Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne
Ottawa, Canada K1A 1J4

October 24, 2022

By e-mail

(See Distribution List)

Dear Parties,

Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008

The Panel wishes to provide the parties with the following letter decision.

I. Introduction

The Panel congratulates the AFN and Canada for making important steps forward towards reconciliation and for their collaborative work on the Final Settlement Agreement on compensation for the class members in the class action (FSA). The FSA is outstanding in many ways, it promises prompt payment, it is a First Nations controlled distribution of funds, and it allows compensation in excess of what is permitted under the *CHRA* for many victims/survivors. The FSA aims to compensate a larger number of victims/survivors going back to 1991. The Panel wants to make clear that it does recognize First Nations inherent rights of self-government and the importance of First Nations making decisions that concern them. This should always be encouraged. The Panel believes this was the approach intended in the FSA which was First Nations-led.

As the Panel has done in the past, this letter is a summary decision. It is intended to convey the results of the Panel's deliberations to the parties immediately. The Panel's decision with its supporting analysis is lengthy and will take more time to complete. All the points identified in this letter will be fully explained in the forthcoming set of reasons, including providing the full reasoning and authorities to support the Panel's conclusions. Nevertheless, the Panel will work to release those reasons shortly. In the meantime, communicating the results of the Panel's analysis is intended to minimize the delay for all parties involved – the victims/survivors whose rights are being advanced in this complaint and those being represented in the class action process. The Panel recognizes the benefit of the parties continuing negotiations and hopes providing the Panel's determinations ahead of the full reasons will assist the parties.

II. Summary of the Context

In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

> Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for

> intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

The Tribunal issued a series of rulings and orders to completely reform the Federal First Nations Child and Family Services Program Child. In 2019, the Tribunal ruled and found Canada's systemic and racial discrimination caused harms of the worst kind to First Nations children and families. The Tribunal ordered compensation to victims/survivors and, at the request of the complainants and interested parties, the Tribunal made binding orders against Canada to provide compensation to victims/survivors. The Tribunal then issued a series of compensation process decisions at the parties' requests and this process came to an end in late 2020 when Canada decided to judicially review the Tribunal's compensation decisions and halt the completion of the compensation process's last stages which would have allowed distribution of the compensation to victims/survivors.

The Tribunal announced in 2016 that it would deal with compensation later, hoping the parties would resolve this before the Tribunal ruled and made definitive orders. The Tribunal can clarify its existing compensation orders but it cannot completely change them in a way that removes entitlements to victims/survivors. The approach to challenge these key determinations is through judicial review.

The Tribunal encouraged the parties for years to resolve this.

The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication (para. 42). The Panel noted in 2016 CHRT 16 that some of the parties cautioned the Tribunal about the potential adverse impacts that remedial orders could have (para. 13). Accordingly, the Tribunal strongly encouraged the parties to negotiate remedies, including on the issue of compensation. The Tribunal offered to work with the parties in mediation-adjudication to help the parties craft remedies that would best satisfy their needs and most effectively provide redress to victims. Only Canada declined.

The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Panel who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the

parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights. The same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions who are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the *CHRA* regime and the Tribunal's orders.

In May 2022, the AFN and Canada advised the Tribunal that they needed a hearing in June to present the FSA. The Tribunal set aside all summer to deal with the matter expeditiously and to have sufficient time to properly consider over 3000 pages of documents but the AFN and Canada advised that class counsel were not yet ready to sign the FSA. The FSA was finally signed on July 4, 2022, and announced publicly but was only presented to the Tribunal on July 22, 2022. The motion to address the FSA was heard in September to afford fairness to all parties. The Panel agrees the victims/survivors have been waiting long enough and emphasizes that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the compensation decision in 2019.

The Panel appreciates the parties' work to prepare for this hearing on a short-time frame and the submissions they provided both in writing before the hearing and at the hearing. There were a few issues on which the Panel had outstanding questions after the hearing. The Panel Chair requested that the parties address these outstanding questions. Once again, the Panel thanks the parties for responding to these questions promptly.

