Tribunal File No: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and –

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

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

REPLY SUBMISSION OF THE COMPLAINANT, ASSEMBLY OF FIRST NATIONS

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke, Adam Williamson and Lacey Kassis
613-241-6789
swuttke@afn.ca
awilliamson@afn.ca
lkassis@afn.ca

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

Dianne Corbiere

705-325-0520
dgcorbiere@nncfirm.ca

FASKEN
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Geoff Cowper, KC
Nathan Surkan
T: 604-631-3131
gcowper@fasken.com
nsurkan@fasken.com

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I. OVERVIEW

1. In December of 2021, the Assembly of First Nations ("AFN") secured a $40 billion settlement with Canada. $20 billion was earmarked for compensation and $19.807 billion was committed for long-term reforms[1]. The Panel has a broad and ongoing jurisdiction to grant the relief sought. This Panel's ongoing jurisdiction was relied upon by the class action parties' in negotiating the terms of the Final Settlement Agreement ("FSA").

2. The Panel itself has repeatedly recognized the need for, and its preference for, the parties to negotiate a resolution, in the spirit of reconciliation. As noted in 2016 CHRT 10, the Panel clearly identified that while it was required to issue the ruling in question, it "continues to encourage the parties to meet and discuss the resolution of this matter".[2] This position was exemplified when, upon learning of the FSA, the Panel congratulated the parties and encouraged them in their important work to develop the FSA.[3]

3. Justice Favel ended his reasons on the judicial review with the following powerful and poignant reminders that are of critical importance for the Panel when considering the submissions of the Canadian Human Rights Commission ("Commission") and of the First Nations Child and Family Caring Society of Canada ("Caring Society"):

> Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. … In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. [Emphasis added].

4. Justice Favel did not end the Panel's jurisdiction, render the Panel *functus officio* or bar the parties from negotiating an agreement to resolve the issues in this most important case. He

[1] Affidavit of Janice Ciavaglia affirmed July 22, 2022 ["Ciavaglia Affidavit"] at para 40.

[2] *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10 paras. 40-42.

[3] It is telling that the Panel itself considered that it was open to the parties to negotiate a settlement to end the litigation and to achieve finality.

did the opposite.

5. The AFN, the Chiefs of Ontario ("COO"), the Nishnawbe Aski Nation ("NAN") and Canada all understood that the Panel's recommendations and Favel J.'s decision to mean that negotiation was not only permitted, but strongly encouraged.

6. The FSA represents a comprehensive settlement in the best interests of the First Nations children and families impacted by the Tribunal's Compensation Decision.[4] In addition, the rights under the FSA are not affected by the outcome of the Appeal from Justice Favel's decision.

7. The AFN, the Caring Society, Canada and the First Nations individuals acting as representative plaintiffs in the class actions ("Representative Plaintiffs") pending before the Federal Court all agreed to attend mediation presided by the Honourable Leonard Mandamin with a view to negotiating an agreement regarding compensation[5].

8. Thereafter, the AFN, the Representative Plaintiffs, Moushoom counsel and Canada all participated in intensive negotiations mediated by the Honourable Leonard Mandamin and thereafter facilitated by the Honourable Murray Sinclair, with a view to settling compensation, both for the class action and the Tribunal proceedings[6]. The Caring Society participated in some of these meetings[7]. In short, the parties did precisely what this Panel and Justice Favel encouraged them to do.

9. In fact, the AFN, Moushoom counsel and Canada's efforts resulted in an increase to the number of individuals who are eligible for compensation in the Final Settlement Agreement[8].

10. The Caring Society's arguments that the Panel cannot grant this motion is contradicted by its participation in the negotiations and Dr. Blackstock's letter of January 21, 2022 (upon which

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[4] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39 ("Compensation Decision").
[5] Ciavaglia Affidavit at para 26.
[6] Ciavaglia Affidavit at para 26-27.
[7] Ciavaglia Affidavit at para 26.
[8] Ciavaglia Affidavit at para 33-39.

the Caring Society heavily relies), where she expressly acknowledges being open to amending the Tribunal's Compensation Decision and Compensation Framework Decision.

11. The Caring Society repeatedly misunderstands the FSA and repurposes Canada's failed arguments in the merits proceeding that challenged this Panel's jurisdiction. Further, the Caring Society's efforts to defeat the FSA would result in restricting compensation for those who were subjected to Canada's discrimination to the Tribunal's maximum of $40,000.

12. The AFN notes that the Caring Society advocated against compensation being paid directly to the victims of Canada's discrimination, instead seeking compensation in the amount of $20,000 for each victim to be paid into an independent Trust fund [Spirit Bear Trust Fund].[9] The Caring Society participated in the compensation negotiations but is now seeking to elevate its role in relation to compensation beyond that established by the Tribunal, seeking to become a principal, after the fact, to the negotiations, including oversight of the compensation package and payments arising out of it.

