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

FACTUM OF THE COMPLAINANT, ASSEMBLY OF FIRST NATIONS

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I. OVERVIEW

1. The Assembly of First Nations ("AFN"), the First Nations Child and Family Caring Society of Canada ("Caring Society") and the Respondent Attorney General of Canada ("Canada") are, on a consent basis, seeking a declaration from the Canadian Human Rights Tribunal ("Tribunal") that the terms of the revised Final Settlement Agreement, dated April 19, 2023 ("Revised Agreement"),[1] on compensation for the class members in two consolidated class actions before the Federal Court, bearing File Nos. T-402-19 and T-1120-21 (these proceedings are referred to, collectively, as the "Class Action"), now fully satisfies the Tribunal's compensation orders,[2] which are currently under appeal to the Federal Court of Appeal. This motion is supported by the representative plaintiffs in the Class Actions and class counsel to the AFN Class Action and the Moushoom Class Action ("Moushoom Class Counsel").

2. This second approval motion has been brought in response to the Panel's December 20, 2022, decision[3] ("Motion Decision") on the AFN's initial motion which sought approval of the Final Settlement Agreement, dated June 30, 2022 ("2022 FSA").[4] While acknowledging that the 2022 FSA substantially satisfied its Compensation Orders, the Tribunal identified three key areas where the 2022 FSA derogated from its orders, including: (1) non-ISC funded placements; (2) estates of deceased caregiving parents and grandparents; and (3) multiple removals. The Tribunal also raised concerns with eligibility under Jordan's Principle and potential uncertainties in terms of compensation to these victims/survivors under the 2022 FSA approach, as well as the opt-out regime.

3. Further to the Panel's recommendations in the Motion Decision, the AFN, the

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[1] Affidavit of Craig Gideon affirmed June 30, 2023 ["Gideon Affidavit"], Exhibit "E", First Nations Child and Family Services Jordan's Principle, Trout Class Settlement Agreement dated April 19, 2023 ["Revised Agreement"],

[2] *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada*, 2019 CHRT 39 ("Compensation Decision"), 2020 CHRT 7; 2020 CHRT 15; 2021 CHRT 6; and 2021 CHRT 7 ("Framework Decision"), all hereinafter collectively referenced as the Compensation Orders.

[3] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2022 CHRT 41 (the "Motion Decision").

[4] First Nations Child and Family Services Jordan's Principle, Trout Class Settlement Agreement dated June 30, 2022 ["2022 FSA"], Affidavit of Janice Ciavaglia affirmed July 22, 2022 ["Ciavaglia Affidavit"], Exhibit "F".

Caring Society and Canada, and Moushoom Class Counsel, came together to address the Tribunal's concerns, culminating in the Revised Agreement after several months of intensive negotiation. The Revised Agreement addresses the derogations and concerns raised by the Tribunal and has resulted in an additional $3.34394 billion being added to the original $20 billion in settlement funds. Critically, prior to its execution, the Revised Agreement was put to the First Nations-in-Assembly who endorsed its approval by way of AFN Resolution 04/2023, *Revised Final Settlement Agreement on Compensation for First Nations Children and Families*.[5] Minutes of Settlement[6] were also reached in the Tribunal proceedings, providing a mechanism for the Caring Society to confirm its support for the Revised Agreement with respect to compensation in these proceedings, as they are not a party to the Revised Agreement.

4. The AFN takes the position that the Revised Agreement fully provides for the effective implementation of the Tribunal's Compensation Orders and asks that the Tribunal endorse it as satisfying same, subject to the minor requested clarifications and minor evidence-based variations described hereunder. The result of doing so reflects the wishes of all the parties to the Revised Agreement and Minutes of Settlement, the wishes of the First Nations -in-Assembly, will remediate the complaint, advance reconciliation between First Nations and Canada, as well as contribute to fulfilling the goals set out in the *Canadian Human Rights Act.*[7]

II. FACTS

5. The AFN relies on its July 22, 2022, factum with respect to the procedural history of the Tribunal Proceedings; the Judicial Review; the Class Actions; the Class Size Estimates; and the Settlement Negotiations and Consultation and adds the following.

a) The Motion for Approval of the 2022 FSA

6. On July 22, 2022, the AFN with the support of Canada, the representative plaintiffs

[5] Gideon Affidavit, Exhibit "F", Resolution 04/2023 Revised Final Settlement Agreement on Compensation for First Nations Children and Families adopted April 4, 2023 ["Resolution 04/2023"].
[6] Gideon Affidavit, Exhibit "G". Minutes of Settlement dated April 19, 2023 ["Minutes of Settlement"].
[7] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ["*CHRA*"].

in the Class Action, and Moushoom Class Counsel brought a motion seeking a declaration from the Tribunal that the terms of the 2022 FSA for the class members in the Class Action satisfied the Tribunal's Compensation Decision and related Compensation Orders, and that such declaration would be contingent on the approval of the 2022 FSA by the Federal Court following a settlement approval hearing.

7. The Tribunal found that the 2022 FSA substantially satisfied its Compensation Decision and related Compensation Orders, but noted certain derogations and concerns which prevented it from endorsing it in full. The Tribunal stated that the 2022 FSA could "potentially fully satisfy the Tribunal's orders if it is amended to include all the categories of victims/survivors and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is fully responsive and rectifies the areas of concerns" as raised by the Tribunal.[8] For the Tribunal, as it had issued compensation decisions on quantum and categories of victims/survivors, they were "no longer up for negotiation" and were in fact a "baseline".[9]

8. The Tribunal identified three key areas where the 2022 FSA derogated from the Compensation Decision and related Compensation Orders, by potentially disentitling or reducing entitlements for certain victims/survivors the Tribunal had found to be entitled to compensation. These derogations included the following:

a) children removed from their homes, families and communities and placed in non-ISC funded placements were excluded from receiving compensation[10];

b) the estates of deceased caregiving parents and grandparents were excluded from receiving compensation[11]; and

c) certain caregiving parents and grandparents would receive less compensation either in circumstances of multiple removals or if there was an unexpected number of claimants which required a reduction in

[8] Motion Decision at para. 509.
[9] Motion Decision at para. 9.
[10] Motion Decision at paras. 283-331.
[11] Motion Decision at paras. 332-350.

compensation to the class to ensure that all caregiving parent and grandparent victims received compensation.[12]

9. The Tribunal also raised certain concerns, including with regard to eligibility under Jordan's Principle and what it perceived as uncertainties introduced in the 2022 FSA in terms of the approach to compensating these victims/survivors, with questions around the meaning of "significant impact" and the definition of "essential service". The Tribunal found that it was uncertain whether the implementation of Jordan's Principle under the 2022 FSA would result in the victims/survivors identified by the Tribunal receiving $40,000.[13] The Tribunal also expressed concern about the opt-out provisions in the 2022 FSA.[14]

