or funding Jordan's Principle requests have sufficient resources, including funding, to do so and sustainable resources, including funding, to do so. The Tribunal does not have this information and would like to be better informed by Canada on this important aspect by January 9, 2025.

[571] Therefore, the Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, allows Canada to refer Jordan's Principle requestors to First Nations or First Nations community organizations engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada as per the Tribunal's orders below in i and ii. Canada can do so immediately and in the interim for ii (see details below for ii), and, until such time as either:

1. New criteria, guidelines, and a new process are developed by the parties and approved by the Tribunal;
2. If it is already in existence and in conformity with the Tribunal's requirements above (the Tribunal does not yet know and would like to find out), the existing criteria, guidelines, and process are provided to the Tribunal by way of an affidavit for the Tribunal's review and approval. This should be filed no later than December 10, 2024, and parties will have an opportunity to file responding affidavits, and cross-examine the affiant and Canada will have an opportunity to file a reply affidavit and to cross-examine the other affiants. All parties will have an opportunity to file written submissions before the Tribunal makes a determination on this specific point; or
3. The parties may propose any other option to the Tribunal that may be more expeditious in addressing this specific point and that would allow the issue to be dealt with efficiently, adequately, fairly, and in the best interest of First Nations children viewed through an Indigenous lens.

The parties will report back to the Tribunal on their views on the 3 options above by December 10, 2024.

[572] The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and if not, with options for orders on an interim mechanism as referred to above and supported by rationale and available evidence and to report back to the Tribunal by February 12, 2025.

[573] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, the parameters of Canada's obligations under the *CHRA*, and the Tribunal's Jordan's Principle orders mentioned above, including the interdiction to underfund in a similar fashion than the one found in the Merit Decision and/or off-load its legal obligations to First Nations, the Tribunal orders that, when ISC is the government department of first contact, Canada may refer requestors:

- i. to an existing and applicable Jordan's Principle group request that has already been approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or

- ii. to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada; (this ii. order is an interim order which will be revisited by the Tribunal, once the Tribunal has received more information from Canada on the contribution agreements and the criteria, guidelines, and process as explained above).

[574] However, where a request is deemed urgent in accordance with the objective criteria to be developed by Canada, the AFN, the Caring Society, the COO, the NAN, and the Commission, ISC will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

[575] For greater clarity, where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan's Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the Tribunal-ordered timelines or procedural terms of any of the Tribunal's Jordan's Principle orders that are directed at Canada.

[576] The Tribunal does not agree to change timelines for urgent services at this time. The Tribunal believes that adjusting Jordan's Principle operations, with the Tribunal's clarifications above, would reduce and reclassify some of the allegedly urgent cases that are not truly urgent and allow Canada to manage the truly urgent cases in the Tribunal-ordered timelines. Canada shall monitor cases after implementing the Tribunal's clarifications of urgent requests and report back to the Tribunal by January 9, 2025.

[577] Without ordering a change in timelines at this time, the Tribunal agrees to receive options from the parties that would arise from their discussions in the format that they so choose (mediation, negotiations, conflict resolution, etc.) and in light of the Tribunal's clarifications. The Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop potential options supported by rationale and available evidence to present to this Tribunal in regards to timelines for non-urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[578] However, the Tribunal rejects the proposed terms "Without unreasonable delay". This concept is vague and does not align with the best interest of the child or any reasonable practice standard. As even immediately and urgent were not understood the same way by everyone, the term "without unreasonable delay" would likely cause other misunderstandings.

[579] The Tribunal's orders in 2017 CHRT 14 and 2017 CHRT 35 were meant to start the determination clock at the reception of a request except when clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs information was required. Given the current backlog and the Tribunal's clarifications on the term urgent and the Tribunal's other consultation orders, the Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties and seek to co-develop guidelines on this aspect and return to the Tribunal with their options by January 9, 2025.

[580] The Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop interim practical and operational solutions supported by rationale and available evidence to redress the hardship imposed on individuals and families (requestors) by reimbursement and payment delays and report back to the Tribunal by January 9, 2025.

[581] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, clarifies that consistent with its orders in 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay paying for approved services in a manner that creates hardship by imposing a burden on families that risks a disruption, delay or inability to meet the child's needs.

[582] The Tribunal finds the current standard deadlines for service providers to be reasonable if there are no delays. As a matter of good practice, guidelines should be in place to avoid unnecessary delays in reimbursements. Canada will report back to the Tribunal to inform the Tribunal if they have such guidelines and if so, provide a copy of the guidelines by December 10, 2024. The Tribunal will revisit this once it has received Canada's information and/or guidelines.

[583] The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction orders Canada to report back to the Tribunal with a detailed report on its progress in coordinating its federal programs, especially since 2022 CHRT 8. The detailed report shall include a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have been met. The information provided shall be sufficient to assist this Tribunal and allow the Tribunal to understand Canada's progress so far. Canada will file its report with the Tribunal and copy all the parties by January 9, 2025.

[584] As a general matter and for clarification purposes, the Tribunal's orders impacts have primacy over any conflicting interpretation of the Financial Administration Act and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders. The Tribunal pursuant to section 53(2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, and its retained jurisdiction, clarifies that Canada shall not rely on the *Financial Administration Act*, and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders to justify departures from this Tribunal's orders.

[585] The Tribunal pursuant to section 53(2)(a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and, if not, with options for orders supported by rationale and available evidence to establish an interim independent, non-complex but effective, credible, national Jordan's Principle complaints mechanism and to report back to the Tribunal by February 24, 2025.

A. Dialogic approach and reconciliation

[586] The Tribunal emphasizes the importance and its commitment to the dialogic approach to resolving matters. The Tribunal strongly feels that the parties are better positioned to resolve the operational issues amongst themselves or with the assistance of mediators than by way of litigation. However, the Tribunal as demonstrated in the past, remains committed to being flexible and to clarify orders when the parties need it. This may avoid costly, divisive litigation and lengthy delays that are not in the best interest of First Nations children and in respecting the parties' rights, obligations, and expertise. In the spirit of reconciliation, the Tribunal remains committed and hopeful in the parties' true commitment to the dialogic approach to solving issues that arise.

B. Updates since the summary ruling was released:

[587] On December 4, 2024, the AGC wrote that ISC has determined that there are approximately 25,000 self-identified urgent cases in the backlog. ISC is reviewing these on a priority basis, taking into account the Tribunal's recent clarifications regarding urgency, the aspects of the Back-to-Basics policy

that should be eliminated, and referrals. In support of this review, each region has developed internal triaging processes to identify and address cases where a failure to act immediately could result in irremediable harm to the child.

[588] Canada submitted that it remains committed to fully implementing Jordan's Principle. The Panel's clarifications in the Summary Ruling are operationally beneficial in this regard. However, ISC's Jordan's Principle team has advised that meeting the Panel's expedited backlog-related timelines is not feasible, accounting for the significant size and complexity of the existing backlog. The backlog currently stands at approximately 131,000 requests, reflecting a continually rapid increase in demand for products, services, and supports through the Jordan's Principle initiative.

[589] In accordance with the Summary Ruling, ISC will report to the Panel on December 10, 2024, providing an update on its progress respecting self-identified urgent requests and further details on its plan to address the backlog of Jordan's Principle requests, including which backlog-related orders can be implemented and feasible timelines for doing so.

[590] Given that backlog issues are already part of the co-development orders, Canada would be pleased to discuss reasonable adjustments to the Panel's backlog-related timelines as part of any Tribunal-assisted mediation.

[591] The Tribunal requested the parties' submissions by December 13, 2024, on the AGC's proposal to adjust the timelines to deal with the backlogs and to discuss this at a mediation.

[592] On December 9, 2024, the AFN wrote to the Tribunal to request the suspension of all deadlines until March 31, 2025. The AFN wrote as follows: As the Panel may be aware, the AFN had been extensively engaged with respect to the negotiation of a Final Settlement Agreement ("FSA") on the long-term reform of the First Nations Child and Family Services Program. The FSA was presented to the First Nations-in-Assembly at a Special Chiefs Assembly called for the purposes of its consideration. The FSA was ultimately rejected.

[593] The Chiefs took issue with the negotiation process and its settlement privileged nature, as well as a desire to seek a revised mandate from Canada to address issues including, but not limited to, funding for off-reserve children not covered by the FNCFS Program, the indefinite continuation of the actuals process, allocation of prevention funding to FNCFS agencies, as well as the indeterminate oversight of the CHRT over the implementation of any Final Agreement. The AFN attached resolution 60-2024 Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle and resolution 61-2024 Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services hereto for your information, which we would note were strongly supported by the Caring Society further to their presentations at the October Special Chiefs Assembly in Calgary, and as recently as this past week during the AFN's December Special Chiefs Assembly in Ottawa. At the December 2024 Special Chiefs Assembly, the Chiefs adopted Resolution 38, affirming their desire to move forward further to the mandates of resolutions 60 and 61-2024. Resolution 38, and an accompanying Resolution 41, speaking to the implementation of Resolutions 60 and 61-2024, will not be officially available until formally ratified and signed by the National Chief, however we have included draft copies of same for the Panel's consideration, along with emergency resolution 02-2024 which also has bearing on the AFN's mandate on these proceedings moving forward. The said resolutions also call for the establishment of a Children's Chiefs Commission who would have oversight of the negotiations of all long-term reform agreements, extending both to long-term reform of the FNCFS Program and Jordan's Principle. The Resolutions also call for a new legal team to support said Commission's efforts. We understand that the Caring Society has been instrumental in crafting associated terms of reference relating to such efforts and should certainly be aware of the complexities with advancing same. Canada and the other parties have also been apprised of these revised AFN mandates and the state of negotiations generally at this time are in need of clarity, given the AFN has not received confirmation from Canada that they have a new negotiation mandate, along with the lack of clear source of funding to implement some aspects of these new resolutions. As the AFN's December Special Chiefs Assembly has

just concluded this past week, the AFN must now take stock of the new mandates adopted therein and the interplay with resolutions 60/2024 and 61-2024. As said resolutions call for the creation of an entirely new entity, with a new negotiation and new legal team, the AFN is currently not in a position to move forward on this matter as set out in the Panel's letter decision. The AFN must consider how the resolutions can ultimately be given effect. The resolutions are complex and will require significant consideration by the AFN with respect to their implementation, which includes issues relating to resourcing and staffing, which are further complicated by the AFN's focus on this past week's Special Chiefs Assembly and upcoming two week shut down for the holidays. The AFN is therefore requesting that the Tribunal extend all timelines provided for in its summary ruling on the Jordan's Principle non-compliance motion and cross-motion to commence on March 31, 2025 to give the AFN sufficient time to take the necessary action(s) to fully consider and work towards implementation of the aforementioned resolutions, further to the will of the Chiefs. We would stress that this request is not being undertaken lightly, however, in light of the scope of the resolutions and their potential impacts on AFN governance, resourcing and staffing, including the potential for the appointment of new legal counsel, it is essential that the AFN be provided with sufficient time to clarify its role and mandate in these proceedings moving forward.

[594] On December 9, 2024, the Caring Society responded to the AGC's December 4, 2024 letter objecting to the extensions.

[595] On December 10, the AGC filed Canada's report as ordered by this Tribunal and detailed Canada's specific concerns with the ordered deadlines.

[596] On December 17, 2024, the Tribunal held a case management conference call to discuss Canada and the AFN's challenges with the Panel's November 21, 2024, ordered timelines. The Panel indicated that the summary ruling provided for this option and that the Panel welcomed it.

[597] The AFN indicated that regardless of their challenges they could start consultations as early as January 6, 2025.

[598] On December 17, 2024, Canada submitted the backlog would not be resolved within a month given that it is simply too large and that a specific date for completion is not possible at this time, however, the Tribunal's clarified orders are very helpful and the work continues to quickly identify requests that have the possibility of irremediable harm.

[599] The AGC proposed a one-month extension to allow Canada to apply the Tribunal's clarified orders and suggested revisiting the issue in a month to assess the effectiveness of the orders in reducing urgent requests. The AGC suggested that they could provide a written report, or a subsequent case management, or both in a month.

[600] On December 18, 2024, the Tribunal directed Canada to provide an updated written report to this Tribunal by January 17, 2025. The Tribunal will revisit its deadlines to eliminate the backlog following the review of the updated report.

VI. Conclusion and Retention of Jurisdiction

[601] The Tribunal remains seized of the issue until long-term reform of Jordan's Principle is achieved or until the Tribunal's approval of the parties' agreement supported by adequate rationale and available evidence to clearly demonstrate how the agreement will effectively eliminate the systemic discrimination found and prevent it from recurring. Sustainability is crucial to eliminate the systemic discrimination and prevent its recurrence. This also means sufficient and sustainable resources including funding allocated to First Nations who choose to take on a greater role in Jordan's Principle and for Canada's responsible department (at this time, ISC), which will remain involved as admitted by Canada in its evidence. The requirement for sufficient and sustainable resources including funding is in line with all of the Tribunal's previous rulings and has been repeated numerous times by this Tribunal in this case.

[602] Aside from the clarifications above, nothing in this ruling affects the Tribunal's previous rulings and orders. Furthermore, the Tribunal retains jurisdiction on all its previous rulings and orders except the compensation orders. The Tribunal will revisit this retention of jurisdiction once long-term reform has been addressed with long-term Tribunal orders or the parties' agreement that clearly demonstrates the systemic racial discrimination will be eliminated in implementing the agreed measures and the same or similar systemic racial discriminatory practices will not reoccur. This necessarily includes sufficient and sustainable resources for all First Nations in the long-term. The Tribunal's cease and desist the discriminatory practice order in the *Merit decision* is an injunction-like permanent order against Canada. The purpose of this order is to eliminate the mass removal of children from their respective Nations and to protect First Nations children, families, and Nations for generations to come. Finally, the Tribunal encourages the parties to negotiate as part of both long-term reform processes, creative, innovative, needs-based culturally appropriate solutions that reflect the different contexts and needs of the many diverse First Nations.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

January 29, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: January 29, 2025

Dates and Place of Hearing: April 2-3, 2024 and September 10-12, 2024

Ottawa, Ontario

Appearances:

David Taylor, Sarah Clarke and Kiana Saint-Macary , for counsel for First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Adam Williamson and Lacey Kassis , for counsel for Assembly of First Nations the Complainant

Brian Smith, for the Canadian Human Rights Commission

Dayna Anderson, Kevin Staska and Samantha Gergely , counsel for the Respondent

Darian Baskatawang , counsel for the Chiefs of Ontario, Interested Party

Meaghan Daniel , counsel for the Nishnawbe Aski Nation, Interested Party

Crystal Reeves and Dawn Johnson , counsel for First Nations Leadership Council, Interested Party

TAB 29

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2025 CHRT 80 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2025-08-20

File number: T1340/7008

Citation:

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2025 CHRT 80 (CanLII), <<https://canlii.ca/t/kg77g>>, retrieved on 2026-01-02

**Most recent
unfavourable
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Tribunal
canadien
des
Canadian Human
Rights Tribunal
droits de
la
personne

Citation: 2025 CHRT 80

Date: August 20, 2025

File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Nishnawbe Aski Nation

- and -

Amnesty International

Interested parties

Ruling

Members: Sophie Marchildon

Edward P. Lustig

Table of Contents

I. Context 1

II. Moving forward on a National FNCFS long-term reform concurrently and separately from Ontario 4

III. Analysis 14

A. The general orders in 2016 CHRT 2 16

B. The Tribunal's Dialogic approach 19

IV. Orders 31

V. Retention of jurisdiction 32

A. Case Management Conference Call (CMCC) 33

I. Context

[1] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [Merit Decision] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work

practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the Merit Decision. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties, (see 2023 CHRT 44, at paras 16-17).

[2] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings.

[3] The Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring, (see 2023 CHRT 44, at para 18).

[4] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation.

[5] The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program, including long-term reform orders focused on prevention, in 2022 CHRT 8. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors, (see 2023 CHRT 44, at para 19). The Tribunal, after partially rejecting an initial Settlement Agreement on compensation, approved a Final Settlement Agreement on compensation in 2023.

[6] The Tribunal encouraged the parties for years to resolve issues.

[7] On February 10, 2025, the Tribunal requested submissions from the parties on how best to proceed with what is still outstanding in the long-term phase of remedies in the best interests of First Nations children and in accordance with section 48.9(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA). In making its decision, the Tribunal has received and considered all of those submissions.

[8] The Tribunal has decided to move forward without further delay into the long-term phase of remedies both for Ontario and the National FNCFS long-term reform concurrently but separately. Given the orders below, which include a broad consultation component, and to avoid a situation similar to the one found in 2022 CHRT 41 concerning the parties interpretation of the Tribunal's final orders, the Tribunal finds it necessary to provide clarity on its 2016 CHRT 2 final order against Canada to: cease the discriminatory practices found and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision and cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle. This will be explained in detail below.

[9] This ruling does not decide the Consultation Motion brought by the Caring Society, which is broader in scope and will require a lengthier consultation process, as it encompasses Jordan's Principle long-term reform. The orders in this ruling are necessary to best inform the Tribunal on the appropriate next steps and are made in keeping with the Tribunal's previous rulings and section 48.9(1) of the CHRA, regardless of whether the Tribunal grants the Consultation Motion. If the Tribunal grants the motion, the National FNCFS long-term reform plan will assist the parties in their discussions. If the Tribunal does not grant the motion, or if Canada—being unwilling to return to negotiations—disagrees with the Tribunal, the Tribunal will nonetheless already have something tangible on which to rely and can move forward with the assistance of the parties outside the Consultation Motion proceedings. This serves as a safeguard to protect First Nations children from undue delays in receiving justice in the event that the Consultation Motion decision results in prolonged negotiation or further potential proceedings before the Courts. The Tribunal hopes that the parties and First Nations will recognize the well-intentioned and creative nature of the orders set out in this ruling.

[10] The Tribunal finds it important to elaborate on the purpose and intent of the dialogic approach, including what it is not intended to be. This will be explained below.

II. Moving forward on a National FNCFS long-term reform concurrently and separately from Ontario

[11] On February 10, 2025, the Tribunal wrote to the parties

The Tribunal signaled in 2018 CHRT 4 that it had entered the long-term remedial phase. The Tribunal ordered studies to inform the long-term remedies. The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the Decision. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief. (see 2018 CHRT 4 at, para. 385).

In 2022, the parties came back to this Tribunal asking for what they described as approximately 80% of the long-term remedial consent orders and that they would have a full reformed program by March 2023. This Tribunal issued its orders on consent of the parties in March 2022, nearly 3 years ago and has waited since and is still waiting.

2022 CHRT 8:

25. On December 31, 2021, the Parties announced that they had reached an Agreement-in-Principle on long-term reform. As part of that Agreement-in-Principle, the Parties committed to reforming the FNCFS Program by March 31, 2023, as well as improving compliance with and reforming Jordan's Principle.

Also, in the Agreement-in-Principle, the parties have agreed that the Reformed CFS Funding Approach will accommodate First Nations and FNCFS service providers experiencing exceptional circumstances, to be defined in the Final Settlement Agreement, which may require a longer transition to the Reformed CFS.

26. In addition, the terms of the consent order sought in this consent motion (see paras 1-9 under "orders sought") were annexed to the Agreement-in-Principle.

Following the execution of the Agreement-in-Principle, the Caring Society, the

AFN, and Canada agreed to seek this order as soon as possible.

VIII. Retention of Jurisdiction

[175] Pending a complete and final agreement on long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Consent Orders contained in this ruling. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief or as the Panel sees fit considering the upcoming evolution of this case.

The Tribunal has been flexible and patient, however, is seriously considering options to move forward with the long-term remedial phase in accordance with its mandate under the *CHRA*, its rulings and in the best interest of First Nations children. The dialogic approach was adopted to move things forward in this case with an emphasis on consultation and reconciliation; however, the dialogic approach is not meant to be waiting for years and years of delay without finality. The Tribunal as master of its own house, has the power to control its own process and not idly wait for parties to unilaterally decide when and how to come back to the Tribunal and how many years to wait before the Tribunal can close the long-term remedial phase chapter.

It is far better for children to complete the long-term remedial phase shortly rather than wait for long periods of time. Reform may take longer but can be projected with the assistance of the studies. The Panel gave guidance on long-term remedy on multiple occasions and recently in 2025 CHRT 6. The Panel continues to rely on this rationale.

The Panel is giving an opportunity for the parties to share their views on the above for the Panel's consideration before it decides next steps. This question does not include Jordan's Principle for the time being. The parties will respond by:

Caring Society, AFN, COO and NAN by February 24, 2025

Commission by March 3, 2025

Canada by March 17, 2025

[12] The parties filed submissions in response to the Tribunal's questions and those submissions are summarized below.

[13] The First Nations Child and Family Caring Society (the "Caring Society") writes further to the Panel's direction of February 10, 2025, and in response to Canada's submission of March 17, 2025, regarding the long-term reform phase of this human rights complaint. It has been over nine years since the Merits Decision and much has been accomplished.

[14] The Tribunal's retention of jurisdiction remains essential, at this time, to ensuring that

[14]Canada's discriminatory conduct is eradicated from child and family services and Jordan's Principle and is not repeated for future generations.

[15] The Caring Society submits that the First Nations-in-Assembly, the National Children's Chiefs Commission (the "NCCC"), and the Caring Society are ready, along with the research regarding First Nations child and family services ("FNCFS") and Jordan's Principle, to build, through dialogue with Canada, an enduring end to Canada's discriminatory conduct and ultimately resolve the complaint. Yet without Canada at the table, we cannot move forward. To this end, the Caring Society's view on the issues raised by the Panel in its February 10, 2025, letter centres on requiring Canada to consult on long-term reform solutions that are grounded in the evidence, which is now ready, with the co-complaints, and with the NCCC. Canada's suggestion that the Ontario Final Settlement Agreement form the basis for national long-term reform of FNCFS is wholly inappropriate, given that many of the terms therein were considered and ultimately rejected by First Nations outside of Ontario.

[16] The Caring Society submits that First Nations and the National Children's Chiefs Commission are ready.

[17] In October 2024, First Nations-in-Assembly passed resolutions directing a reset of work towards long-term reform, including the establishment of the NCCC and the inclusion of the Caring Society in FNCFS and Jordan's Principle negotiations and long-term reform. Since October 2024, the Caring Society has been working with technical experts across Canada to support the implementation of the direction of First Nations-in-Assembly,

[17]including collaboration with the NCCC when requested.

[18] The First Nations-in-Assembly resolutions set out clear direction for FNCFS reform,

[18]guided by the NCCC, that is informed by evidence and protects First Nations children

[18]from discrimination now and forever. Through collective decision-making and affirmed resolutions, First Nation leaders have called for the development of a national umbrella agreement, with regional agreements that take full account of the distinct circumstances, cultures and the inherent rights of the children and the First Nations they belong to. First Nations-in-Assembly were clear in their expectations of a nation-to-nation relationship with the government of Canada and have repeatedly insisted on the importance of Canada fulfilling its obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the honour of the Crown and asserting their right to Free, Prior and Informed Consent.

[19] The Caring Society supports the approach set forth by the First Nations-in-Assembly and is confident that if (and when) Canada returns to the table in good faith, consistent with direction of the First Nations-in-Assembly, First Nations children, youth and families will be protected from discrimination now and into the future. Canada's refusal to continue consultations and meaningfully engage in the dialogic approach to end discrimination for all First Nations children evidences the need for the Tribunal to maintain its jurisdiction in this regard.

[20] The Caring Society submits that the research is ready and the studies will be completed by March 31, 2025.

[21] The Caring Society shares the Panel's concerns regarding the delay in achieving long-term reform and recognizes that the Tribunal cannot indefinitely remain seized of this complaint. However, the Caring Society sees Canada's refusal to return to discussions with First Nations outside of Ontario and recent unilateral actions on Jordan's Principle, which appear to dramatically narrow the scope of the support Canada is willing to provide, as demonstrating that the progress since the Merits Decision is still not yet entrenched. As such, it is the Caring Society's position that a premature release of jurisdiction risks eroding the hard work undertaken over the last nine years, including from the lessons learned from First Nations outside of Ontario in their calls for a new approach to long-term reform.

[22] The Caring Society further submits that Canada's reliance on the Ontario Final Settlement Agreement (FSA) to inform national First Nations Child and Family Services (FNCFS) long-term reform contradicts the direction of First Nations rights holders and the express resolutions of the First Nations-in-Assembly. The Ontario FSA was rejected by First Nations outside of Ontario and cannot serve as the blueprint for national reform, as it fails to meet the goal of ending and preventing discrimination. Canada must be deterred from using the Ontario FSA as a national template, as it does not reflect the diverse needs of First Nations children, youth, and families across the country. While the Ontario FSA should proceed with care for those it impacts, national FNCFS long-term reform must advance concurrently through evidence-informed consultation in accordance with First Nations-in-Assembly guidance.

[23] Much of the work needed to meet these milestones has been completed. With Canada at the table, the Caring Society is confident that long-term reform can be achieved. Even if there are some disagreements on certain aspects of reform, the dialogic approach has assisted the Parties in the past, as evidenced by the approach taken to the Compensation Framework Order and the Revised Final Settlement Agreement on compensation.

[24] The Caring Society and the AFN Executive, supported by the NCCC, have a pathway for achieving long-term reform. Consultation regarding FNCFS and Jordan's Principle is essential to ensure First Nations children, youth and families benefit from a fulsome consultation process, bringing together the NCCC and First Nations, national and regional experts, the co-complaints and Canada in manner that upholds the principles of fairness and good faith negotiations and substantive equality.

[25] The Caring Society submits that now is the time to move swiftly and effectively to implement the dialogic approach now that the research, the experts and the First Nations in-Assembly have set the table for evidence-informed solutions for FNCFS and Jordan's Principle. First Nations and the NCCC is ready, the EAC is ready, the research is ready and so is the Caring Society. It is Canada that is the source of delay and requires encouragement from this Tribunal to make itself ready.

[26] The AFN is in agreement with the Caring Society's submission that the main obstacle to long-term reform is Canada's refusal to continue consultations, and meaningfully engage in the dialogic approach in relation to continuing to develop a national agreement on long-term reform of First Nations child and family services, with regional variations which substantively address the distinct circumstances, cultures, and inherent rights of First Nations children and families.

[27] The AFN has reviewed the National Children's Chiefs Commission's ("NCCC") correspondence requesting that Canada immediately re-engage with the NCCC, AFN Executive, and the Caring Society to complete negotiations of a long-term reform agreement. The AFN agrees with the NCCC's statement in its February 21, 2025, letter that a national long-term reform agreement is within reach and merely requires Canada to return to the negotiation table to work with the NCCC, the AFN Executive, and the Caring Society in good faith.

[28] The COO respects that the Chiefs in other regions were not agreeable to move ahead with the proposed reforms, as is their right. COO and NAN have been working closely together on long-term reform that suits the needs of First Nations in Ontario and as mandated by their respective Chiefs-in-Assembly to do so. Ontario Regional Chief Abram Benedict and Grand Chief Alvin Fiddler formally invited Canada to enter into negotiations to achieve reform to the FNCFS Program in Ontario. On December 30, 2024, Canada announced to COO and NAN it had received a mandate to negotiate with COO and NAN to implement the reforms contained in the rejected national agreement, but specifically in Ontario.