13. The Commission's arguments should likewise be rejected. This case has repeatedly demonstrated how the interests and rights of First Nations children, families and communities have taken a back seat to other interests such as the public interest, Canada's fiscal priorities and public policy. The Commission now appears to follow suit in its challenge of the FSA. The Commission's interest in this motion revolves around protecting prior orders, rulings and precedents of the Tribunal in this matter and those of other cases outside of this matter, all at the expense of First Nations children and families. In defending Tribunal precedent, the Commission has forgotten the fact that the settlement being advanced by the AFN for the Tribunal's endorsement is and will likely remain <u>unprecedented</u> both in nature and scope, easily distinguishable by virtue of the monetary consideration at play and scope of the discrimination it seeks to redress.

14. The AFN encourages this Panel to look past the limited and technical arguments of the Caring Society and the Commission. The AFN submits that any individual affected by a divergence

[9] Caring Society's written submissions at para 32.

from the Tribunal's Compensation Order will be eligible for indirect compensation benefits from the FSA's Cy-près Fund.

15. The benefits of the FSA were considered and largely supported by First Nations leadership across Canada. COO and NAN support the FSA without qualification, with NAN expressly noting the importance of ensuring that those who suffered the greatest harm receive the greatest compensation. In addition, the Federation of Sovereign Indigenous Nations' reconsideration of its opposition to the FSA and commitment to not rely on its position advanced in seeking interested party status. All of this speaks to First Nations support of the FSA. The AFN, COO and NAN are each representative organizations of First Nations and their citizens. They are accountable and answerable to First Nations. On the other hand, the Caring Society is mainly accountable to child welfare agencies.

16. The AFN submits that this Panel must duly consider the fact that the FSA is a First Nations-led and endorsed process. It is First Nations children and families who are at the heart of these proceedings and, as endorsed by this Tribunal, it is incumbent on this Tribunal to give due effect to the will of First Nations across Canada and those who speak on their behalf and endorse the FSA.

17. The consequences of accepting the Caring Society's position are ongoing and uncertain litigation, delay in compensation and general confusion. If the Tribunal does not grant the relief sought, Canada will not have any legal obligation to pay $20 billion to compensate hundreds of thousands of First Nations victims who desperately want and need it. The settlement may simply be gone, and it is uncertain whether Canada will return to the negotiating table, whether a new government will change course, whether legislation will be passed affecting the case, etc. Canada would also have the right to reactivate its appeal.

18. Notably, failure to ratify and/or obtain court/tribunal approval of agreements on compensation before December 31, 2022, also places the settlement in jeopardy of the Treasury Board repurposing all or a portion of these funds. These are material risks which will be mitigated by this Panel's endorsement of the FSA.

II. REPLY SUBMISSIONS

a) The Class Parties Executed Justice Favel's Direction in the Spirit of Reconciliation

19. The AFN's position is that this settlement satisfies the Tribunal's Compensation Decision and related orders. The AFN views this settlement, reflected in the FSA, as the best possible resolution to both the complex and lengthy proceedings before this Panel related to compensation for victims of Canada's discrimination and to the Class Action. In addition to finally providing resolution of all outstanding legal proceedings and ensuring timely delivery of compensation, approval of the FSA will significantly expand the number of individuals who would otherwise not be entitled to compensation under the CHRT process and allows those who suffered the greatest harm to be compensated commensurately.

20. The FSA represents a First Nations-led, heavily negotiated and consulted mechanism to pay timely compensation and indirect benefits to victims of Canada's discrimination potentially covered by this Panel's compensation orders and the class actions. The FSA also provides life-changing compensation to tens of thousands of the vulnerable First Nations individuals who would not otherwise receive any compensation at all. Such compensation can potentially put the claimants on course for meaningful and positive futures, and thereby promotes reconciliation.

21. Contrary to the assertion of both the Commission and Caring Society, Justice Favel's judgment does not stand for the proposition that this Panel's orders are final and can never be reconsidered.[10] In relation to the Attorney General of Canada's arguments that the Tribunal was engaged in an open-ended series of proceedings which offended the principles of certainty and finality, Justice Favel expressly noted that the proceedings subsequent to the Merits Decision reflected the Tribunal's management of the proceedings utilizing the dialogic approach. Importantly, Justice Favel endorsed the approach as it sought to enable

[10] Commission's written submissions at paras 13, and 55. Also the Caring Society's written submissions at paras 9, 105, 108, and 109.

negotiation, practical solutions and giving full effect to the recognition of human rights.[11] The Compensation Order was a continuation of this approach.

22. Justice Favel not only empowered but expressly encouraged the parties to do precisely what they did in negotiating the FSA.[12]The Commission's argument that this Panel should not accept the FSA as satisfaction of its decisions would render Justice Favel's exhortation to the parties to negotiate and resolve matters meaningless. It is also expressly contrary to his clear statement that "the good work of the parties is unfinished". The FSA is a negotiated settlement between Canada, the AFN (a representative organization created by and accountable to First Nations across Canada), and the representative plaintiffs who personally suffered Canada's discrimination. Negotiation, by definition, entails compromise. This FSA may not be perfect, but represents the culmination of the AFN and Canada's efforts to move forward in a reconciliatory manner towards ongoing and mutually respectful long-term Crown-First Nations relations.[13]

23. At the Federal Court, the Commission recognized the unprecedent nature of this matter.

> Some aspects of the Tribunal's Decisions may be bold, in the sense they are breaking new ground, and have few if any analogous precedents. However, in this case, that is not a sign of any unreasonableness in the Tribunal's process or reasoning. Instead, it is a reflection of the magnitude of Canada's discriminatory practices. Extraordinary infringements of the CHRA reasonably call for extraordinary remedies.[14]