10. In keeping with its human rights approach, the Tribunal was clear that its broad and flexible remedial powers allowed it to remain open and flexible to the potential variation and clarification of its orders, particularly where supported by the evidence and where it was in the best interest of the victims/survivors. [15] While it found that the 2022 FSA substantially satisfied its orders, it could not approve the 2022 FSA, or declare or find that it met the Tribunal's compensation orders, as the Tribunal found that it did not have the authority diminish the quantum or entitlement of compensation provided for in its Compensation Orders, as would be required in light of the derogations.[16]

11. The Tribunal urged the parties to this proceeding and the parties to the Class Action to continue the good work accomplished by the parties to date and stressed that a final agreement could move forward as long as all of the victims/survivors were included and their rights recognized and vindicated.[17]

b) Directions of the First Nations in Assembly and Negotiations Following the Motion Decision

12. The Tribunal provided summary reasons on the AFN and Canada's motion by letter

[12] Motion Decision at paras. 351-360.
[13] Motion Decision at paras. 361-379.
[14] Motion Decision at para. 385-390.
[15] Motion Decision at para. 269.
[16] Motion Decision at para. 187, 194-195,229,266
[17] Motion Decision at para. 10, 162, 521-522.

decision on October 25, 2022. On December 7, 2022, at the AFN Special Chiefs Assembly, the First Nations-in-Assembly unanimously adopted Resolution 28/2022 addressing compensation for the victims/survivors of Canada's discrimination. Resolution 28/2022 provided critical guidance to the AFN, including the following directions:

a) Support compensation for victims covered by the proposed Final Settlement Agreement on compensation and those already legally entitled to $40,000 plus interest under the Canadian Human Rights Tribunal compensation orders to ensure that all victims receive compensation for Canada's willful and reckless discrimination.

b) Support the principles on which the FSA is built, including taking a trauma-informed approach, employing objective and non-invasive criteria, and ensuring a First Nations-driven and culturally-informed approach to compensating individuals.

c) Continue to support the representative plaintiffs and all victims of Canada's discrimination by ensuring that compensation is paid as quickly as possible to all those who can be immediately identified and to continue to work efficiently to compensate those who may need more time.[18]

13. The Tribunal released its full reasons on the Motion Decision on December 20, 2022.

14. Further to the Panel's recommendations in the Motion Decision[19] and in accordance with the mandates directed by the First Nations-in-Assembly, Canada, the Caring Society, the AFN and Moushoom class action counsel came together in intensive negotiations from January to April 2023 to address each of the derogations identified by the Tribunal in the Motion Decision, so that the Tribunal would be able to find that the Revised Agreement fully satisfies its Compensation Decision and related Compensation Orders, in alignment

[18] Gideon Affidavit, Exhibit "D", Resolution 28/2022 – Final Settlement Agreement on Compensation for First Nations Children and Families adopted December 7, 2022 ["Resolution 28/2022"] Be-it-resolved numbers 1, 5-6.
[19] Motion Decision at para. 519.

with the mandates of the First Nations-in-Assembly.[20]

15. The class action parties and the Caring Society raised and canvassed many issues and sought insight from outside experts as needed. This lengthy process ultimately led to approval of the Revised Agreement by all the parties to the Class Action and agreement by the Caring Society that the Revised Agreement satisfies all of the Tribunal's compensation orders, which agreement was to be completed by way of separate Minutes of Settlement in the Tribunal proceedings.[21]

16. The Revised Agreement was tabled to the First Nations-in-Assembly who unanimously approved its execution at the April 4, 2023, Special Chiefs Assembly. The First Nations-in-Assembly confirmed by way of Resolution 04/2023 that they fully support the Revised Final Settlement Agreement, authorizing the AFN negotiators to make any necessary minor edits to complete same; fully support the AFN in seeking an order from the Tribunal confirming that the Revised Agreement on compensation fully satisfies its compensation orders and direct AFN to return to the First Nations in Assembly with regular updates and to seek direction as required. Importantly, it also directed the AFN to continue to support the representative plaintiffs and all survivors and victims of Canada's discrimination, by ensuring that compensation is paid, and adequate supports are provided, as quickly as possible to all those who can be immediately identified and to ensure that compensation reaches all those who are eligible.[22]

17. The Revised Agreement and Minutes of Settlement were thereafter formally executed, respectively, by each of the parties thereto on April 19, 2023.[23]

c) Summary of the Substantive Changes to the Terms of Settlement

18. The provisions of the Revised Agreement remain substantive and complex, but the submissions below seek to summarize the key changes in the Revised Agreement, with emphasis on those made in response to the Tribunal concerns in the Motion Decision:

[20] Gideon Affidavit at para. 30.
[21] Gideon Affidavit at paras. 34-35 & Minutes of Settlement
[22] Gideon Affidavit at paras 32-33, Resolution 04/2023
[23] Gideon Affidavit at para. 34.

i. The Settlement Funds

19. The Revised Agreement reflects the overarching agreement that Canada will pay $23.34394 billion to settle the claims of the Class in accordance with the terms of the Revised Agreement, which is to be paid into a Trust Fund by Canada as directed by the Trustee within 120 days from the last day on which a Class Member may appeal or seek leave to appeal the Settlement Approval Order, or the last date where any appeals of the Settlement Approval Order have been determined.[24]

ii. Revised FSA Classes

20. The settlement reflected in the Revised Agreement comprises 9 classes, up from six in the 2022 FSA, which are included in the definition of the "Class". Each of the "Removed Child Class", "Removed Child Family Class", "Jordan's Principle Family Class", "Trout Child Class", and "Trout Family Class" have not been changed in any substantial way from the 2022 FSA, nor has the definition of "First Nations". The simplified definitions for the new classes and important edits to the pre-existing classes are as follows:[25]

a) **"Essential Service Class":** those First Nations individuals who did not receive from Canada (whether by reason of a denial or a service gap) an Essential Service relating to a confirmed need, or whose receipt of said Essential Service was delayed by Canada, on grounds including, but not limited to, lack of funding or lack of jurisdiction, as a result of a jurisdictional dispute with another government or federal government department(s) during the period between December 12, 2007 and November 2, 2017, while under the age of majority.

b) **"Jordan's Principle Class":** those First Nations individuals who are Essential Service Class members who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the delay, denial, or service gap of an essential service that was the subject of a confirmed need. The Parties intend that the way the highest

[24] Revised Agreement, art. 1.01 Definitions, "Settlement Funds" and "Implementation Date", art. 4.01(3)-(4).
[25] Revised Agreement, art. 1.

level of impact is defined, and threshold for membership within this Class, fully overlap with those children entitled to compensation under the Compensation Orders.