[29] A provisional Ontario Final Agreement and the Trilateral Agreement Respecting the

[29]1965 Agreement were reached on February 10, 2025, and will be the subject of ratification

[29]votes by the NAN Chiefs and Ontario Chiefs-in-Assembly on February 25 and 26, 2025, respectively.

[30] The COO submits that if the draft agreements are ratified by the NAN and Ontario Chiefs, the COO expects to bring a joint motion in March 2025 along with the NAN and Canada seeking a Tribunal order that the draft Ontario Final Agreement and the Trilateral Agreement Respecting the 1965 Agreement meet the Tribunal's prior orders and consequently that the Tribunal's jurisdiction over the long-term reform of the FNCFS Program in Ontario (but not Jordan's Principle) is ended.

[31] The NAN submits that with respect to the Panel's concerns regarding long-term reform, specifically the delay in reaching long-term reform through efforts towards consultation, The NAN advises that the Assembly of First Nations (AFN), Chiefs of Ontario (COO), NAN, and Canada reached a draft Final

Agreement on long-term reform in July 2024. In October 2024, NAN and COO each and separately held successful ratification votes on the draft Final Agreement. However, the draft Final Agreement was ultimately rejected by the First Nations in Assembly of the AFN in October 2024.

[32] While the AFN, by majority, rejected the draft Final Agreement, Chiefs in the Ontario region were largely supportive. The Ontario region Chiefs therefore directed the leadership within NAN and COO to pursue a regionalized version of the reforms contained in the draft Final Agreement.

[33] On December 30, 2024, Canada informed the NAN and the COO that it had a mandate to negotiate a regionalized version of the draft Final Settlement Agreement for long-term reform in Ontario only.

[34] The NAN submits that between December 30, 2024, and February 10, 2025, Canada, the NAN, and the COO negotiated a provisional Ontario Final Agreement (OFA) and a Trilateral Agreement Respecting the 1965 Agreement. These two draft agreements will be voted on in a Special Chiefs Assembly by NAN Chiefs on February 25, 2025, and by Special Chiefs Assembly by Ontario Chiefs on February 26, 2025. Without in any way pre-determining the will of the Chiefs in the above-noted Special Chiefs Assemblies; if so instructed, the NAN, the COO, and Canada intend to bring a joint motion to the Tribunal. The relief sought on this motion would be to end the Tribunal's jurisdiction over the long-term reform of the First Nation Child and Family Services Program in Ontario based on a new Ontario Final Agreement settlement.

[35] The NAN submits that as the Tribunal is aware, dating back to 2016, NAN has strongly advocated for the development of a remoteness quotient that would address the unique challenges faced by remote communities in the delivery of child and family services. This work has culminated in the development of a form of indexing for remoteness termed the Remoteness Quotient Adjustment Factor (RQAF). The RQAF indexing coupled with important terms around remoteness data collection and research represent gains that NAN, in partnership with the COO and Canada, has sought to preserve in the new proposed OFA. If so mandated by the Chiefs, it is NAN's intention to file materials with the Tribunal that elaborate on these significant reforms.

[36] The specific motion materials are the subject of discussions with the COO and Canada but will reflect the context and factual foundation of the work that has been done to conclude long-term reform in Ontario.

[37] Following the COO and the NAN's submissions above, and the resolutions from a majority of the Chiefs-in-Assembly in Ontario, the NAN and the COO brought a joint motion seeking the Tribunal's approval of a final settlement agreement for long-term reform in Ontario. Both the COO and the NAN request the joint motion to proceed expeditiously.

[38] The Commission's view is that it is respectfully the decision of the Tribunal to determine how to advance the long-term remedial stage. The Commission has not been involved in negotiations on long-term reform. Instead, the development of remedies on long-term reform was led by the First Nations bodies with ties to the First Nations children, families, and communities harmed by Canada's discriminatory practices. The Commission acknowledges the Tribunal's jurisdiction over this matter. As noted by the Tribunal, the parties entered the long-term remedial phase in 2018 and committed to reforming the FNCFS Program by March 2023. In the spirit of consultation and reconciliation, the Tribunal adopted the dialogic approach to provide the parties with an opportunity to engage in good faith negotiations to advance this matter while seeking direction from the Tribunal as needed.

[39] While being supportive of the dialogic approach, the Commission is concerned with the amount of time it has taken to achieve long-term reform of the FNCFS Program. As explained by the Federal Court, while negotiations are a way to realize the goal of reconciliation, good will in the negotiation process must be encouraged and fostered "before the passage of time makes an impact on those negotiations." The Commission agrees with the Tribunal's rationale that "[i]t is far better for children to complete the long-term remedial phase shortly rather than wait for long periods of time."

[40] As the Tribunal recently expressed, it has always hoped for a settlement on long-term reform by way of consent order requests by the parties. If this is not possible, however,

[40]the Tribunal stated that it “can make systemic long-term orders informed by the parties to eliminate the systemic discrimination found”.

[41] Canada submits that as the Tribunal is aware, Canada, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN) recently entered into an agreement to reform the FNCFS Program in Ontario (Ontario Final Agreement), as well as a Trilateral Agreement respecting the 1965 Agreement. These agreements were ratified by the NAN Chiefs and the Ontario Chiefs-in-Assembly on February 25 and 26, 2025 respectively. On March 7, 2025, the COO and the NAN filed a joint motion for approval of the Ontario Final Agreement, which Canada has supported.

[42] These agreements come after years of research, study, consultation and negotiation with the Assembly of First Nations (AFN), the First Nations Child and Family Caring Society of Canada (Caring Society), COO and NAN, all in an effort to secure agreement on the long-term reform of the FNCFS Program nationally, the specifics of which are set out in the Affidavit of Duncan Farthing-Nichol, filed on March 13, 2025, in response to the Caring Society’s consultation motion. These specifics include:

- completion of the December 31, 2021, Agreement in Principle;
- the funding and work of multiple committees and tables to provide advice and consider general and specific reform issues;
- regular meetings between the parties, including multiple full day negotiation meetings;
- Indigenous Services Canada’s (ISC) financial support of the development of research in a number of areas. This included funding, amongst other research, of contracts between the AFN and the Institute of Fiscal Studies and Democracy (IFSD), and between the Caring Society and IFSD, to inform the development of an alternative funding system.

[43] Canada submits that it is of note that during most of the period of consultation and negotiation on long-term reform of the FNCFS Program, the Caring Society, the AFN, COO and NAN were active participants in either consultations or negotiations with Canada. The Caring Society ceased their participation in negotiations between December 2023 and February 2024. The AFN did not participate in the negotiation of the Ontario specific agreement in January 2025 but was otherwise an active participant in the negotiations.

[44] With this context in mind, Canada respectfully submits that the best way to move forward with the long-term remedial phase is for the Tribunal to first consider the joint motion from COO and NAN respecting long-term reform of the FNCFS program in Ontario. This motion, if granted, would finally resolve and remedy all issues respecting the FNCFS Program in Ontario. For the benefit of First Nation children and families in Ontario, it is imperative that this motion proceed without delay. Further, the outcome of the joint motion is likely to inform the path forward in these proceedings, including the use of the dialogic approach and the completion of the long-term remedial phase outside of Ontario.

[45] Canada respectfully urges the Tribunal to honour the effort and urgency expressed by the COO and the NAN to address the joint motion. Canada also urges the Tribunal to facilitate the consideration of the Ontario Final Agreement, which is conditional on Tribunal approval, by placing the Caring Society’s consultation motion temporarily into abeyance. Consideration of national reform continues to be extremely important to Canada. It is Canada’s perspective that the Tribunal’s analysis of the Ontario Final Agreement will inform the next steps on national reform.

[46] Canada submits that the FNCFS Program today is very different than it was in 2016. Canada has done significant work and has implemented important reforms. During consultations and negotiations, Canada made considerable reforms to the Program in keeping with the parties’ recommendations and

the orders from this Tribunal (including on consent). Canada has and continues to implement this Tribunal's orders. Further, Canada has and continues to provide funding beyond the Tribunal's orders, including with respect to housing and First Nations Representative Services outside Ontario. Recipients who are eligible to receive funding under the FNCFS Program continue to benefit from these reforms. Approximately \$3.6 billion in funding was provided in 2023-2024, which stands in stark contrast with the \$676.8 million in funding spent on the FNCFS Program in 2015-2016, when this complaint was substantiated. Effectively Canada is more than honouring the Tribunal's orders. As such, Canada is asking the Tribunal to honour the urgency of the COO and the NAN's joint motion and focus first on Ontario Final Agreement. It is Canada's perspective that the work of final national reforms will benefit from and be informed by the Tribunal's review of the Ontario final reforms.

[47] Canada has since filed an amended joint OFA motion, specifying that it has joined COO and NAN as co-moving parties.

III. Analysis

[48] On January 26, 2016, this Panel rendered its decision on the merits (see, 2016 CHRT 2, <https://canlii.ca/t/gn2vg>, (Merit Decision). This Merit Decision was long awaited by First Nations Peoples and was positively received. This was the result of the enormous collective efforts of the parties especially, the co-complainants, the First Nations Child and Family Society (Caring Society) and the Assembly of First Nations (AFN) and the Canadian Human Rights Commission (Commission). The decision was publicly described as historic, landmark and groundbreaking. Canada accepted the decision through its Justice Minister Jody Wilson Raybould, as she then was. Minister Wilson Raybould made powerful public comments on the Tribunal's Merit Decision: "We believe that this decision is pointing us in the right direction, as a country, and we will not seek a judicial review of the decision. This is part of the new relationship and spirit of reconciliation that our government is committed to." <https://www.cbc.ca/news/politics/federal-government-not-appeal-children-reserves-1.3458969>

[49] In its 182 pages Merit Decision, the Tribunal made a whole array of findings including on: intergenerational trauma, international law, residential schools, the sixties scoop, substantive equality, and much more, in support of its orders.

[50] The Tribunal wrote: AANDC (now Indigenous Services Canada) is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[51] At, paragraph 482, the Tribunal found:

More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "...equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).

[52] In the Missing and Murdered Indigenous Women and Girls' November 1, 2017, interim report, *Interim Report the National Inquiry into Missing and Murdered Indigenous Women and Girls: Our Women and Girls are sacred*, made findings and recommendations based on the Tribunal's Merit Decision:

This legal case, as well as a substantial number of the reports we reviewed, recognizes strong links between the child welfare system and violence against Indigenous women and girls in Canada, at, page. 45.

(...)

The National Inquiry calls for:

immediate action for: Full compliance with the Canadian Human Rights Tribunal ruling (2016) that found that Canada was racially discriminating against First Nations children, at, pages 80- 81.

[53] The Tribunal takes judicial notice that Canada accepted the interim report. (See for example, at, https://search.open.canada.ca/qpnotes/record/wage%2CWAGE-2020-QP-00005?utm_source).

[54] While the stronger legally binding step from Canada was when the Justice Minister decided not to judicially review the Merit Decision, the recommendations from the MMIWG accepted by Canada reinforce Canada's public commitments.

[55] The United Nations Committee on Economic, Social and Cultural Rights (CESCR) recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 Decision. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding observations on the sixth periodic report of Canada, March 23, 2016, E/C.12/CAN/CO/6, paras 35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para 33, Exhibit L).

A. The general orders in 2016 CHRT 2

[56] The word **cease** found in the order is taken directly from the quasi-constitutional CHRA:

53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

[57] In 2018 CHRT 4, at, para 34, the Tribunal explicitly stated that section 53(2)(a) of the CHRA grants it jurisdiction to make a "cease and desist order", the Tribunal stated clearly:

[34] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease and desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 9 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [Action Travail des Femmes]]. In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future... (at page 1141).

[35] The Supreme Court also said in reference to the Order made by the Tribunal in that case:

...When confronted with such a case of "systemic discrimination", [as was the case with Canadian National Railway], it may be that the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met.

In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed, there is no prevention without some form of remedy... (at pages 1141 to 1142).

[36] The Court pointed out that:

Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose. (at page 1142)

[37] As in the *NCARR* case referred to above, the Panel is not dealing with employment equity issues however, there is nothing in the *CHRA* that restricts remedies under section 53 (2) (a) to employment equity issues. Similar to the analysis in *NCARR*, the Panel believes this is applicable to the case at hand.

[38] In fact as an example, the words in section 16 (1) of the *CHRA* are not earmarked for employment situations only:

Special programs

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group. (emphasis added).

[39] Moreover, the Federal Court of Canada in regards to remedies stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 40 [Grover], "[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the *Act* is structured so as to encourage this flexibility." (emphasis added).

[40] The Tribunal made extensive findings in 2016 CHRT 2 and provided very detailed reasons as to how it arrived at its findings. The Panel specifically mentioned that reform must address the findings in the Decision. This case is about underfunding, policy, authorities and, the National Program that were found to be discriminatory.(...) .

[41] Canada must accept that liability was found and that remedies flow from this finding. The Decision was not a recommendation; it is legally binding.

[42] To the same extent that funds must be provided to comply with Court decisions, funds must also flow from the Tribunal's Decision. Treasury Board decisions cannot be above the CHRA when it comes to expenses for liability.

[43] The Panel to date has not made orders prescribing specific amounts of funding. It has chosen to make orders flowing from its findings which were accepted by Canada.

[58] The Tribunal in 2019 CHRT 7, at paragraph 52 described this power as an injunction-like power.

[59] In *Canada (human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 (Taylor), the Supreme Court made findings on a Canadian Human Rights Tribunal decision which found the Western Guard Party had repeatedly sent telephonic hate messages directed at Jewish individuals—constituting a discriminatory practice under section 13(1) of the CHRA. The Tribunal ordered the messages to cease, effectively commanding the conduct stop immediately. To summarize Chief Justice Dickson's comments in the Taylor decision, the fact that the Act imposes no criminal sanction is particularly important. Section 13(1) is not aimed at punishing an individual for expression. Rather, in conjunction with s. 53(2)(a), it provides a remedy for discriminatory expression in the form of a cease and desist order. This is a remedial order, not a penal one. It is forward-looking and aimed at preventing the continuation of discriminatory practices. The order does not involve a fine or imprisonment, and does not attract a criminal record.

[60] This shows that a Tribunal's cease-order under section 53(2)(a) of the CHRA is treated the same as an injunction.

[61] The Tribunal made this order to cease the systemic discriminatory practices found as an order meant to protect First Nations and families for generations to come. It is a forward-looking order aimed at preventing the continuation of the discriminatory practice found and as mentioned multiple times in previous rulings in this case, prevent future practices to reoccur.

[62] Without this assurance of both a final and long-term order to cease the discriminatory practice and prevent its recurrence, respondents, especially the ones found liable in systemic cases, could cease their discriminatory practices until such time as the Tribunal no longer has jurisdiction and there would be no safeguard in place should the systemic discrimination start again years later. This would leave the victims of the systemic discrimination to start their case all over again. Such an unreasonable result is the opposite of access to justice. Moreover, it is the opposite of judicial economy and is undoubtedly unjust.

[63] The Tribunal confirms the final nature of the general orders in 2016 CHRT 2, at paragraph 481, to cease the discriminatory practice that are akin to an injunction:

AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle, (emphasis added).

[64] The Tribunal will next turn to the dialogic approach and examine its proper relationship to the final 2016 CHRT 2 orders explained above.

B. The Tribunal's Dialogic approach

[65] The Federal Court, in a judicial review initiated by Canada in this case, in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, in dismissing all of Canada's arguments, made important comments on the Tribunal's approach to remedies in this case:

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

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

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

[138] I agree with the Tribunal’s reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [Grover] where the task of determining “effective” remedies was characterized as demanding “innovation and flexibility on the part of the Tribunal...” (2016 CHRT 10 at para 15). Furthermore, I agree that “the [*CHRA*] is structured so as to encourage this flexibility” (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

...

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

...

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

(AG), 2007 FCA 268 at para 37 and *Hughes* 2010 at para 50 (Merit Decision at paras 468, 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined. (emphasis added)

...

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

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

[66] The Dialogic approach does not supplant a final “cease the discriminatory practice” order grounded in the evidence and the *CHRA*; rather, it operates as a mechanism for implementing such an order. The cease order in this matter, addressing systemic racial discrimination, is firmly grounded in the extensive evidentiary record underlying the Merit Decision and is issued pursuant to the Tribunal’s authority under the *CHRA*. Its purpose is to provide immediate and enduring protection to the victims of such discrimination and to ensure that the same or similar practices do not recur.

[67] The Tribunal affirms that this order has never been negotiable and was not issued on an interim basis. The “cease the discriminatory practices” order in 2016 CHRT 2 is final and binding. It is not subject to variation under the Dialogic approach, nor to derogation or abrogation by any future decision in these proceedings, or to amendment through any agreement between the parties. The cease order determines what the authors of the discrimination must do—stop—while the Dialogic approach addresses how compliance is to be achieved, and the orders implemented. There may be multiple effective methods for remedying discrimination, and flexibility is permitted in selecting among them, provided that the discrimination is fully and effectively addressed. What remains non-negotiable is the requirement to end systemic discrimination permanently.

[68] The dialogic approach is helpful in the phased remedy portion of this case; however, it cannot be elevated above final orders or be a means to stagnate long-term reform.

[69] In a recent case management conference, the Tribunal emphasized that the findings and orders in 2016 CHRT 2 are intended to be lasting. The Tribunal considers its general orders akin to an injunction to cease and desist the systemic racial discrimination identified and to prevent its recurrence, to constitute final orders that cannot subsequently be modified by this Panel or by future members.

[70] Moreover, while the Panel has no authority to bind Tribunal members in other cases, in this instance, the final orders found in 2016 CHRT 2 cannot be abrogated or amended by this Panel or by any new Panel members, if applicable.

[71] The Tribunal interpreted the principle of finality of its orders in 2022 CHRT 41 and continues to rely on the same reasoning:

[178] Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the Merit Decision to a finding that there never was racial discrimination and, therefore, no remedy is required. In the same vein, if evidence-based findings are made that victims/survivors have suffered and should be compensated, the parties cannot contract out or ask the Tribunal to amend its previous evidence-based findings and related orders to a finding that certain victims/survivors entitled by this Tribunal have not suffered and should no longer receive compensation.

[179] This is significantly different than asking the Tribunal to make a finding based on new evidence presented that demonstrates that some aspects of the discrimination found by this Tribunal has ceased in compliance with the injunction-like order made by this Panel to cease the discriminatory practice or that some amendment requests may enhance the Tribunal's previous orders to eliminate discrimination (2022 CHRT 8). The Tribunal's retention of jurisdiction is to ensure its orders are effectively implemented. This includes not narrowing its orders (see for example Jordan's Principle definition in 2017 CHRT 14) and eliminating the discrimination found in a complex nation-wide case involving First Nations from all regions. This is done through reporting, motions, clarification requests, etc. and findings are made on the evidence.

[72] However, as was also raised during the case management conference, numerous immediate and mid-term orders were intended to be superseded by sustainable long-term orders, with the assistance and input of the parties. The objective was to issue final long-term orders that would constitute an improvement upon the immediate orders, which had been made on the basis of the best evidence then available. The parties submitted that further studies and additional data collection were necessary to inform best practices in relation to long-term remedies.

[73] This Tribunal agreed and took a phased approach to the remedies in dividing them in categories: general orders in 2016 CHRT 2, immediate relief, mid-term relief, long-term relief, reform and compensation. This allowed the Tribunal to make immediate relief orders three months after the Merit Decision and in many subsequent decisions.

[74] This was to allow for change to occur immediately while studies and data collection would be completed. This was explained in previous rulings. This is how the dialogic approach was adopted by this Tribunal.

[75] The dialogic approach was never intended to continually revisit previous orders or to confine the proceedings within an endless cycle of interim measures. Its purpose is to facilitate the transition from immediate and mid-term orders based on the best evidence then available, to long-term, sustainable, culturally appropriate, evidence-based, orders, whether by consent or determination of the Tribunal (based on the parties' evidence and submissions), designed to benefit future generations. Moreover, long-term orders must be informed by First Nations' perspectives and guided by First Nations-led solutions.

[76] Furthermore, waiting months and years because some parties are not in agreement or do not want to negotiate anymore will not assist the Panel in determining the outstanding issues. The Tribunal has authority to move things forward to find meaningful, effective, sustainable, culturally appropriate, needs-based, long-term solutions for generations to come, that incorporate the distinct needs of First Nations without hearing directly from each one of them.

[77] The Tribunal cannot possibly hear directly from all 634 First Nations, organizations, experts, agencies etc. This was clear from the beginning of the proceedings and the dialogic approach did not change this:

This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties, (see 2023 CHRT 44, at paras. 16-17).

[78] The parties and the NCCC can consult them, and the parties can bring their perspectives to the Tribunal.

[79] In 2016 CHRT 11, at para 14, the Tribunal stated that: the Tribunal's remedial clarification and implementation process is not to be confused with a commission of inquiry or a forum for consultation with any and all interested parties.

[80] In 2022 CHRT 26, at paragraphs. 41-42 the Tribunal stated that:

[41] Moreover, in this wide-ranging case, impacting First Nations communities in Canada, the Tribunal has to consider that every First Nation community or organization could seek to intervene in these proceedings to share their unique knowledge, experience, culture and history. Would they have expertise to offer? Absolutely. However, it is impossible for all of the First Nations to join this case without halting the work of the Tribunal. The Tribunal is informed by three large organizations representing First Nations (AFN, COO, NAN) and an organization with expertise in child welfare and other services offered to First Nations children regardless of where they reside (Caring Society) to consult with First Nations by different means and bring their perspectives to these proceedings.

[42] Moreover, the Panel recognizes that the rights holders are First Nations people and First Nations communities and governments. While it is ideal to seek every Nations' perspective again, these proceedings are not a commission of inquiry, a truth and reconciliation commission or a forum for consultation. The Panel relies on the evidence, the parties in this case and the work that they do at the different committees such as the National Advisory Committee on Child Welfare (NAC), tables, forums and community consultations to inform its mid and long-term findings.

[81] In 2020 CHRT 31, at para 28, the Tribunal reiterated the same principle, quoting 2016 CHRT 11.

[82] In 2022 CHRT 8, the Tribunal on consent of the parties, made long-term relief orders focused on prevention and in line with the Merit Decision's findings on the need to reform and shift the approach from protection to prevention in the FNCFS Program. The Tribunal found that the Federal FNCFS Program focused on protection and created an incentive to remove Indigenous children from their families.

[83] Indeed, as this Tribunal already stated in these proceedings, this shift is necessary to stop the mass removal of children 2018 CHRT 4, at. paragraph 47:

[47] More importantly, this case is vital because it deals with mass removal of children. There is urgency to act and prioritize the elimination of the removal of children from their families and communities.

[84] The Tribunal finds that the parties' commitment to return to the Tribunal with a National FNCFS long-term agreement by end of 2023 is overdue. The Tribunal, at the time that it made the consent orders in 2022 CHRT 8, was urged by the parties to remove the part of its compensation order that ensured compensation was owed to the victims/survivors of the discrimination until the systemic discrimination had ended. This was a powerful deterrent, and it was upheld by the Federal Court. The

Tribunal given the prevention orders and, in foreseeing a long-term reform agreement in approximately a year's time, agreed to remove the ongoing aspect of the compensation and change it for a 2022 cut-off date.

[85] We are now in August 2025, and it is time for swift action.

[86] On January 29, 2025, the Tribunal made interim Jordan's Principle consultation orders. The parties opted for Tribunal-assisted mediation with a different Tribunal member than this Panel to resolve the 9 items. Six months later, the Tribunal is still waiting, and there is no indication of any agreement to date. The Tribunal was informed by Canada that the Tribunal-assisted mediation was terminated by the member on August 13, 2025, even though two outstanding items remained to be resolved under the Tribunal's orders. This mediation concerned interim orders under Jordan's Principle, not a complete long-term reform of the FNCFS Program or Jordan's Principle.

[87] Of note, in 2024, the AFN and Canada had discouraged the Tribunal to make interim Jordan's Principle orders given that a final Jordan's Principle long-term reform settlement agreement was forthcoming in March 2025. The Tribunal rejected that argument based on its extensive experience in these proceedings and the low probability of obtaining such an agreement in that time frame. The parties could not agree on the 9 interim Jordan's Principle items in the time frame anticipated by the AFN and Canada to arrive to a complete long-term reform agreement for Jordan's Principle.

[88] This is not to cast blame on anyone however, it does show that with the best of intentions, deadlines may not be met. This is consistent with many instances in these proceedings and informs the Tribunal's approach in this ruling.

[89] Consequently, the Tribunal finds it more efficient to complete the long-term reform of the FNCFS Program in the short-term and deal with the long-term reform of Jordan's Principle afterward, rather than attempting both together and risking long delays for each.

[90] During the conference management call on July 25, 2025, Member Lustig mentioned that the FNCFS Program will always be undergoing change and that there is no perfect solution. Further, he mentioned that there needs to be some compromise from all sides to arrive to an agreement.

[91] The Tribunal further clarifies that compromise is one that is reasonable and respects the rights of First Nations children and in line with the spirit of the Tribunal's findings and orders.

[92] Furthermore, at the case management conference call on July 25, 2025, the Tribunal had intended to discuss how best to advance long-term reform based on the parties' submissions and further discussion at the CMCC. However, due to time constraints, this discussion was postponed, and the Tribunal informed the parties that another CMCC would be scheduled for this purpose.

[93] Following the CMCC, the Tribunal deliberated on the parties' responses to its Jordan's Principle consultation orders and other emerging issues. The Tribunal was also informed that the mediation process between the parties had been terminated by the Tribunal mediator. Canada expressed its willingness to continue discussions with the parties to resolve two outstanding issues and indicated that it will provide an update in September 2025.

[94] The Tribunal's consent orders were issued in November 2024, with reasons to follow, aiming for an expeditious process for interim solutions and further orders.

[95] This delay is very concerning and informs the Tribunal on the proceedings moving forward.

[96] Five months from now, it will be the tenth anniversary of the Tribunal's decision on the merits.

[97] The Tribunal believes it is now time to proceed towards completion on FNCFS long-term reform and further CMCCs can be scheduled following the Tribunal's orders below.

[98] While the Tribunal fully agrees to proceed with the OFA, it does not agree to delay the National FNCFS long-term reform until the OFA motion has been determined. This would be unhelpful for several reasons. The OFA will not apply to other regions, and the Tribunal will not rely on the OFA to determine a National FNCFS long-term reform remedy. Therefore, delaying the National FNCFS long-term reform proceedings until the OFA has been decided is neither reasonable nor in the best interests of First Nations children and families outside Ontario, and it is inconsistent with the Tribunal's previous orders and with section 48.9(1) of the *CHRA*.

[99] The Tribunal directs that both the OFA and the National FNCFS long-term reform matters proceed concurrently. Should one be decided before the other, both matters will nonetheless have advanced and will proceed to hearings within a reasonably proximate timeframe.

[100] The Tribunal has received an unprecedented number of motions seeking interested party status. A recurring submission in these motions is that, if approved, the OFA may serve as a precedent for the National long-term reform. As noted above, the Tribunal has determined that this will not be the case, except insofar as certain general statements may be made regarding the Tribunal's previous orders, findings, process and approach to remedies.

[101] Another recurring submission is that Canada has refused to return to negotiations, resulting in a halt in the National long-term reform. While the Tribunal does not determine the multiple motions for interested party status in this ruling, the order issued in this ruling may nonetheless address aspects of the recurring submissions that have generated concern among numerous First Nations governments and organizations that are not parties to these proceedings.

[102] The broad consultation for long-term reform orders explained in 2018 CHRT 4 were directed at Canada.