The Panel emphasizes that it acknowledges First Nations inherent rights to self-determination and self-governance. The Panel recognizes that the Canadian legal system views this motion as balancing individual and collective rights, while First Nations may frame the dialogue around responsibilities. The Tribunal emphasizes that First Nations rights holders are best placed to make decisions for their own citizens in or outside the courts. The Tribunal stresses the important fact that First Nations are free to make agreements concerning their citizens. The Tribunal understands the difficult choices made by the AFN and why the AFN has made them. First Nations had to work with $20 billion when they were asking much more for all cases.

III. The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders

The Panel remained seized of all its compensation orders to ensure effective implementation of its orders.

The Panel is not barred by the Federal Court decision to review the FSA in order to consider if the FSA fully satisfies the Tribunal's orders.

The Panel agrees with Canada and the AFN that the Federal Court in affirming the Tribunal's orders found the Tribunal had made reasonable decisions within the range of different reasonable outcomes.

The Panel agrees with Canada that this is not the first time the Tribunal has significantly amended an order, as demonstrated by the order in 2022 CHRT 8. Although consent is not a precondition to jurisdiction, both the Commission and the Caring Society agreed that the Tribunal had the authority to make that order. The 2022 CHRT 8 order made substantive changes to this Tribunal's previous orders. It ordered Canada to fund post-majority care at actual costs; fund additional research by the Institute of Fiscal Studies and Democracy; fund on an ongoing basis prevention measures at $2500, adjusted for inflation, per person for those persons on reserve and in the Yukon; and, finally, it set March 31, 2022, as the end date for compensation for removed children and their caregiving parents and grandparents.

The Panel finds that the 2022 CHRT 8 amendments clearly are in line with the retained jurisdiction to ensure discrimination is eliminated and does not reoccur.

The preceding example supports that the Tribunal had retained its jurisdiction to ensure effective implementation of its orders. The Tribunal expanded its orders and amended its orders to establish an end date for compensation based on the evidence provided that removals of children from their communities are being eliminated through sustainable and adequately funded community-led and developed programs.

Moreover, to determine if the Tribunal can amend its orders, one needs to look at the nature of the amendments sought and the evidence supporting the amendments.

The Panel finds the FSA is principled and carefully thought through and substantially satisfying the Tribunal's orders.

The real legal difficulties here are first that the FSA is not made on consent of all the parties to these proceedings and second arrives after, not before, the Tribunal made orders recognizing victims/survivors and therefore, the FSA proposes to remove rights from victims/survivors who have already been recognized in these proceedings. This situation could have been entirely different and more appropriate if the FSA had been presented to the Tribunal before the Tribunal had issued its orders or if the FSA included all victims/survivors covered by the Tribunal's orders. Now the Tribunal has made entitlement orders upheld by the Federal Court. The Tribunal's decision remains untouched at this time. It is open to the parties to come back before the Tribunal for the implementation phase.

The compensation process continues at this time and the Tribunal foresaw that the parties could appear before the Tribunal to seek clarifications and further orders on process and implementation. An example of seeking clarification is when the parties' different interpretation of the Tribunal's orders impact implementation of the orders. For example, in this joint motion, the parties disagree on who is part of the removed child category under the Tribunal's orders. This is an issue that the Tribunal, having retained jurisdiction on all its orders, can examine and clarify. However, his only came up as part of this joint motion.

Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the *Merit Decision* to a finding that there never was racial discrimination and therefore no, remedy is required. In the same

vein, if evidence-based findings are made that victims have suffered and should be compensated, the parties cannot contract out or ask the Tribunal to amend its previous evidence-based findings and related orders to a finding that certain victims entitled by this Tribunal have not suffered and should no longer receive compensation.