c) **"Kith Child Class"**: those First Nations children who, with involvement of a child welfare authority, were placed with a Kith Caregiver (an adult who is not a member of the Child's Family who lived off reserve and cared for the child without receiving funding in terms of the placement), in a Kith Placement (a First Nations Child residing with Kith Caregiver and the placement was associated with a child welfare authority) during the period between April 1, 1991, and March 31, 2022;

d) **"Kith Family Class":** those Caregiving Parents or, Caregiving Grandparents if no Caregiving Parents, of an approved Kith Child Class Member placed in a Kith Placement between January 1, 2006, and March 31, 2022.[26]

iii. Compensation Budget

21. Based on the estimates considered during the settlement negotiations of the Revised Agreement, the increase of the settlement funds to $23.34394 billion, and new/revised classes (including entitlements), there have been some additions and adjustments to the budgets, which include the following: $7.25 billion to the Removed Child Class; $5.75 billion to the Removed Child Family Class, plus an additional $997 million to address the payment of compensation to caregiving parents or grandparents who had multiple children removed from their care and placed outside of their home, family and community; $3 billion to the Essential Service Class (inclusive of the Jordan's Principle Class); $2 billion to the Trout Child Class; $2 billion to the Jordan's Principle and Trout Family Class; $600 million to the Kith Child Class; and $702 million for the Kith Family Class.[27] $1 billion has also been budgeted to an interest reserve fund, which has been designed to ensure that those members of the Class who are entitled to compensation and interest thereon further to the Tribunal's Compensation Decision receive same under the terms of the Revised

[26] Revised Agreement art. 1.01 Definitions: "Essential Service Class", "Jordan's Principle Class", "Kith Child Class" and "Kith Family Class".
[27] Revised Agreement, art. 6.03(5), 6.04(12), 6.06(6), 6.08(8)-(9), 6.09(8), 7.02(5), 7.04(2).

Agreement.[28]

iv. Entitlement and Quantum of Compensation for the Class

22. The criteria for entitlement to compensation continue to be set out in the Revised Agreement, as are the principles for determining the amount of compensation each individual will receive.[29] The general mechanism contemplated by the Revised Agreement generally continues to be the payment of a base compensation amount and the possibility of enhanced payment for those individuals who were most impacted by Canada's discriminatory conduct, however some adjustments were made as a result of the collective effort to address the derogations and concerns identified by the Tribunal.

23. Notably, the Revised Agreement contemplates the payment of additional compensation in the circumstance of multiple removals for certain members of the Removed Child Family Class[30]; provides clarity on the payment of base compensation for the members of the Jordan's Principle Class in alignment with the Tribunal's orders[31]; provides for the payment of interest to those members of the Class with an existing entitlement under the Tribunals orders[32]; as well as granting the payment of compensation for the "Kith Child Class" and "Kith Family Class" to account for the Tribunal's direction with respect to children placed off-reserve into non-ISC funded placements with non-family members.[33]

24. The Revised Agreement continues to contemplate that some members of the various family classes, without an existing CHRT entitlement, may not receive direct compensation but will benefit from the Cy-près Fund.[34] The revised entitlements to compensation are described in more detail below.

v. Administrator

25. The Revised Agreement acknowledges the appointment of Deloitte LLP to the role of Administrator, accomplished following the 2022 FSA by way of Court Order dated

[28] Revised Agreement, art. 6.15
[29] Revised Agreement, art. 6 and 7.
[30] Revised Agreement, art. 6.06
[31] Revised Agreement, art. 1.01 "Jordan's Principle Class", 6.08.
[32] Revised Agreement, art. 6.15.
[33] Revised Agreement, art. 7
[34] Revised Agreement, preamble "BB", 6.01(6), 6.04(1), 6.09(7), 7.01(5).

August 11, 2022, whose powers and responsibilities continue to be outlined in the Revised Agreement, and as per the direction of the Settlement Implementation Committee ("SIC").[35]

vi. Claims Process/Distribution Protocol

26. The Revised Agreement continues to contemplate a claims process that minimizes the administrative burden on victims/survivors and recognizes the importance of cultural safety, and health and wellness supports[36], outlining the principles and process relating to the distribution of compensation which will inform the development of the final distribution protocol.[37]

27. An important aspect of the Revised Agreement is its acknowledgment that the distribution protocol within the claims process may be created and submitted to the Court for approval in one package or in several parts relating to a specific class or classes as and when each part becomes ready following the implementation date, recognizing that some aspects of distribution may be implemented in phases.[38]

vii. Notice Plan/Opt-Out

28. With respect to notice, the parties to the Revised Agreement have ensured appropriate notice to the class consistent with the orders of the Federal Court and will continue to implement a robust Notice Plan to inform potential class members of their entitlements to compensation under the Revised Agreement, which remain subject to court approval.[39]

29. With respect to opt-out, victims/survivors will continue to have the opportunity to opt-out of the settlement and preserve their right to pursue their own individual claims, should they so desire.[40] As of the date of this submission, no individuals have exercised their right to opt-out of the Class Action.[41] The Notice Plan will ensure that, in the event that any survivors/victims elect to opt out of the settlement, those who do will have adequate

[35] Revised Agreement, art. 1.01 "Administrator", 3.01, 3.02(1), 3.01(2).
[36] Revised Agreement art. 5.01(3), 6.01(1)-(3), 6.02(1)-(3), 7.01(1)-(3), art. 9.
[37] Revised Agreement art. 5, art. 6., art. 7, art. 14
[38] Revised Agreement, art. 1.01 "Claims Process".
[39] Revised Agreement, art. 11.02, Schedule B: Order dated August 11, 2022.
[40] Revised Agreement, art. 13.
[41] Gideon Affidavit, at para. 98.

notice of their rights. The Revised Agreement also permits Class Members to seek leave to opt-out from the court even following the opt-out deadline. Importantly, the opt-out period was extended upon a motion by the class action parties to the Federal Court, to August 23, 2023.[42] The AFN and Canada have agreed to seek a further extension of this deadline to October 6, 2023, which must be approved by the Federal Court, as identified within the Minutes of Settlement.[43] This amounts to approximately 14 months of opt-out notice, which is one of the longest opt-out periods in Canada.