[103] Moreover, the Caring Society submits that now is the time to move swiftly and effectively to implement the dialogic approach now that the research, the experts and the First Nations in-Assembly have set the table for evidence-informed solutions for the FNCFS. First Nations and the NCCC is ready, the EAC is ready, the studies will be completed by March 31, 2025, the research is ready and so is the Caring Society and much of the work needed to meet these milestones has been completed.

[104] In considering Canada's submissions above and its willingness to sign a National long-term agreement that was ultimately rejected, Canada must be taken to have a clear understanding of what long-term reform entails from its perspective.

[105] The ideal solution would be for an agreement on consent of all the parties if Canada returns to the table and such an agreement is possible. However, if not, the Tribunal cannot allow the parties to dictate a very slow pace in achieving finality on long-term reform contrary to the *CHRA*'s requirements and the best interest of First Nations children and families and their respective Nations.

[106] The Tribunal in the objective of avoiding the possibility of an imposed final solution, urges Canada to return to the table of negotiations to listen to the NCCC and the co-complainants and consider the research, the experts and the evidence-informed solutions for long-term reform of the FNCFS Program.

[107] If Canada refuses, the Tribunal, the other parties, the NCCC, the experts, the First Nations Chiefs, governments and organizations, should not be forced to wait till the OFA is completed to see what Canada decides to do for National long-term reform. Canada was ordered to complete long-term reform. Canada can agree to negotiate or not however, one thing that Canada cannot do is simply wait and let time go by. Therefore, should Canada refuse to return to the table to meet the NCCC and hear them out, the Tribunal will hear the co-complainants' evidence-based solutions representing the NCCC and multiple First Nations' viewpoints and Canada's and then choose between the long-term reform order requests.

[108] The Tribunal values all expert viewpoints of First Nations. However, the Tribunal is not and cannot invite them directly into these proceedings without creating a paralysis of these proceedings that would negatively affect the very children that are at the heart of these proceedings.

[109] The Tribunal has limited resources and is not mandated and does not have capacity to hear directly from every First Nation to make its orders. This is clearly expressed in considering the whole body of decisions rendered by this Tribunal in this case.

[110] The Tribunal finds that the Caring Society, the AFN and the NCCC, can aptly consult and gather relevant Nations specific, local and regional perspectives, other First Nations experts and First Nations organization's perspectives and incorporate them in their National long-term reform plan and requested orders for the Tribunal's consideration.

[111] Canada is encouraged to join them or to work on a separate plan informed by the recent evidence and recent studies and incorporate this in their National long-term reform plan and requested orders for the Tribunal's consideration.

[112] The Tribunal renders this creative and innovative decision, consistent with the *Grover* decision referred to above, in an effort to advance proceedings in the best interest of First Nations children and families in circumstances marked by limited collaboration among the parties, who have become increasingly adversarial, and in the face of unforeseen delays.

[113] The Tribunal, in issuing the following orders, establishes non-exhaustive parameters, which have been referenced in prior rulings. Long-term reform remedies shall:

1. Have lasting effects, be adequately resourced, and remain sustainable for present and future generations;
2. Be flexible and improve upon the Tribunal's previous orders;
3. Incorporate regional and local First Nations perspectives;
4. Be evidence-based, relying on the best currently available research and studies, without delay for additional studies;
5. Align with the spirit of the Tribunal's findings and rulings in a non-rigid manner;
6. Be First Nations-centered and respectful of their distinct needs and perspectives;
7. Be culturally appropriate, respect substantive equality, reflect the best interests of the child through an Indigenous lens and respect the specific needs of First Nations children and families;
8. Comply with domestic and international human rights, especially the Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples Act; and
9. Strive for excellence rather than perfection, without narrowing the Tribunal's findings and orders.

[114] The National FNCFS long-term reform plan and requested remedies outside Ontario shall include detailed deadlines and clear, measurable targets based on the most recent studies, evidence, and the diverse viewpoints of First Nations and other experts. The National long-term reform plan and requested remedies outside Ontario shall demonstrate how its implementation will clearly and effectively cease the systemic racial discrimination identified in the Tribunal's findings and prevent its recurrence for multiple generations. The National FNCFS long-term reform plan and requested remedies outside Ontario will focus on the long-term reform of the FNCFS currently before the Tribunal and described at length in its previous rulings. The National FNCFS long-term reform plan and requested remedies outside Ontario will improve upon the Tribunal's current orders, whether by mirroring them or by adopting different approaches, as supported by the evidence and First Nations' perspectives.

[115] The parties' commitment to this ruling and orders will inform the Tribunal on next steps and may impact the Tribunal's approach toward the other matters before it.

[116] The consultations shall be conducted efficiently and shall prioritize virtual meetings over in-person meetings in light of time and financial constraints.

[117] The Tribunal, in an effort to advance the matter, finds that, given the extended timeline for completing the remaining long-term orders originally intended to be finalized in 2023 as explained in 2022 CHRT 8 and the continued delays in these proceedings, there is a need for monthly reporting to the Tribunal. The parties engaged in the consultations shall provide the Tribunal with a monthly progress report.

IV. Orders

[118] Pursuant to section 48.9(1) and 53(2) of the CHRA, the dialogic approach, the Tribunal's previous orders and the Tribunal's retention of jurisdiction, the Tribunal orders:

[119] Canada shall inform the Tribunal, by August 29, 2025, whether it agrees to meet with the National Children's Chiefs Commission to discuss National FNCFS long-term reform outside Ontario, or whether it will reconsider meeting with the AFN and the Caring Society, on a voluntary basis, for the same purpose.

[120] Within four months of the date of this ruling (December 22, 2025), the Caring Society and the AFN shall consult, in accordance with the parameters set out above, with the National Children's Chiefs Commission, First Nations Chiefs, and other experts, including First Nations and First Nations organizations outside Ontario, as well as those that have filed interested party motions, to develop an evidence-based, comprehensive National FNCFS long-term reform plan and requested remedies outside Ontario. The completed plan, together with supporting affidavit evidence and materials, shall be filed with the Tribunal for its consideration.

[121] The consultations shall ensure that French speaking First Nations who desire to communicate and read materials in French will have the opportunity to do so.

[122] The determination of the OFA motion shall not be contingent upon the Tribunal's conclusion of its consideration of the National FNCFS long-term reform plan and requested remedies outside Ontario referred to in paragraph 120.

[123] The determination of the National FNCFS long-term reform plan and requested remedies outside Ontario shall not be contingent upon the Tribunal's conclusion of its consideration of the OFA motion for Ontario.

[124] The Caring Society, the AFN and Canada shall provide monthly updates to the Tribunal.

[125] Should Canada agree to participate in the consultations referred to in paragraph 120, it shall do so in accordance with the parameters set out above and the orders in this ruling. Where possible, a National FNCFS long-term reform plan and requested remedies outside Ontario, agreed to on consent by the Caring Society, the AFN, and Canada, together with supporting affidavit evidence and materials, shall be filed with the Tribunal at the conclusion of the consultations.

[126] If a National FNCFS long-term reform plan and requested remedies outside Ontario cannot be reached on consent, or if Canada declines to participate in the consultations, Canada shall, within four months of the date of this ruling (December 22, 2025), file with the Tribunal its evidence-based National plan on long-term reform remedies outside Ontario. The completed plan shall be supported by affidavit evidence and materials for the Tribunal's consideration.

[127] As already directed, the Ontario region and the OFA will have its separate hearing and parties in favour or opposing will have an opportunity to be heard. The Tribunal is aiming to hold a hearing in 2025, in the absence of unforeseen circumstances.

[128] The orders above do not include Jordan's Principle long-term reform.

V. Retention of jurisdiction

[129] Pending a complete and final agreement on long-term relief on consent or otherwise (a National long-term reform plan as ordered in this ruling) and consistent with the dialogic approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Orders contained in this ruling and all its previous orders except its compensation orders. The Panel will revisit its retention of jurisdiction once the parties have filed a National long-term reform plan as ordered in this ruling or a final and complete agreement on long-term reform or as the Panel sees fit considering the upcoming evolution of this case.

A. Case Management Conference Call (CMCC)

[130] The Tribunal will organize a CMCC shortly, to discuss the implementation of the Orders and answer any questions and/or clarifications, if necessary. The Tribunal will also discuss the long-term reform outside Ontario's hearing schedule. While the Tribunal will receive either a single National Plan filed on consent or two National FNFCS long-term reform plans with supporting evidence within approximately the same timeframe, the parties will have an opportunity to respond to the report(s). The schedule governing those submissions, any reply evidence, and the cross-examination of affiants and other witnesses if any, will be addressed before or at the CMCC.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

August 20, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: August 20, 2025

Written representations by:

David P. Taylor, Sarah Clarke, Kiana Saint-Macary and Robin McLeod, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Anshumala Juyal and Khizer Pervez, counsel for the Canadian Human Rights Commission

Paul Vickery, Sarah-Dawn Norris, Meg Jones, Dayna Anderson, Kevin Staska, Sarah Bird, Jon Khan, Alicia Dueck-Read and Aman Owais, counsel for the Attorney General of Canada, the Respondent

Maggie Wente, Jessie Stirling, Ashley Ash and Katelyn Johnstone, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer, Asha James, Shelby Percival and Meaghan Daniel, counsel for the Nishnawbe Aski Nation, Interested Party

TAB 30

Gitxaala v. British Columbia (Chief Gold Commissioner), 2025 BCCA 430 (CanLII)

Source: Court of Appeal for British Columbia

Date: 2025-12-05

File number: CA49428; CA49430

Citation:

Gitxaala v. British Columbia (Chief Gold Commissioner), 2025 BCCA 430 (CanLII),
<<https://canlii.ca/t/kgvvb>>, retrieved on 2026-01-02

**Most recent
unfavourable
mention**

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

*Gitxaala v.
British
Columbia
(Chief Gold
Commissioner),*

2025 BCCA
430

Date: 20251205

Dockets: CA49428, CA49430

Docket: CA49428

Between:

**Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the
Smgyigyem Gitxaala, and Gitxaala Nation**

Appellants

(Petitioners)

And

**Chief Gold Commissioner of British Columbia, Lieutenant Governor in
Council of British Columbia, Attorney General of British Columbia,
Christopher Ryan Paul and Oliver John Friesen**

Respondents

(Respondents)

And

**British Columbia Civil Liberties Association, First Nations Summit, Union of
B.C. Indian Chiefs, BC Assembly of First Nations, Cheona Metals Inc.,
B.C. Human Rights Commissioner and Association for Mineral Exploration
British Columbia**

Interveners

- and -

Docket: CA49430

Between:

**Ehattesaht First Nation and Chief Simon John in his capacity as Chief of the
Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation**

Appellants

(Petitioners)

And

**His Majesty the King in Right of British Columbia, as represented by the Chief
Gold Commissioner, Attorney General of British Columbia, Privateer Gold Ltd.,
Lieutenant Governor in Council of British Columbia, Andre Lyons,
Calvin Manahan, and Forest Crystal Ltd.**

Respondents

(Respondents)

And

**British Columbia Civil Liberties Association, First Nations Summit, Union of
B.C. Indian Chiefs, BC Assembly of First Nations, Cheona Metals Inc.,
B.C. Human Rights Commissioner and Association for Mineral Exploration
British Columbia**

Interveners

Before:

The
Honourable
Justice
Dickson

The
Honourable
Justice Iyer

The
Honourable
Justice
Riley

On appeal from: An Order of the Supreme Court of British Columbia, dated
September 26, 2023 (*Gitxaala v. British Columbia (Chief Gold Commissioner)*,
2023 BCSC 1680, Vancouver Dockets S219179 and S224680).

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Place and Date of Judgment:	Vancouver, British Columbia December 5, 2025

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Justice Iyer

Dissenting Reasons by:

The Honourable Justice Riley (page 75, para. 201)

Summary:

The appellants, the Gitxaala and Ehattesaht First Nations, challenged the mineral tenure system under the Mineral Tenure Act, R.S.B.C. 1996, c. 292. They alleged the operation of the automated online registry system permitting “free miners” to register claims to mineral rights on Crown land prior to consultation with affected First Nations was inconsistent with the duty to consult, the honour of the Crown, s. 3 of British Columbia’s Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44 (“Declaration Act”), and the rights recognized in the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP” or “Declaration”). The chambers judge found there was a breach of the duty to consult. However, he found the Declaration Act did not create justiciable rights and it did not implement UNDRIP into the laws of BC.

Majority (per Justice Dickson and Justice Iyer): Appeals allowed. The judge erred in adopting an unduly narrow approach to the legal effect of the Declaration Act and UNDRIP. Properly interpreted, the Declaration Act incorporates UNDRIP into the positive law of British Columbia with immediate legal effect. It affirms the interpretive lens through which BC laws must be viewed and the minimum standards against which they should be measured. The Crown has a statutory duty under s. 3 of the Declaration Act to consult and cooperate with the province’s Indigenous peoples in addressing inconsistencies between rights and standards in UNDRIP and the laws of BC. The issue of consistency between the Mineral Tenure Act and UNDRIP is a justiciable question. UNDRIP and the mineral claims regime are inconsistent.

Dissent (per Justice Riley): The Declaration Act gives the executive branch of government a statutory mandate and duty to take all measures necessary to bring British Columbia’s laws into alignment with UNDRIP, as an exercise in legislative reconciliation. Oversight and accountability for this law reform exercise is assigned to the legislative branch of government. Nowhere in the Declaration Act is the judicial branch invited or called upon to adjudicate claims of inconsistency between UNDRIP and British Columbia’s laws, and doing so would take the court outside of its proper role in our constitutional democracy.

Table of Contents	Paragraph Range
Overview	[1] - [8]
Background	[9] - [23]
The Parties	[9] - [13]
The Petitions	[14] - [19]
Mineral Tenure Act	[20] - [21]
The Hearing of the Petitions	[22] - [23]
Reasons for Judgment: 2023 BCSC 1680	[24] - [43]
Preliminary Matters	[25] - [27]
Section 35 Duty to Consult	[28] - [28]
Nature of the Breach of s. 35 Duty to Consult	[29] - [32]
UNDRIP and the Declaration Act	[33] - [41]
Remedy and Result	[42] - [43]
Post-Judgment Developments	[44] - [47]

On Appeal	[48] - [52]
Legal Framework and Context	[53] - [100]
International Law and Its Domestic Reception: General Principles	[53] - [63]
UNDRIP	[64] - [70]
Federal Declaration Act	[71] - [73]
Recent Jurisprudence Regarding the Effect of the Federal Declaration Act and UNDRIP	[74] - [83]
Declaration Act	[84] - [87]
Interpretation Act	[88] - [100]
Discussion	[101] - [198]
What is the Applicable Standard of Review?	[101] - [103]
What is the Proper Scope of the Appeal?	[104] - [111]
Provincial Respondents and Privateer Gold	[104] - [106]
Appellants and Interveners	[107] - [109]
Analysis	[110] - [111]
What is the Effect of the Declaration Act and UNDRIP on the Laws of British Columbia?	[112] - [163]
Appellants	[112] - [117]
Provincial Respondents	[118] - [121]
Analysis	[122] - [163]
Presumption of Conformity	[125] - [132]
Interpretation of the Declaration Act	[133] - [157]
The Declaration Act, the Honour of the Crown, and the Duty to Consult	[158] - [163]
Is the Question of Consistency Between the Mineral Claims Regime and the Declaration Act and UNDRIP Justiciable?	[164] - [182]
Appellants	[164] - [166]
Provincial Respondents	[167] - [169]
Analysis	[170] - [182]
What Relief, If Any, Should Be Granted on the Appeal?	[183] - [198]
Appellants	[183] - [185]
Respondents	[186] - [189]

Analysis	[190] - [198]
Closing Comment	[199] - [199]
Conclusion	[200] - [200]
Reasons for Judgment of the Honourable Justice Riley	
Introduction	[201] - [206]
Background	[207] - [213]
Analysis	[214] - [255]
Statutory Interpretation	[216] - [239]
Justiciability	[240] - [255]
Conclusion	[256] - [256]
Appendix A (UNDRIP)	

Reasons for Judgment of the Honourable Justice Dickson:

Overview

[1] This appeal concerns the interpretation and legal effect of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*Declaration Act*] and the *United Nations Declaration on the Rights of Indigenous Peoples*, U.N.G.A., 33rd Sess., U.N. Doc. A/RES/61/295 (2007) G.A. Res. 61/295 [*UNDRIP* or *Declaration*]. It requires us to interpret key provisions of the *Declaration Act* and to consider the justiciability of alleged inconsistencies between the rights recognized in the *Declaration Act* and *UNDRIP*, on the one hand, and, on the other, the operation of a provincial statutory scheme. Some of the issues raised come before this Court for the first time.

[2] *UNDRIP* is an international declaration of the individual and collective rights of the world's Indigenous peoples. Adopted by the United Nations General Assembly in 2007, it identifies “the urgent need to respect and promote the inherent rights of indigenous peoples” (preamble) and provides that the rights it recognizes “constitute the minimum standards for the survival, dignity and well-being of indigenous peoples of the world” (art. 43). Among other things, *UNDRIP* affirms that Indigenous peoples have the right to self-determination (art. 3), the right to self-government (art. 4), and rights to own, use and control their traditional lands, territories and resources (arts. 26, 27, 29, 32). It also encourages states to implement “all their obligations as they apply to indigenous peoples under international instruments” (preamble) and provides that states shall consult and cooperate in good faith with Indigenous peoples “in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources” (art. 32(2)).

[3] Canada initially voted against the General Assembly's adoption of *UNDRIP*. However, over time its position shifted, and in 2016 the federal government endorsed *UNDRIP* without qualification. Five years later, in 2021, Parliament enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 [*Federal Declaration Act*], which expresses a commitment to “fully adopt and implement the Declaration as the framework for reconciliation” and affirms *UNDRIP* as “a source for the interpretation of Canadian law” (preamble). Section 4 of the *Federal Declaration Act* states that its purposes are to “affirm the Declaration as a universal international human rights instrument with application in Canadian law; and provide a framework for the Government of Canada's implementation of the Declaration”.

[4] British Columbia was the first Canadian jurisdiction to enact a statute incorporating *UNDRIP* into domestic law. Passed in 2019, the *Declaration Act* includes within its purposes to “affirm the application of the Declaration to the laws of British Columbia” and “contribute to the implementation of the Declaration” (ss. 2(a) and (b)). It obliges the government and government actors in consultation and cooperation with the province’s Indigenous peoples to “take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration” (s. 3), “prepare and implement an action plan to achieve the objectives of the Declaration” (s. 4), and report annually to the Legislature on progress made toward implementing the measures and achieving the goals of the action plan (s. 5).

[5] The appellant First Nations assert Aboriginal and Indigenous rights in and title to certain territories in British Columbia. Following the grant of mineral claims in those territories, they brought petitions below challenging the mineral tenure system then operated under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292. The appellants contended that the operation of an automated online registry permitting “free miners” to register claims to mineral rights on Crown land prior to consultation with affected First Nations (the “Mineral Claims Regime”) was inconsistent with the Crown’s duties under s. 35 of the *Constitution Act, 1982* [“*Constitution Act*”], the honour of the Crown, s. 3 of the *Declaration Act*, and their rights recognized in *UNDRIP* and the *Declaration Act*. Together with other relief, they sought declarations with respect to the alleged inconsistencies.

[6] The chambers judge accepted that the Crown’s s. 35 duty to consult was triggered by the grant of mineral claims based on the test established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]. He held that the absence of a system for pre-registration consultation breached that duty to consult. As a result, the judge granted related declarations, but he suspended them to allow for the design and implementation of a system providing for consultation prior to issuance of mineral claims. However, he concluded that, while the *Declaration Act* contemplates a forward-looking process of consultation and cooperation to address the objectives of *UNDRIP*, it does not “implement” *UNDRIP* into British Columbia law, and he stated that *UNDRIP* “remains a non-binding international instrument”. He also concluded that s. 3 of the *Declaration Act* “does not create justiciable rights”; therefore, he declined to adjudicate the question of whether the Mineral Claims Regime was consistent with *UNDRIP*. In the result, he dismissed the appellants’ claims for related declaratory relief, from which orders they appeal.

[7] In my view, the judge adopted an unduly narrow approach to the interpretation and legal effect of the *Declaration Act* and *UNDRIP*. Properly interpreted, the *Declaration Act* incorporates *UNDRIP* into the positive law of British Columbia with immediate legal effect. This does not mean that s. 2(a) of the *Declaration Act* creates or confers new substantive legal rights or obligations arising from *UNDRIP*. Rather, it affirms the interpretive lens through which British Columbia laws must be viewed and the minimum standards against which they are to be measured. In addition, s. 3 imposes a statutory duty on the Crown to consult and cooperate with the province’s Indigenous peoples in addressing unresolved inconsistencies between *UNDRIP* rights and standards, on the one hand, and, on the other, the laws of British Columbia. The consistency question raised by the appellants is justiciable, and the answer is obvious: *UNDRIP* and the Mineral Claims Regime are inconsistent. The Crown must take that inconsistency into account in discharging its consultative duties with respect to the Mineral Claims Regime.

[8] For these reasons and those that follow, I would allow the appeal and grant declarations in the form outlined below.

Background

The Parties

[9] The judge determined two separate petitions brought by two different First Nations following a joint hearing.

[10] The petitioners in the first proceeding were Sm’ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the Smgyigyem Gitxaala, and Gitxaala Nation (“Gitxaala”). Gitxaala assert Aboriginal and Indigenous rights in and title to traditional territory located south of Prince Rupert, including Banks Island. The respondents in the first proceeding were the Chief Gold Commissioner of British Columbia (“CGC”), the Lieutenant Governor in Council of British Columbia (“LGIC”), and the Attorney General of British Columbia (“AGBC”), together with holders of certain mineral claims.

[11] The petitioners in the second proceeding were Ehattesaht First Nation and Chief Simon John in his capacity as Chief of Ehattesaht First Nation on behalf of all members of Ehattesaht First Nation (“Ehattesaht”). Ehattesaht assert Aboriginal and Indigenous rights in and title to traditional territory located northwest of Tofino, including the Nomash and Zeballos River watersheds. The respondents in the second proceeding were His Majesty the King in Right of British Columbia (the “Crown”) as represented by the CGC, the AGBC, and the LGIC, together with holders of certain mineral claims.

[12] Eight intervenors participated in the joint hearing, including the Human Rights Commissioner for British Columbia (“BCHRC”).

[13] In this Court, the appellants are Gitxaala and Ehattesaht. The respondents are the CGC, the AGBC, the LGIC, the Crown (together, the “provincial respondents”), and two registered mineral claim holders, Privateer Gold Ltd. and Forest Crystals Ltd., as well as two Forest Crystals directors, Calvin Manahan and Andre Lyons. There are also several interveners, including the BCHRC, BC Civil Liberties Association, First Nations Summit, Union of BC Indian Chiefs, and BC Assembly of First Nations (“BCCLA & FNLC”), Cheona Metals Inc. (“Cheona Metals”), and the Association for Mineral Exploration British Columbia (“AME”).

The Petitions

[14] Gitxaala and Ehattesaht brought similar, though not identical, challenges to the operation of the Mineral Claims Regime, or, alternatively, the validity of the underlying legislation. Gitxaala filed their petition in October 2021. Ehattesaht filed their petition in June 2022.

[15] In their Further Amended Petition, Gitxaala sought declarations in relation to the duty to consult, the honour of the Crown, and the constitutional validity of s. 4 of the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004, together with orders quashing specified mineral claims and injunctive relief in connection with the operation of the Mineral Claims Regime. Gitxaala also sought “for the purposes of, or pursuant to, section 3 of the [*Declaration Act*]”, declarations that the Mineral Claims Regime’s operation “is not consistent” with *UNDRIP*, and the Crown “has a statutory duty to consult and cooperate with Gitxaala concerning measures necessary to ensure the laws of British Columbia, as they relate to mineral titles within Title Lands, are consistent with the Declaration”.

[16] In their Further Amended Petition, Ehattesaht similarly sought declarations in relation to the duty to consult, the honour of the Crown, the validity and applicability of aspects of the statutory scheme, orders quashing specified mineral claims, and injunctive relief. As to *UNDRIP* and the *Declaration Act*, Ehattesaht sought declarations that the operation of the Mineral Claims Regime is inapplicable to the extent it operates without consultation or consent in a manner contrary to “the indigenous rights of Ehattesaht and/or First Nations recognized in *UNDRIP* and [the *Declaration Act*]”.

[17] Both petitioners described the statutory basis for the Mineral Claims Regime, the way in which it operated, and its alleged adverse impacts on their rights and title. Both pleaded that the Crown had failed to fulfil its duty to consult prior to the grant of mineral claims, and both relied on common law precedents and principles relating to the honour of the Crown and the duty to consult, the *Interpretation Act*, R.S.B.C. 1996, c. 238, the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, the *Declaration Act*, and *UNDRIP*.

[18] The provincial respondents denied that the registration of a mineral claim triggered a duty to consult and pleaded that the Crown had acted honourably. They also pleaded that the *Declaration Act* provides a process for implementation of *UNDRIP*, but it does not give *UNDRIP* independent legal force, and that, while it may be used as an interpretive aid, *UNDRIP* cannot be used to amend legislation or the *Haida* test.

[19] To the extent relevant to their defences, the individual respondents opposed the relief sought in the petitioners' Further Amended Petitions.

Mineral Tenure Act

[20] The *Mineral Tenure Act* regime in British Columbia is rooted in colonial legislation first codified in the *Gold Fields Act*, 1859. That Act introduced the concept of the “free miners” and “free entry” system predicated on the notion that the Crown owns all lands within a colony’s territorial boundaries that have not otherwise been devolved, granted or sold and that all subsurface minerals vest in the Crown. Under the free entry system, “free miners” were given license to roam the colony and physically stake claims, at which point rights accrued to the holder of the claim.

[21] Over the years, British Columbia modified and amended its mineral tenure legislation. In 2004, it adopted a system for online registration of mineral claims under the *Mineral Tenure Act*. When the appellants filed their petitions in 2021 and 2022, the draft action plan prepared under s. 4 of the *Declaration Act* did not include reform of the *Mineral Tenure Act*. The government added it to the draft action plan after the petitions were filed.

The Hearing of the Petitions

[22] The parties advanced a wide variety of arguments at the hearing in general alignment with their pleadings. The arguments focused on the interpretation and legal effects of s. 35 of the *Constitution Act*, the *Declaration Act*, and *UNDRIP* in relation to the operation of the Mineral Claims Regime.

[23] Neither the petitioners nor the provincial respondents argued that s. 2(a) of the *Declaration Act*, in and of itself, gives *UNDRIP* the full force and effect of an enactment in British Columbia law such that it can create or confer substantive rights on Indigenous peoples and impose obligations on the government. However, the BCHRC submitted that s. 2(a) affirms the application of *UNDRIP* to the laws of British Columbia, and thereby implements it, which means that *UNDRIP* now has the full force and effect of law in British Columbia.

Reasons for Judgment: 2023 BCSC 1680

[24] The judge began his reasons by summarizing the petitioners' claims, the parties' positions, and his key findings. As to the latter, he stated that he had concluded the Mineral Claims Regime triggered a duty to consult flowing from s. 35 of the *Constitution Act*; s. 2 of the *Declaration Act* “does not implement *UNDRIP* into the domestic law of BC”; s. 3 of the *Declaration Act* “does not create justiciable rights”; the petitioners “are not entitled to any relief under [the *Declaration Act*] or *UNDRIP*”; and, the proper remedy was a declaration that the province owes a duty to consult. The implementation of the remedy was suspended for 18 months to allow for consultation and the design of a system that allows for consultation: at paras. 14–15.