24. The Commission's submissions now elevate form over substance and reconciliation, to the potential detriment of the tens of thousands of First Nations individuals envisaged by the FSA. In short, the Tribunal should not put the Commission's institutional interests in case

[11] *Attorney General of Canada v. First Nations Child and Family Caring Society et al.,* 2021 FC 969, at para 162 ["Judicial Review"].
[12] Judicial Review para 300 – 301.
[13] *R. v. Desautel*, 2021 SCC 17 at para. 30 ["*Desautel*"].
[14] Factum of the Canadian Human Rights Commission dated May 12, 2021, at para. 73.

laws precedent and the finality of orders ahead of reconciliation with First Nations.

25. With respect to the Caring Society, its submissions are contrary to its actions and statements. The Caring Society agreed to negotiate, participated in mediation, requested facilitated discussions by the Honourable Murray Sinclair, gave its considered views on many aspects of the FSA, and assisted with the negotiations that ultimately led to the FSA[15].

26. Further, contrary to the assertion at paragraph 9 of its submission that "the compensation orders are now final and cannot be re-examined, refined, or amended. The Federal Court closed the door on such options when it upheld the Tribunal's compensation orders on September 29, 2021", in its letter to the parties to the FSA dated January 21, 2022,[16] the Caring Society stated that it remained open to considering amendments to the Tribunal's orders in relation to compensation for adult victims. Thus, the Caring Society expressly acknowledges that it was open to the Tribunal to re-examine, refine or amend its orders.

27. The Caring Society could not and would not have acted in the foregoing manner if it was of the view that no negotiation was permitted, and the Panel had no jurisdiction other than to simply apply its decisions to the letter.

b) The Compensation Order is not Final

28. The AFN submits that the Compensation Order and Compensation Framework Order is not final as the Caring Society and Commission assert. In this Panels' Compensation order, the Panel stated:

> [270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims /survivors should be further detailed and new categories added.

[15] Ciavaglia Affidavit at para 26-27.

[16] Exhibit A of the Affidavit of Jasmine Kuar affirmed on August 5, 2022. The Caring Society states: "the Caring Society remains open to considering and supporting amendments, if required, to the Tribunal's orders to address the amount of compensation for adult victims where Canada and class counsel can demonstrate that an amount lower than $40,000 is just compensation for the infringement of the adult victim's dignity".

29. Furthermore, in the Compensation Framework Order, this Panel stated:

> [41] The Panel retains jurisdiction on all its Compensation orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.

30. Despite its assertion that that this Panel's orders are final, the Caring Society recognizes that both the Compensation Order and Compensation Framework Order lack clarity which the Parties will likely have to return to Panel for future direction. For instance, the Caring Society admits that this Panel has never defined the meaning of "in care" in relation to children removed from their homes and placed "non-ISC funded placements".[17] As a result, the Caring Society admits that a potential group of children and individuals might not be eligible for compensation and their status is undetermined under the CHRT process. The Caring Society suggests further negotiations are warranted to address the status of this class, while suggesting that AFN's negotiation of the FSA is completely prohibited. Unlike the CHRT process, the FSA clearly settles this issue.

31. The Commission relies on *Hughes*[18] to suggest that this Panel is constrained by the evidence and is prohibited from reconsidering its orders in perpetuity. However, the AFN submits that *Hughes* stands for the proposition that human rights tribunals possess a degree of latitude in the making of remedial orders, which must be reasonable and the remedial discretion exercised in light of the evidence presented.[19]

32. In addition, the Commission and Caring Society rely on *Walden*, *Payiappoly*, and *Lake Babine Nation* to argue that this Panel cannot reconsider its orders once its statutory mandate has been fulfilled, the discovery of new evidence or with the consent of the Parties. The AFN submits that these cases are distinguishable from this matter. First, those three cases deal with individual employment complainants or a class of employees working for the same employer. Secondly, they relate to unjust dismissal claims or pay equity matters. The facts

[17] Caring Society's Submissions at paras 120 – 124.
[18] *Hughes v. Elections Canada,* 2010 CHRT 4 ["*Hughes*"]
[19] *Hughes* at para 50.

of this case are very complex when compared to employment related matters. The nature of discrimination, the complex classes of victims and the principles of reconciliation demand that this Panel be less formalistic and exercise a degree of flexibility.[20]

33. Furthermore, the AFN's request to vary the compensation orders does not amount to deciding a matter differently. Rather, the need to vary the order is required to address the existing and evolving needs of First Nations claimants with specific provisions included in the FSA. This is particularly applicable in this matter as the Compensation Order and Compensation Framework are not final and a number of issues still need to be addressed.

34. The Compensation Framework is by no means a complete final product. A number of elements still need to be negotiated, drafted and approved by this Panel. In short, this Panel has not completely fulfilled its task in disposing of the compensation issues raised in the proceeding.[21] This is evidenced by the fact that compensation under the Compensation Framework cannot be paid at this time due to the many missing elements.