viii. Claims Period

30. While the Revised Agreement contemplates a three-year claims period for individuals who have reached the age of majority or died before the date of approval of the claims process for their class by the Federal Court, it is tied to the defined "claims process approval date". This aligns with the potential of phased approval of class-specific distribution protocol, in place of the one-off settlement approval date in the 2022 FSA. The Revised Agreement continues to provide for a three-year claims period following class members reaching the age of majority and now establishes a clear three-year period after the date of death for class members for those who were alive at the claims process approval date, but who died prior to reaching the age of majority. Finally, the Revised Agreement provides that the Administrator, on an individual request basis, may provide for an extension of the claims period of up to 12 months to account for extenuating personal circumstances of a Claimant.[44]

ix. Cy-Près Fund

31. In addition to the establishment of a general First Nations-led Cy-près fund ("Cy-près Fund") endowed with $50 million designed with the assistance of experts with the objective of providing culturally-sensitive and trauma-informed supports to survivors,[45] the Revised Agreement also contemplates a further function of the Cy-près Fund, which will be separately administered and focused on providing benefits to approved Jordan's Principle Class Members who require post-majority services. This additional purpose will be

[42] Revised Agreement, Schedule "A", Order dated February 23, 2023, on Opt-Out Deadline.
[43] Minutes of Settlement, s. 9.
[44] Revised Agreement, art. 1, "Claims Deadline".
[45] Revised Agreement, art. 8.01, 8.02; Gideon Affidavit at para. 93.

facilitated by a $90 million capitalization ("Jordan's Principle Post-Majority Fund"), with growth and interest being re-invested in this fund.[46]

32. The Jordan's Principle Post-Majority Fund will be administered by a trust entity to be selected by the Caring Society, with input from the plaintiffs. The purpose of this fund will be to, on a request basis, provide additional supports to high needs Approved Jordan's Principle Class Members between the age of majority and their 26th birthday to ensure their personal dignity and well-being. The Caring Society is tasked with designing the associated trust agreement, designing the eligibility and distribution processes, as well as regularly reviewing the accounting of the associated trust entity.[47]

x. Estates

33. The Revised Agreement provides that the estates of deceased Removed Child Class Members placed off-reserve as of and after January 1, 2006 (those with an existing CHRT entitlement), Kith Child Class Members, and Jordan's Principle Class Members will be entitled to claim $40,000 in base compensation and interest, as well as the potential to receive any applicable enhancement payments on behalf of the deceased. The estates of all other deceased Removed Child Class Members, Essential Service Class Members or Trout Child Class Members may be entitled to direct compensation and any applicable enhancements.[48]

34. With respect to deceased caregiving parents and grandparents, the Revised Agreement provides for claims to be made on behalf of Removed Child Family Class Members (caregiving parents or grandparents of a child placed off-Reserve with non-family as of and after January 1, 2006), Kith Family Members, or Jordan's Principle Family Class Members. This entitlement under the Revised Agreement is designed to overlap with the cohort of victims/survivors with an existing Tribunal entitlement.[49] For these caregiving parents and grandparents, the Revised Agreement provides that where a claim has been approved, base compensation in the amount of $40,000 and interest will be paid directly to

[46] Revised Agreement, art. 8.03(1).
[47] Revised Agreement, art. 8.03.
[48] Revised Agreement art. 14.02(1)-(2)
[49] Revised Agreement 14.03(1)-(2)

their living child or children on a *pro rata* basis.

35. For clarity, while the Revised Agreement uses the capitalized term "Child" as the eligible recipient in relation to compensation to estates of deceased caregiving parents and caregiving grandparents, the parties' intention is that **all** children of the estate will be eligible to receive a *pro rata* payment of the compensation. The Revised Agreement does not limit compensation to only those children who have experienced discrimination. Instead, all children of the estate, whether or not they experienced discrimination themselves, will be eligible for the receipt of compensation directly under the terms of the Revised Agreement.

36. The estates of all other deceased caregiving parents and grandparents in the Removed Child Family Class and Trout Family Class (those without a CHRT entitlement) are not entitled to compensation, unless a claim was submitted by such class member prior to their death. In such an event, their compensation would be paid directly to their estate where a grant of authority has been granted, or subject to an established priority list where no grant of authority has been granted for the estate.[50]

37. The Revised Agreement continues to provide for the submission and treatment of claims both in circumstances where an Estate Executor or Estate Administrator has been appointed and where no such individual is in place.[51] In addition, provision is made for the assistance of ISC in the administration of the estates of eligible deceased class members and payment to personal representatives of class members who are, or become, Persons Under a Disability.[52]

xi. Caring Society Involvement

38. The Revised Agreement provides for the involvement of the Caring Society with respect to implementation, providing them with standing to make submissions on any applications brought for Court approval by the SIC or the parties to the Revised Agreement pertaining to administration or implementation following the settlement approval hearing,

[50] Revised Agreement 14.03(3), 14.03-14.04
[51] Revised Agreement, arts. 14.03-14.04.
[52] FSA, arts. 13.01 & 13.04(3)-(4).

including the Claims Process and Distribution Protocol to the extent the issues bear on those individuals affected by the Tribunal's compensation orders. This includes an entitlement to notice and receipt of all associated applications.[53]

d) Future work required as part of settlement implementation

39. Under the Revised Agreement, there remains certain aspects of the compensation mechanisms that will be determined following the Federal Court's approval of same and further refinement to the process throughout the claims process, as overseen by the SIC, and subject to the Federal Court's approval.

40. The outstanding items to be determined include:

a) Finalization of the Jordan's Principle Class Member and Jordan's Principle Family Class Member assessment methodology, premised on the method developed in accordance with the Framework of Essential Services, which remains subject to the results of piloting, and the continued dialogue between the plaintiffs and the First Nations-led Circle of Experts;[54]

b) Notice of the settlement approval hearing to the class is to be recirculated pending a rescheduled settlement approval hearing;[55]

c) Approval of the Revised Agreement by the Federal Court. The approval hearing was initially scheduled to have commenced on September 19, 2022, but has been deferred since that time pending the outcome of the Motion Decision and subsequent negotiations;[56]

d) Design of the notices to the class, which will be led by First Nations, class counsel, and developed in collaboration with the Administrator;[57] and,

e) Development of a distribution protocol with respect to each of the classes.[58]

[53] Revised Agreement, art. 22.05.
[54] Gideon Affidavit at paras. 73-75.
[55] Gideon Affidavit at para. 23.
[56] Gideon Affidavit at para. 23.
[57] Revised Agreement, art. 11.02
[58] Revised Agreement, art. 5.01(1).

III. ISSUE

41. The issue to be determined by the Tribunal is whether the terms of the Revised Agreement address the derogations and concerns identified by Tribunal in the Motion Decision, and fully satisfies the Compensation Decision and related Compensation Orders.

IV. SUBMISSIONS

a) The AFN's Position

42. The AFN's position is that the Revised Agreement addresses the derogations and concerns identified by the Tribunal in the Motion Decision and fully satisfies the Tribunal's Compensation Decision and related Compensation Orders, albeit subject to the Tribunal's adoption of some minor clarifications and variations to same. While the AFN was of the view that the 2022 FSA reflected a strong resolution to the complex and lengthy proceedings before the Tribunal related to compensation for survivors and to the Class Action, the Revised Agreement built upon and strengthened same. This success is directly attributable to the continued support and direction of the AFN Executive Committee, the First Nations-in-Assembly, as well as the Tribunal's clarifications, findings and recommendations enunciated in the Motion Decision.