Preliminary Matters

[25] The judge reviewed several salient legal concepts and listed the issues for determination: at paras. 16, 19. He also dealt with various procedural matters, including the proper mode of proceeding and the nature of the administrative decision under review.

[26] Regarding the nature of the decision under review, the judge stated that the issue was “the CGC’s ongoing decision not to implement a system that provides for consultation prior to the issuance of mineral claims”, and this “impugned decision-making ... can be categorized as a series of ‘non-decisions’”: at paras. 76–77. He found the petitioners were seeking “judicial review of a series of non-decisions”, which presented an “awkward fit” for a judicial review, although he accepted the provincial respondents’ position that “the petitioners’ claims should be adjudicated, in full, on the basis of [their] petitions”: at paras. 78–79. He went on to state that he was proceeding “on the basis that the petitioners question the series of higher-level decisions (or non-decisions) that have the effect of allowing the registration of mineral claims without consultation”: at para. 97. He also stated that whether a duty to consult arises is a question of law to be reviewed on a standard of correctness: at para. 98.

[27] After resolving other procedural and evidentiary matters, the judge identified the core substantive issue, namely, whether the provincial respondents were correct in asserting that the granting of a mineral claim does not trigger a duty to consult: at para. 248. For purposes of analysis, he posed three related questions: i) is there a duty to consult under s. 35 of the *Constitution Act* and the *Haida* test?; ii) where does the infirmity lie?; and iii) does a duty arise under the *Declaration Act*? at para. 251. Then he dealt with each question in turn.

Section 35 Duty to Consult

[28] The judge rejected the petitioners’ submission that the Mineral Claims Regime interfered with their laws, governance and management of their territories with adverse impacts that gave rise to a duty to consult. He stated that to trigger the duty to consult, “the impugned Crown conduct must in some way impede the petitioners’ ability to govern their land in the future, when title is established”, but that the petitioners’ submission on the point was “only that their ability to govern at present is interfered with”: at para. 306. He stated this “is not the type of adverse impact contemplated by the *Haida* Test”: at para. 306. However, he found that allowing mineral claims without consultation created adverse impacts on the petitioners’ Aboriginal rights in connection with their cultural and spiritual beliefs, and adverse physical and economic impacts on the Aboriginal rights and title of First Nations generally. Accordingly, he held, a s. 35 duty to consult was triggered under the *Haida* test, and the province was in breach of that duty to consult: at paras. 320–330, 389–402.

Nature of the Breach of s. 35 Duty to Consult

[29] The judge found that the *Mineral Tenure Act* is constitutionally valid because it provides the necessary authority and discretion to the CGC to institute a pre-registration consultation process. That being so, he concluded that the failure lay at the CGC level: at paras. 405–406.

[30] In reaching his conclusion, the judge stated that he construed the *Mineral Tenure Act* using *UNDRIP* as an interpretive aid under s. 8.1 of the *Interpretation Act*.

[31] Section 8.1 provides that “every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35”, and that “every Act and regulation must be construed as being consistent with the Declaration”. The judge described s. 8.1 as “an umbrella that covers the entirety of the process”: at para. 417. He stated that “if there are two (or more) possibly valid interpretations of the [*Mineral Tenure Act*], then I am to construe the Act in a manner that is consistent with *UNDRIP* (i.e., that protects Indigenous rights)”: at para. 416. Then he stated that “the application of s. 8.1 in this case does no more, and no less, than provide that overlay”, and he was obliged to “construe [the *Mineral Tenure Act*] in a manner that upholds the Aboriginal rights enshrined in s. 35 and set out in *UNDRIP*”: at para. 418. He went on to conclude that “where there is a question in the interpretation of [the *Mineral Tenure Act*] regarding the breadth of the CGC’s authority, I construe that issue liberally, such that the legislation upholds Indigenous rights” and “[t]he logical end-point of that analysis ... is that the CGC has been improperly implementing [the *Mineral Tenure Act*] by not providing for pre-registration consultation”: at para. 418.

[32] After finding that the CGC had breached the s. 35 duty to consult, the judge turned to whether to grant the petitioners' applications for "a declaration that the current process for granting mineral titles under the [*Mineral Tenure Act*] is inconsistent with *UNDRIP*": at para. 432. This required him to consider "the proper interpretation of [the *Declaration Act*]": at para. 433.

UNDRIP and the Declaration Act

[33] The judge began this aspect of his analysis with a review of the relevant background, including the General Assembly's adoption of *UNDRIP*, Canada's endorsement of *UNDRIP*, and British Columbia's enactment of the *Declaration Act* and s. 8.1 of the *Interpretation Act*: at paras. 436–441. With that background in mind, he asked: a) did the *Declaration Act* implement *UNDRIP* into the domestic law of British Columbia?; and b) does s. 3 of the *Declaration Act* raise justiciable questions of law, and, if so, what are they?: at para. 442.

[34] Under the heading "Did [the *Declaration Act*] "implement" the Declaration into the domestic laws of British Columbia?", the judge stated that a non-binding international instrument endorsed by the executive branch does not become a binding source of domestic law in Canada unless it is implemented through legislation: at para. 444, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69, 1999 CanLII 699. After explaining why by quoting from the minority discussion in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [Nevsun] on implementing treaties, he addressed the BCHRC's position, which he understood to be that s. 2(a) of the *Declaration Act* "implements" *UNDRIP* in the sense that "it has the same legal effect as a provincial or federal enactment. It can create rights for citizens, impose obligations on the government, and create causes of action... [and]... now has the full force and effect of law in British Columbia": at para. 450.

[35] The judge rejected this conception of the legal effect of the *Declaration Act* and *UNDRIP*. Based on its "broad and imprecise language", he described s. 2(a) as a purpose statement, and not a substantive provision that creates rights or imposes obligations: at paras. 457–463. In support of his view, the judge contrasted the language of s. 2(a) with that of other treaty-implementing legislation and stated that the phrase "to contribute to the implementation" of *UNDRIP* in s. 2(b) indicates that "implementation" was not accomplished: at para. 464. He also emphasized the prospective nature of the obligations under ss. 4 and 5, and found that "a correct, purposive interpretation of [the *Declaration Act*] does not lead to the conclusion that [the *Declaration Act*] 'implemented' *UNDRIP* into domestic law": at para. 466. Rather, he stated, the *Declaration Act* "contemplates a process wherein the province, "in consultation and cooperation with the Indigenous peoples in British Columbia' will prepare, and then carry out, an action plan to address the objectives of *UNDRIP*": at para. 466.

[36] Further, the judge stated the context surrounding the passage of the *Declaration Act* included statements by the Minister of Indigenous Relations and Reconciliation that the *Declaration Act* would "not in and of itself, give the UN declaration legal force and effect" and aligning domestic laws with *UNDRIP* would be "generational work": at para. 467. He acknowledged the human rights character of the *Declaration Act* and requirements of s. 8.1(3) of the *Interpretation Act*, but he found "these factors do not overcome the fact that s. 2(a) is a broad statement of purpose that cannot, on its own, produce substantive outcomes": at para. 469.

[37] In sum, the judge concluded:

[470] ... s. 2(a) of [the *Declaration Act*] does not implement *UNDRIP* into the domestic law of British Columbia. This interpretation is consistent with the characterization of s. 2(a) as a purpose statement as well as the legislation's purpose and context. As such, *UNDRIP* remains a non-binding international instrument.

[38] Having answered “no” to the first question, the judge moved on to the second question. Under the heading “Does s. 3 of [the *Declaration Act*] raise justiciable questions of law?”, he asked whether, considering its text, context and purpose, s. 3 “creates justiciable rights”: at para. 471. He summarized the governing principles regarding justiciability and outlined the parties’ competing positions on the issue. Then he conducted his justiciability analysis.

[39] As a starting point, the judge accepted that in isolation, “the courts have the institutional capacity and legitimacy to determine whether the laws of British Columbia are ‘consistent’ with the rights set out in *UNDRIP*”, and, in that sense, “the question of ‘consistency’ is justiciable”: at para. 485. However, he concluded that the consistency between British Columbia laws and *UNDRIP* rights is nevertheless non-justiciable:

[486] ... while s. 3 may raise a justiciable question, it does not necessarily follow that the section either commands or invites judicial intervention. Put differently, notwithstanding my conclusion that “consistency” is justiciable, I must still determine whether s. 3 calls on the courts to adjudicate the question of consistency.

[487] I conclude that s. 3 does not have that effect...

[40] The judge gave two reasons for his view that s. 3 of the *Declaration Act* does not “call upon the courts to adjudicate the issue of consistency”: i) s. 3 does not impose a requirement of consistency; and ii) s. 3 allows for the Indigenous peoples of the province instead of the courts to be involved in determining whether British Columbia laws are consistent with *UNDRIP*:

[488] First, s. 3 does not impose a requirement of consistency. As noted, s. 3 uses imperative language, specifically the term “must.” However, the word “must” is used in connection with the phrase “take all measures necessary.” No imperative language is used in connection with the phrase “consistency.” This, in my view, indicates that s. 3 was not intended to invoke the courts to adjudicate every instance where the laws of BC may be inconsistent with *UNDRIP*.

[489] Second, s. 3 allows for the Indigenous peoples of BC, instead of the courts, to be involved in the determination of whether the province’s laws are consistent with *UNDRIP*. Section 3 starts with the phrase “In consultation with the Indigenous peoples of British Columbia”. I consider that placement and wording to be important. There must be cooperation and consultation in determining whether the duties imposed by s. 3 are satisfied. It is not for the court to intervene and unilaterally determine what is meant by this provision. The provision contemplates ongoing cooperation between the government and the Indigenous peoples of BC to determine which of our laws are inconsistent with *UNDRIP*.

[Emphasis added.]

[41] Based on the foregoing analysis, the judge concluded as follows:

[490] Therefore, I find that s. 3 does not call upon the courts to adjudicate the issue of consistency. I do note, however, that s. 3 obligates the province to consult and cooperate with the Indigenous peoples of British Columbia. It may be the case that failure to do so would constitute a justiciable breach of the government’s obligations. However, that question does not arise on this hearing and will be for a future court to decide.

[491] As a final point, I note that the parties agree that the question of what is meant by “all measures necessary” is not a justiciable question. Because there is no dispute on this issue, I accede to the parties’ position. I do not suggest that I have determined the issue.

Remedy and Result

[42] With respect to remedy, the judge declared that the Crown owes a s. 35 duty to consult prior to issuing mineral claims under the *Mineral Tenure Act*, and the CGC's conduct in establishing an online system allowing for automatic registration of mineral claims without creating a system for consultation breached that duty. As noted, he suspended the latter declaration for 18 months to allow for the design and implementation of a regime that provides for consultation prior to the issuance of mineral claims. He dismissed the petitioners' other claims for relief, including their claims for declarations of inconsistency between the Mineral Claims Regime and the Indigenous rights recognized in the *Declaration Act* and *UNDRIP*.

[43] In his final summary, the judge stated that he found "s. 2 does not implement *UNDRIP* into the domestic law of BC" and "s. 3 does not create justiciable rights": at para. 559. The orders that he made provide, in relevant part:

[Gitxaala Petition]

4. The following claims for relief sought by the Petitioners are dismissed:

- a) a declaration that, for the purposes of, or pursuant to, section 3 of [the *Declaration Act*] the current system for granting mineral claims is inconsistent with [*UNDRIP*];
- b) a declaration that, for the purposes of, or pursuant to, section 3 of [the *Declaration Act*], the Crown has a statutory duty to consult and cooperate with the Petitioners concerning measures necessary to ensure the laws of British Columbia, as they relate to mineral titles within the territory in which the Petitioners assert Aboriginal rights and title under section 35 of the *Constitution Act, 1982*, are consistent with [*UNDRIP*].

[Ehattesaht Petition]

4. The following claims for relief sought by the Petitioners are dismissed:

- a) A declaration that the current system for granting mineral claims is inconsistent with [*UNDRIP*] and [the *Declaration Act*];

Post-Judgment Developments

[44] The judge released his reasons for judgment on September 26, 2023. Shortly thereafter, the appellants appealed the orders dismissing their applications for *UNDRIP*-related declaratory relief, together with those dismissing their applications for injunctions and quashing orders. The provincial respondents did not appeal or cross appeal the declarations regarding the s. 35 duty to consult and related breaches of duty.

[45] In February 2024, the Supreme Court of Canada released its reasons for judgment in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [First Nations Families Act Reference]. As discussed below, the Court stated in the *First Nations Families Act Reference* that *UNDRIP* "has been incorporated into the country's positive law" by the *Federal Declaration Act*: at para. 4. Additional judgments have since touched on the domestic effect of *UNDRIP*, including *R. c. Montour*, 2023 QCCS 4154; *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10; and *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319 [Kebaowek].

[46] In March and July of 2024, the LGIC made orders under s. 7 of the *Environment and Land Use Act*, R.S.B.C. 1996, c. 117, preventing new mineral claim registrations and deferring mining activity under existing claims in Gitxaala and Ehattesaht territories. As a result, the appellants abandoned their appeals of the orders dismissing the quashing and injunctive relief previously sought.

[47] In March 2025, the Mineral Claims Regime was replaced with a new mineral claims consultation framework: see Government of British Columbia, “Mineral Tenure Act Reform”, online: Government of British Columbia <<https://engage.gov.bc.ca/mtareform/>>. These changes were evidently made in response to the lower court ruling, and they came into effect after the hearing of the appeal. They are not germane to the issues on appeal, but important to note as part of the narrative.

On Appeal

[48] The parties rely on many of the arguments they made below, with refinements and updates in response to recent developments. Those positions are discussed in detail in the analysis that follows.

[49] The BCCLA & FNLC, Cheona Metals, and the BCHRC generally support the appellants’ position. In doing so, the BCCLA & FNLC emphasize the interpretive significance of *UNDRIP* in light of s. 8.1(3) of the *Interpretation Act*. Cheona Metals emphasizes the significance of the presumption of conformity, customary international law, and international treaties and conventions in domestic law. The BCHRC emphasizes the human rights character of the *Declaration Act* and submits that s. 2(a) of the *Declaration Act* and article 40 of *UNDRIP* make the question of consistency between domestic laws and *UNDRIP* justiciable, as is the question of “all measures necessary” under s. 3 of the *Declaration Act*.

[50] To varying extents, Forest Crystals and its directors, Privateer Gold and AME generally support the position of the provincial respondents. Forest Crystals and its directors emphasize that their mineral activities were irrelevant to the live issues and ask that we encourage all concerned not to draw third parties into complex litigation of this sort unnecessarily. Privateer Gold submits that the essential question below was whether the Crown has a duty to consult, which was resolved, and, therefore, the appeal is moot. The AME emphasizes the importance of mining to British Columbia’s economy, submits that the judge interpreted the *Declaration Act* correctly, and says that reconciliation is most effectively achieved through non-court processes such as those envisioned by the *Declaration Act*.

[51] Broadly speaking, the issues that emerge for determination are:

- a) What is the applicable standard of review?
- b) What is the proper scope of the appeal?
- c) What is the effect of the *Declaration Act* and *UNDRIP* on the laws of British Columbia?
- d) Is the question of consistency between the Mineral Claims Regime and the *Declaration Act* and *UNDRIP* justiciable?
- e) What relief, if any, should be granted on appeal?

[52] To explain my conclusions on these issues I will provide an overview of the legal framework and statutory context for their determination, followed by a discussion of each issue.

Legal Framework and Context

International Law and Its Domestic Reception: General Principles

[53] International law regulates the conduct and relations of states, and between states and other entities, including individuals. Its sources are established by the practice of states. The main sources are treaty, custom, and widely recognized general principles of law. Judicial decisions and the writings of pre-eminent authors are a subsidiary means of determining the rules of international law: *Neusun* at para. 76; *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, art. 38(1); Gib van Ert, *Using International Law in Canadian Courts*, 3rd ed. (Toronto: Irwin Law, 2024) at 15–16 [“*Using International Law in Canadian Courts*”].

[54] Treaties are the most significant law-making instruments in modern international law. Formal agreements concluded between or among states with the intention of establishing international legal rights and obligations, they are the product of state consent to be bound by the rules articulated in and created by the treaty or convention. Consent to be bound by those rules is expressed by signature or ratification in accordance with the constitutional laws of the consenting state: *Using International Law in Canadian Courts* at 16–20; J. Brunnée and S.J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002), 40 Can. Y.B. Intl. L. 3 at 14 [“A Hesitant Embrace”].

[55] Under Canada’s constitutional system of government, international treaties and conventions are not “self-executing”. As a result, they are not stand-alone sources of domestic law. This is because the executive branch is empowered to conduct foreign affairs, but not to make domestic law without legislative action. Based on principles of parliamentary sovereignty and democracy, unless a provision in a treaty or convention expresses a customary rule or peremptory norm of international law, it will only be given direct domestic legal effect through legislative implementation. In other words, Canada maintains a dualist system of application of treaty and conventional international law: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 69; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at paras. 149–150; *Using International Law in Canadian Courts* at 284–285.

[56] The extent to which a particular statute implements a treaty domestically depends on the circumstances, such as the text of the statute and the specificity of the treaty. Depending on the will of the legislator, treaty-created international legal rights and obligations may be fully or partially implemented by statute in domestic law: *Society of Composers, Authors, and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 at paras. 46–48; Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) at §18.03 [“Sullivan, Statutes”].

[57] While treaties are now the pre-eminent form of law-making on the international plane, custom is the oldest and original source of international law. As Justice Abella explained in *Nevsun*, it is “the common law of the international legal system—constantly and incrementally evolving based on changing practice and acceptance”: at para. 74. Customary law is evidenced by state practice that is both general, consistent, and widespread (though not necessarily universal) and motivated by a sense of legal obligation, known as *opinio juris*. If, and, if so, when, an international practice becomes widely accepted and understood as obligatory, it “ripens” into a customary international law norm that binds all states except those that persistently objected from the outset. There is also a subset of peremptory norms known as *jus cogens* from which no derogation is allowed: *Nevsun* at paras. 74–84; see also *Using International Law in Canadian Courts* at 20–22, 284.

[58] State practice may be exhibited in many ways, including by treaties, state acts such as legislation and judicial decisions, and resolutions of the General Assembly touching on legal questions. Custom emerges where many states support or adhere to the practice, together with the requisite *opinio juris*. In some cases, this process may take years; in others, a customary rule may develop quickly if many states support or adhere to the practice in question. Unlike treaty-created rules, absent conflicting legislation, the rules and norms of customary international law are automatically incorporated into Canadian law and given direct effect without the need for legislation. Unlike foreign law, established customary rules and norms are judicially noticed without the need for formal proof by evidence: *Nevsun* at paras. 71–72, 79, 86–99; *Using International Law in Canadian Courts* at 20–22; A Hesitant Embrace at 15–17.

[59] International activity that is not explicitly law-making by nature is often referred to as “soft law” in international law rhetoric. The term is commonly used to mean a written instrument that sets out international principles and norms such as a resolution or declaration of the General Assembly, which is a deliberative, not law-making, international body. Although non-binding *per se*, “soft law” instruments may be evidence of existing, new, or developing international laws and provide the state practice and *opinio juris* required to support a claim of custom. In other words, while General Assembly resolutions typically do not create new legal rights and obligations or formally bind states on the international plane, they may be declaratory of existing customary or conventional law, as in the case of the *Universal*

Declaration of Human Rights, U.N.G.A., 3rd Sess., U.N. Doc. A/810 (1948) G.A. Res 217A (III). In addition, non-binding international instruments may assist courts in construing domestic law: *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras. 25, 30–38, 41 [9147-0732 Québec inc.]; *Using International Law in Canadian Courts* at 29–30; *A Hesitant Embrace* at 10, 18–20.

[60] Binding international instruments trigger the presumption of conformity. A common law interpretive principle, the presumption of conformity requires domestic law to be construed consistently with international law and comity, wherever possible. Its normative justification is respect for international law. In *R. v. Hape*, 2007 SCC 26, Justice LeBel explained the presumption this way:

53 ... The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.

[Emphasis added; see also *Using International Law in Canadian Courts* at 166–169.]

[61] The presumption of conformity applies to all internationally binding instruments, regardless of whether they have been implemented domestically. In *9147-0732 Québec inc.*, Justices Brown and Rowe emphasized the differing normative value and interpretive weight attributable to different international law sources and stated that the presumption of conformity is tied “to the language of Canada’s international obligations or commitments”: at paras. 33–35. They also stated that while courts may draw on both binding and non-binding international instruments for interpretive purposes, those courts “drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used”: at para. 38.

[62] The presumption of conformity applies whether a binding international rule originates in treaty or custom. In the case of customary international law, the presumption applies to both statute and the common law. As to the latter, custom-based rules are indistinguishable from the doctrine of incorporation because, absent conflicting legislation, customary international law is considered a branch of the common law. Consistent with the presumption of conformity, the *Canadian Charter of Rights and Freedoms* is presumed to provide at least as great a level of protection as those protections included in Canada’s international human rights obligations: *Ktunaxa Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 65; *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 at paras. 64–67, 2004 CanLII 871 (C.A.), leave to appeal ref’d, [2004] S.C.C.A. No. 410; *Using International Law in Canadian Courts* at 201–202.

[63] International law can also influence the application of domestic legislation. For example, in some contexts, “international law will operate as an important constraint on an administrative decision maker”. In addition, “international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power”: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 114.

UNDRIP

[64] *UNDRIP* is an international declaration of the individual and collective rights of the world's Indigenous peoples. Adopted by the General Assembly in 2007, it is the product of decades of negotiations between states and Indigenous peoples of the world. When *UNDRIP* was adopted, 143 states voted in favour, four states voted against, and 11 states abstained from voting. Australia, Canada, New Zealand, and the United States were the four states that voted against its adoption. All have since changed their positions and expressed their support.

[65] Described by the UN Department of Economic and Social Affairs as the “most comprehensive international instrument on the rights of Indigenous Peoples”, *UNDRIP* includes 24 preambulatory clauses and 46 articles. Article 43 provides that the rights recognized in *UNDRIP* “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”. According to the UN, *UNDRIP* “establishes a universal framework of minimum standards” and “elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous Peoples”: United Nations, Department of Economic and Social Affairs – Social Inclusion, online: United Nations Declaration on the Rights of Indigenous Peoples <<https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>>. A copy of *UNDRIP* is attached to these reasons as “Appendix A”.

[66] As a General Assembly resolution, *UNDRIP* does not create or impose new international legal rights or obligations, nor is it formally binding as a treaty. Rather, it is a statement of internationally recognized human rights and standards. Some of its articles overlap with existing rules of treaty, custom or general principles of law of broad application, expressed in specific relation to Indigenous peoples. For example, article 3 recognizes and affirms the inherent right of Indigenous peoples to self-determination, which the International Law Commission has identified as a peremptory norm of international law and which is enshrined in binding conventions such as the *International Covenant on Civil and Political Rights*, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 and the *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46. Other *UNDRIP* articles elaborate and extend existing international legal rights derived from convention or custom and, to varying degrees, still others are, in whole or in part, aspirational. In other words, *UNDRIP* aggregates, articulates and extends a range of internationally binding rights, obligations and general principles, together with internationally recognized minimum standards of achievement, aspirations and concerns: Gib van Ert, “The impression of harmony: Bill C-262 and the implementation of the *UNDRIP* in Canadian law” (27 November 2018) 2018 CanLIIDocs 252 at 2–5; Naomi Metallic, “Breathing Life into Our Living Tree and Strengthening Our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act” in Alpert et. al., eds., *Rewriting the Canadian Constitution* (forthcoming) at 7–9; Sylvanus Ghendazhi Barnabas, “The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law” (2017) 6:2 Int'l. Hum. Rts. L. Rev. 242 at 251 [“The Legal Status of the United Nations Declaration”].

[67] In its preamble, *UNDRIP* expresses concern that the Indigenous peoples of the world have suffered from historic injustices due to “their colonization and dispossession of their lands, territories and resources” and recognizes the “urgent need to respect and promote the inherent rights of indigenous peoples”. It also recognizes that the situations of Indigenous peoples vary throughout the world, which means that national and regional “particularities” require consideration. The final preambulatory clause proclaims *UNDRIP* “as a standard of achievement to be pursued in a spirit of partnership and mutual respect”.

[68] Several *UNDRIP* articles recognize and, in some respects, extend international rights, principles and standards in relation to traditional territories and resources, and provide for state obligations to consult with Indigenous peoples affected by state action. These land-related rights, obligations, principles and standards are conceptually rooted in the inherent right to self-determination recognized in article 3 and international human rights in relation to property, culture, and non-discrimination. For example, article 32(2) of *UNDRIP* provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

[69] The content and contours of the state duty to consult and the standard of free, prior and informed consent expressed in article 32(2) as well as the extent to which it expresses binding international legal obligations or otherwise is a matter of some debate in international legal circles. That said, the existence of a state duty to consult Indigenous peoples in connection with state action affecting their lands or territories is generally accepted as a matter of international law: see *Kebaowek* at para. 96; The Legal Status of the United Nations Declaration at 249–251, 256; Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in J. Borrows et. al., eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Montreal: McGill-Queen’s University Press, 2019) at 68–73; Kevin W. Gray, “Change by Drips and Drabs or No Change at All: The Coming UNDRIP Battles in Canadian Courts” (2023) 11:2 Am. Indian L.J. 1 at 16–22.

[70] Other notable *UNDRIP* articles for present purposes include articles 19, 38, 40 and 46. Article 19 provides that states “shall consult and cooperate in good faith with the indigenous people concerned...in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”. Article 38 provides that states “in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”. Article 40 affirms the right of Indigenous peoples to “access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties” and to effective remedies where there are infringements of individual and collective rights. Article 46(2) provides that the exercise of *UNDRIP* rights shall be subject only to those limitations “determined by law and in accordance with international human rights obligations” and strictly necessary “for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society”.

Federal Declaration Act

[71] Canada’s position on *UNDRIP* evolved incrementally. Traced in recent case authorities, that evolution eventually led to the passage of the *Federal Declaration Act* in 2021: see *Montour*; *First Nations Families Act Reference*; and *Kebaowek*.

[72] In summary, after voting against its adoption in 2007, Canada expressed qualified support for *UNDRIP* in a 2010 statement, describing it as an aspirational, non-legally binding document that did not change Canadian laws: *Montour* at para. 1182; *Kebaowek* at para. 75. Then, following the 2015 call of the *Truth and Reconciliation Commission of Canada* for all levels of government to fully adopt and implement *UNDRIP* as the framework for reconciliation, in a 2016 speech to the UN Permanent Forum on Indigenous Issues, the Minister of Indigenous and Northern Affairs expressed the government’s unqualified endorsement of *UNDRIP*. In doing so, she stated that “by adopting and implementing the Declaration, we are excited that we are breathing life into s. 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada”: see also *First Nations Families Act Reference* at paras. 13–14; *Montour* at paras. 1183–1185; *Kebaowek* at para. 75. Following a further call by the *National Inquiry into Missing and Murdered Indigenous Women and Girls* for implementation of various principles recognized in *UNDRIP*, “[i]t seems that these calls for action were heard”, and Parliament enacted the *Federal Declaration Act* on June 21, 2021: *Montour* at para. 1187; *First Nations Families Act Reference* at paras. 4, 15; *Kebaowek* at para. 75.