This is significantly different than asking the Tribunal to make a finding based on new evidence presented that demonstrates that some aspects of the discrimination found by this Tribunal has ceased in compliance with the injunction-like order made by this Panel to cease the discriminatory practice or that some amendment requests may enhance the Tribunal's previous orders to eliminate discrimination (2022 CHRT 8). The Tribunal's retention of jurisdiction is to ensure its orders are effectively implemented. This includes not narrowing its orders (see for example Jordan's Principle definition in 2017 CHRT 14) and eliminating the discrimination found in a complex nation-wide case involving First Nations from all regions. This is done through reporting, motions, clarification requests, etc. and findings are made on the evidence.

Moreover, the Tribunal's compensation decisions focused on what led to the removal of First Nations children and caused harm to children and families rather than the harms that happened after their removal given that this was not the evidence provided. Both should be compensated. The Tribunal made findings on the evidence it had at the time. The Tribunal foresaw that other harms could be compensated and much more than the *CHRA* cap through other recourses. This was explained in the compensation decision.

Upon consideration of the evidence, the FSA and all materials and submissions filed as part of this joint motion, the Panel accepts to make a declaration amounting to a finding (the Tribunal does not have authority to award declaratory relief: see *Merit Decision* at paras 472-473) with recommendations in the interest of reconciliation in Canada, expeditious distribution of compensation to victims/survivors and in recognizing the exceptional circumstances surrounding this FSA. The current circumstances are unique and distinguishable from the Panel's body of case law and the Tribunal's future cases.

IV. The Tribunal grants the motion in part

Summary of reasons

First, the AFN and Canada requested a finding that the FSA fully satisfies the Tribunal's *Compensation Decision* and related compensation orders. The AFN and Canada request that this finding is conditional on the Federal Court approving the FSA. Alternatively, the AFN and Canada request the Panel to amend its compensation orders to reflect the terms of the FSA or to find that in case of conflict between the FSA and the Tribunal's compensation decisions, the FSA will take precedence.

The Tribunal had difficulty making the decision given that the agreement occurred after the evidence-based findings and orders were made confirming compensation entitlement to categories of victims/survivors by this Tribunal. This important fact is determinative in considering the FSA. The Tribunal was open to adding people which is exactly what the FSA does and on this point the Tribunal is very pleased. However, the Tribunal never envisioned disentitling the victims who have already been recognized before the Tribunal through evidence-based findings in previous rulings. The difficulty would not have occurred but for the fixed amount of $20 billion that Canada offered, which forced First Nations to make difficult choices. Some of those choices are

understandable from a First Nations viewpoint recognizing Indigenous collective inherent rights but not for Canada under the human rights regime. While we understand that Canada respected that the negotiations were First Nations led, Canada is a signatory to the FSA and cannot contract out of its human rights obligations. It cannot collaterally attack the Tribunal's decisions. This would not have occurred if Canada had given sufficient funds to ensure it first compensates all the victims in front of the Tribunal who were the first to benefit from legal findings of a Tribunal based on tested evidence and legal analysis and compensation orders subsequently upheld by the Federal Court. Canada decided to negotiate a settlement of class actions that are at a very early stage and where an exercise such as the FSA is optimal. However, it sought to incorporate a Tribunal case at a very late stage, after findings on evidence have been made and orders on quantum and categories of victims were issued by the Tribunal. It also chose to impose a class action lens to a human rights process. This is feasible and should be encouraged if the Tribunal's reasons, orders on quantum and categories of victims are honored in the FSA. Denying entitlements once recognized in orders is an unfair and unjust outcome that the Tribunal cannot endorse given the *CHRA*'s objectives and mandate. The Tribunal's authority flows from its quasi-constitutional legislation and the Tribunal is, according to the Supreme Court, the " final refuge of the disadvantaged and the disenfranchised ".

On this point the Tribunal answers two specific questions as follows:

1. Are all the categories of victims in the Tribunal's orders covered by the FSA?

    a. No.

2. If the answer to question 1 is no, can the Tribunal find that the FSA fully satisfies the Tribunal's orders if categories of victims have been removed from the Tribunal's orders?

    a. No.