43. Critically, the Revised Agreement still generally expands the scope of compensation available to those with an existing Tribunal entitlement, as well as extending eligibility to several thousand more victims/survivors who would otherwise not be entitled to compensation, while ensuring full overlap with the Tribunal's Compensation Orders. The class action parties have made the necessary changes as required by the Motion Decision and are confident that the Revised Agreement will finally resolve these outstanding legal proceedings on compensation and ensure, to the greatest extent possible, the expedient delivery of compensation in a trauma-informed and culturally-sensitive manner.

44. While the $20 billion in compensation contemplated in the 2022 FSA represented a quantum that far outstripped any class action settlement known in Canada in any context, the class action parties and the Caring Society have successfully negotiated an additional $3.34394 billion in the context of the Revised Agreement, for a total value of $23.34394

billion. The scope of the settlement has further been expanded, adding the potential for several thousand more victims/survivors to be added to the existing pool of hundreds of thousands of victims/survivors of Canada's discrimination contemplated within the 2022 FSA, as well as additional supports for some of the most vulnerable survivors.

45. The AFN remains of the view that class action administration by the Federal Court, with the culturally-appropriate protective measures which continue to be set out in the Revised Agreement, will be the most effective and feasible mechanism for delivering compensation to victims/survivors. The Tribunal was clear that it saw great value in such an approach.[59] The AFN has negotiated the specific wellness supports set out in the Revised Agreement in order to maximize the benefit and minimize the harms associated with receipt of compensation for victims/survivors.

46. It is of critical importance that the payment of compensation to survivors/victims of Canada's discrimination be addressed expeditiously as the AFN continues to hear from victims/survivors, including the representative plaintiffs, in relation to the ongoing hardships and suffering associated with the delays on the payment of compensation.[60] The First Nations-in-Assembly have specifically directed the AFN to ensure that all of the survivors/victims of Canada's discrimination are effectively supported and paid compensation as quickly as possible.[61]

47. The AFN puts forward these submissions on this motion with the full support of the First Nations-in-Assembly, as expressed in AFN Resolution 04/2023 and again highlights the fact that the Revised Agreement reflects the wishes of <u>all</u> the parties to the Revised Agreement and Minutes of Settlement. Further, reconciliation between First Nations and Canada, as well as the goals set out in the *CHRA* support the Tribunal's endorsement of the Revised Agreement.

b) Jurisdiction of the Tribunal to Endorse the Revised Agreement

48. The Tribunal's remedial jurisdiction lies in subsection 53(2) of the Act, which

[59] Motion Decision at para. 511.
[60] Gideon Affidavit at para 92.
[61] Resolution 04/2023, s. 5.

establishes broad remedies available to the Tribunal.[62]The Tribunal is afforded "broad" and "extensive" statutory jurisdiction to fashion appropriate remedies.[63] The quasi-constitutional nature of the *CHRA* as human rights legislation demands that it be interpreted in a broad and purposive manner, including with respect to the application of its remedial provisions.[64] This is required because, as noted by the Supreme Court of Canada:

> Human rights legislation is amongst the most pre-eminent category of legislation.... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed....[65]

49. The Tribunal has crafted its remedies in these proceedings in the context of this broad remedial authority,[66] including through retaining jurisdiction over its subsequent rulings in relation to the Compensation Decision and related Compensation Orders. As noted within the Compensation Decision:

> The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.[67] [emphasis added.]

50. And as further elaborated upon within the Framework Decision:

> 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.[68] [emphasis added]

51. The Federal Court upheld this retention of jurisdiction on the Judicial Review[69] and has also previously endorsed such an approach, finding that the Tribunal has jurisdiction to

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[62] *Taylor v. Canada (AG)*, 184 D.L.R. (4th) 706, 2000 CanLII 17120 (FCA) at para. 70.
[63] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada,* 2021 FC 969 at para. 126 ["JR Decision"].
[64] *Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 S.C.R 566 at para. 18.
[65] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339.
[66] JR Decision at para. 130.
[67] Compensation Decision at para. 277
[68] Framework Decision at para. 41.
[69] JR Decision. at para. 302.

reconsider and change a remedial order[70] and "has broad discretion to return to a matter…".[71] The Tribunal itself extensively considered the scope of its broad and remedial powers, having found that said powers and its retained jurisdiction provided it with the ability to both endorse the payment of compensation into trust as contemplated within its Compensation Decision,[72] and thereafter the endorsement of the Compensation Framework itself.[73]

52. This was a critical consideration for the Tribunal in the context of the Motion Decision, with the Tribunal concluding that its retention of jurisdiction allowed it to examine the 2022 FSA in an effort to determine if it was aligned with its orders, including whether victims/survivors would receive appropriate compensation. It explicitly recognized that it was not *functus officio* in this regard, noting that this and the concept of finality, while applying to the Tribunal, must be applied flexibly considering the factual matrix of the case, findings, reasons and orders already made therein.[74]

53. The Tribunal elaborated on its role as prescribed by the *CHRA* in the context of weighing the 2022 FSA, noting that the Tribunal was assessing whether its existing orders are satisfied or, in the alternative, whether it should modify them. It confirmed that it has consistently taken an evidence-based approach in assessing these proceedings, including consideration of whether the evidence before it demonstrates that its existing orders are satisfied or whether justification exists to revisit its previous orders through the dialogic approach.[75] This approach was endorsed by the Federal Court as an expression of the fact that effective remedies in the context of human rights legislation require "innovation and flexibility on the part of the Tribunal" and the *CHRA* is structured to facilitate this flexibility".[76]

54. Distilled, the Tribunal clearly enunciated its view that the primary purpose of its

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[70] *Canada (Attorney General) v. Grover*, 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC).
[71] *Canada (Attorney General) v. Moore*, [1998] 4 FC 585, 1998 CanLII 9085 (FC) at para. 49.
[72] *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada,* 2021 CHRT 6 at paras. 51-80.
[73] Framework Decision at paras. 34-38.
[74] Motion Decision at para. 229, 508.
[75] Motion Decision at para. 232.
[76] Motion Decision at para. 233 citing JR Decision at para. 138.

retained jurisdiction on all of its Compensation Orders is to ensure their effective implementation.[77] Clarification orders could be sought by the parties but solely on process and implementation, in keeping with the fact that the Tribunal is in the implementation phase of the Compensation Orders.[78] Weighing the effective implementation of its orders or a forthcoming remedy involves the Tribunal considering its orders and the evidence on implementation to make findings as to their effectiveness. The Tribunal noted that this should not be construed as a door for reducing or removing entitlements, but instead a door to improve, refine or clarify orders if necessary to ensure they effectively compensate the victims.[79]