35. Finality occurs where there is nothing left to perfect the decision of a tribunal or to render it capable of execution.[22] A judicial decision is deemed final when there is nothing to be judicially determined or ascertained thereafter. As discussed above, this Panel's compensation order and the compensation framework order are not implementable at this point. There remains considerable work yet to be concluded in the context of the Tribunal's Compensation Framework; which work has now been done through lengthy, intensive negotiations that have resulted in the FSA.

36. The AFN is troubled by the Caring Society's positions regarding kinship care placements, stepparents and the broad inclusion of every individual that was placed into care.[23] The term "kinship and various custody arrangements" in the Compensation Framework is

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[20] *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 862 ["*Chandler*"].
[21] *Chandler* at 862.
[22] *St-Amour v Canada (AG),* 2014 FC 103 at para 44; *Lukacs v Natural Sciences and Engineering Research Council of Canada,* 2015 FC 267 at para 42; *Ali v Canada (Minister of Citizenship and Immigration),* 2012 FC 710 at para 25 [Ali v Canada].
[23] Caring Society's written submissions at paras. 40-42.

insufficiently defined, ambiguous and overly broad. The Tribunal has not provided any direction regarding its interpretation in the Compensation Framework.[24] The inclusion of such a broad term would obviate the parties' efforts to give clarity to the eligibility criteria for compensation. Further, the AFN has maintained all along that the ISC data is critical to minimizing the burden upon First Nations children, which is not available for this limited subset of children.

c) The Panel is not *functus officio* nor does finality require rejection of the FSA

37. The doctrine of *functus officio* is centred, amongst others, around the need for finality. The FSA brings finality through lengthy mediation and negotiations led by eminent First Nations jurists, the Honourable Leonard Mandamin and the Honourable Murray Sinclair, in the spirit of reconciliation. This negotiated finality comes at the invitation and encouragement of Justice Favel in this same matter in the passage quoted above.

38. The alternative presented by the opposing parties is anything but finality. It is an invitation to years of more litigation, uncertainty and confusion at the expense of victims.

39. Contrary to the technical arguments of the Commission and the Caring Society, the Tribunal is not *functus officio*. The doctrine of *functus officio* does not apply to administrative tribunals in the same way as it applies to courts. As the Supreme Court of Canada explained in *Chandler*, "justice" sometimes requires that the doctrine be applied in a "more flexible and less formalistic" manner.[25]

40. The case law has recognized situations where the doctrine should be applied more flexibly. The present motion meets two such situations.

41. The first arises where there is no right of appeal. In that circumstance, a tribunal can reopen a decision to grant relief that is not available on appeal. If there is a right to appeal "only on a point of law [j]ustice may require the reopening of administrative proceedings in order to

[24] Compensation Framework at s. 4.2.1.
[25] *Chandler* at p. 862.

provide relief which would otherwise be available on appeal".[26] In this case, the *CHRA* contains no appeal rights. This requires a more flexible and less formalistic approach to *functus officio*. The approach advocated by the opposing parties is anything but flexible: it is a most formalistic and technical approach.

42. The existence of judicial review does not play a determinative role. The Federal Court of Appeal stated in *Canada (Attorney General) v Symtron Systems Inc*: "if, as here, appeal from a decision of the Tribunal is only by way of judicial review, then justice may require that the [tribunal] be allowed some latitude".[27]

43. Therefore, contrary to the arguments of the Caring Society and the Commission to the effect that Justice Favel's decision on judicial review rendered the panel *functus*, the fact that the Compensation Decision was not disturbed on judicial review is not determinative. In *Merham v. Royal Bank of Canada*,[28] the Human Rights Commission had rejected a complaint and that decision was upheld on judicial review. The complainant subsequently sought a reconsideration from the Commission in light of new developments. The Commission rejected the complaint again and on further judicial review argued that the Commission was *functus*. The Federal Court disagreed. The Court's analysis is instructive on this motion:

> [22] In *Kleysen Transport Ltd. v. Hunter*, 2004 FC 1413, [2004] F.C.J. No.1723 (QL) [*Kleysen*], Mr. Justice O'Reilly found that the Commission "has the power to reconsider its decisions" (at para. 4) even though no specific statutory provision provides for such reconsideration. Justice O'Reilly found that under the *Canadian Human Rights Act*, the Commission clearly possessed a very broad discretion to screen and process complaints which supported the conclusion that it could reconsider its decisions, *Kleysen*, *ibid* at para. 8.
>
> [24] Moreover, Mr. Justice Sopinka stated the following in *Chandler et al. v. Alberta Association of Architects et al.*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848 at p. 862:

[26] *Chandler* at p. 862. See also *Raman v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 140 (CA): "the doctrine of *functus officio* must be more flexible where there is no right of appeal … where justice requires, administrative bodies should be able to reopen proceedings".
[27] *Canada (Attorney General) v Symtron Systems Inc*, [1999] 2 FC 514
[28] *Merham v. Royal Bank of Canada*, 2009 FC 1127 ["*Merham*"]

> To this extent, the principle of *functus officio* applies [to decisions of administrative tribunals]. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute.

> [25] Consequently, the above case law leads me to conclude that the Commission has the power to reconsider its decisions, but this is a discretionary power which must be used sparingly in exceptional and rare circumstances.