Specific derogations from the Tribunal's Compensation Orders

The parties addressed four potential derogations from the Tribunal's compensation orders in the FSA:

1) Entitlement for First Nations children removed and placed in non-ISC funded placements
2) Estates of deceased caregiving parents and grandparents are not entitled to compensation
3) Certain caregiving parents and grandparents will receive less compensation
4) Some Jordan's Principle victims/survivors may receive less compensation

The Tribunal will briefly address them in turn here:

1) Entitlement for children removed and placed in non-ISC funded placements

The FSA is adding another requirement in order to award compensation to First Nations children. The Tribunal decisions provide compensation for children removed from their homes, families and communities as a result of the FNCFS Program's discrimination. The FSA narrows it into removed children who were also placed in ISC funded care. In light of the evidence presented throughout this case, the Tribunal ordered the maximum compensation available under the *CHRA* for the great harms caused by the removal of First Nations children rather than the number of years in care or the other harms that occurred in care. The Tribunal explained that a removed child or caregiving

parent or grandparent had other recourses in addition to this maximum compensation that they could pursue to obtain higher amounts of compensation for the additional harms they suffered. The FSA and class actions focus on these additional harms and the Tribunal agrees this is an appropriate focus for the FSA and the class actions. However, the requirement of removal and placement in care in an ISC funded location cannot be considered a proper interpretation of the Tribunal's findings and orders. The Panel disagrees with the AFN and Canada's interpretation of the Tribunal's orders on this point. The Caring Society properly characterized the Tribunal's findings and orders in that regard.

Moreover, the AFN's interpretation of the children eligible for compensation because of their removal by child and family services was raised for the first time in this motion. The AFN may have some valid points about the challenges in identifying the children covered by the Tribunal's Compensation Orders. However, the manner in which these arguments were raised does not permit the Tribunal to assess the AFN's underlying arguments. While there was some limited evidence presented as part of this motion, the parties' arguments essentially focused on what the Tribunal had determined in previous motions. This was appropriate given the nature of this motion. The AFN's arguments about the ambiguity in which children are covered by the Tribunal's orders and the challenges in providing compensation to certain children are better addressed in a separate motion where the parties have sufficient notice to lead evidence on this point. The Tribunal is open to further clarifying and addressing implementation challenges for these victims. In fact, if there is ambiguity or outstanding challenges that will delay compensation, those issues should be resolved now so that the parties are able to implement the Compensation Framework promptly. However, the FSA's attempt to unilaterally remove these victims from the scope of the Tribunal's compensation through the class action proceeding is close to being a collateral attack on the Tribunal's decisions.

Further, in the *Merit Decision*, the Panel discussed the term in care:

> [117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child "in care". The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.
>
> [119] There are circumstances, however, when the risk to the child's safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

2) Estates of caregiving parents and grandparents

Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.

3) Certain caregiving parents and grandparents will receive less compensation

The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims who were retraumatized and suffered greatly.

4) Some Jordan's Principle victims/survivors may receive less compensation

While the Tribunal understands the rationale for the FSA's phased approach on this aspect, the Tribunal is at a very different stage in the proceedings and has a different mandate. Further, the Tribunal is asked to accept the end of its jurisdiction on the compensation issue without having the full picture on this point as opposed to the Federal Court who will supervise the implementation of the FSA. The Tribunal's role is quite different then that of a class action process. Further, the Tribunal's role includes making findings on the evidence presented and, on this point, it is difficult to make proper findings which indicates that the request may be premature for this category.

While it is obvious that one of the reasons the AFN and Canada are proposing compromising the compensation ordered to victims in this case is the fixed amount of funds Canada provided to resolve this issue, the Tribunal is not suggesting that Canada should provide unlimited funding. The compensation orders require finite compensation to a finite class of victims/survivors. While the exact number of victims/survivors eligible for compensation is not known, it is not an unlimited number.