[73] The *Federal Declaration Act* expresses the government’s commitment to “fully adopt and implement the Declaration as the framework for reconciliation”. Among other things, its preamble states that the government “is committed to taking effective measures—including legislative, policy and

administrative measures—at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration” and affirms *UNDRIP* “as a source for the interpretation of Canadian law”. Section 2(3) provides that “[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law”. Sections 4(a) and (b) state that its purposes are to “affirm the Declaration as a universal international human rights instrument with application in Canadian law” and to “provide a framework for the Government of Canada’s implementation of the Declaration”. Section 5 provides that the government “must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration”. Sections 6 and 7 impose specific obligations in relation to an action plan and annual reporting to Parliament.

Recent Jurisprudence Regarding the Effect of the Federal Declaration Act and UNDRIP

[74] As noted, in February 2024 the Supreme Court of Canada handed down judgment in the *First Nations Families Act Reference*. The question for determination was the constitutional validity of the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 [*First Nations Families Act*]. In addressing that question, the Court made *obiter* statements of relevance for present purposes regarding the domestic legal effect of the *Federal Declaration Act* and *UNDRIP*.

[75] In the introduction to its reasons, the Court stated that although *UNDRIP* is not binding as a treaty, it has been incorporated into Canada’s positive law by s. 4(a) of the *Federal Declaration Act*:

[4] While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take “in consultation and cooperation with indigenous peoples, ... the appropriate measures, including legislative measures, to achieve the ends” of the Declaration (art. 38). Recognized by Parliament as “a universal international human rights instrument with application in Canadian law”, the Declaration has been incorporated into the country’s positive law by [the *Federal Declaration Act*], s. 4(a). This statute recognizes that the Declaration “provides a framework for reconciliation” (preamble): s. 5 of the same statute requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take “all measures necessary to ensure that the laws of Canada are consistent with the Declaration”. The statute’s preamble expressly provides that the implementation of the Declaration in Canada “must include concrete measures to address injustices” facing, among others, Indigenous youth and children.

[5] The [*First Nations Families Act*] challenged in this reference is therefore directly in keeping with Canada’s commitment to “implementing [*UNDRIP*], as the first recital of its preamble confirms. ...

[76] The Court then reviewed the preamble and purpose provision of the *First Nations Families Act*. It noted that s. 8 provides for three purposes: to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services”; “set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children”; and “contribute to the implementation of [*UNDRIP*]”. The Court described these purposes as a reflection of Parliament’s “openness to using three different types of legal norms that will be interwoven in this framework for reconciliation”, namely, Indigenous legislative authority in relation to child and family services, national standards established by Parliament, and international standards referred to in *UNDRIP*. It endorsed the metaphor of braiding the three together in implementing *UNDRIP* and stated that Parliament’s effort to do so in the *First Nations Families Act* “constitutes the specific framework for reconciliation when it comes to Indigenous child and family services, in the spirit of the Declaration”: at paras. 7–8.

[77] In discussing the context in which the *First Nations Families Act* was enacted, the Court repeated that in the *Federal Declaration Act*, Parliament recognized *UNDRIP* “as a universal international human rights instrument with application in Canadian law”. Then it stated “[i]t is therefore through [the *Federal Declaration Act*] that the Declaration is incorporated into the country’s domestic positive law”: at para. 15 (emphasis added). It went on to note that *UNDRIP* calls for lawmakers to pass legislation

affirming and facilitating self-government and described such measures as part of a process of “legislative reconciliation” in which legislation is enacted “to respect, promote, protect, and accommodate inherent rights through mechanisms or frameworks elaborated upon within the statute”: at para. 17. It also explained that legislation of this kind “does not purport to be the source of the rights in question” and may be characterized as “recognition legislation”, which “proceeds on the premise that these rights exist”: *First Nations Families Act Reference* at paras. 16–17, quoting N.S.W. Metallic, “Aboriginal Rights, Legislative Reconciliation, and Constitutionalism” (2023), 27:2 Rev. Const. Stud. 1 at 5; see also *Kebaowek* at paras. 76–78.

[78] I understand the Court’s statement that the *Federal Declaration Act* incorporated *UNDRIP* into positive law and its reference to Canada’s commitment to implement *UNDRIP* to indicate that, consistent with our dualist system, Parliament enacted the *Federal Declaration Act* to incorporate (i.e., integrate) *UNDRIP* into Canadian law and thus give domestic legal effect to Canada’s obligations and commitments in relation to *UNDRIP* by providing a foundational structure for putting them into action. As discussed below, in my view this signals that *UNDRIP* should be applied as a weighty source for the interpretation of Canadian law in accordance with the presumption of conformity, with due regard to the extent to which the relevant articles express binding international legal rights, obligations, or general principles, minimum standards, or aspirations.

[79] The Court went on in the *First Nations Families Act Reference* to address the legal effects of certain provisions of the *First Nations Families Act* that affirm the inherent right to self-government. It stated that Parliament may bind the Crown through such affirmations, and, subject to constitutional imperatives, constrain and limit government actors, thus shaping the exercise of public powers: at paras. 19, 56–58. In particular, the Court stated, “[b]y enacting a binding affirmation, Parliament has bound the federal government to the position it has affirmed as a matter of statutory positive law” as “government actors are bound by laws that create, structure and limit their powers”: at para. 59. Specifically, the Court explained, while Parliament cannot bind the courts or the provinces with respect to the definitive interpretation to be given to s. 35, the affirmations in the *First Nations Families Act* regarding self-government require the federal government “to act in accordance with its position that this right of self-government was recognized” and to prevent it from asserting “in any proceedings or discussion, that there is no Indigenous right of self-government in relation to child and family services”: at paras. 60–62.

[80] Moreover, the Court stated, the statutory affirmations of the right of self-government could have other legal effects by requiring the Crown “to act as though the principle of the honour of the Crown is engaged”: at para. 63. It explained that Parliament had “intentionally embarked on a particular path to reconciliation” which required the Crown “to act...in accordance with the legislative affirmation that the inherent right of self-government has constitutional status”: at para. 64. It also explained that this “implies that the Crown must take a broad approach to the interpretation of this right and must act diligently to implement it”, the affirmation “represents a promise of rights recognition”, and “[i]t is always assumed that the Crown intends to fulfil its promises”: at para. 66.

[81] As discussed below, the Court’s observations on the legal effects of the statutory affirmation in the *First Nations Families Act* assist in illuminating the legal effects of the affirmation in the provincial *Declaration Act*, namely, that *UNDRIP* applies to the laws of British Columbia: see also G. van Ert, “Three Good Reasons Why UNDRIP Can’t Be Law – And One Good Reason Why It Can” (2017) 75(1) Advocate (Vancouver Bar Association) 29 at 31–32 [“Three Good Reasons”].

[82] Shortly after releasing the *First Nations Families Act Reference*, the Supreme Court of Canada touched briefly on the *Federal Declaration Act* and *UNDRIP* again in *Dickson*. The central issues in *Dickson* concerned the application of the *Charter* to a self-governing Indigenous community and the proper interpretation of s. 25 of the *Charter*. In discussing the purpose of s. 25 of the *Charter*, Justices Kasirer and Jamal for the majority observed that their interpretation was “consonant with [*UNDRIP*], as brought into Canadian law by the [*Federal Declaration Act*]”, and they pointed specifically to article 34 of *UNDRIP*: at para. 117. For their part, Justices Martin and O’Bonsawin for the minority noted that

binding international instruments carry interpretive weight, stated that “*UNDRIP* is binding on Canada and therefore triggers the presumption of conformity”, and ultimately concluded that a holistic reading of *UNDRIP*, including articles 2, 4, 5, 9, 20 and 34, supported their contrary interpretation of s. 25 of the *Charter*: at paras. 317–319.

[83] Similarly, in *Montour* and *Kebaowek* the Court concluded that *UNDRIP* engages the interpretive presumption of conformity: *Montour* at paras. 1194, 1201–1204, 1287; *Kebaowek* at paras. 80–86. I understand that both decisions are under appeal, with judgment currently on reserve in *Kebaowek*.

Declaration Act

[84] As noted, British Columbia was the first Canadian jurisdiction to enact a statute to incorporate *UNDRIP* into domestic law. In force since November 2019, ss. 1(1) and (4), 2, and 3 of the *Declaration Act* provide:

Interpretation

1(1) In this Act:

“Declaration” means the United Nations Declaration on the Rights of Indigenous Peoples set out in the Schedule; ...

(4) Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.

Purposes of Act

2 The purposes of this Act are as follows:

(a) to affirm the application of the Declaration to the laws of British Columbia;

(b) to contribute to the implementation of the Declaration;

(c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

Measures to align laws with Declaration

3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

[85] Like its federal analogue, in addition to obliging the government to consult, cooperate and take necessary measures to ensure that British Columbia laws are consistent with *UNDRIP*, the *Declaration Act* imposes other statutory obligations. Specifically, s. 4 provides that, in consultation and cooperation with the Indigenous peoples of the province, the government must “prepare and implement an action plan to achieve the objectives of the Declaration”. Section 5 requires the Minister, in consultation and cooperation with Indigenous peoples, to prepare and deliver annual reports to the Legislative Assembly regarding progress made “towards implementing the measures referred to in section 3 and achieving the goals in the action plan”.

[86] When the bill was before the Legislature, the Minister of Indigenous Relations and Reconciliation made several statements regarding the effect of the *Declaration Act*. For example, in introducing the bill, he stated that “through this legislation, we are recognizing the human rights of Indigenous peoples in law” and he described the new law as “a critical step towards true and lasting reconciliation” which, if

passed, would make British Columbia “the first province to bring these internationally recognized standards into provincial law”. Over the course of the debate that followed, among other things, he also stated:

[The *Declaration Act*] acknowledges the aspects of [UNDRIP] that already reflect international conventions or international customary law and that already apply to the laws of British Columbia. While this bill does not, in and of itself, give [UNDRIP] legal force and effect, it does not delay or affect that current application of [UNDRIP]. ...

What we’re accomplishing here is recognizing the human rights of Indigenous peoples into the law in this province. The legislation will give us a path forward as government.

[...]

[The *Declaration Act*] does not bring [UNDRIP] into legal force and effect.

[...]

Upon passage, there is no immediate effect other than as an interpretive aid on laws. It does not give legal force and effect. [The *Declaration Act*] provides a process, a framework, for government to move forward, which will be covered in sections 3, 4 and 5. ...

[See British Columbia, *Official Report of Debates (Hansard)*, 41st. Parl., 4th. Sess., No. 286 (30 October 2019) at 10373; British Columbia, *Official Report of Debates (Hansard)*, 41st. Parl., 4th. Sess., No. 291 (19 November 2019) at 10520; British Columbia, *Official Report of Debates (Hansard)*, 41st. Parl., 4th. Sess., No. 292 (19 November 2019) at 10558, 10567.]

[87] Since the *Declaration Act* was enacted, UNDRIP-guided law reform in consultation and cooperation with Indigenous peoples has been a significant component of the provincial legislative agenda. For example, as well as amending several other statutes, the Legislature amended the *Adoption Act*, R.S.B.C. 1996, c. 5 and the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, to be interpreted in accordance with the self-government and self-determination rights recognized by UNDRIP. It also amended the *Human Rights Code*, R.S.B.C. 1996, c. 210, to add “Indigenous identity” as a prohibited ground of discrimination.

Interpretation Act

[88] As part of the law reform process contemplated in the *Declaration Act*, the Legislature amended the *Interpretation Act* in November 2021 by adding s. 8.1 to address both s. 35 and UNDRIP:

Section 35 of *Constitution Act, 1982* and *Declaration*

8.1(1) In this section:

“Declaration” has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;

“Indigenous peoples” has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;

“regulation” has the same meaning as in the *Regulations Act*.

(2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

(3) Every Act and regulation must be construed as being consistent with the Declaration.

[89] The modern principle of statutory interpretation applies to s. 8.1, as it does to all statutory provisions. Pursuant to the modern principle, the words of a provision must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Vavilov* at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837.

[90] Section 8.1 deals with two separate and distinct subjects: s. 35 of the *Constitution Act* and *UNDRIP*. Its instructions with respect to those subjects are not the same. Specifically, s. 8.1(2) mandates interpretations that uphold and do not derogate from Aboriginal and treaty rights, which are subject to constitutional protection in Canada. In contrast, s. 8.1(3) mandates interpretations that are consistent with *UNDRIP*, which recognizes, and in some respects extends, international Indigenous rights, and articulates minimum standards and aspirations: see Nigel Bankes, “The Legal Status of *UNDRIP* in British Columbia: *Gitxaala v. British Columbia (Chief Gold Commissioner)*” (5 October 2023), online: ABlawg, <<http://ablawg.ca>> at 4.

[91] Subsections 8.1(2) and (3) must be considered and applied separately in the interpretive process. However, the judge conflated them when analyzing the constitutional validity of the *Mineral Tenure Act* (paras. 409–418). In addition, although he recognized that s. 8.1 acts as an interpretive aid during the entire interpretive process (para. 417), he appears to have considered two or more possibly valid interpretations to be necessary for s. 8.1 to be engaged (para. 416). There is no such requirement. Section 8.1 applies generally and infuses the entire interpretive process, regardless of whether multiple reasonable interpretations of a statutory provision are possible.

[92] Considered in the light of its text, context, and purpose, in my view s. 8.1(3) requires that British Columbia’s laws be interpreted to conform with the binding international rights, obligations and principles recognized in *UNDRIP* and to generally harmonize with the international standards and extended rules that it articulates, wherever possible. In other words, from a functional perspective, s. 8.1(3) imposes a rebuttable presumption of consistency between British Columbia statutes and *UNDRIP*, akin to the common law presumption of conformity.

[93] I reach this conclusion for the following reasons.

[94] First, the language of s. 8.1(3) is imperative: British Columbia enactments must be construed as being consistent with *UNDRIP*. However, in keeping with the modern principle, s. 8.1(3) is to be read together and harmoniously with the other *Interpretation Act* provisions, including s. 2(1), which states that every provision of the Act applies to every enactment “unless a contrary intention appears in this Act or in the enactment” (emphasis added). In the face of a clear contrary intention, an *UNDRIP*-consistent interpretation will not be possible. Reading the combined effect of ss. 8.1(3) and 2(1) as imposing a rebuttable presumption of consistency accommodates this reality.

[95] Second, as noted, s. 8.1 was enacted approximately two years after the *Declaration Act*, which includes contributing to the implementation of *UNDRIP* as a purpose and imposes a duty on government to take measures to ensure that British Columbia laws are consistent with *UNDRIP*. Since its enactment, the Legislature has passed various measures aimed at aligning provincial statutes with *UNDRIP*. Reading s. 8.1(3) as imposing a rebuttable presumption of consistency fits within this pattern of legislative reform.

[96] Third, the ordinary meaning of “consistent”, expressed relationally, is that two or more things are marked by conformity, adherence or harmony in relation to one another: see generally, Oxford English Dictionary (online) sub verbo “consistent”; Cambridge Dictionary (online) sub verbo “consistent”; Merriam-Webster Dictionary (online) sub verbo “consistent”. The manifest purpose of s. 8.1(3) is to promote consistency between British Columbia enactments, on the one hand, and, on the other, *UNDRIP*, and thus to contribute to domestic implementation of *UNDRIP* and to further the goal of reconciliation. To give effect to s. 8.1(3) when construing an enactment, courts should engage directly with relevant *UNDRIP* articles in attempting to achieve interpretive consistency, wherever possible. For

example, in interpreting the *Mineral Tenure Act* and the *Declaration Act* it was incumbent on the judge to take specific account of relevant articles with a view to achieving *UNDRIP*-consistent interpretations, if possible, or acknowledging the inconsistency, if not.

[97] Focusing attention on relevant *UNDRIP* articles is essential to any determination of *UNDRIP* consistency. Moreover, the requirement of consistency means that *UNDRIP* must be understood and addressed on its own terms, namely, as an international legal instrument of rights-recognition, standard-setting, and goal-pursuing, as opposed to law-creation. Depending on the interpretive issue in question, the court may need to assess the extent to which a relevant article expresses a binding international right, obligation or general principle, a minimum standard, or an aspiration. This is because:

- i. *UNDRIP* is not, and does not purport to be, law-creating (it does not create rights by recognizing them);
- ii. *UNDRIP* both recognizes existing rights and extends them, without distinction; and
- iii. binding rights and obligations (specific legal entitlements and duties), general principles (guiding truths or values), minimum standards (levels of quality or measurements), and aspirations (goals) differ.

In my view, the same is true of the related demands of consistency.

[98] In other words, an assessment of the international legal status of an Indigenous right expressed as such in *UNDRIP* may be required to give effect to s. 8.1(3) in the interpretive process. Insofar as *UNDRIP* expresses a binding international right, obligation or general principle, to be consistent, an enactment should clearly conform, with due regard for local particularities. On the other hand, insofar as *UNDRIP* expresses an internationally recognized minimum standard or an aspiration, the margin of appreciation is greater, and general harmony will suffice for consistency to be achieved.

[99] The jurisprudential implications of s. 8.1(3) for domestic legal practitioners are significant. As Professors Brunnée and Toope observed in 2002, Canadian courts and counsel are not typically steeped in international law, and they have tended to approach and apply it hesitantly. At the hearing of the appeal, counsel made similar observations. However, the fact is that the Legislature has chosen to incorporate a complex, multi-faceted international instrument into domestic legislation, and, if possible, provincial enactments must now be interpreted consistently with that instrument in all its complexity.

[100] The rights, obligations, principles and standards expressed in *UNDRIP* are rooted in international law. In my view, consideration of their source, nature, and reach cannot be avoided or side-stepped in the interpretive exercise mandated by s. 8.1(3), either on the basis that *UNDRIP* is not itself a binding instrument (as the respondents suggest) or that every article of *UNDRIP* describes “rights” in the sense that term is used in domestic law (as the appellants suggest). I would not accede to either position, neither of which respond to the complex and varied nature of *UNDRIP*. As I see it, to determine whether a proposed interpretation of an enactment is consistent with *UNDRIP*, depending on the issue, it may be necessary to analyse the source, nature, and reach of the relevant right, obligation, standard, or goal expressed as such in its article(s). This, in turn, will likely lead to increased domestic familiarity and facility with international law.

Discussion

What is the Applicable Standard of Review?

[101] The parties agree that the applicable standard of review is correctness. The issues that arise on appeal pertain to statutory interpretation, justiciability, and the availability of declaratory relief. These are questions of law subject to correctness appellate review: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8–9; *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 82.

[102] On appeal from a judicial review decision the question is whether the reviewing judge identified the appropriate review standard and applied it correctly: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10. According to the provincial respondents, applying this framework is complicated as the judge only discussed the standard of review in relation to the s. 35 duty to consult and not the *Declaration Act* and *UNDRIP* issues. They say those issues do not arise from an administrative decision to which a review standard could apply. Nevertheless, they say, correctness review is appropriate either because the judge made original findings outside the review of an administrative decision or because reasonableness review is displaced by the nature of the issues for determination.

[103] In my view, the *Declaration Act* and *UNDRIP* issues for determination do arise from an administrative decision. The administrative decision in question was the CGC's discretionary decision to operate a system for automatic pre-consultation registration of mineral claims, which engaged issues in relation to s. 35 and the *Declaration Act* and *UNDRIP*. Although the judge characterized the decision as "a series of non-decisions", he properly treated it as a decision, identified the appropriate review standard (correctness), and accepted the provincial respondents' position that he should adjudicate the claims raised in the petitions, in full, in the context of the judicial review proceeding. Given the general, centrally important, and broadly applicable nature of the legal questions in issue, and their potential relationship with s. 35 of the *Constitution Act*, reasonableness review is displaced in accordance with the rule of law exceptions discussed in *Vavilov* (at paras. 53–64). The issue on appeal is whether the judge answered them correctly.

What is the Proper Scope of the Appeal?

Provincial Respondents and Privateer Gold

[104] The provincial respondents submit that the influence of *UNDRIP* on the development of the duty to consult does not arise on the appeal because they have not appealed the s. 35 declarations. They say the arguments advanced by Ehattesaht on the legal effect of the *Declaration Act* and *UNDRIP* challenge the judge's reasoning regarding the duty to consult, not his order refusing a declaration of inconsistency, and are outside the scope of the appeal.

[105] According to the provincial respondents, Ehattesaht's main arguments seek to elide *UNDRIP* rights with s. 35 and the duty to consult by proposing the application of *UNDRIP* to existing s. 35 doctrine. They say that such arguments raise significant, complex, and contentious legal questions, and drive toward constitutionalizing *UNDRIP* rights. In their submission, although, as a relevant international law instrument, *UNDRIP* is capable of influencing the development of the common law duty to consult, this statutory appeal is not the forum in which to address its impact on that development, nor is it this Court's role to conduct a roving commission to delineate the potential application of *UNDRIP* on all British Columbia laws. They submit that is what Ehattesaht seek by requesting a declaration that *UNDRIP* applies to all British Columbia laws, including the duty to consult. Moreover, they say, some of the interveners' arguments are also outside the scope of the appeal and the bounds of their roles as interveners.

[106] Privateer Gold submits the appeal is moot because the essential question of whether the Crown had a duty to consult was resolved in the appellants' favour and the provincial respondents have not appealed the s. 35 declaration. Accordingly, it says, there is no live controversy among the parties and no practical benefit to proceeding with the appeal.

Appellants and Intervenors

[107] Ehattesaht respond that their petition squarely raised a claim to consultation based on their Indigenous rights recognized in the *Declaration Act* and *UNDRIP*. However, the judge dismissed that claim, finding *UNDRIP* is not implemented by the *Declaration Act*, ignoring their consultation rights in article 32(2) of *UNDRIP*, and refusing their request for a declaration that the grant of mineral tenures without consultation is inconsistent with the *Declaration Act* and *UNDRIP*. Ehattesaht submit the

judge's finding of a s. 35 duty to consult does not preclude them from appealing the dismissal of their claim in relation to the *Declaration Act* and *UNDRIP*, nor from making arguments in support of related declaratory relief.

[108] In support of their position, Ehattesaht submit that their argument does not seek separately to constitutionalize *UNDRIP* rights. Rather, they say, their argument is that the province has obliged itself through its promises in the *Declaration Act*, government publications, and public statements to recognize *UNDRIP* rights as existing and to implement them, at least in the forum of present significance, namely, consultation. According to Ehattesaht, the Crown must adapt its consultative duties and practices accordingly. However, Ehattesaht do not ask this Court to determine the nature or extent of the appropriate adaptation on this appeal. Rather, they submit, this Court should simply affirm their entitlement to raise their inherent Indigenous rights recognized in article 32(2) and have them addressed in consultation. In their submission, this would represent a modest, but necessary, shift in the law, while leaving the content of the necessary adaptation as a matter for consultation and cooperation between the parties. Accordingly, they say, their arguments fall within the scope of the appeal.

[109] The interveners submit that, properly understood, their arguments also fall within the scope of the appeal and the bounds of their intervener roles.

Analysis

[110] The provincial respondents' concern with the breadth of the relief initially sought by Ehattesaht is well-founded. However, as the hearing progressed both appellants narrowed their arguments and the relief sought and focused on the alleged inconsistency between the Mineral Claims Regime and article 32(2) of *UNDRIP*. To the extent they may continue to overreach, their arguments can be addressed in the analysis of the substance of the appeal. The same is true of the interveners' arguments, which for the most part helpfully contextualized and illuminated some of the complex issues for consideration, including relevant matters of conventional and customary international law.

[111] I agree with the provincial respondents that our determination of the legal effect of the *Declaration Act* and *UNDRIP* must be grounded in a review of the order under appeal. However, I agree with Ehattesaht that they brought a claim for a declaration of inconsistency between the Mineral Claims Regime and their Indigenous rights recognized in the *Declaration Act* and *UNDRIP*, the judge dismissed that claim, and his order doing so is under appeal. Moreover, although Ehattesaht clearly disagree with aspects of the judge's reasoning in connection with the s. 35 duty to consult, their arguments are not advanced as a direct challenge to that reasoning or a present attempt to merge *UNDRIP* rights with existing s. 35 doctrine. Rather, I understand Ehattesaht to argue that the Crown's consultative duties in relation to s. 35 and article 32(2) of *UNDRIP* differ and that in light of the *Declaration Act*'s affirmation that *UNDRIP* applies to British Columbia laws their asserted Indigenous rights recognized in *UNDRIP* should be addressed and accounted for in consultation. In my view, that argument does not exceed the scope of the appeal, nor is the appeal moot.

What is the Effect of the Declaration Act and UNDRIP on the Laws of British Columbia?

Appellants

[112] Gitxaala contend that ss. 1(4), 2(a) and 3 of the *Declaration Act* incorporate *UNDRIP* into British Columbia law by requiring their alignment, interpretively and through the imposition of a statutory duty on government to take measures to ensure their consistency and to consult and cooperate regarding those measures. They submit that the presumption of conformity applies to all British Columbia laws based on s. 8.1(3) of the *Interpretation Act*, ss. 2(3) and 4(a) of the *Federal Declaration Act*, and ss. 1(4) and 2(a) of the *Declaration Act*. Specifically, they say, while *UNDRIP* is not an international convention and thus cannot be ratified, the *Federal Declaration Act* and the *Declaration Act* express a commitment to its implementation sufficient to give *UNDRIP* "the same standing" as a ratified convention such that

it engages the presumption of conformity, and therefore British Columbia laws must be interpreted to align with *UNDRIP* rights. In addition, Gitxaala say, the *Interpretation Act* imposes a similar statutory presumption of consistency.

[113] In support of their submission, Gitxaala argue that purpose statements such as s. 4(a) of the *Federal Declaration Act* and s. 2(a) of the *Declaration Act* are well-established as interpretive laws of a procedural nature. They say that, read together, ss. 2(a), 2(b) and 3 of the *Declaration Act* disclose its overarching purpose, which is to align British Columbia laws with *UNDRIP*. They also emphasize that, when the Minister introduced the *Declaration Act*, he stated that the government was affirming the human rights of Indigenous peoples and acknowledged that *UNDRIP* would have immediate effect on provincial laws as an interpretive aid. However, by characterizing *UNDRIP* as a mere “non-binding international instrument” and failing to apply the presumption of conformity, Gitxaala say the judge rendered its application to British Columbia law, as affirmed in s. 2(a), meaningless for practical interpretive purposes and thus violated the presumption that the Legislature does not legislate in vain.

[114] Gitxaala go on to submit that, purposively interpreted, s. 2(a) implements and applies the whole of *UNDRIP* to British Columbia laws without distinguishing which of the Indigenous rights recognized in *UNDRIP* are reflected in ratified conventions or custom. Accordingly, they say, the presumption of conformity applies uniformly to all Indigenous rights recognized in *UNDRIP* (although they do not address the fact that *UNDRIP* is an amalgam of recognized rights, minimum standards, and aspirations). They submit further that by referring to “British Columbia laws” without distinguishing between statutory and common law, s. 2(a) extends the presumption of conformity to the common law, including the common law of justiciability.