44. This case involves human rights, an area where courts have found that the *functus officio* doctrine plays a diminished role. For example, the British Columbia Court of Appeal held that the British Columbia Council of Human Rights had jurisdiction to reconsider its own decisions simply by virtue of the fact that it was a human rights tribunal.[29] The Federal Court has repeatedly held that section 53(2) of the *CHRA*,[30] grants this Tribunal "the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the

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[29] *Zutter v British Columbia (Council of Human Rights)*, 57 BCAC 241

[30] *Canadian Human Rights Act*, RSC 1985, c H-6

Tribunal are forthcoming to complainants".[31] In this case, failure to accept the settlement because it falls short of some aspects of the order, while far exceeding the order in others, would prevent remedies from being "forthcoming to complainants".

45. The second situation where the *functus officio* doctrine applies more flexibly is where a tribunal is asked whether a novel course of action complies with its order. The Court has held that a tribunal can answer questions about whether a course of action not contemplated at the time of the order complies with its order.[32]

46. At the time of the compensation decisions, neither the parties nor the Tribunal contemplated the FSA, which is more advantageous to First Nations than the Compensation Decision in light of the statutory and time limitations that exist in the Tribunal setting. The Tribunal has the jurisdiction to clarify whether, given the options of the Compensation Decision or the FSA, it would support the FSA as providing adequate remedies to all victims.

47. The FSA has the overwhelming support of First Nations around the country and there should be no further delay to the deserved compensation to tens of thousands of individuals. This settlement, and what it can do for so many, is far too important to be lost as a result of technical legal arguments.

48. The Panel should declare its decisions satisfied, endorse the FSA and if necessary, amend its Orders, to achieve finality and, most importantly, facilitate the payment of significant compensation to tens of thousands of First Nations children and families without further litigation.

d) The Panel's retained jurisdiction enables it to grant the relief sought

49. This Panel remains seized to determine whether it is satisfied that the parties have

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[31] *Canada (Attorney General) v Grover*, [1994] FCJ No 1000 (QL) at para 32; *Canada (Attorney General) v Moore*, 1998 CanLII 9085 (FC); *Kleysen Transport Ltd v Hunter*, 2004 FC 1413 ("the Commission has the power to reconsider a complaint in order to be fair to the parties before it" at para 13); *Merham* at para. 25 (it "has the power to reconsider its decisions").

[32] *Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832,* 1999 CanLII 14235 (MB QB) at paras 33-35.

satisfactorily resolved the important matters in this case through negotiation.

50. Contrary to the position of the Commission, this Panel's retained jurisdiction is not solely limited to procedural matters. Nor is the Panel's jurisdiction to vary its orders limited to "add or further specify categories of compensation beneficiaries",[33] as the Commission argues (without any supporting authority to that effect). The Tribunal has exercised its continued jurisdiction to add thousands of beneficiaries to the claim and has added to the scope of Jordan's Principle.

51. The Commission cites *Doucet-Boudreau v Nova Scotia (Minister of Education)*, where the Supreme Court stated that the rules of practice in the provincial courts enable the courts "to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted".[34] This decision, to the extent it applies to the *CHRA* context and this Tribunal, actually supports the Panel's jurisdiction to grant the "other or further relief" sought by the AFN on this motion.

52. The Caring Society incorrectly argues that the relief sought renders the Panel's decisions "null and void".[35] On the contrary, the Panel's decisions are not overturned, and they will forever remain as among the most powerful and important precedents in Canadian history. That the decisions will lead to an FSA that provides immediate compensation to tens of thousands of First Nations individuals than the Compensation Decision could provide is a large step forward toward reconciliation, not a step backward.

e) AFN's Motion is not Premature

53. The Caring Society takes exception to the phased in approach that Parties to the FSA have undertaken. The Caring Society is of the view that all elements of the FSA, including the distribution protocol and Jordan's Principle compensation provisions should be fully defined

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[33] Commission Factum at para 54.
[34] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para 81
[35] Caring Society written submissions at para 8.

and laid out before this Tribunal entertains the AFN's motion.

54. The Caring Society's proposition should be rejected as it unrealistic given the size and nature of this class action. Furthermore, the AFN notes that many aspects of the CHRT's Compensation Framework are incomplete and would require additional months of negotiations, if not years to conclude.

55. The AFN and Moushoom class action opted for a staged approach to developing and seeking approval of the FSA, and this is one positive characteristic of the agreement. Normally in class actions, the approval process would include the notice plan, final agreement, distribution plan, appointment of the administrator, dispute resolution mechanisms, and other aspects all at the same time. The FSA was developed in stages to ensure the Parties could optimize benefits and take their time to consult with First Nations.

56. For instance, the Jordan's Principle compensation scheme is complex and it is important to for the Parties to ensure that the application and assessment procedures are trauma informed and culturally relevant. Rather than commit to an abstract process at this time, the Jordan's Principle scheme is being developed by experts in the field and will be tested with focus groups and practice runs to ensure that any potential complications or problems are identified and resolved.