55. The Tribunal proffered some helpful insight on what it may consider in its analysis for a finding that its Compensation Orders are being effectively implemented, and are therefore satisfied, drawing from previous request for consent orders/amendments by the parties to the Tribunal proceedings, including the Immediate Measures Decision.[80] It highlighted three aspects to its existing approach which the AFN submits remain of importance to the relief contemplated within this motion, and which can be distilled into the following three questions:

a) Does the evidence support the relief sought?

b) Does the relief sought align with the Tribunal's previous reasons, finding and orders?

c) Is the relief sought in the best interest of First Nations children and families as defined by First Nations themselves and does this relief build upon the Tribunal's short and long-term orders?[81]

56. In the context of amendments for example, this analysis includes examining the nature of the amendments sought and the evidence supporting same. Furthermore, the Tribunal is required to carefully consider the orders linked to the findings and reasons as it

[77] Motion Decision at para. 164.
[78] Motion Decision at para. 176-177.
[79] Motion Decision at para. 269.
[80] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2022 CHRT 8 ["Immediate Measures Decision"].
[81] Motion Decision at para. 224.

is necessary to determine if the nature of a sought amendment is in fact permissible.[82] The Tribunal also noted that it can amend its orders to reflect the parties' wishes if they consent and do not remove recognized rights.[83]

57. Such analysis accords with the Tribunal's remedial jurisdiction, which affords flexibility and broad statutory discretion, and that it is only constrained by the fact that it "must be exercised on a principled and reasonable basis",[84] and is limited by and subject to rules of procedural fairness, natural justice, and the regime of the *CHRA*.[85] As noted by the Tribunal in the Motion Decision, the human rights framework at play in this motion centers on the child and parent/caregiver experience of harm.[86] It must be assured, and the evidence must support, in this context that the derogations and concerns that it noted are being addressed and that the victims/survivors and their quasi-constitutional right to compensation are being respected, have not been bargained away, and that their endorsement of the Revised Agreement can be said to be in the best interest of First Nations children and families.[87] This accords with the underlying theme of the Motion Decision: the *CHRA* does not grant fleeting rights, once entitlements are recognized under the *CHRA*, they cannot be removed.[88]

58. The AFN submits that the Tribunal therefore continues to have the express jurisdiction to consider the question as to whether the Revised Agreement fully satisfies the Tribunal's Compensation Orders and has provided a pathway for the analysis of same, including any requested clarifications or variations thereof. In finding that the 2022 FSA substantially satisfied its Compensation Orders, the Tribunal clearly identified that it viewed those elements of the 2022 FSA that did not derogate from its orders or cause it concern as respecting its Compensation Orders and supporting their effective implementation.[89] It was the derogations and concerns identified by the Tribunal which undermined its ability to find

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[82] Motion Decision at para. 185.
[83] Motion Decision at para. 492.
[84] *Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 at para. 188, citing *Hughes v. Elections Canada*, 2010 CHRT 4 at para.50.
[85] CHRA s. 48.9(1). This section provides that proceedings before the Tribunal be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
[86] Motion Decision at para. 244.
[87] Motion Decision at para. 244, 267, 509.
[88] Motion Decision at para. 504
[89] Motion Decision at para. 511

that the 2022 FSA provided for the effective implementation of its Compensation Orders. The question before this Tribunal is whether the derogations and concerns identified within the Motion Decision have been addressed in accordance with the *CHRA* lens at play and allow for a finding that the Revised Agreement provides for the effective implementation of its Compensation Orders, and thus fully satisfies same.

59. In the sections below, the AFN outlines how the Revised Agreement addresses the derogations and concerns raised by the Tribunal in the Motion Decision and satisfies it Compensation Orders by ensuring their effective implementation, in alignment with the human rights lens required by the *CHRA*, ensuring that the Tribunal is allowed to "complete its task to ensure victims/survivors of the discrimination are compensated" and that their entitlements are neither reduced nor removed.[90] While certain clarifications or minor variations by the Tribunal will be required, they are supported by evidence, substantially align with the Tribunal's previous orders/reasons, are supported by all the parties to the Revised Agreement and Minutes of Settlement, are also supported by the representative plaintiffs, and are in the best interest of First Nations children and families, amounting to relief that both builds upon and, at times, expands the Tribunal's Compensation Orders.

c) The Derogations and Concerns of the Tribunal

60. In its consideration of the 2022 FSA in the Motion Decision, the Tribunal found that the 2022 FSA substantially satisfied its Compensation Orders, and that it could potentially fully satisfy the Tribunal's orders if it was amended to include all the categories of victims/survivors and the compensation amounts included in the Tribunal's orders and to include the possibility for them to opt-out of the FSA in a manner that is both fully responsive and rectifies the areas of concern referenced by the Tribunal.[91]

61. The Tribunal highlighted the fact that the 2022 FSA respected significant components of the Compensation Orders, such as "as not retraumatizing victims, avoiding children testifying and using a culturally appropriate process". It further noted that it generally accepted the 2022 FSA, found it more advantageous on many aspects and

[90] Motion Decision at para. 267.
[91] Motion Decision at para. 509.

understood the principled choices made by First Nations.[92]

62. As previously highlighted, the Tribunal identified the following derogations from its Compensation Orders: (i) the exclusion of children removed from their homes, families and communities and placed in non-ISC funded placements[93]; (ii) the exclusion of the estates of deceased caregiving parents and grandparents[94]; and (iii) reduction and potential removal of compensation for certain caregiving parents and grandparents with respect to multiple removals.[95] It also identified concerns with what it perceived as uncertainties under eligibility for Jordan's Principle and ensuring that those entitled under their orders would be receiving a baseline of $40,000 in compensation, as well as what it perceived as a short opt-out period.

i. The establishment of the Kith Child Class and the Kith Family Class

63. The 2022 FSA contemplated an underlying assumption with respect to its approach to compensation, namely that children whose placements were not funded by Indigenous Services Canada ("ISC") would not be entitled to compensation. This accordingly precluded consideration of those whose were placed with a family friend off-reserve subject to agreed upon conditions or as a result of the involvement with a child welfare service provider operating under the FNCFS Program, including under arrangements not funded by ISC.[96]

64. The Tribunal determined that its Compensation Orders did not focus on ISC-funded placements and viewed such an approach as a narrow interpretation of its Compensation Orders – it never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC.[97]

65. First Nations children who were removed were harmed and experienced an infringement of their human rights and dignity when they were deprived of the opportunity to receive preventative services and least disruptive measures as a result of Canada's discriminatory conduct. The Tribunal stated that compensation is tied to Canada's

[92] Motion Decision at para. 511.
[93] Motion Decision at paras. 283-331.
[94] Motion Decision at paras. 332-350.
[95] Motion Decision at paras. 351-360.
[96] Gideon Affidavit at para. 49-50.
[97] Motion Decision at para. 297, 314.

discrimination being the basis for the removal, not that it paid for their care.[98] The AFN accepts the Tribunal's interpretation of its Compensation Orders.