[115] Ehattesaht endorse Gitxaala’s submissions. They say the judge erred by casting the *Declaration Act* as a commitment to take future action to implement *UNDRIP* with no present legal effect. In their submission, *UNDRIP* was incorporated into domestic positive law with immediate effect by the *Federal Declaration Act* and the *Declaration Act*, albeit without providing all the mechanisms by which *UNDRIP* rights will be implemented over time in different contexts. Nevertheless, Ehattesaht say the *Declaration Act* is statutory recognition that the Indigenous rights recognized in *UNDRIP* exist and apply now in British Columbia, which recognition engages the honour of the Crown and creates an opening for their *UNDRIP* rights to be addressed in the consultation forum.

[116] According to Ehattesaht, *UNDRIP* should inform the interpretation of the duty to consult that arises with provincial decision-making and conduct under the *Mineral Tenure Act*. In their submission, the *Declaration* is directly relevant to their claim that the Mineral Claims Regime is inconsistent with their Aboriginal and asserted Indigenous rights, and they are entitled to raise both in consultation with the Crown. They argue that the *Declaration Act* is intended to recognize *UNDRIP* rights and standards as law in British Columbia, shift the province’s approach to Crown-Indigenous relations to one of rights-recognition, and make *UNDRIP* part of British Columbia’s normative order. They also argue that s. 2(a) of the *Declaration Act* should be interpreted in light of its incorporation of *UNDRIP* as a Schedule to the *Declaration Act*, which makes *UNDRIP* part of a provincial statute. In addition, Ehattesaht say the legislation should be interpreted bearing in mind that both Canada and British Columbia have proclaimed support for implementing *UNDRIP*, both have affirmed that *UNDRIP* rights are fundamental international human rights, and both have agreed *UNDRIP* is a framework for reconciliation.

[117] In support of their argument, Ehattesaht emphasize that the inherent Indigenous rights recognized in the *Declaration Act* and *UNDRIP* are not necessarily the same as s. 35 rights, although there are obvious similarities and overlay. In their submission, their inherent Indigenous rights recognized in *UNDRIP* should inform the interpretation and application of s. 35 rights and the common law duty to consult. For example, they say, the duty to consult can and should evolve to address adverse impacts to asserted Indigenous rights such as governance rights and the free, prior and informed consent standard in article 32(2) of *UNDRIP*. However, the reality is that final resolution of s. 35 claims is often

protracted, costly, and out of foreseeable reach, and, given that reality, adopting an *UNDRIP*-informed approach to consultation now can play an important and immediate role in furthering the goal of reconciliation while the long-term law reform project unfolds.

Provincial Respondents

[118] The provincial respondents contend that the judge correctly found *UNDRIP* remains a non-binding international instrument that is not implemented in British Columbia law by s. 2(a) of the *Declaration Act*. It follows, they say, that *UNDRIP* does not engage the presumption of conformity. In their submission, while some *UNDRIP* provisions may overlap with binding customary and conventional international law, that does not make *UNDRIP* itself binding internationally, which is the normative underpinning for the presumption. Nor, they say, do the words of s. 2(a) of the *Declaration Act*, read in their context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, make *UNDRIP* binding as a matter of domestic law.

[119] In the provincial respondents' submission, s. 2(a) is a purpose statement that guides the interpretation of the substantive provisions of the *Declaration Act* but does not declare its legal effect. Accordingly, they contend that, as the judge concluded, s. 2(a) does not implement *UNDRIP* in British Columbia law. In support, they point to the difference between the broad language of s. 2(a) and more direct language in provincial statutes such as the *International Sale of Goods Act*, R.S.B.C. 1996, c. 236 and the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154, which implements international instruments like the UN Convention on Contracts for the International Sale of Goods and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards respectively. Those statutes state the "Convention applies in British Columbia". They also note s. 2(b) provides that a purpose of the *Declaration Act* is to contribute to the implementation of *UNDRIP*, which they say signals that the *Declaration Act* does not immediately implement *UNDRIP* into the law of British Columbia. Nevertheless, they acknowledge that the combined effect of ss. 1(4) and 2(a) of the *Declaration Act* and s. 8.1(3) of the *Interpretation Act* produces a similar interpretive result to the application of the common law presumption of conformity, and they say that, despite its non-binding status, *UNDRIP* should be accorded some interpretive weight.

[120] The provincial respondents go on to say that the judge's interpretation of the *Declaration Act* aligns with the Court's analysis in the *First Nations Families Act Reference*. Specifically, they submit, both the judge here and the Supreme Court of Canada in the *First Nations Families Act Reference* found that the Act in question (the *Declaration Act* and the *Federal Declaration Act*, respectively) does not implement *UNDRIP* immediately; rather, those Acts each create a framework for its implementation and require government to consult and cooperate to "braid together" the different legal norms. They submit further that Ehattesaht's theory that the *Declaration Act* partially implements *UNDRIP* by "rights recognition" and "application", with immediate legal effect, is unpersuasive.

[121] In support of their position, the provincial respondents emphasize that determining the effect of the Schedule to an enactment involves determining legislative intent. In their submission, the *Declaration Act* was manifestly not intended to implement *UNDRIP* in British Columbia law immediately. They also submit that a general approval provision does not on its own implement treaty provisions, confirmation of a scheduled agreement, standing alone, is generally insufficient to support the conclusion that it constitutes part of a statute, and the ambiguous ministerial statements relied on by the appellants suggest only that *UNDRIP* applies immediately where it reflects conventional or customary international law, a proposition with which they agree. However, they do not agree that the *Declaration Act* and *UNDRIP* are deprived of any legal effect other than in a forward-looking sense by the judge's interpretation of s. 2(a) of the *Declaration Act* in light of the significant impacts the s. 3 alignment process has already had, and will continue to have, as the legislative reform process unfolds. They also repeat that the influence of *UNDRIP* on the s. 35 duty to consult is not at issue on the appeal and they characterize Ehattesaht's "recognition" argument as solely relevant to that issue.

Analysis

[122] The legal effects of a law are discerned from its provisions by asking “how the legislation as a whole affects the rights and liabilities of those subject to its terms”: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 70, citing *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 482, 1993 CanLII 74; *First Nations Families Act Reference* at para. 54. As noted, the words of a statutory provision must be read in context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislator: *Vavilov* at para. 117.

[123] Wherever possible, courts strive to give meaning and effect to every word in an enactment and reject constructions that would leave any part of its language without effect. As directed by s. 8 of the *Interpretation Act*, courts should construe an enactment as remedial and give it “such fair, large and liberal construction as best ensures the attainment of its objects”: see also *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at para. 1.

[124] In the discussion that follows, I will address the presumption of conformity in relation to *UNDRIP*, the interpretation of the *Declaration Act*, and the effect, if any, of the *Declaration Act* on the honour of the Crown in relation to the common law duty to consult.

Presumption of Conformity

[125] For the reasons already provided, I agree with Gitxaala that s. 8.1(3) of the *Interpretation Act* imposes a statutory rebuttable presumption of consistency between British Columbia enactments and *UNDRIP*, which is functionally akin to the presumption of conformity. I also conclude that *UNDRIP* engages the common law interpretive presumption of conformity arising out of Canada’s obligations and solemn commitment as a member of the international community to apply and implement *UNDRIP* in domestic law.

[126] As I have explained, the common law presumption of conformity is a rule of judicial policy that requires domestic laws to be construed consistently with international law and comity, wherever possible. To repeat, the presumption applies whether a binding international rule originates in treaty or custom, and regardless of whether the international rule has been implemented domestically. Tied “to the language of Canada’s international *obligations or commitments*”, the presumption has two aspects: first, the Legislature is presumed to act in compliance with Canada’s treaty obligations and as a member of the international community; second, the Legislature is presumed to comply with the values and principles of customary and conventional law: *9147-0732 Québec inc.* at paras. 33–35; *Hape* at para. 60.

[127] As I have also explained, the Court stated in the *First Nations Families Act Reference* that “[w]hile the Declaration is not binding as a treaty in Canada” (emphasis added), in s. 4(a) of the *Federal Declaration Act* (a purpose statement) Parliament recognized the Declaration as “a universal international human rights instrument with application in Canadian law”: at para. 4. Then it stated “[i]t is therefore through [the *Federal Declaration Act*] that the Declaration is incorporated into the country’s domestic positive law”: at para. 15 (emphasis added). It also characterized the *First Nations Families Act* as a concrete step taken in keeping with Canada’s commitment to implement *UNDRIP* and part of the overall process of legislative reconciliation: at paras. 5–6, 21, 45.

[128] As I read the reasons, the Court was acknowledging in the *First Nations Families Act Reference* that, while *UNDRIP* is not formally binding *per se*, it aggregates several binding international rules, obligations, and principles of broad application in specific relation to Indigenous peoples, together with internationally recognized standards and aspirations. It was also acknowledging that Canada could not express its consent to be bound by the rights, obligations, principles, and standards stated cumulatively in *UNDRIP* through ratification, as with a treaty, which, unlike *UNDRIP*, creates the binding rules that it articulates. However, the Court clarified that by enacting the *Federal Declaration Act* Parliament recognized Canada’s international obligations and solemn commitment to apply and implement those

cumulatively stated rights, obligations, principles, and standards, as previously expressed by the federal executive, and, consistent with our dualist system, incorporated *UNDRIP* into domestic law by legislative action.

[129] In my view, it follows that, wherever relevant, *UNDRIP* should be applied as a weighty source for the interpretation of Canadian law in accordance with the presumption of conformity, with due regard for the extent to which a relevant article expresses a binding international rule or general principle, minimum standard, or aspiration. In other words, unlike a typical international “soft law” instrument, *UNDRIP* should not be treated as a mere “non-binding international instrument” to which modest, moderate, or significant weight, or no weight at all, may be optionally ascribed in the interpretive exercise. As I see it, this interpretive mandate is justified in light of the widespread international support for *UNDRIP*, Canada’s unqualified international expression of commitment to its application and implementation, and, given Parliament’s enactment of the *Federal Declaration Act*, attenuated concern with safeguarding the respective roles of the executive and legislative branches and protecting parliamentary sovereignty that normally constrain application of the presumption.

[130] That said, as previously discussed, determining whether a domestic law conforms with *UNDRIP* may require assessment of the extent to which a relevant article states a binding rule or general principle, a minimum standard, or an aspiration. For example, determining whether a law conforms with article 32(2) of *UNDRIP* may require assessment of the extent to which article 32(2) expresses binding international rules and principles (possibly, a state duty to consult, the good faith requirement) or standards, extended rules, or aspirations (possibly, the need for and meaning of free, prior and informed consent). Accordingly, contrary to the appellants’ submission, in my view the presumption of conformity does not apply in the same way to all aspects of every Indigenous right expressed as such in *UNDRIP*.

[131] The judge did not apply the presumption of conformity in construing the *Mineral Tenure Act* or the *Declaration Act*, either under the common law or s. 8.1(3) of the *Interpretation Act*. In my view, this was an error. I do not accept the provincial respondents’ submission that his analysis aligns with the *First Nations Families Act Reference*. Nor do I accept that the Court found in that case that the *Federal Declaration Act* did not immediately implement *UNDRIP* in any way. Given the magnitude of the task, implementing *UNDRIP* will obviously be a complex, long-term process that is not amenable to all-or-nothing legislative action. As I read the *First Nations Families Act Reference*, the Court was fully alive to that reality.

[132] It seems to me the Court viewed Parliament’s enactment of the *Federal Declaration Act* as a preliminary, but significant, step in the long-term process of implementing *UNDRIP* domestically. That step included express recognition that *UNDRIP* applies in Canadian law, legislative incorporation of *UNDRIP* into the country’s positive law, and the imposition of a statutory duty to consult, cooperate, and take measures to align domestic laws with *UNDRIP*, together with related planning and reporting obligations. The Court also viewed the *First Nations Families Act* as another, more specific, step in the same process. It also seems to me that, in substance, both the majority and minority in *Dickson* applied the common law presumption of conformity in their respective interpretations of s. 25 of the *Charter*, albeit with varying degrees of explicitness and detail and with differing results.

Interpretation of the Declaration Act

[133] Determining the effect of the *Declaration Act* on British Columbia laws is a matter of statutory interpretation. Pursuant to s. 8.1(3) of the *Interpretation Act*, its provisions must be construed as being consistent with *UNDRIP*, if possible. The common law presumption of conformity also applies. As noted, the common law presumption is based on a rule of judicial policy applicable to both statute and the common law regardless of whether an international instrument has been implemented domestically, and, absent contrary legislation, custom-based rules are automatically incorporated into domestic common law. It follows that determining the effect of the *Declaration Act* on British Columbia laws is

not a matter of asking whether s. 2 engages the presumption of conformity. Rather, it is a matter of asking whether s. 2, properly interpreted, implements the rights, obligations, principles, and standards expressed in *UNDRIP*, and, if so, how and to what extent.

[134] As discussed, the extent to which a domestic statute implements an international instrument depends on the circumstances, such as the text of the statute and the specificity of the instrument. It is fundamentally a matter of legislative intent.

[135] To repeat, ss. 1(1) and (4), 2(a) and (b) and 3 of the *Declaration Act* provide:

Interpretation

1(1) In this Act:

“Declaration” means the United Nations Declaration on the Rights of Indigenous Peoples set out in the Schedule; ...

(4) Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.

Purposes of Act

2 The purposes of this Act are as follows:

(a) to affirm the application of the Declaration to the laws of British Columbia;

(b) to contribute to the implementation of the Declaration ...

Measures to align laws with Declaration

3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

[136] The judge asked whether s. 2(a) of the *Declaration Act* implements *UNDRIP* in the sense that it gives *UNDRIP* “the same legal effect as a provincial or federal enactment” such that *UNDRIP* “now has the full force and effect of law in British Columbia”: at para. 450. In other words, he asked whether s. 2(a) was intended “to be a rights-creating, substantive provision”: at para. 461. In doing so, he was responding to BCHRC’s argument and approaching the implementation question as an essentially “all-or-nothing” proposition that hinged on the function of s. 2(a) within the *Declaration Act*. In answering that question, he looked to case authorities and legislation involving the domestic implementation of treaties, which, unlike *UNDRIP*, create substantive legal rights.

[137] The unique nature of *UNDRIP*, the magnitude of the task of implementing it, and the need to read the provisions of the *Declaration Act* together and harmoniously with its scheme and objects mean that interpreting s. 2(a) and its effect on British Columbia laws does not lend itself to that form of all-or-nothing analysis. Rather, to ascertain the extent, if any, to which the *Declaration Act* implements *UNDRIP*, ss. 1(1) and (4), 2(a) and (b) and 3 should be considered both individually and together, with *UNDRIP*’s nature and varied attributes borne firmly in mind.

[138] Under the heading “Interpretation”, s. 1(1) of the *Declaration Act* defines “Declaration” by reference to a Schedule that sets out *UNDRIP* in its entirety. The ordinary meaning of the words of s. 1(1) and the fact that *UNDRIP* is appended do not suggest, on their own, a legislative intent to implement *UNDRIP* as substantive law in British Columbia. In appending the *Declaration* as a Schedule, s. 1(1) simply clarifies that any reference to *UNDRIP* is a reference to *UNDRIP* as a whole.

[139] Section 1(4) of the *Declaration Act* also comes under the heading “Interpretation”. It provides that nothing in the *Declaration Act* is to be construed as delaying the application of *UNDRIP* to the laws of British Columbia. The word “application” ordinarily means the way in which something is used, and “to apply” ordinarily means the act of using something by bringing it to bear or putting it upon something else with practical results: see generally, *Oxford English Dictionary* (online) sub verbo “application”; *Cambridge Dictionary* (online) sub verbo “application”; *Merriam-Webster Dictionary* (online) sub verbo “application”. With those definitions in mind and reading it in context, I understand s. 1(4) to recognize that *UNDRIP* aggregates various international rights, obligations, principles, standards and aspirations, and to clarify that nothing in the *Declaration Act* may be interpreted as delaying the extent to which any of them would otherwise affect British Columbia laws, either interpretively or as incorporated into statutory or common law. For example, ss. 3, 4 and 5 of the *Declaration Act* create three positive statutory obligations, namely, to align laws with *UNDRIP*, create an action plan, and produce an annual report. Fulfilling one of those obligations cannot justify delay in fulfilling another.

[140] Sections 2(a) and (b) of the *Declaration Act* come under the heading “Purposes of the Act”. They provide that the purposes of the Act include “to affirm the application of the Declaration to the laws of British Columbia” and “to contribute to the implementation of the Declaration”. As purpose statements, ss. 2(a) and (b) articulate the principles or policies the *Declaration Act* is intended to implement or the objectives it is intended to accomplish. Unlike preambulatory statements, purpose statements are binding as duly enacted law, but they are interpretive in character, not substantive, and they provide direction on how the substantive provisions of an enactment are to be construed: Sullivan, *Statutes* at §14.04.

[141] As discussed, the Court in the *First Nations Families Act Reference* held that the purpose statement in the *Federal Declaration Act* that affirmed *UNDRIP* as “a universal international human rights instrument with application in Canadian law” incorporated *UNDRIP* into this country’s positive law: at paras. 4, 15.

[142] The ordinary meanings of the key words of ss. 2(a) and (b) may be summarized as follows: i) “to affirm” is to state positively that something is true, validate, or confirm something; ii) “to contribute” is to give or add something as part of helping to make something happen; and iii) “implementation” is the process of making something active or effective: *First Nations Families Act Reference* at para. 107; see generally, *Oxford English Dictionary* (online), sub verbo “affirm”, “contribute”, “implementation”; *Cambridge Dictionary* (online) sub verbo “affirm”, “contribute”, “implementation”; *Merriam-Webster Dictionary* (online) sub verbo “affirm”, “contribute”, “implementation”. As noted, an “application” is the way in which something is used, and “to apply” is the act of using something by bringing it to bear or putting it upon something else with practical results.

[143] Read together with ss. 1(1), 1(4) and 2(b), in context and harmoniously with the *Declaration Act*’s scheme and object, I interpret s. 2(a) to mean that its first purpose is to state positively that *UNDRIP* is to be used by bringing it to bear on British Columbia laws, specifically, in the construction of the Act’s substantive provisions. I also conclude that in affirming its domestic application, s. 2(a) incorporates (i.e., integrates) *UNDRIP* in its entirety into British Columbia positive law: *First Nations Families Act Reference* at paras. 4, 15. I interpret s. 2(b) to mean that the *Declaration Act*’s second purpose is to add to the process of bringing *UNDRIP* into active effect.

[144] I agree with the judge that, standing alone, s. 2(a) does not implement *UNDRIP* in British Columbia law in the sense that it creates substantive rights arising out of *UNDRIP*. Given the declaratory nature of *UNDRIP*, that is unsurprising. However, I do not accept that the phrase “to contribute to the implementation of the Declaration” in s. 2(b) indicates the *Declaration Act* is not intended to implement *UNDRIP* in any immediate sense. Nor do I accept that *UNDRIP* remains a mere “non-binding international instrument” and, as such, plays a limited optional interpretive role.

[145] Notably, the *Federal Declaration Act* and the *First Nations Families Act* both include purpose clauses identical to s. 2(b). In the *First Nations Families Act Reference*, the Court found that both Acts contribute to the domestic implementation of *UNDRIP*, with the *First Nations Families Act* doing so in a detailed and specifically targeted way via legislation. In addition, the statutory affirmation in s. 2(a) is expressed in positive and present terms, which, in my view, indicates the Legislature intended to ensure the immediate interpretive effect of *UNDRIP* in its entirety. Moreover, the combined effect of ss. 1, 2 and 3 of the *Declaration Act* contributes to the implementation of *UNDRIP* in British Columbia in an immediate and significant, albeit partial, way.

[146] The foregoing interpretation generally aligns with the Minister's statement to the Legislature that s. 2(a) of the *Declaration Act* gives *UNDRIP* immediate effect as an interpretive aid in domestic law. It also aligns with the *Truth and Reconciliation Commission's* 2015 call for all levels of government to implement *UNDRIP* and the federal executive's 2016 international expression of commitment to the domestic application and implementation of *UNDRIP*.

[147] In his dissenting reasons, Justice Riley interprets s. 2 of the *Declaration Act* as a statutory mandate to pursue legislative reconciliation between British Columbia's laws and *UNDRIP*. While I agree that legislative reconciliation is an important aspect of the purpose of the *Declaration Act*, I see no reason, textually or contextually, to interpret s. 2 as limiting its purpose to legislative reform. In my view, if the Legislature intended to limit its purpose in this manner it could and would have said so. However, it did not.

[148] Turning, then, to s. 3 of the *Declaration Act*, I begin by noting that the judge interpreted this substantive provision when conducting his justiciability analysis. However, in my view, this approach was incorrect. As I see it, a court must interpret a statute before considering whether a particular issue is justiciable. It follows that I consider it necessary to interpret s. 3 and its legal effect together with other relevant *Declaration Act* provisions in the overall statutory construction exercise before addressing the justiciability issue. In doing so, I bear in mind the requirement that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, s. 8. I also bear in mind the need to apply the s. 8.1(3) presumption of consistency and the common law presumption of conformity, as previously described.

[149] In my view, generously and purposively interpreted, s. 3 imposes a positive obligation on the Crown, in consultation and cooperation with Indigenous peoples, to take all steps, methods, and means (measures) necessary to ensure (make certain) that British Columbia laws clearly conform with the binding international rights, obligations, and principles aggregated in *UNDRIP* and generally harmonize with the minimum standards and aspirations that it articulates (*UNDRIP* consistency). It is the existence of inconsistency between a British Columbia law and one or more provisions of *UNDRIP* that triggers the Crown's obligation to take action, namely, to develop the measures necessary to resolve the inconsistency, in consultation and cooperation with Indigenous peoples, and to implement those measures (make them active or effective). Some such measures may require legislative action. To the extent they do, the Crown's duty is to develop the necessary amendments in consultation with Indigenous peoples and to place them before the Legislature. In other cases, executive or administrative action may be sufficient. For example, in the circumstances in question in this case, the Crown could decide to reform the *Mineral Tenure Act*, which would mean placing proposed amendments before the Legislature, or the CGC could take action at the policy level.

[150] I reach this conclusion for the following reasons.

[151] First, s. 29 of the *Interpretation Act* provides that the term "must" in an enactment is to be construed as imperative. Accordingly, the language of s. 3 is obligatory: the government must take all measures necessary to ensure that the laws of British Columbia are consistent with *UNDRIP*. Read grammatically and together with the main clause of s. 3, the dependent clause ("[i]n consultation and cooperation with the Indigenous peoples in British Columbia") is also obligatory.

[152] Second, as noted, the ordinary meaning of the word “consistent”, when expressed relationally, is that two or more things are marked by conformity, adherence or harmony in relation to one another. The ordinary meaning of the word “measure” is a step, method or means taken to achieve an end or to judge the quality, effect, importance or value of something: see generally, *Oxford English Dictionary* (online), sub verbo “measure”; *Cambridge Dictionary* (online) sub verbo “measure”; *Merriam-Webster Dictionary* (online) sub verbo “measure”. The foregoing interpretation aligns with both the ordinary meanings of the key words of s. 3 and the varied nature of *UNDRIP*, as previously discussed in connection with s. 8.1(3).

[153] Third, the term “government” in an enactment means His Majesty in right of British Columbia: *Interpretation Act*, s. 29. “His Majesty in right of British Columbia” is synonymous with the Crown and refers to the executive branch of government: see Patrick Monahan, Wade K. Wright & Erika Chamberlain, *Hogg’s Liability of the Crown*, 5th ed. (Toronto: Thomson Reuters Canada, 2024) at 11–12 [*Liability of the Crown*]. Unlike the judge, I understand the imperative language of s. 3 in relation to the phrase “take all measures necessary” to acknowledge and respond to the limits of executive power, not as addressing whether the question of consistency between British Columbia laws and *UNDRIP* is justiciable. Specifically, in my view, in expressing the Crown’s duty as “to take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration”, s. 3 recognizes the reality that law-making power lies exclusively with the legislative branch.

[154] Fourth, the foregoing interpretation of s. 3 harmonizes with ss. 1 and 2, as previously interpreted, and with the general structure of the *Declaration Act*. Specifically, as I have noted, the *Declaration Act* imposes three positive statutory obligations on government: i) to take measures to align laws with *UNDRIP* (s. 3); ii) to create an action plan to achieve the objectives of *UNDRIP* (s. 4); and iii) to produce an annual report on progress made in implementing the measures and achieving the goals (s. 5). All three obligations must be met in consultation and cooperation with the Indigenous peoples of British Columbia.

[155] Fifth, this interpretation also harmonizes with the overarching object and purpose of the *Declaration Act*, namely, to achieve consistency between the provisions and operation of British Columbia laws and *UNDRIP* and thus to contribute to its implementation and advance the goal of reconciliation. Moreover, it is consonant with several of the Minister’s statements to the Legislature, including his statements that aspects of *UNDRIP* reflect binding conventional and customary law and that the *Declaration Act* brings *UNDRIP* standards into provincial law.

[156] Again, I part company with Justice Riley for reasons related to our differing interpretations of s. 2, namely, his view of s. 3 as directed at legislative reform only. In my view, although legislative reform is obviously key to the alignment process envisaged in s. 3, nothing in its text or context suggest such a limitation. If the Legislature intended to limit the s. 3 duty to legislative reform it would have said so. For example, it could have limited the government’s duty to take “necessary measures” to ensure that provincial enactments are consistent with *UNDRIP* or referred to “necessary legislative measures”. However, it did not.

[157] Finally, the foregoing interpretation is consonant with various *UNDRIP* articles that provide for the active engagement of Indigenous peoples in matters that affect them and corresponding state duties. For example, articles 19 and 38 provide, respectively, that states shall “consult and cooperate in good faith with the indigenous people concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” and “take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”. In addition, and significantly for present purposes, article 32(2) provides that states shall “consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...”.

The Declaration Act, the Honour of the Crown, and the Duty to Consult

[158] In the seminal *Haida* decision, the Court established a general framework for the common law duty to consult before Aboriginal title or rights claims have been decided. The common law duty flows from the Crown's duty of honourable dealing toward Aboriginal peoples. As Chief Justice McLachlin explained, the honour of the Crown is "always at stake in its dealings with Aboriginal peoples" and "a core precept that finds its application in concrete practices": at para. 16. It follows that the Crown must always act honourably in those dealings "if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'": *Haida* at paras. 16–17, citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186, 1997 CanLII 302, quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31, 1996 CanLII 216.

[159] A key aspect of the honour of the Crown is the assumption that the Crown intends to fulfil its promises: *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41, 1996 CanLII 236. As previously discussed, in the *First Nations Families Act Reference* the Court interpreted a legislative affirmation of the inherent right of self-government as a binding Crown promise of rights-recognition obliging the government to act accordingly, as though the principle of the honour of the Crown is engaged: at paras. 59–64.

[160] The legislative affirmation in question in the *First Nations Families Act Reference* was s. 8(a) of the *First Nations Families Act*, which provides that the Act's first purpose is to "affirm the inherent right of self-government". The same affirmation is repeated in s. 18(1), which provides that "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services". The Court explained that, by enacting this affirmation, Parliament bound the federal government to act in accordance with the position affirmed as a matter of statutory positive law. Then the Court said this:

[65] The affirmation in ss. 8(a) and 18(1) will inform the context and content of the resulting obligations, as if this affirmation was enshrined in the Constitution. As the Court has explained, "[the Constitution] is at the root of the honour of the Crown" (*Manitoba Metis*, at para. 70). Under the Act, the government formally undertakes to act in accordance with the position that this right has constitutional status (see *Manitoba Metis*, at paras. 69–70). The honour of the Crown is not a mere "incantation", but rather "finds its application in concrete practices"; it "gives rise to different duties in different circumstances" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 16 and 18, quoted in *Mikisew Cree*, at para. 24). As the Court stated in *Manitoba Metis*, "the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it" (para. 75).