57. The Caring Society's central argument about Jordan's Principle—that it remains vague or uncertain—is incorrect. Contrary to the Caring Society's argument, pursuant to the terms of the FSA, the Federal Court Motion Record for the Settlement Approval Motion includes the AFN's Impact Assessment Matrix (Jordan's Principle approach) within Janice Ciavaglia's Affidavit of September 6, 2022, and the expert report of Dr. Lucyna Lach (commissioned by Moushoom counsel).[36]

[36] A copy of the AFN approach is included in Janice Ciavaglia's Affidavit and the expert report of Dr. Lucyna Lach have both been filed with the Federal Court in the Plaintiff's Motion Record dated September 6, 2022, and will be publicly available on the Court's website under its new pilot project announced this week. In the interim a copy is posted on the AFN's website at the following link: http://www.fnchildcompensation.ca/#Resources.

58. The Caring Society's argument overlooks the terms of the FSA which provides for a staged approach to the development of the Jordan's Principle claims process which has substantially advanced since the conclusion of the framework and is being overseen by a committee of experts and is subject to the approval and oversight of the Federal Court. The staged approach has been adopted to avoid re-traumatizing and on the advice of experts and contemplates testing, piloting and assessment after the approval of the FSA. These professionals advised that creating a list of essential services was not practical or recommended. These processes of necessity cannot take place prior to approval to avoid misplaced expectations and confusion in First Nations communities.

f) The Caring Society Second-Guesses the Terms of the FSA

59. In its submission, the Caring Society takes issue with some of the decisions made in negotiating the FSA.

60. Rather than focusing on these peripheral issues raised by the Caring Society, the AFN encourages this Panel to focus on the many benefits the FSA provides to First Nations individuals. Under the FSA, all 116,000 children whose removals were funded by ISC will be properly entitled to compensation, regardless of where they were placed. This will include those placed both on-and-off reserve since 1991[37]. This will entitle more children to compensation under the FSA compensation scheme than the CHRT process[38].

61. The Caring Society fails to understand the proposed compensation scheme for Jordan's Principle children. The Caring Society mischaracterizes the "significant impact" threshold that Jordan's Principle children must experience to receive the full compensation amount awarded by this Panel. The FSA contemplates a scheme whereby children who suffered physical, developmental and/or lasting or permanent harm as a result of the Jordan's Principle denial or delay of an essential service will obtain a minimum of \$40,000[39]. It is the intention of the Parties in the Class Actions that these children will get more than the \$40,000

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[37] Ciavaglia Affidavit at paras 55-56, 63-71.
[38] Ciavaglia Affidavit at para 55.
[39] Ciavaglia Affidavit at para 87.

ordered by the Tribunal because the denial or delay would have resulted in additional harms, escalated into permanent disabilities or contributed to premature death.

62. The other children the FSA speaks to are those who may not have even received compensation under the Panel's compensation order. The Caring Society correctly notes that a number of children were excluded from this Panel's orders.[40] The FSA provides compensation for children who may have been left out of this Panel's compensation order and who will now be entitled to an amount up to $40,000[41]. This category will include those children who suffered discrimination, but who were not significantly harmed as a result of the denial or delay of a Jordan's Principle request. This could be viewed as an enlargement of the Tribunal's Compensation Order.

63. The Caring Society seems to take issue that its suggestions on their generated list of essential services was not incorporated into the settlement agreement.[42] The Caring Society did not have a determinative voice in the negotiations and had a limited role. The AFN Circle of Experts on Jordan's Principle rejected the proposal that a list of essential services was appropriate for the purposes of compensation for Jordan's Principle. Therefore, the parties to the FSA have departed from the proposal of a list and now have a Framework of Essential Services, which the Caring Society refers to in its written submissions.[43] Class counsel solicited the views of First Nations and the Caring Society. Those suggestions that were in the best interests of the class are reflected in the FSA.

64. Thirdly, the Caring Society wrongly asserts that this Panel made no distinction between biological, adoptive or stepparents in its compensation orders. This assertion is incorrect. The Panel supported AFN's arguments that those parent(s) or grandparent(s) must be biologically related.[44] The AFN noted during the 2020 motion to expand the definition of

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[40] Caring Society's written submissions at para 36.
[41] Ciavaglia Affidavit at para 93.
[42] Caring Society's written submissions at para 60.
[43] Caring Society's written submissions at para 90.
[44] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 15 at paras 32, 44, and 45.

caregivers that the purpose of the compensation awarded by the Panel was to compensate a biological parent or grandparent for the loss of their child to a system that targeted them because they were First Nations. To add more eligible individuals to the list of eligible parents would subject a child to an interrogatory process of deciding which individuals would be the proper claimant.

65. Furthermore, the Caring Society seems to erroneously suggest that this Panel's compensation orders will enable more than two parents or grandparents to receive compensation.[45] The AFN submits that this Panel's compensation order contemplated providing compensation to two individuals only. There is nothing in the compensation orders to support the payment of compensation to four individuals, should a breakdown in the family relationship occur and both biological parents remarry while retaining joint custody. The AFN submits that the Compensation Orders and Compensation Framework do not account for the complex relationships a child has with his or her biological parents.

66. The Parties to the FSA have carefully considered these social relationships. Under the FSA, a priority of parents is established to ensure that those individuals who had continuous custody of a child for three years prior to a removal are eligible for compensation[46]. This could include an adoptive parent or a stepparent, in addition to a biological parent.

