Canadian Human Rights Tribunal

Tribunal canadien des 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**

**Acknowledgement**

The Tribunal is releasing this ruling in painful times in Canada were 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**
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> 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).
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> (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 that 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 *amicae 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 *amicae 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 *amicae 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 *amicae curiae* appointment at the rate it proposes to pay. Third and finally, courts directing the expenditure of significant sums by fixing *amicae 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 FNFCS 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 FNFCS 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:
    - Air quality (e.g. vent replacement),
    - Thermal comfort (e.g. replacement of thermostats),
    - Acoustics (e.g. wall insulation),

Community Well-being and Jurisdiction Initiatives:

Infrastructure Purchase, Maintenance and Renovations

- Capital costs for:
- <u>Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services;</u>
- 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 a*d 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 paly 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 de 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 systematic 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 Commissions 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 inoperable 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] 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 discretionnary 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;
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> 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;
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> 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
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> 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.
>
> […]
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> [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 <u>fully funded at actual costs</u> 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 feasibilities 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:
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> (…) 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 Representatives 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**
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> 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.
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> …
>
> In rendering a determination on appeal, the following factors may be considered:
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> - 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 quality 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 leans 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 form 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 FNCFCS 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

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