[66] The fact that s. 7 of the [*First Nations Families Act*] requires the Crown to act as though the right of self-government described in s. 18(1) had been proved therefore implies that the Crown must take a broad approach to the interpretation of this right and must act diligently to implement it, as long as this affirmation is part of the law in force. The fact is that the legislative affirmation regarding the scope of s. 35 "represents a promise of rights recognition, and '[i]t is always assumed that the Crown intends to fulfil its promises'", in this case the promise to act as though Indigenous peoples' right of self-government in relation to child and family services were recognized, while awaiting a formal court ruling on the question (*Haida Nation*, at para. 20, quoting *Badger*, at para. 41).

[Emphasis added.]

[161] Like the *First Nations Families Act*, the *Declaration Act* includes a legislative affirmation as its first purpose. In my view, that affirmation also amounts to a binding Crown promise, namely, that the Crown will act as though the existing legal rights, obligations, principles, minimum standards and goals expressed in *UNDRIP* in specific relation to Indigenous peoples apply to British Columbia laws, including the common law. By enacting s. 2(a) of the *Declaration Act*, the Legislature created a reasonable expectation that government actors will exercise their powers in accordance with the position it has affirmed, take a broad purposive approach to interpreting its promise, and act diligently in fulfilling that promise. The honour of the Crown is thus engaged.

[162] In *Haida*, the Court observed that, in accordance with the common law tradition, the Crown duty to consult would develop over time with the application of the general framework it established: at para. 11. In *Neusun*, the Court observed that the common law develops “where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society”: at para. 118. Consistent with those observations, the provincial respondents acknowledge that, as a relevant international instrument, *UNDRIP* can influence the development of the common law duty to consult. However, they say, development of that common law duty should be confined to incremental changes, with the “heavy lifting” of *UNDRIP* alignment to occur through legislative amendment.

[163] I agree with provincial respondents that the influence of *UNDRIP* on the development of the common law duty to consult should proceed incrementally. I also agree that legislative action is the best route to align *UNDRIP* and British Columbia laws. However, given the Crown’s solemn promise to act as though *UNDRIP* applies to British Columbia laws, I agree with Ehattesaht that *UNDRIP* can and should inform the interpretation of the common law duty to consult that arises with provincial decision-making and conduct, and that the appellants are entitled to raise both their s. 35 rights and their *UNDRIP* rights in relation to the Mineral Claims Regime in consultation.

Is the Question of Consistency Between the Mineral Claims Regime and the Declaration Act and UNDRIP Justiciable?

Appellants

[164] Next, the appellants submit the judge erred in concluding that consistency between the Mineral Claims Regime and the *Declaration Act* and *UNDRIP* is not justiciable because s. 3 of the *Declaration Act* does not “call on” or “invoke” courts to adjudicate consistency. In their submission, the consistency between a British Columbia law and *UNDRIP* is a quintessentially legal question that a court may competently and legitimately adjudicate. They say there is no common law requirement that a statute “call on” or “invoke” courts to adjudicate a question to make it justiciable. On the contrary, they rely on *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [*Highwood Congregation*] to suggest that subject to a law limiting the court’s jurisdiction, the only preconditions to justiciability are institutional capacity and legitimacy with respect to the subject matter of a dispute.

[165] The appellants go on to say that they asked the judge to decide whether the Mineral Claims Regime was inconsistent with s. 35 and the *Declaration Act* and *UNDRIP*. However, he declined to answer their question with respect to the *Declaration Act* and *UNDRIP* based on a flawed interpretation of s. 3 of the *Declaration Act*. In their submission, this was an obvious error: s. 3 does not oust the court’s jurisdiction to adjudicate a dispute when the preconditions of institutional capacity and legitimacy are satisfied. Rather, they say, properly interpreted, s. 3 makes inconsistency both the condition that triggers the government’s legal duty to consult, cooperate, and take necessary measures and the subject of the required consultation.

[166] According to the appellants, where, as here, Indigenous peoples and the government disagree on whether a law operates consistently with *UNDRIP*, the dispute on that threshold question requires resolution. However, unless they have access to the courts to resolve the dispute, they are left without an effective remedy and their rights under s. 3 are rendered unenforceable. They submit that this interpretation is incorrect on the language of s. 3, inconsistent with articles 38 and 40 of *UNDRIP*, and incompatible with the Act’s purpose of implementing *UNDRIP* and the goal of achieving reconciliation. They submit further that the provincial respondents’ decision to make a non-binding concession that the Mineral Claims Regime is inconsistent with *UNDRIP*, post-judgment, in the context of this appeal, does not render the matter non-justiciable.

Provincial Respondents

[167] The provincial respondents begin by emphasizing that they do not suggest all elements of s. 3 of the *Declaration Act* will be non-justiciable in all circumstances. Rather, they say, the consistency question raised in the specific context of this case is non-justiciable. They also challenge the premise that they are currently denying inconsistency between the Mineral Claims Regime and *UNDRIP* or refusing to consult and cooperate to achieve their alignment. On the contrary, they say, neither premise is true.

[168] According to the provincial respondents, the judge did not improperly impose an additional criterion in his justiciability analysis. Rather, his comment that s. 3 was not intended to “invoke” court adjudication in every instance where a British Columbia law may be inconsistent with *UNDRIP* goes to the court’s proper role within Canada’s constitutional framework. In their submission, although the determination of *UNDRIP* consistency has a legal component, that does not overcome the intent of the legislator or the factors relevant to the justiciability analysis, such as the close connection between identifying inconsistency and developing necessary measures and the complexity of both *UNDRIP* and the *Mineral Tenure Act*.

[169] The provincial respondents submit that these factors support addressing the consistency question through the process of consultation and cooperation, not the courts. They say that piecemeal judicial declarations confirming inconsistency at large or in relation to isolated articles of concern to a particular litigant risk incompleteness, inaccuracy and misdirection. This is particularly so, they say, given the holistic nature of the law reform contemplated by s. 3 and the central role of consultation and cooperation between the parties that infuses both the *Declaration Act* and *UNDRIP*. They also emphasize the government cannot unilaterally ensure compliance with the requirements of s. 3 and repeat that the *Declaration Act*’s framework for implementing *UNDRIP* is backstopped by a robust framework of legislative accountability, which is what the Legislature intended. Moreover, they say, jurisdiction and justiciability are different concepts, and, while a court may have jurisdiction to decide an issue, it may nonetheless conclude the issue is not justiciable on considering the criteria of capacity and legitimacy.

Analysis

[170] In *Highwood Congregation*, Justice Rowe explained that justiciability “is about deciding whether to decide a matter in the courts”: at para. 33, citing Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2 ed. (Toronto: Carswell, 2012) at 1 [Sossin]. Concerned with the subject of a dispute, it is “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life” and was developed to answer the question of whether an issue is appropriate for judicial determination: at paras. 32–33, citing Sossin at 7. The primary goal of the doctrine of justiciability is to ensure that the court remains within the confines of its proper role in the constitutional framework of our democratic form of government: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545, 1991 CanLII 74.

[171] As Justice Rowe emphasized in *Highwood Congregation*, there is no single set of rules that delineate the scope of justiciability:

[34] ... Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider “that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties’ positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute” (*ibid.*).

[172] The justiciability doctrine is “founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes”: *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 459, 1985 CanLII 74. In determining that role, the focus of the justiciability analysis is often the intention of the Legislature regarding the interpretation, application, and enforcement of its statute: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 at 90–91, 1989 CanLII 73; *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 at para. 31, aff’d 2009 FCA 297, leave to appeal to SCC ref’d, [2009] S.C.C.A. No. 497. To find a legislative intention to oust inherent jurisdiction, courts require “clear and precise statutory language”: *Buchan v. Moss Management Inc.*, 2010 BCCA 393 at para. 29.

[173] A matter is not rendered non-justiciable simply because it raises complex or controversial issues with social or political dimensions. Courts must be flexible and focus on the specific context in question when determining justiciability. In doing so, the court should ask whether a matter has a sufficient legal component upon which it can adjudicate, bearing in mind Canada’s constitutional matrix and the need to avoid inappropriate intrusion into the spheres reserved to other branches of government: *La Rose v. Canada*, 2023 FCA 241 at paras. 28–32; *Friends of the Earth* at para. 25.

[174] That said, policy considerations underlie all legislation. Once political choices are made and a legislative response is crystallized, a law is not insulated from judicial scrutiny solely because the issue raises a political question. The justiciability of a matter turns largely on whether “the court can adjudicate the issues against an objective legal standard”. If so, the court cannot relinquish its jurisdiction over an issue merely because it raises a political question, nor can it abdicate its duty to decide the legal questions properly posed for judicial determination: *La Rose* at paras. 29–36.

[175] Bearing the foregoing principles in mind, I agree with the appellants that the judge erred in his justiciability analysis. Properly interpreted, s. 3 does not preclude judicial adjudication of whether a British Columbia law is consistent with *UNDRIP* or oust the courts’ jurisdiction to do so when asked by an Indigenous litigant to resolve a dispute with the Crown on an allegedly duty-triggering inconsistency. The question of consistency is fundamentally legal in nature, it can be adjudicated by the court against an objective legal standard, and, where disputed, is on its face justiciable. That it may also be complex and subject to consultation between the government and Indigenous peoples does not impact its justiciability.

[176] The appellants sought a judicial determination of whether the operation of the Mineral Claims Regime was inconsistent with s. 3 of the *Declaration Act* and their rights recognized in *UNDRIP*. In the court below, the provincial respondents denied that the Mineral Claims Regime triggered a duty to consult under the common law, the *Declaration Act*, or otherwise. As previously discussed, it is the existence of inconsistency between a British Columbia law and *UNDRIP* that triggers the Crown’s duty to develop, in consultation and cooperation with Indigenous peoples, measures to resolve the inconsistency and implement those measures. However, where, as below, the Crown denies the existence of any inconsistency, unless Indigenous litigants have access to the courts to decide whether an inconsistency exists, they are left without a remedy and their rights under s. 3 are unenforceable.

[177] The Legislature chose to impose a statutory duty on the Crown to consult, cooperate and take necessary measures to align British Columbia laws and *UNDRIP*. I see nothing in the language of s. 3 to suggest it intended the rights and obligations so imposed to be unenforceable by precluding the courts from resolving threshold disputes on action-triggering inconsistencies. As I have explained, I understand the imperative language in s. 3 in relation to “take all measures necessary” to respond to the limits of executive power, not to have an impact on the justiciability of consistency questions. Additionally, I do not see the Crown’s duty to consult with Indigenous peoples in the alignment process as inconsistent with judicial resolution of consistency questions.

[178] Where there is a right, there is generally a remedy for its violation: *Nevsun* at para. 120; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 25. I reject the submission that the planning and reporting obligations in ss. 4 and 5 of the *Declaration Act* provide an adequate (or

any) remedy where, as below, the Crown say there is no inconsistency between a British Columbia law and *UNDRIP*. The existence of an inconsistency between a law and *UNDRIP* is not an explicit trigger for the planning and reporting obligations in ss. 4 and 5, and the Legislature is not an adjudicative body equipped to resolve a threshold legal question of this nature. Nor can it be resolved by the parties through consultation and cooperation, given that the Crown's position means it need not consult at all.

[179] Moreover, an interpretation that s. 3 “does not create justiciable rights” is inconsistent with the first two purposes of the *Declaration Act*, namely, to affirm the application of *UNDRIP* to British Columbia law and to contribute to its implementation. It also fails to comport with the common law presumption of conformity and the s. 8.1(3) presumption of consistency. As noted, article 38 of *UNDRIP* provides that states “shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”. In addition, article 40 provides that Indigenous peoples shall have “the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties...”, together with effective remedies for rights violations. Interpreting s. 3 to provide for unenforceable rights and corresponding duties in the alignment process does not conform to or harmonize with either article. Nor does it advance the overarching goal of reconciliation.

[180] The judge commenced his justiciability analysis by finding the courts have both the institutional capacity and legitimacy to decide whether British Columbia laws and the *Declaration* are consistent. In my view, that finding was correct. However, based on a flawed interpretation of s. 3 of the *Declaration Act*, he erred by going on to conclude that the question posed by the appellants regarding the alleged inconsistency between the Mineral Claims Regime and *UNDRIP* was nonetheless non-justiciable.

[181] As I see it, there are several ways in which a disputed question in relation to s. 3 of the *Declaration Act* may come before the court. For example, there may be a dispute about: i) whether there is an inconsistency between a British Columbia law and *UNDRIP* (as in this case); ii) whether the type of inconsistency in issue must be addressed by the Crown taking measures; iii) what measures should be taken; iv) the adequacy of the consultation process; or v) the meaning or extent of “cooperation”. In every instance, justiciability concerns may arise, and, if they do, the court will need to determine whether, given the nature of the dispute, including the relevant articles of *UNDRIP*, the matter is justiciable.

[182] I agree with the appellants: the question they posed below is quintessentially justiciable. In my view, the provincial respondents' recent change of position on the answer to the question relates to whether declaratory relief should be granted as a matter of judicial discretion, not to whether the question itself is justiciable. As I see it, the same is true of the concerns underlying Justice Riley's differing views from my own regarding the proper interpretation of s. 3 of the *Declaration Act* and justiciability.

What Relief, If Any, Should Be Granted on the Appeal?

Appellants

[183] Finally, the appellants contend that the Mineral Claims Regime is manifestly inconsistent with their rights recognized in the *Declaration Act* and article 32(2) of *UNDRIP*. In their submission, while the judge did not adjudicate the question, that is the logical extension of his conclusions. They acknowledge that they also relied on other *UNDRIP* articles below and in their factums, but at the hearing of the appeal, they narrowed their focus to article 32(2). They characterize article 32(2) of *UNDRIP* as the key procedural safeguard to ensuring that their substantive rights are effective and submit the relief they seek is rooted in s. 2(2)(b) of the *Judicial Review Procedure Act* and R. 2-1(2)(c) of the *Supreme Court Civil Rules*.

[184] According to the appellants, it is neither necessary nor desirable for this Court to adjudicate the precise content and contours of the article 32(2) state duty to consult or the international standard of free, prior and informed consent that it articulates. Given that the Mineral Claims Regime provides for

no prior consultation whatsoever, they say it is plainly inconsistent with article 32(2) of *UNDRIP* on its face. In their submission, the full meaning of article 32(2) can and should be addressed by the parties in consultation, which will be facilitated by the court-based accountability associated with the grant of declaratory relief.

[185] The appellants go on to submit that the relief they seek would have considerable practical utility. Specifically, they say, it would allow them to engage with the Crown in the consultation context on the basis that there is an inconsistency between the Mineral Claims Regime and their rights recognized in *UNDRIP* and that their *UNDRIP* rights are relevant to the administration of the *Mineral Tenure Act* as the process of reform unfolds. Moreover, they submit that the provincial respondents' shifting position and opposition to the grant of a declaration of inconsistency between the Mineral Claims Regime and *UNDRIP* serves to highlight the practical utility of this Court granting the relief they seek and thus ensuring court-backed accountability.

Respondents

[186] The provincial respondents contend that the appellants have not met the threshold criteria for the grant of a declaration. In their submission, the relief they seek is untethered to an exercise of a statutory power and therefore not authorized by the *Judicial Review Procedure Act*. In other words, they say, the duty of the government under s. 3 of the *Declaration Act* does not fall within the definition of a statutory power under the court's supervisory jurisdiction pursuant to s. 2(2)(b) of the *Judicial Review Procedure Act*.

[187] The provincial respondents emphasize that they no longer deny the existence of inconsistency between the Mineral Claims Regime and *UNDRIP*, as evidenced by their decision not to appeal the s. 35 declaration. Importantly, they say, the complex s. 3 alignment process with respect to the *Mineral Tenure Act* is already moving forward based on a shared understanding that the s. 35 consultation deficit declared by the judge, together with broader inconsistencies, must be addressed in consultation. According to the provincial respondents, in the circumstances there is no real or current dispute between the parties in which the Court could provide productive assistance by granting declaratory relief. Accordingly, if the Court did, it would lack practical utility.

[188] In support of their position, the provincial respondents rely on the Supreme Court of Canada's long-standing recognition that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms", citing *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 24. They emphasize that "[r]econciliation often demands judicial forbearance" and "[c]ourts should generally leave space for the parties to govern together and work out their differences", as discussed in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 at para. 297 [*Restoule*]. In their submission, the process of consultation and collaboration mandated by s. 3 of the *Declaration Act* exemplifies this approach, and the grant of declaratory relief at the outset of the process may disrupt, rather than enable, reconciliation. For example, they say, premature court intervention could change the cooperative dynamic of the consultation, encourage unnecessary resort to the courts on issues under discussion, and spawn expensive, protracted litigation on contentious issues.

[189] Moreover, the provincial respondents argue that their lack of interest in opposing the substance of the declaration sought by the appellants indicates that declaratory relief is unnecessary. They also point to the broad, imprecise, and variable nature of the declarations sought below and in this Court. In the provincial respondents' submission, these deficits provide further support for their position that the grant of the declarations sought by the appellants would lack practical utility and should be denied.

Analysis

[190] As the Court explained in *Shot Both Sides v. Canada*, 2024 SCC 12, declarations are authoritative statements of legal states of affairs, but they do not provide consequential or coercive relief to an applicant. Rather, declarations outline the parameters of legal states of affairs or relationships and may

confirm or deny the legal rights of the parties or the breach of those rights: at paras. 65–66. Unlike most rulings, a declaratory judgment goes no further in providing relief than stating an applicant’s rights: *Restoule* at para. 279.

[191] The grant of declaratory relief is discretionary. The discretion is only engaged if certain threshold criteria are met, namely: i) the court has jurisdiction to hear the issue; ii) the dispute is real and not theoretical; iii) the party raising the issue has a genuine interest in its resolution; and iv) the responding party has an interest in opposing the declaration sought: *S.A. v. Metro Vancouver Housing Corp*, 2019 SCC 4 at para. 60.

[192] Where the threshold criteria are met, declaratory relief will only be granted if it would have practical utility in that the declaration will settle a live controversy between the parties. In making that assessment, courts consider the effect of the requested remedy on the parties’ rights or their clarification. Given its non-coercive nature, declaratory relief has been recognized as a means by which the court can assist in fostering and promoting reconciliation in the context of Aboriginal and treaty rights: *First Nation of Na-Cho Nyäk Dun v. Yukon (Government of)*, 2024 YKCA 5 at paras. 169–173; *Shot Both Sides* at paras. 67–74.

[193] The appellants’ submissions on the value of declaratory relief in the present circumstances are persuasive. Specifically, I agree that the Mineral Claims Regime is manifestly inconsistent with article 32(2) of *UNDRIP* because it does not provide for any consultation and cooperation with the Indigenous peoples concerned prior to granting a mineral claim on lands to which they have asserted a claim. The provincial respondents acknowledge that article 32(2) provides for consultation rights as great as s. 35 consultation rights and they have not appealed the s. 35 declaration. While the precise content of the international legal duty to consult Indigenous peoples in connection with state action affecting their lands or territories is debatable, the existence of a duty to do so is generally accepted as a matter of international law.

[194] In other words, in my view, in the circumstances of this case it is not necessary to engage in a detailed way with the text of article 32(2) or other *UNDRIP* articles to make a finding of inconsistency. However, such an exercise may well be required to answer a different question raised in a different context in relation to whether a British Columbia law is consistent with *UNDRIP* or, as previously discussed, to achieve interpretive consistency between a British Columbia enactment and *UNDRIP* under s. 8.1(3) of the *Interpretation Act*.

[195] I also agree with the appellants that the relief sought relates to a failure to exercise a statutory power, and it is rooted in the *Judicial Review Procedure Act* and the *Supreme Court Civil Rules*. As discussed, the CGC operated a system for automatic pre-consultation registration of mineral claims, which engaged issues in relation to s. 35 and the *Declaration Act* and *UNDRIP*. Further, I agree with the appellants that a declaration would help to affirm their right to raise *UNDRIP* consistency in consultation, and, in doing so, promote the overarching goal of reconciliation.

[196] In light of their post-judgment change in position, I find it difficult to understand why the provincial respondents oppose the grant of a declaration that the CGC’s conduct in allowing for automatic registration of mineral claims without creating a system for consultation is inconsistent with article 32(2) of *UNDRIP*. In my view, their intransigence on this apparently no longer contentious point does not contribute to the cooperative consultative dynamic to which all concerned should aspire.

[197] Given the history of the litigation, it seems to me that this Court formally declaring what the provincial respondents now informally acknowledge to be true would likely contribute to the tone and quality of the ongoing consultation process. In addition, by affirming the duty-triggering existence of inconsistency between the Mineral Claims Regime and article 32(2) of *UNDRIP* and the need to address it in the consultation forum, a declaration would facilitate, not disrupt, reconciliation.

[198] Moreover, in my view, the fact that the provincial respondents have not appealed the declaration regarding the s. 35 consultation deficit is of no moment. The judge dismissed the appellants' applications for declaratory relief with respect to the alleged *UNDRIP* consultation deficit. In the absence of appellate intervention, those dismissal orders remain extant.

Closing Comment

[199] As I noted near the outset, Forest Crystals and its directors ask that we encourage all concerned not to draw third parties into complex litigation of this sort unnecessarily. As a general matter, that is an obviously appropriate approach. That said, I make no comment on the specifics of this case. Such matters are best addressed in the court below.

Conclusion

[200] For the foregoing reasons, I would allow the appeals, set aside the judge's orders dismissing the appellants' applications for relief with respect to inconsistency between the Mineral Claims Regime and *UNDRIP*, and declare that the CGC's conduct in establishing an online system allowing for automatic registration of mineral claims without requiring prior consultation and cooperation of affected Indigenous peoples is inconsistent with article 32(2) of *UNDRIP*.

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Justice Iyer”

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[201] I agree with my colleague Justice Dickson that the judge erred in holding that the *Declaration Act* does not implement *UNDRIP* into British Columbia law. The judge was in error in concluding that, despite the Legislature's passage of the *Declaration Act* into law, *UNDRIP* remains a non-binding international instrument. I concur with my colleague's conclusion that the *Declaration Act* incorporates *UNDRIP* into the positive law of British Columbia, with immediate legal effect. However, I part company with her as to the nature of the *Declaration Act*'s legal effect, and the role that courts can and should play in achieving its aims.

[202] In my view, the *Declaration Act* gives the government a statutory mandate and responsibility to pursue legislative reconciliation through the implementation of *UNDRIP*, and establishes a framework for doing so. The objective is to bring British Columbia's laws into alignment with the rights, standards, and goals contemplated in *UNDRIP*. To this end, the statute requires the government, in consultation and cooperation with Indigenous peoples, to take all measures necessary to make British Columbia's laws consistent with *UNDRIP*. It makes express provision for government accountability through mandatory reports to the Legislature.

[203] The expectation is that the government will take constructive, collaborative, concrete steps to attain consistency between British Columbia's laws and *UNDRIP*, through legislative reform, and other executive and administrative action. The statutory scheme is not built around, and does not contemplate, the identification and litigation of inconsistency in the courtroom. This is the basis of my fundamental disagreement with the notion that the *Declaration Act* gives the court a mandate to rule upon claims of inconsistency between particular British Columbia laws and specific *UNDRIP* articles.

[204] In my view, the question of whether the courts have any role to play in assessing claims of inconsistency between British Columbia's laws and *UNDRIP* ought to be determined as a matter of statutory interpretation, based on the text of the *Declaration Act*, assessed in light of the purpose of the legislation, and the context in which it operates. For the reasons below, I conclude that the *Declaration Act* does not call upon the courts to adjudicate such claims of inconsistency.

[205] This conclusion is reinforced when one asks and answers the same question through the lens of justiciability. For the reasons given below, I conclude that the question of inconsistency between British Columbia's laws and *UNDRIP* is not a justiciable matter because it would take courts beyond their proper role in our constitutional democracy.

[206] Finally, I accept that courts may have a role to play in holding the government to account for its statutory obligations under the *Declaration Act* to consult with Indigenous peoples, and to take all measures necessary to ensure consistency of British Columbia's laws with the various rights, standards of achievement, and goals contemplated in *UNDRIP*. However, that jurisdiction ought not to be invoked in this case. The judge made a declaration recognizing the Crown's duty to consult with affected First Nations under s. 35(1) of the *Constitution Act* prior to accepting mineral claims falling within their asserted territories. For the reasons stated below, I consider the judge's declaration that the Crown has a s. 35 duty to consult sufficient on its own to ensure that the government lives up to its responsibility to take all necessary measures to ensure the Mineral Claims Regime's consistency with *UNDRIP*.

Background

[207] There are three aspects of the judge's reasons that I wish to highlight before turning to an analysis of the issues on appeal. The first two are directly relevant to my analysis. The third is worth pointing out because it underscores the forward-looking nature of what is in issue in this appeal.

[208] The first topic of significance is the judge's consideration of the argument that the existing Mineral Claims Regime did not comply with the Crown's duty to consult on unresolved Aboriginal rights claims under s. 35 of the *Constitution Act*. On this issue, the judge focused on whether the government 'drew the line' in the right place, in taking the position that consultation with a First Nation asserting Aboriginal rights over territory affected by a particular mineral claim: (i) was not required prior to granting a mineral claim under Part 2 of the *Mineral Tenure Act*, allowing for limited mineral exploration; and (ii) was only required prior to granting a mining lease under Part 3 of the *Mineral Tenure Act*, allowing for more extensive development of the mineral claim area.

[209] On this first topic, the judge rejected the Crown's argument that the government had "drawn the line in the correct place". The judge found that the granting of the particular mineral claims at issue in these proceedings had adverse "physical impact on areas of cultural importance" to the Gitxaala and the Ehattesaht. Further, granting any mineral claim within the asserted territory of any First Nation with unresolved Aboriginal rights claims has adverse "physical and economic" impacts on the First Nation's asserted rights. All of these adverse impacts triggered the s. 35 duty to consult, prior to the grant of a mineral claim under Part 2 of the *Mineral Tenure Act*. The latter impacts were systemic, because they could apply to any mineral claim within the territory of any First Nation having an unresolved Aboriginal rights claim. This, on the judge's findings, warranted a general declaration, not specific to the Gitxaala or the Ehattesaht, that the Crown owes a s. 35 duty to consult "prior to issuing mineral claims" under the *Mineral Tenure Act*, and that the government's conduct in establishing and operating an online system for automatic registration of mineral claims, without consultation, constituted a breach of the duty to consult. The judge suspended the effect of the declaration for 18 months, to allow for the "design and implementation" of a regime providing for consultation prior to granting of mineral claims. There is no appeal from this aspect of the judge's decision.

[210] The second topic of particular relevance to my analysis is the judge’s consideration of the argument that, independent of the complaints about the Mineral Claims Regime’s non-compliance with the s. 35 duty to consult, the regime was also inconsistent with various provisions of *UNDRIP*, given the force of law through the *Declaration Act*.