67. The Federal Court has considered and approved the opt-out period and process.[47] The Caring Society asserts that the opting out scheme of the class action does not conform to the Compensation Framework Order. The AFN notes that the Compensation Framework does not yet have an opting out process. The Framework merely provides that the "Parties and the Central Administrator shall develop an opt out process that is easy to understand".[48]

68. As work on the CHRT's opting out process is incomplete, the AFN submits that it is impossible to determine if the FSA does not conform, or the extent of such non-conformity, at the

[45] Caring Society submissions at para 83.
[46] Ciavaglia Affidavit at paras 74-75.
[47] Order of Madam Justice Aylen dated June 24, 2022.
[48] Article 3.3 of the Compensation Framework.

present time. The Caring Society's characterization of the FSA's alleged noncompliance is a fiction at best, and the AFN submits that little to no weight be given to this concern.

g) Tinkering with the FSA will unwind the careful construction of the Agreement

69. As noted, the parties to the FSA negotiations were at all times guided by and attempted to build upon the Compensation Decision and related compensation orders. The FSA was constructed in a manner whereby one provision rests and builds on prior provisions. The AFN submits that changing one provision to accommodate the wishes of the Caring Society may have the unintended effect of unraveling the whole agreement and jeopardizing a $20 billion settlement.

70. This case is unique in the sense that the FSA has come before the Panel prior to the Federal Court for approval. However, the law with respect to such approvals in the Federal Court is clear: the Court can either accept the FSA as is or reject it altogether.[49] Neither the Panel or the Court should be stepping into the role of drafting the parties' agreement.

h) The AFN, as the only party to request individual compensation and as the national representative organization of First Nations, is not precluded from seeking a variation of the compensation order

71. The AFN was the only Party in this proceeding to request that compensation be paid to individuals and would accordingly submit that the Compensation Order is the direct result of the AFN's advocacy, further to its mandates derived from the Chiefs-in-Assembly.

72. Ultimately, it was the AFN's arguments that carried the day at the compensation hearing, despite the Caring Society's insistence that compensation be paid into a Spirit Bear Trust Fund and that restrictions be placed on how and when claimants could access their compensation. As noted by this Court in the *Merits Decision*:

> The Caring Society requests the compensation be placed in an independent trust to

[49] *McLean v. Canada*, 2019 FC 1075 at para 70.

> fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.[50]

73. The AFN's unique role with respect to compensation was addressed in depth by this Tribunal in the context of its representative nature in seeking compensation for First Nations individuals, the Tribunal noting that while the AFN did not have a legal representation mandate from each First Nations child and parent living on reserve, what it did have was "a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their First Nations Chiefs."[51]

74. Drawing from this, the Tribunal found that:

> …the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out.[52] [emphasis added]

75. The Panel also noted that the First Nations interested parties, being COO and NAN – who as noted have both expressed their unqualified support for the FSA – should be able to speak on behalf of their children and voice their needs and seek redress for compensation.[53]

76. The Tribunal finally noted its appreciation for the Caring Society's efforts, as led by Dr. Blackstock, and its tireless work in the context of advocating for the best interests of the child with an Indigenous lens. Critically, in the context of the Caring Society's role on compensation, the Tribunal was clear that the Caring Society had invaluable expertise to

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[50] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2016 CHRT 2 at para. 486 ["Merits Decision"], as reflected on by the Tribunal in the Compensation Decision at para. 23.
[51] Compensation Decision at para. 201.
[52] Compensation Decision at para. 201.
[53] Compensation Decision at para. 201.

assist the Panel and the parties in this process.[54]

77. The AFN submits that these findings by the Tribunal clearly reflects the role of the parties to these proceedings in the context of compensation, the AFN and the interested parties' being responsible for the seeking of redress on behalf of the First Nations they represent and development of the associated process related to compensation, with the Caring Society providing expert assistance in relation to same. The Caring Society was and remains in effect a specialized advisor to the Tribunal, AFN and others representing First Nations rights holders, i.e. the victims of Canada's discrimination.

78. As acknowledged by the Tribunal, it was and remains incumbent on the AFN as the national First Nations representative organization to speak on behalf of First Nations children, as well as voice and address their needs within the context of a culturally safe and independent compensation process. The FSA is the product of this role, which as noted, has been endorsed by COO and NAN on behalf of the rights-holding victims they represent and, the AFN would contend, as informed by the Caring Society premised on the consultative efforts undertaken by the AFN and class action counsel with the Caring Society throughout the negotiation process.

79. The Caring Society contends that the AFN and Canada are in fact distorting the dialogic approach, claiming that it requires the parties' and Tribunal to engage in dialogue to move the complaint towards resolution and that the negotiation of the FSA effectively amounts to efforts aimed at "thwarting" same. In support of this statement, it cites academic cautions about applying the dialogic approach in a manner that "ignores the plight of individual litigants", expressing concern about the risk that the interest of victims could potentially be sacrificed by same.[55]

80. The AFN submits that it is in fact the Caring Society who is distorting the Tribunal directed scope of its contributions to the compensation process, neglecting the Tribunal's clear

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[54] Compensation Decision at para. 202.
[55] Caring Society's written submissions at para. 134-135.

endorsement of the AFN and other First Nations representative parties to ultimately speak on behalf of their children and voice their needs and seek redress. It forgets that it is our children and families who are affected by the Decision and ultimately, the FSA.