Opting-out provision

The Tribunal agrees with the Caring Society that under the FSA, victims will need to opt-out of the class action in short time frame. Further, the short time to make an opt out decision, particularly for child victims, is made more challenging because the FSA has incomplete definitions of terms and criteria that will directly affect compensation entitlements. This situation places some victims in an unfair position wherein they are being forced to make a decision to opt out without knowing what they can receive under the FSA versus their entitlement to human rights compensation pursuant to the Tribunal's orders. The unfairness deepens as the FSA seems to force victims to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims and is therefore inconsistent with a human rights approach. This is concerning.

Moreover, the evidence in these proceedings has demonstrated many times that some First Nations often lack capacity by no fault of their own to respond rapidly to deadlines. For example, in 2020

CHRT 24, the Chiefs of Ontario objected to a firm, 13-month, deadline imposed by Canada to submit claims for retroactive reimbursement of Band Representative Services and a firm deadline for current-year claims for Band Representative Services. COO argued this period was too short. This Tribunal agreed with the COO. This is even more of an issue for individual victims given the incomplete information provided to the public by the AFN and Canada on the Tribunal's compensation orders.

Again, in accordance with the overarching goal of reconciliation, compensation that can be forthcoming to a majority of victims before the Tribunal and many more in a timely manner, in the spirit of UNDRIP and in recognition of First Nations right to self-government.

The Tribunal finds as follows:

The Tribunal is not functus to consider if the FSA fully satisfies the Tribunal's orders.

The Tribunal finds the FSA substantially satisfies the Tribunal's orders. The FSA can potentially fully satisfy the Tribunal's orders if it is amended to include all the categories of victims and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is fully responsive and rectifies the areas of concerns mentioned above.

The Tribunal cannot declare or find the FSA fully satisfies the Tribunal's orders given that some victims/survivors who were recognized by and awarded compensation by this Tribunal have been removed or provided with reduced compensation. The Tribunal's orders were upheld by the Federal Court. The evidence currently before the Tribunal does not permit a finding that the FSA fully satisfies the Tribunal's orders. This difficulty is more than technical; it is a real legal one.

The Tribunal finds the FSA respects numerous and many important components of the Tribunal's compensation orders such as not retraumatizing victims, avoiding children testifying and with a culturally appropriate process. The Panel generally accepts the FSA and finds it more advantageous on many aspects and understands the principled choices made by First Nations. The Panel also sees great value in having one process supervised by the Federal Court for the compensation issue. The Panel would likely have approved a settlement along the lines of the FSA if it had been asked to do so prior to issuing its compensation entitlement decision or if all victims already recognized by the Tribunal's orders were included.

The Tribunal always contemplated adding more categories of compensable victims and offered to do so but the AFN turned this offer down in its submissions given that they had concerns that the compensation process with Canada would reach an impasse. The compensation orders were still judicially reviewed. The Tribunal never envisioned removing recognized categories of victims/survivors after it made its findings and orders based on evidence of harm. After the Tribunal makes an order entitling a category of victims to compensation, those orders have finality and the only options for removing the entitlement is through judicial review. While the Panel agrees it did not have the FSA before it at the time it made its orders, the Panel finds no legal basis justifying the denial of compensation to categories of victims recognized by this Tribunal. Moreover, the Tribunal would review the victims' eligibility for compensation if directed by the reviewing court.

The Panel stresses this context to emphasize that it urged the parties to negotiate an agreement on compensation to avoid making very specific orders that First Nations later argue against. This can

easily be avoided with deals in earlier stages of proceedings where no compensation has been ordered. The purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to disentitle or remove victims. A careful reading of the Tribunal's decisions makes this clear.