66. Taking the Tribunal's clarifications with respect to the eligibility for those victims/survivors whose placements were not funded by ISC to heart, the Revised Agreement, based upon the significant input of the Caring Society, includes compensation for First Nations children removed from their homes, families and communities and placed in alternative non-ISC funded placements and compensation for their parents/caregiving grandparents. These placements are referred to as "Kith Placements" in the Revised Agreement.[99] Children placed in Kith Placements, as well as their parents/caregiving grandparents, are entitled to $40,000 in base compensation plus applicable interest.[100]

67. As noted above, the victims/survivors forming the Kith Child Class are First Nations children placed with a Kith Caregiver (an adult who is not a member of the Child's Family who lived off reserve and cared for the child without receiving funding in terms of the placement), in a Kith Placement (a First Nations Child residing with Kith Caregiver and the placement was associated with a child welfare authority) during the period between April 1, 1991, and March 31, 2022, thus extending the compensation for these children contemplated by the Tribunal back to the advent of the Direction 20-1, in line with the timeline for compensation for the Removed Child Class.[101] Members of the Kith Child Class are not eligible for enhancements, but will receive the full compensation they would have received under their CHRT entitlement plus Tribunal-directed interest, which has been preserved in the Revised Agreement by way of an Interest Reserve Fund.[102] The amount of $600 million with respect to the budget for the Kith Child Class was drawn from the Caring Society's evidence-based consideration of the potential class size for children between 2006-2022. The AFN defers and relies upon the Caring Society's submissions as to the 2006-2022 class size.

68. With respect to the caregiving parents or in their absence, caregiving grandparents

[98] Motion Decision at para. 331.
[99] Revised Agreement art. 1.01, definitions "Kith Placement".
[100] Revised Agreement art.. 7.02(1)
[101] Revised Agreement art. 7.02(3)(b), 1.01 definitions "Removed Child Class Period".
[102] Revised Agreement art. 6.15(1)-(2), 7.02(2).

of Kith Child Class members, compensation has been limited to the period of the Tribunal's Compensation Orders, being from January 1, 2006 to March 31, 2022.[103] These Kith Family Class Members[104], similar to the Removed Child Family Class, are not eligible for compensation if they abused an eligible child in alignment with the Tribunal Compensation Orders.[105] The Kith Family Class members may also receive multiples of compensation where multiple children were removed and placed in a Kith Placement between January 1, 2006 and March 31, 2022.[106] The budget for the Kith Family Class was set at $702 million in compensation, which was extrapolated from the projected size of the Kith Child Class over the period covered by the Tribunal's compensation orders.[107] The AFN again defers to the Caring Society in this regard.

69. The AFN submits that the collective efforts on addressing the payment of compensation for non-ISC funded placements by way of the establishment of the Kith Child Class and Kith Family Class have resulted in the effective implementation of the Tribunal Compensation Orders. Compensation under the Revised Agreement is predicated on compensating those whose removal was a result of the discriminatory FNCFS Program, not who funded the removal. Thus, the Revised Agreement accounts for the harms these victims/survivors experienced as a result of the infringement of their human rights and dignity when they or their children were deprived of the opportunity for preventative services and least disruptive measures due to Canada's discriminatory conduct. The Kith Class entitlements entirely align with and provide for the effective implementation of the Compensation Orders in relation to these victims/survivors, in a manner which is in the best interests of First Nations children and families. The AFN submits that Revised Agreement fully satisfies the Tribunal's Compensation Orders in relation to these victims/survivors.

ii. Estates

70. The 2022 FSA contemplated that the estates of caregiving parents and grandparents would not be entitled to direct compensation, save and except in the circumstance where an

[103] Revised Agreement art. 7.03(1).
[104] Revised Agreement art. 1.01 definition "Kith Family Class".
[105] Revised Agreement art. 7.03(2).
[106] Revised Agreement art. 7.03 (4).
[107] Gideon Affidavit at para. 55.

application for compensation was submitted prior to the individual's death. The parties to the 2022 FSA submitted that this compromise was necessary to ensure that compensation for deceased members of the child classes would be safeguarded.[108]

71. The Tribunal was clear that it could not accept this derogation, citing the fact that entitlement orders were already made by the Tribunal and it could not amend its orders to reduce compensation or disentitle victims/survivors.[109]

72. In response to the Tribunal's concerns regarding the estates of deceased caregiving parents and caregiving grandparents, the Revised Agreement provides for claims to be made on behalf of Removed Child Family Class Members (of a child placed off-Reserve with non-family as of and after January 1, 2006), Kith Family Members, or Jordan's Principle Family Class Members. Specifically for these caregiving parents and grandparents, the Revised Agreement provides that where a claim has been approved, base compensation in the amount of $40,000 and interest will be paid directly to their living child or children on a *pro rata* basis. The AFN submits that this entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement.[110] If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

73. The provisions of compensation under the Revised Agreement does diverge in some respects from the Tribunal's Compensation Orders, specifically where the Tribunal noted as follows in 2020 CHRT 7:

> [152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision* Order, including the referenced period in the Order above mentioned in Question 2.[111]

74. The AFN submits that the approach is principled, as it effectively prioritizes the

[108] Factum of the AFN, dated July 22, 2022 at paras. 214-216.
[109] Motion Decision at para. 344. [110] Revised Agreement 14.03(1)-(2)
[110] Revised Agreement 14.03(1)-(2)
[111] Framework Decision at para. 152.

children/grandchildren heirs of these deceased caregiving parents and grandparents at least one of whom would be victims/survivors themselves, and thus the basis for the deceased caregiving parent's or grandparent's claim for compensation. Effectively, the settlement funds to which the deceased's estate would be entitled under the Tribunal's compensation orders would be treated akin to life insurance, allowing it to bypass the estate and be paid directly to the named beneficiary of same (children/grandchildren) with the commensurate benefits. This includes the expedited delivery of compensation, avoiding the potential diminishment of the benefit of settlement funds to surviving First Nations children/grandchildren as a result of the deceased's estate being indebted, as well as the potential levy of estate administration taxes.[112] This directly accords with the principles enumerated both in the Compensation Framework which sought to avoid the diminishment of victims/survivors' compensation as a result of tax consequences, as well as the efforts of the Revised Agreement to ensure that any compensation payable would remain tax exempt and not negatively impact any social benefits that victims/survivors are receiving (consistent with the Tribunal's guidance in 2019 CHRT 39 at para 265).[113]