[211] With regard to this second topic, the judge held that the enactment of the *Declaration Act* did not “implement *UNDRIP* into the domestic law of British Columbia”, such that, in the judge’s view, it remained a “non-binding international instrument”. The judge went on to consider principles of justiciability, concluding that s. 3 of the *Declaration Act* did not “impose a requirement of consistency” as between British Columbia’s laws and *UNDRIP*, and did not “call upon the courts to adjudicate inconsistency”. Rather, in the judge’s view, s. 3 of the *Declaration Act* “contemplates ongoing cooperation between the government and the Indigenous peoples of [British Columbia] to determine which of our laws are inconsistent with *UNDRIP*”. He added that since s. 3 obliges the government to “consult and cooperate” with Indigenous peoples, it could be that a failure to do so would constitute “a justiciable breach of the government’s obligations”, however that question did not arise in this case. The judge therefore dismissed the claim for a declaration that the existing Mineral Claims Regime was inconsistent with *UNDRIP*. It is this determination that is the focus of the appeal.

[212] The third topic I wish to highlight is the judge’s consideration of the validity of certain mineral claims that had been granted under the existing Mineral Claims Regime, and which fell within the asserted territories of the Gitxaala and the Ehattesaht. The Gitxaala and Ehattesaht argued that these mineral claims ought to be quashed on the basis that they were granted under a process that: (i) did not involve consultation as required under s. 35 of the *Constitution Act*; and (ii) was inconsistent with *UNDRIP*.

[213] On this third topic, the judge considered only whether the impugned mineral claims were invalid because the regime did not involve any s. 35 consultation. (Having rejected the Gitxaala and Ehattesaht arguments on the effect of the *Declaration Act*, the judge did not consider whether the mineral claims were invalid due to asserted inconsistency with *UNDRIP*.) The judge ultimately refused to quash the impugned mineral claims, relying on three key lines of reasoning. The first was the forward-looking nature of the duty to consult. The second was the *de facto* doctrine, under which rights and obligations created or recognized under laws and legal processes that were valid at the time “are, and will always be enforceable and unassailable”. The third was the need for certainty as to the validity of all existing mineral claims under the *Mineral Tenure Act*. No appeal is taken from this determination.

Analysis

[214] As noted, I concur with my colleague’s analysis and conclusion on the status of *UNDRIP* under British Columbia law. Where I differ with her is on the legal effect of the *Declaration Act*, and the role that courts can and should play in achieving its aims.

[215] The fundamental question is whether the courts have any role to play in assessing claims of inconsistency between British Columbia’s laws and *UNDRIP*. In my view, the answer is “no”. I reach that conclusion principally because, on my interpretation of the *Declaration Act*, the Legislature has not assigned any such role to the courts. The doctrine of justiciability reinforces this conclusion, because the *Declaration Act* sets up a framework for legislative reconciliation within the purview of the executive and legislative branches of government. By making judicial pronouncements on inconsistency between *UNDRIP* and specific provincial laws, the court would be inserting itself into the law reform process, in a matter that strays outside the proper role of the judicial branch of government in our constitutional democracy.

Statutory Interpretation

[216] Before squarely addressing the interpretation of the *Declaration Act* itself, I will comment briefly on s. 8.1(3) of the *Interpretation Act*. It states that every enactment “must be construed as being consistent with” *UNDRIP*. I agree with the judge that s. 8.1(3) establishes an interpretive “overlay”, but I disagree with his suggestion that this overlay is only engaged where there are two potentially competing interpretations of a statute. This would assign only a residual or secondary role to s. 8.1(3), in a manner that does not accord with its intended effect.

[217] In my view, courts are required by s. 8.1(3) of the *Interpretation Act* to interpret British Columbia’s laws in a manner that achieves the greatest amount of consistency with *UNDRIP* that a text-based, purposive, and contextual interpretation of those laws will bear. One must always interpret a particular statutory provision based upon its text, purpose, and context. To the extent that the rights, standards, and goals reflected in *UNDRIP* are implicated, s. 8.1(3) of the *Interpretation Act* further requires us to adopt the text-based, purposive, and contextual interpretation that is most consistent with *UNDRIP*. This is not a function of any binary distinction between the concepts of consistency and inconsistency, but rather a recognition of the objective of maximizing consistency of the province’s laws with *UNDRIP*.

[218] This brings me to the interpretation of the *Declaration Act*. I begin by considering its legislative purpose. The *Declaration Act*’s stated purposes are to affirm the application of *UNDRIP* to British Columbia’s laws, to contribute to *UNDRIP*’s implementation, and to affirm and foster the development of relationships between British Columbia and Indigenous governing bodies: s. 2. This is a statutory mandate to pursue legislative reconciliation, intended to align British Columbia’s laws with the rights, standards, and goals recognized in *UNDRIP*.

[219] I move next to the text of the statute. Here, I will first address the *Declaration Act*’s overall structure, before turning to the text of s. 3, which is the provision the appellants rely upon to say that the courts should assume the role of adjudicating claims of inconsistency between provincial laws and *UNDRIP*.

[220] The structure of the *Declaration Act* provides a framework for implementing *UNDRIP* through legislative reconciliation and other means. Section 2 sets out the purposes of the statute. Section 3 assigns the government, in consultation with Indigenous peoples, the responsibility for taking all measures necessary to ensure that British Columbia’s laws are consistent with *UNDRIP*. Section 5 provides for oversight and accountability of the legislative reform project in the form of annual reports to the Legislature. Sections 4, 6, and 7 implement *UNDRIP* in other ways: mandating an action plan to implement the objectives of *UNDRIP* and providing a statutory framework for the government and Indigenous governing bodies to jointly exercise statutory decision-making powers.

[221] There is nothing in the overall structure of the *Declaration Act* indicating, expressly or by implication, that the courts have a specific role to play in the implementation of *UNDRIP*. This is not to say that express reference to the courts or court processes would be necessary to clothe courts with jurisdiction. Superior courts have the jurisdiction to interpret, apply, and enforce provincial laws, and to judicially review action taken under those laws, unless that jurisdiction is expressly ousted, in a constitutionally compliant manner: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 734–35, 1981 CanLII 24; *Crevier v. A.G. (Québec)*, [1981] 2 S.C.R. 220 at 234, 1981 CanLII 30. It is nonetheless relevant that, unlike many other statutes setting out mechanisms for their administration or enforcement through judicial proceedings, the *Declaration Act* makes no such provision. The statute gives no express statutory mandate to the courts.

[222] This brings me to the text of s. 3. It assigns to “the government”, in “consultation and cooperation with the Indigenous peoples in British Columbia”, the responsibility to “take all measures necessary to ensure” that the province’s laws are “consistent” with *UNDRIP*. By its text, s. 3 gives “the government”, working together with Indigenous peoples, a mandate to embark upon a process of legislative reconciliation, with a view to making British Columbia’s laws consistent with *UNDRIP*.

[223] There are, in my view, four textual features of s. 3 which augur against the conclusion that the courts should assume the role of adjudicating inconsistency between any particular British Columbia law and specific articles in *UNDRIP*. These features are revealed by asking what the Legislature designed s. 3 to achieve, who the Legislature assigned to attain this goal, how the Legislature envisioned the legislative goal would be attained, and when the Legislature expected the goal to be attained.

[224] I begin with the “what”. The focus of s. 3 is on attaining consistency between British Columbia’s laws and *UNDRIP*. In submissions, many of the parties described this as a process of “alignment” of British Columbia’s laws with *UNDRIP*. I accept that characterization. However, contrary to the submissions of the parties and the conclusions of my colleague, I see no reason to read the text of s. 3 as focusing on inconsistency. The text of s. 3 is directed toward the prospective attainment of consistency, not on the identification and adjudication of claims of inconsistency.

[225] I turn next to the “who”. The Legislature has imposed a duty on “the government”, in consultation and cooperation with Indigenous peoples, to take all necessary measures to ensure consistency. I will address the consultation and cooperation feature in more detail below. My present focus is on the Legislature’s designation of “the government” as the body responsible for pursuing the goal of consistency.

[226] The term “government” means “His Majesty in right of British Columbia” (per s. 29 of the *Interpretation Act*), often referred to as “the Crown”. These terms describe the executive branch of government. Although the executive has a role to play in the legislative process (by introducing proposed legislation, and in giving royal assent to laws as passed by the legislature), the power to make laws rests exclusively with the legislative branch: *Liability of the Crown* at 11–12; *Anglin v. Resler*, 2020 ABCA 184 at paras. 10–12. Thus, by virtue of the institutional limits on the executive, the government does not have the constitutional authority to guarantee consistency between the province’s laws and *UNDRIP*. The most the government can do is take all measures within its control to pursue the objective of consistency.

[227] This brings me to the “how”. Section 3 of the *Declaration Act* directs the government to act “[i]n consultation and cooperation with” Indigenous peoples. This ties into s. 4, which directs the government, again “in consultation and cooperation with the Indigenous peoples in British Columbia”, to “prepare and implement” an “action plan”, which must be presented to the Legislature.

[228] Thus, the manner by which the government is expected to pursue the objective of attaining consistency between British Columbia’s laws and *UNDRIP* is through executive action, working in cooperation with Indigenous peoples in the province, focused on legislative reform. Oversight and accountability come from the Legislature under ss. 4 and 5.

[229] All of this is entirely consistent with the establishment of a framework for legislative reconciliation as contemplated in *First Nations Families Act Reference* at paras. 4–8, 17. Nothing in this model requires, or even contemplates, a role for the courts in adjudicating claims of inconsistency between British Columbia’s laws and *UNDRIP*.

[230] Finally, I turn to the “when”. The text of s. 3 contemplates a prospective exercise of taking measures to ensure consistency between British Columbia’s laws and *UNDRIP*. The annual reporting requirement provided for in s. 5 tells us that the alignment exercise will not be instantaneous, and will not be accomplished in any set period of time. Section 3 of the *Declaration Act* envisions a process, over an open-ended time frame, during which alignment of provincial laws with the *Declaration Act* will be a work in progress. Reconciliation is a “long-term project” which will “not be accomplished in a single sacred moment”: *First Nations Families Act Reference* at para. 90. This makes it hard to read the text of s. 3 as inviting courts to adjudicate on claims of inconsistency between *UNDRIP* and specific British Columbia laws as they exist at any particular point in time.

[231] It is also necessary to consider the broader context of the legislation.

[232] One contextual feature is the nature of *UNDRIP* as an instrument passed by the United Nations General Assembly. It is not a binding treaty (*First Nations Families Act Reference* at para. 4), although the *Declaration Act* makes it part of the positive law of British Columbia. While one must be cautious in placing undue emphasis on any one part of the text to the exclusion of other parts, it is nonetheless noteworthy that *UNDRIP*'s final preambulatory statement "[s]olemnly proclaims" that it is a "standard of achievement to be pursued in a spirit of partnership and mutual respect". Other preambulatory statements reference "treaties, agreements and other constructive arrangements", "strengthened partnership", and enhancement of "harmonious and cooperative relations" between Indigenous peoples and states. All of this supports the conclusion that the *Declaration Act*'s chosen method of achieving alignment is through legislative reconciliation, not adjudication of claims of inconsistency.

[233] Another contextual feature arises from the preambulatory statement in *UNDRIP* that the situation of Indigenous peoples "varies from region to region and from country to country" and that there are significant "national and regional particularities" and a variety of "historical and cultural backgrounds" amongst Indigenous peoples in signatory states. In Canada, Aboriginal and treaty rights are affirmed in s. 35 of the *Constitution Act*. Canada has a robust legal system allowing for the litigation of Aboriginal and treaty rights claims. There are two features of this system that are particularly relevant for current purposes.

[234] First, the very existence of this robust legal system suggests the adoption of *UNDRIP* as part of the positive law of British Columbia was never intended to create an entirely separate system for adjudicating Indigenous rights claims. It would make little sense to read s. 3 of the *Declaration Act* as establishing an entirely separate route for the adjudication of Indigenous rights, by litigating claims of inconsistency between British Columbia's laws and *UNDRIP*. This lends even further support to the conclusion that the *Declaration Act*'s chosen method of achieving consistency between provincial law and *UNDRIP* is through legislative reconciliation, not adjudication.

[235] Second, there is the oft-repeated acknowledgment of Canadian courts that litigation, while sometimes unavoidable and indeed essential to the recognition and protection of Aboriginal rights, is not the most constructive route to reconciliation. It has been said that true reconciliation is "rarely, if ever, achieved in courtrooms" (*Clyde River (Hamlet)* at para. 24), and "often demands judicial forbearance" to "leave space for the parties to govern together and work out their differences" (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at paras. 4, 33). These sentiments provide context for interpretation of the government's obligation in s. 3 of the *Declaration Act* to work "[i]n consultation and cooperation" with Indigenous peoples to bring British Columbia's laws into alignment with *UNDRIP*.

[236] A final contextual factor is revealed through the positions taken by the parties in this appeal. Although both the appellants and the respondents made lengthy submissions on the topic of inconsistency generally, none of them undertook a detailed, text-based analysis of specific *UNDRIP* articles. The Gitxaala and Ehattesaht assert that the Mineral Claims Regime is inconsistent with a number of specific articles, but focused their oral submissions on article 32(2), which requires states to "consult and cooperate" with Indigenous peoples "in order to obtain their free and informed consent" prior to the approval of any "project" affecting their "lands or territories and other resources", including "mineral" resources. However, while relying upon article 32(2) to press their argument on inconsistency, the appellants also assert that it is undesirable for the court to pronounce on its precise meaning and application. They simply urge this Court to make a finding of inconsistency, leaving it to the parties to grapple with the full meaning of article 32(2) in subsequent consultation.

[237] For my part, I do not believe it would be possible or appropriate to make a finding of inconsistency without a careful consideration of the text of article 32(2), and its application in the context of asserted but unproven territorial claims. Further, the inconsistency analysis would be incomplete without a consideration of article 46, which is an internal limits clause, at least some elements of which are roughly analogous to the reasonable limits provision found in s. 1 of the *Canadian Charter of Rights and Freedoms*. (It has been noted that commentary on the proper approach to interpretation of

UNDRIP seldom involves “meaningful (or any) discussion of how the substantive provisions within *UNDRIP* interact with the interpretation and limitations clauses in Article 46”: Dwight Newman, “Interpreting FPIC in *UNDRIP*” (2019), 27 Int’l J. Minority & Group Rights 233 at 235.)

[238] In this context, this Court should be reluctant to wade into the interpretation of specific *UNDRIP* articles, which in my view would be a necessary step in the exercise of determining whether there is any inconsistency between *UNDRIP* and a particular British Columbia law. It would be unwise to undertake this exercise without the benefit of submissions of the parties on the actual text and proper application of the articles in issue. What is more, the appellants have signalled that judicial commentary on the scope and meaning of specific *UNDRIP* articles could be counterproductive in subsequent consultations. Thus, the appellants themselves urge judicial forbearance, leaving space for the parties to find common ground through consultation.

[239] I conclude, based on its legislative purpose, text, and context, that s. 3 of the *Declaration Act* does not contemplate a role for the courts in adjudicating claims of inconsistency between *UNDRIP* and specific British Columbia laws. Rather, s. 3 imposes a statutory duty on the government, working in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure alignment between provincial laws and *UNDRIP*, as an exercise in legislative reconciliation. Because this interpretation of s. 3 of the *Declaration Act* advances the objective of bringing the province’s laws into alignment with *UNDRIP* as contemplated by the Legislature, it construes s. 3 in a manner that maximizes its consistency with *UNDRIP*, as required under s. 8.1(3) of the *Interpretation Act*.

Justiciability

[240] The doctrine of justiciability has been described as “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political, and economic life”: Sossin at 7, cited with approval in *Highwood Congregation* at para. 33. Justiciability depends to some extent on context, and the doctrine must be applied flexibly: *Highwood Congregation* at para. 34.

[241] One of the relevant considerations in deciding whether a matter is suitable for adjudication in the courts is whether some “other administrative or political body has been given prior jurisdiction of the matter by statute”: *Highwood Congregation* at para. 34. Thus, in some contexts, determining justiciability may become a question of discerning and giving effect to the will of the legislature that the subject matter is properly dealt with in some forum other than a court.

[242] Subject to constitutional constraints, it is the legislature’s prerogative to “make its intention known as to the role that courts are to play in interpreting, applying and enforcing its statutes”: *Canada (Auditor General)* at 91. Thus, a court that interprets a statute as not allowing for the adjudication of a particular matter is giving effect to the legislature’s view of the justiciability of that matter. In this context, the matter is non-justiciable not because of the court’s own view of “the appropriateness of its intervention”, but because the legislature is taken to have resolved that the matter is not a proper subject for the court’s adjudication: *Canada (Auditor General)* at 91–92.

[243] In such a context, the court’s “primary concern” will be to “retain its proper role within the constitutional framework of our democratic form of government”: *Reference re Canada Assistance Plan (B.C.)* at 545. Thus, a court may refrain from answering a question that would require it to stray beyond the role of the judicial branch of government within the framework of our constitutional democracy: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 26, 1998 CanLII 793.

[244] These principles resonate in the present case. Section 3 of the *Declaration Act* gives the government, in consultation and cooperation with Indigenous peoples, a statutory mandate and duty to embark upon what is effectively a law reform exercise. Sections 4 and 5 assign the responsibility for oversight and accountability over this process to the Legislature itself. Thus, the executive branch is responsible for taking all measures necessary to make the province’s laws consistent with *UNDRIP*, and the legislative branch retains ultimate responsibility for the end result.

[245] Legislative reconciliation is fundamentally a matter of law reform within the purview of the executive and legislative branches of government. Making judicial pronouncements on inconsistency between UNDRIP and specific British Columbia laws would take the court outside its proper role in our constitutional democracy. The court would be inserting itself into the law reform process.

[246] The present appeal bears some similarity to the situation considered in *Friends of the Earth*. In that case, a public interest group brought a petition for judicial review challenging the federal government's failure to: (i) prepare a climate change action plan as mandated under the *Kyoto Protocol Implementation Act*, S.C. 2007 c. 30; and (ii) make the necessary regulatory changes to meet Canada's commitments under the *Kyoto Protocol*. The petition judge held that while the statutory duty to prepare a climate change action plan "may well be justiciable", an "evaluation of its content was not": *Friends of the Earth* at para. 34.

[247] The petition judge addressed the question of justiciability as a matter of statutory interpretation, asking whether Parliament intended the statutory duties imposed on the executive to be "subjected to judicial scrutiny and remediation": *Friends of the Earth* at para. 32. He answered that question in the negative. The decision was upheld on appeal, in a brief endorsement: *Friends of the Earth v. Canada (Environment)*, 2009 FCA 297, leave to appeal ref'd, [2009] S.C.C.A. No. 497. (The *Kyoto Protocol Implementation Act* was later repealed, but this does not affect the soundness of the Court's justiciability analysis.)

[248] The following passage from the petition judge's decision is particularly relevant:

[35] There are other reasons for not construing the words in section 5 "to ensure that Canada meets its [Kyoto] obligations" as creating justiciable duties. The Act contemplates an ongoing process of review and adjustment within a continuously evolving scientific and political environment. It refers to cooperative initiatives with third parties including provincial authorities and industry. These are not matters that can be completely controlled by the Government of Canada such that it could unilaterally ensure Kyoto compliance within any particular timeframe. The Act also recognizes that the implementation of any given Climate Change Plan may not be fully accomplished in any given year. This is the obvious purpose of paragraph 5(1)(f), which allows for a failure to implement any of the required remedial measures for ensuring Kyoto compliance in a given year. Any such failure must be explained by the Minister in the succeeding Climate Change Plan to be tabled in Parliament, but it is implicit in this provision that strict compliance with the Kyoto emission obligations in the context of any particular Climate Change Plan is not required by section 5. [Underlining added.]

[249] Although the subject matter in issue is fundamentally different, there are some obvious parallels between the framework of the legislation in issue in *Friends of the Earth* and the framework of the *Declaration Act*. Both statutes recognize and implement Canada's commitments under an international instrument; require the government to take measures to ensure consistency or compliance with the international instrument; require consultation and cooperation with interested parties outside the government; contemplate an ongoing exercise not expected to be accomplished within a set period of time; and include mechanisms for oversight and accountability to the legislature.

[250] I conclude that the question of inconsistency between *UNDRIP* and specific British Columbia laws at any fixed point in time is not a justiciable matter. This is a function of the Legislature's intent in enacting the *Declaration Act* as a framework for legislative reconciliation, which is a form of law reform within the domain of the executive and legislative branches.

[251] I do accept, as did the judge, that a failure by the government to act on the specific duties imposed under the *Declaration Act* may well be a justiciable matter. I see no reason why questions about whether the government has failed to consult with Indigenous people as contemplated under s. 3 of the *Declaration Act*, or otherwise failed to meet its statutory obligation to take all measures necessary to ensure the consistency of British Columbia's laws with *UNDRIP*, would be non-justiciable. These are

specific and cognizable statutory duties, adjudication of which would involve no impermissible intrusion on the executive or legislative branches of government. One would expect the government to act upon these statutory duties in keeping with the honour of the Crown.

[252] However, I agree with the judge that no such issue arises in this case.

[253] There is no suggestion in the petition record that anyone from the government undertook any form of consultation with impacted Indigenous peoples about the rights, standards, or goals recognized in *UNDRIP* prior to the granting of mineral claims under the existing regime. However, on the judge's findings, this failure would appear to be a function of where the government 'drew the line' on consultation more generally.

[254] To explain, prior to the judge's ruling, the government took the position that the issuance of mineral claims under Part 2 of the *Mineral Tenure Act* did not impact outstanding Aboriginal rights claims, and that consultation was only required before the issuance of mineral leases under Part 3 of the *Mineral Tenure Act*. It is therefore unsurprising that the government also undertook no consultation with Indigenous peoples to ensure consistency between the Mineral Claims Regime and *UNDRIP*.

[255] I see no reason to expect that the government, having now been corrected by the judge on where the consultation line is to be drawn, would fail to consult with affected Indigenous peoples, with a view to pursuing all measures necessary to ensure consistency between the new Mineral Claims Regime and *UNDRIP*. Thus, the judge's declaration that the Crown has a s. 35 duty to consult is, in the context of this particular litigation, sufficient on its own to ensure that the government lives up to its statutory responsibilities under the *Declaration Act*.

Conclusion

[256] I would dismiss the appeals.

"The Honourable Justice Riley"

Appendix A

Schedule

(Section 1)

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting

13 September 2007

¹See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

See resolution 2200 A (XXI), annex.

A/CONF.157/24 (Part I), chap. III.

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Resolution 217 A (III).

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

TAB 31

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (CanLII), [2004] 3 SCR 511

Source: Supreme Court of Canada

Date: 2004-11-18

File number: 29419

Other citations:

245 DLR (4th) 33 — 327 NR 53 — 135 ACWS (3d) 2 — [2005] 3 WWR 419 — 36 BCLR (4th) 282 — 11 CELR (3d) 1 — 206 BCAC 52 — 19 Admin LR (4th) 195 — [2005] 1 CNLR 72 — [2004] CarswellBC 2656 — JE 2004-2156 — [2004] SCJ No 70 (QL) — [2004] ACS no 70 — 26 RPR (4th) 1

Citation:

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (CanLII), [2004] 3 SCR 511, <<https://canlii.ca/t/1j4tq>>, retrieved on 2026-01-02

**Most recent
unfavourable
mention**

Ross River Dena Council v Yukon (Government of), 2024 YKSC 1 (CanLII)

[...] Indigenous claimants must not frustrate the Crown's reasonable good faith consultation attempts, nor should they take unreasonable positions to thwart government from making decisions where agreement is not reached despite meaningful consultation (Haida Nation at para. 42). [...]

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

Minister of Forests and Attorney General of British Columbia

on behalf of Her Majesty The Queen in Right of the Province

of British Columbia *Appellants*

v.

Council of the Haida Nation and Guujaaw, on their own behalf

and on behalf of all members of the Haida Nation *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

Council of the Haida Nation and Guujaaw, on their own behalf

and on behalf of all members of the Haida Nation *Respondents*

and

Attorney General of Canada, Attorney General of Ontario,

Attorney General of Quebec, Attorney General of Nova Scotia,

**Attorney General for Saskatchewan, Attorney General of Alberta,
Squamish Indian Band and Lax-kw'alaams Indian Band,
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British Columbia Chamber of Commerce, Council of Forest
Industries, Mining Association of British Columbia,
British Columbia Cattlemen's Association and
Village of Port Clements** *Interveners*

Indexed as:Haida Nation v. British Columbia (Minister of Forests)

Neutral citation:2004 SCC 73.

File No.:29419.

2004:March 24; 2004:November 18.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held:The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

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S.C.R. 1075; *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 2000 CanLII 5713 (ON CA), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC SC), [1997] 4 C.N.L.R. 45, aff'd 1999 BCCA 470 (CanLII), [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 2003 BCSC 1422 (CanLII), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025; *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 1888 CanLII 209 (UK JCPC), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748.

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Forest Act, R.S.B.C. 1996, c. 157.

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Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

The Chief Justice —

I. Introduction

¹ To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. Does the Law of Injunctions Govern This Situation?

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a

promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow, supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented”.

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013, where Cory J. wrote: “So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement” (para. 110).

23 In the companion case of *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for “consultation and compensation”, and to consider “how the government has accommodated different aboriginal rights in a particular fishery . . . , how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users” (para. 64).

24 The Court’s seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in

question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law “duty of fairness”, based on the general rule that an administrative decision that affects the “rights, privileges or interests of an individual” triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be “sound practical and policy reasons” to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow*, *supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 2000 CanLII 5713 (ON CA), 186 D.L.R. (4th) 403, which held that “what triggers a consideration of the Crown’s duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)” (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a “mere” duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government’s arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, “[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation” (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC SC), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot “meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope”. However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. The Scope and Content of the Duty to Consult and Accommodate

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 2003 BCSC 1422 (CanLII), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation" in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions

for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . .

. . .

. . . genuine consultation means a process that involves . . .:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of “accommodate”. The terms “accommodate” and “accommodation” have been defined as to “adapt, harmonize, reconcile” . . . “an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise”: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.

50 The Court’s decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands “cannot be accommodated to reasonable exercise of the Hurons’ rights”. And in *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights “can be accommodated with the Crown’s special fiduciary relationship with First Nations”. Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, at para. 54, the government “may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance”. It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries’ and agencies’ operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

E. Do Third Parties Owe a Duty to Consult and Accommodate?

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party’s obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and

consult with “aboriginal people claiming an aboriginal interest in or to the area” (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of “knowing receipt”. However, as discussed above, while the Crown’s fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown’s honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, made it clear that the “trust-like” relationship between the Crown and Aboriginal peoples is not a true “trust”, noting that “[t]he law of trusts is a highly developed, specialized branch of the law” (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court’s determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees’ harvesting rights, in part to make land available for Aboriginal peoples. The government’s legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government “has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser’s consent or co-operation” ((2002), 2002 BCCA 462 (CanLII), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy “hollow or illusory”.

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.

F. The Province’s Duty

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province’s argument rests on s. 109 of the *Constitution Act, 1867*, which provides that “[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces.” The Province argues that this gives it exclusive right to the land at

issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would “undermine the balance of federalism” (Crown’s factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to “any Interest other than that of the Province in the same” (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 1888 CanLII 209 (UK JCPC), 14 App. Cas. 46 (P.C.), lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p. 59). The Crown’s argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine’s Milling*, *supra*. There is therefore no foundation to the Province’s argument on this point.

G. Administrative Review

60 Where the government’s conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government’s efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered

their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

(1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;

(2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

[O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits. . . . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting . . ." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

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