The FSA is driven both by the class action cases and class action law. It does not apply a human rights lens and does not uphold Canada's human rights obligations under the Tribunal's orders. While the AFN in its submissions urges the Panel to consider a class action lens, the AFN has not persuaded the Panel why the Tribunal should apply this lens instead of an assessment based on existing human rights jurisprudence, especially as articulated in earlier decisions in this case. Even if the Panel were to use a class action lens, the AFN and Canada have not sufficiently explained how the factors that apply to a class action analysis would be applicable in the current context where many of the beneficiaries of the class action have an existing entitlement to compensation under valid Tribunal orders. While these orders are under judicial review, this is considerably different from the most typical class action context where none of the class action beneficiaries have any legal entitlement to compensation at the time of a settlement approval hearing. Further, the AFN does not sufficiently address how the class action framework applies when considering victims/survivors who would lose entitlement to compensation that they are currently owed by Canada.

Furthermore, the Panel believes that Justice Favel's comments on reconciliation cannot be interpreted to disentitle victims who were recognized by this Tribunal.

The Tribunal declares/finds

The FSA substantially satisfies the Tribunal's orders and, given that the Tribunal cannot order non-parties to negotiate or amend the FSA, recommends:

> Canada negotiates with the class action and Tribunal parties and allocates funds to cover <u>all</u> victims entitled to compensation under the Tribunal decisions. The amounts already ordered by the Tribunal should be the floor.
>
> For example, Canada can pay compensation funds of $20 billion or more if insufficient into a trust within 21 days following this letter-decision in order to generate interest until the time it is ready to roll out compensation in order to compensate human rights victims who were included in the Tribunal's orders but excluded under the FSA.
>
> If the Federal Court does not approve the FSA, the funds could revert to Canada.
>
> This may not be sufficient to cover the excluded categories. The parties to the FSA may need to consider other options.
>
> If all the victims identified and the compensation amounts in the Tribunal's orders are accounted for in the FSA and there is a possibility for them to opt-out of the FSA in a manner that rectifies the areas of concerns mentioned above, the Tribunal will be able to find the FSA <u>fully</u> satisfies the Tribunal's orders.

Alternatively:

Given the real potential for delaying compensation from additional litigation and judicial reviews that may arise from either side as a result of this joint motion, the Tribunal recommends removing the Tribunal approval from the FSA and make the necessary amendments to settle all three class actions and move forward at the Federal Court for approval and pay compensation in early 2023 to victims covered in the class actions. The parties to these proceedings can finalize their unfinished work in a timely manner and come back before the Tribunal to start distributing compensation to victims/survivors in the near future. Again, the Federal Court approved our compensation decisions and determined that they were reasonable, this is a compelling reason supporting our reasons in this decision. This alternative can be achieved regardless of Canada's judicial review at the Federal Court of Appeal.

Furthermore, the Tribunal notes the comments from the parties during the hearing that they are not yet in a position to distribute compensation under the Tribunal's orders and the Compensation Framework. The Tribunal reminds the parties that, absent a stay of the orders, the parties have an obligation to continue to address outstanding compensation issues so that they are in a position to set the earliest implementation date possible.

V. The request to amend the Tribunal's compensation orders to reflect the terms of the FSA is denied

The Tribunal cannot make the alternative order requested to amend its previous orders to conform to the FSA or to elevate the FSA over the Tribunal's orders in case of conflict. The Tribunal reaches this conclusion after considering the applicable case law, the *CHRA* and human rights regime, its previous findings and its previous orders.

Moreover, the FSA's legal framework is driven by the current class actions. Canada did not ensure that an appropriate human rights lens respecting its current human rights obligations and binding orders against it in this case was applied to allow it to agree to the FSA.

The Tribunal is fully aware that applying a human rights lens and its statutory powers to the issue does not provide statutory authority to change or amend the Tribunal's orders in removing rights to categories of victims so that the Tribunal's orders conform to the FSA. This is not permissible by law. The Tribunal is not a political body, it is an adjudicative body deriving its authority from statute and it cannot disturb the legal recourses under the *CHRA* regime to deny quasi-constitutional rights.