81. To displace the FSA First Nations reached with Canada on a nation-to-nation basis in deference to a non-rights holding organizations who represents the very agencies that were forced to give effect and perpetuate Canada's discriminatory FNCFS Program offends the sensibilities. Such an approach represents a clear departure from the constitutional promise of reconciliation which underlies s. 35 of the *Constitution Act, 1982*, and Canada and the First Nations parties' efforts to move forward in accordance therewith towards an ongoing mutually respectful long-term Crown-First Nations relationship.[56]

82. The Caring Society seems to assert that that the FSA is a creature foreign to this process and that Parties seeking this Panel's approval of the FSA are outside of the CHRT process.[57] This is simply not the case. The request for individual compensation was the AFN's burden to pursue and fight for, as it was the only party in this proceeding to seek compensation in the amount of $40,000 to be paid directly to victims of Canada's discrimination, and further to the endorsement by the Tribunal of the AFN as the voice of the victims of Canada's discrimination.

83. In summary, the AFN submits that it is the Caring Society who is the foreign party to the individual compensation process. The Caring Society did not seek individual compensation and tenaciously campaigned against it. Its role was confined by the Tribunal to providing advice to the First Nations parties and the Tribunal in the context of developing the compensation process. As such, the AFN submits that the Caring Society has no valid role or moral authority to now oppose the provision of compensation to First Nations children and family members as contemplated within the FSA. Accordingly, the AFN is not precluded from seeking a variation of the relief it requested, as it continues to represent the voice of First

[56] *Desautel* at para. 30.
[57] Caring Society's written submissions at paras 134, 140 and 150

Nations victims and redress for the discrimination they endured.

84. The Caring Society argues “that giving some parents/ caregiving grandparents less and others nothing is not in keeping with the principles and values enshrined in the CHRA and is not in keeping with the evidence and factual terminations made by the Tribunal. Fundamentally, … there is no principle basis within the human rights framework to reconcile the approach suggested in this motion”.[58] The FSA provides a comprehensive settlement agreement providing compensation on a principled basis to those children and families who were the victims of discriminatory funding by Canada.

III. ORDER REQUESTED

85. The AFN is hereby seeking the following Declaration from the Tribunal:

    a. that the FSA fully satisfies the terms of the Tribunal’s Compensation Decision, the Compensation Framework, and other compensation related orders; or

    b. alternatively, that the Tribunal amends the Compensation Decision, Compensation Framework, and other compensation related orders, to conform to the proposed FSA as outlined in Appendix A; and

    c. in either event, that the Tribunal’s endorsement of the FSA or variation of its Compensation Decision to conform to the terms thereof shall remain contingent on the Federal Court of Canada’s approval of the terms of the FSA.

[58] Caring Society written submissions at para 88.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 14, 2022

ASSEMBLY OF FIRST NATIONS
Stuart Wuttke
Adam Williamson
Lacey Kassis
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
T: (613) 241-6789
F: (613) 241-5808
swuttke@afn.ca
awilliamson@afn.ca
lkassis@afn.ca

NAHWEGAHBOW CORBIERE
Dianne Corbiere
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
T: 705-325-0520
F: 705-325-7204
dgcorbiere@nncfirm.ca

FASKEN
Geoff Cowper, KC
Nathan Surkan
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3
T: 604-631-3131
F: 604-631-3232
gcowper@fasken.com
nsurkan@fasken.com

Counsel for the Complainant, Assembly of First Nations

IV. LIST OF AUTHORITES

	PRIMARY SOURCES
	Legislation
1.	*Canadian Human Rights Act*, RSC 1985, c H-6
	Jurisprudence
2.	*Ali v Canada (Minister of Citizenship and Immigration),* 2012 FC 710
3.	*Attorney General of Canada v. First Nations Child and Family Caring Society et al.,* 2021 FC 969
4.	*Canada (Attorney General) v Grover*, [1994] FCJ No 1000 (QL)
5.	*Canada (Attorney General) v Moore*, 1998 CanLII 9085 (FC);
6.	*Canada (Attorney General) v Symtron Systems Inc*, [1999] 2 FC 514
7.	*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848
8.	*Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3
9.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2016 CHRT 2
10.	*First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10
11.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39
12.	*Hughes v. Elections Canada,* 2010 CHRT 4
13.	*Kleysen Transport Ltd v Hunter*, 2004 FC 1413
14.	*Lukacs v Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267
15.	*McLean v. Canada*, 2019 FC 1075
16.	*Merham v. Royal Bank of Canada*, 2009 FC 1127
17.	*R. v. Desautel*, 2021 SCC 17
18.	*Raman v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 140 (CA):
19.	*Rogers Sugar Ltd v United Food and Commercial Workers Union, Local 832,* 1999 CanLII 14235 (MB QB)
20.	*St-Amour v Canada (AG),* 2014 FC 103
21.	*Zutter v British Columbia (Council of Human Rights)*, 57 BCAC 241