The Tribunal cannot overstate the importance of securing victims' rights across Canada. This requires the Tribunal to ensure that victims, who may include Indigenous Peoples and Nations, can pursue a human rights case under the *CHRA* through to a final resolution with fair recourse. Victims must be able to rely on the finality of findings of discrimination and compensation ordered by the Tribunal. Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders that generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative proceeding.

The case is quite different with long-term reform where not all issues have been adjudicated by the Tribunal. The Tribunal supports First Nations-led solutions to eliminate discrimination if the

evidence advanced proves to eliminate the systemic discrimination found. The Panel reminds the parties that it is a Tribunal created by statute with a mandate to eliminate discrimination in Canada once findings are made, always based on evidence and not opinion. The Tribunal is still seized of the matter and will need to make findings before ending its jurisdiction to ensure discrimination is eliminated and does not reoccur.

The *CHRA* does not grant fleeting rights: once entitlements are recognized under the *CHRA*, they cannot be removed. Once a finding and a compensation order is made to vindicate rights, they may not be revoked absent an order from a reviewing court.

On this point, the Panel understands the AFN advances the FSA on behalf of First Nations Peoples expressing their decisions through an AFN executive decision rather than a Chiefs-in-Assembly resolution and the AFN submits the Panel should not get involved in the AFN's internal affairs. The Panel does not wish to meddle in the AFN's affairs.

However, a number of questions arose out of this joint motion. While these questions are not determinative of the outcome of this decision, the Panel has a number of areas of concern. The Panel also notes the evidence includes concerns raised by a number of First Nations concerning the FSA. However, there are some First Nations supporting it, as demonstrated by the COO resolutions supporting the FSA. There is also sufficient evidence demonstrating that when the AFN and Canada made public statements regarding the FSA, no meaningful steps were made to inform the public, the victims or their families who are entitled to compensation under the Tribunal's orders that they may lose entitlement to compensation under the FSA. In other words, what was communicated to the public was that the FSA only enhances the Tribunal orders when this is not true. Reconciliation also includes the whole truth. These comments do not apply to the AFN's meetings with First Nations to discuss the FSA as the Tribunal has little information on this point.

Again, this is not determinative on this motion but needs to be said and may be revisited in the issue on long-term reform.

In a previous hearing, counsel for the AFN explained that he viewed the AFN like the United Nations. The Panel liked the analogy of sovereign nations meeting to make decisions that concern them. The Panel understood that the Chiefs-in-Assembly resolutions adequately reflect this and ensure an effective process to express their consent after meaningful consultation. Chiefs-in-Assembly resolutions are referenced in previous decisions. This was given considerable weight by the Panel when accepting the AFN's past submissions given the representativity of First Nations through the resolutions made by Chiefs-in-Assembly. In all of the previous rulings made by the Panel, there never was a situation where the Tribunal received evidence of other First Nations disagreeing with the AFN's requested orders. Usually, the AFN provides Chiefs-in Assembly resolutions which bring assurances to the Panel that the rights holders agree with the order requests. This is an efficient way to proceed instead of hearing from each of the 634 First Nations in Canada which could paralyze the Tribunal's proceedings. Furthermore, the Tribunal's *Compensation Decision* (2019 CHRT 39), at paragraph 34 clearly mentions and relies on the Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System. Moreover, the Tribunal's finding that pursuant to AFN resolution 85/201 the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada was upheld by the Federal Court (2021 FC 969, at para. 160).

A question remains as to why an important question such as compensation and the FSA was not addressed in a resolution from the Chiefs-in-Assembly. While the AFN indicates the Chiefs-in-Assembly were presented with the FSA, the FSA was already signed at the time that it was presented. The AFN states that the Chiefs-in-Assembly did not object to the FSA. However, little is said on the absence of a resolution from the Chiefs-in-Assembly. While the Panel agrees with the AFN that requiring all First Nations to agree may jeopardize any agreement, a resolution from the Chiefs-in-Assembly recognizes this reality and provides some assurances to the Panel on such important questions .In this case, the Panel does not have a resolution on the FSA from the AFN in the evidence and the Panel has resolutions voted on by some First Nations who have expressed concerns about the FSA to the AFN. Upon a full consideration of the issues since the recent interested party request ruling and, given that the Tribunal's approval of the FSA could result in ceasing the Tribunal's supervision of the financial compensation aspect of the case if the Tribunal later declares the FSA fully satisfies the Tribunal's orders, the opting-out process for First Nations at the Federal Court does not assist the Tribunal in making a determination in this motion.

The Panel also agrees with the Caring Society's submissions on the issue of free, prior and informed consent. The absence of a Chiefs-in-Assembly resolution in the evidence coupled with an insufficient period to opt-out of the FSA is a concern for this Tribunal.

Finally on this point, the Panel does not believe that this ruling should be interpreted to preclude Self-government or other agreements in the future. The real difficulty in this joint motion is the fact that entitlements orders were already made for victims/survivors by this Tribunal, the orders were upheld by the Federal Court and the compromises were made subsequently.

VI. Conclusion

The Panel does not believe it has a legal basis for granting the amendments requested by the AFN and Canada or for finding that the FSA fully satisfies the Tribunal's compensation orders. Granting the requested orders would disentitle certain victims/survivors from compensation under the Tribunal's orders. The Panel is nonetheless urged to accept this position because it would provide expedited compensation to the victims/survivors being compensated under the FSA. However, the Panel is not persuaded the expedited compensation would actually occur given the possibility of challenging the Tribunal's decision on this joint motion by way of judicial review and the possibility the FSA class action settlement is not approved in the Federal Court. Therefore, there is a risk of providing a false hope to those entitled to compensation under the FSA about the timeframe in which they would receive compensation.

This does not dispose of the Tribunal's retained jurisdiction to ensure systemic discrimination is eliminated. Canada cannot contract out the Tribunal's quasi-constitutional responsibility to eliminate the discrimination found and prevent similar discriminatory practices from arising. It has to occur after an evidence-based finding that satisfies the Tribunal that discrimination is eliminated and prevented from reoccurring or on consent of all, not just some, parties in the Tribunal proceedings and based on compelling evidence that discrimination will be eliminated. The Tribunal urges Canada in the spirit of reconciliation to remove the pressure on victims and First Nations and extend its December 30, 2022, deadline to the agreements to at least March 2023. The Tribunal has requested a minimum of 60 business days to consider long-term reform and will take the appropriate time needed to consider the matter.

The AFN in its oral arguments at the September 2022 hearing submitted that discrimination continues. This can be revisited in the long-term issue.

VII. Final remarks

The Panel honours the First Nations children victims/survivors who are really overcomers, First Nations across Turtle Island, and the First Nations parties in these proceedings who are the AFN, the Caring Society, the COO and the NAN. You are the true heroes.

The Panel also honors the Commission for never losing sight of not only First Nations victims in Canada but also all victims the human rights regime aims to protect.

The Panel honours the CAP, Amnesty International and the Innu Nation for their contributions on other aspects of these proceedings.

The Panel honours Canada for making an important step forward to negotiate in the spirit of reconciliation. However, this work is left unfinished.

The Tribunal's role includes all Peoples in Canada and must protect victims. The Tribunal signals to all victims in Canada that once your rights have been recognized and vindicated, they cannot be taken from you by respondents or the same Tribunal who has vindicated your rights unless ordered by higher Courts.

The Panel believes that the great work accomplished by the parties in these proceedings and the parties to the FSA can be kept alive and move forward if all victims/survivors are included or if the Tribunal’s full approval is no longer required.

Sophie Marchildon, Panel Chairperson
Edward P. Lustig, Tribunal Member

Ottawa, Ontario, October 24, 2022

Should you have any questions, please do not hesitate to contact the Registry Office by e-mail at registry.office@chrt-tcdp.gc.ca by telephone at 613-878-8802 or by fax at 613-995-3484.

Yours truly,

Judy Dubois

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