75. The AFN submits that this evidence supports the relief sought with respect to varying the compensation entitlement of estates of deceased caregiving parents and grandparents who have an existing entitlement under 2020 CHRT 7, and that it also substantially aligns with the Tribunal's reasons within the context of the related Compensation Orders. It is also in the best interest of the First Nations children and families who are the victims/survivors of Canada's discrimination by ensuring that the child/grandchild heirs of same receive their undiminished compensation. For the AFN, this amounts to a reasonable variation which has been supported by all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly. The AFN submits that with the adoption of this principled and evidence informed variation of the Tribunal's Compensation Order, which is in the best interest of First Nations class members, the Revised Agreement fully satisfies the Tribunal's Compensation Orders by ensuring that the Tribunal's compensation entitlement for these deceased caregiving parents and grandparents effectively flows to their

[112]Gideon Affidavit at para. 64.
[113] Compensation Framework at s. 10.9, Revised Agreement art. 10.03.

children or grandchildren.

iii. Removed Child Family Class – Multiple Removals

76. The Tribunal stated that its award for multiple removals was premised on addressing the compound effects on caregiving parents or grandparents who had already experienced the harm associated with the removal of a child and thereafter were forced to undergo the egregious harm of having another one or more child/children removed from their care as a result of Canada's discrimination.[114]

77. In response, the class action parties, with the assistance of the Caring Society, contemplated the number of claimants who could potentially be able to claim for multiple removals and developed a budget in the amount of $997 million for same, which was accepted by Canada and incorporated into the settlement funds of the Revised Agreement.[115]

78. While the Revised Agreement provides for the payment for multiplications for all members of the Removed Child Family Class, it does place some restrictions on those members who do not have an existing entitlement under the Tribunal's Compensation Orders. This does not impact upon those with an existing CHRT entitlement. The restriction for non-CHRT compensation includes a cap of $80,000 in compensation for those who had two or more children removed between the period of April 1, 1991 and December 31, 2005 (and who were no longer in care on January 1, 2006) and Stepparents.[116] To be clear, these are not deviations from the Compensation Orders as these members of the Removed Child Family Class have no pre-existing Tribunal entitlements. The Revised Agreement also contemplates the potential adjustment of eligibility and compensation for these specific members of the Removed Child Family Class who have no existing Tribunal entitlements, including the potential for increases to the $80,000 cap.

79. Whether to include stepparents and the appropriate limitations upon eligibility to align with First Nations conceptions of family structures was the subject of a mediation

[114] Motion Decision at para. 356.
[115] Gideon Affidavit at para. 57-59.; Revised Agreement art. 6.06(6).
[116] Revised Agreement 6.06(1)-(4).

between the Parties to the Revised Agreement in 2022. For clarity:

a) The Revised Agreement requires that Stepparents, who are not entitled to compensation under the Compensation Orders, be First Nations in order to be eligible for compensation.

b) The requirement that individuals are First Nations does not apply to caregiving parents and/or grandparents who are entitled to compensation under the Compensation Orders.

c) Step-grandparents are not eligible for compensation under the Revised Agreement or under the Compensation Orders, regardless of their First Nations status.

80. The Revised Agreement also places an $80,000 cap on sequential removals and the potential for adjustment of this compensation on caregiving grandparents where a caregiving parent (not a stepparent) has been approved for compensation under the Revised Agreement with respect to the affected child.[117] The AFN submits that this cap does not amount to a divergence from the Compensation Decision or the Tribunal's related Compensation Orders, but instead acts as a clarification of the Tribunal's intentions, the scope of which was developed by the parties' to the Revised Agreement and Minutes of Settlement further to the dialogic process.

81. In the Compensation Decision, the Tribunal noted as follows on the issue of sequential removals at para. 257:

> [257] A parent or grandparent entitled to compensation under section 53 (2) (e) of the CHRA above and, who had more than one child unnecessarily apprehended is to be compensated $20,000 under section 53 (3) of the CHRA per child who was unnecessarily apprehended or denied essential services.

82. The parties to the Tribunal proceedings considered the development of

[117] Revised Agreement 6.06(4)(c)

compensation in line with the Tribunals direction, ultimately developing the following text in Compensation Framework as endorsed by the Tribunal in 2021 CHRT 7 at s. 4.4:

> Where a child was removed more than once, the parents (or one set of caregiving grandparents) **shall** be paid compensation for a removal at the first instance. A different grandparent or set of grandparent(s) (or the child's parents where they were not the primary caregivers at the time of the first or prior removal) **may** be entitled to compensation for a subsequent removal where they assumed the primary caregiving role where the parents (or the other grandparents) were not caring for the child.[118] [emphasis added]

83. What is clear upon an examination of the provisions related to the payment for sequential removals is that the Tribunal, via its endorsement of the Compensation Framework, expected that the parents, or one set of caregiving parents, would be entitled to for the removal at first instance, as illustrated by the use of "shall". This entitlement for removal at first instance is mirrored in the context of the Revised Agreement.[119] The Compensation Framework thereafter establishes the potential for a different caregiving grandparent(s) or parents, where not the caregiver at the removal of first instance, to claim compensation for a subsequent removal. To be clear, this provision did not establish an entitlement, but merely the possibility by way of the use of "may".

84. The AFN submits that a right to compensation for subsequent removals for caregiving grandparents in this context never crystallized in the Tribunal proceedings and that the compensation process in relation to multiple removals was in fact never finalized by the parties to the Compensation Framework. Further, the word "may" was used to account for the possibility of potential changes and/or amendments as viewed necessary by the parties thereto. As provided for by s. 13 of the Compensation Framework, the Framework was intended to provide general guidance to facilitate the compensation process, and the parties were continuing to work to provide more precision to guide implementation, recognizing that "processes can and should be amended where the parties agree amendment is necessary" and that such amendments did not necessarily require the

[118] Framework Decision, Compensation Framework at s. 4.4 – Multiple Removals
[119] Revised Agreement art. 6.06(1).

approval of the Tribunal absent disagreement between the parties.

85. The AFN submits that limiting compensation for caregiving grandparents where a caregiving parent has already advanced a claim for compensation to the affected child is a reasonable clarification of the Tribunal's Compensation Orders, providing certainty to scope of entitlement where none previously existed in the context of the Tribunal's proceedings, as well as reflecting the wishes and efforts of all the parties to the Revised Agreement and Minutes of Settlement, as well as the First Nations-in-Assembly.

86. The class action parties' and the Caring Society's efforts to address the payment of compensation for multiple removals for the Removed Child Family Class results in the effective implementation of the Tribunal Compensation Orders in this regard. While a clarification by the Tribunal is required, it is supported by the approach as endorsed by the Tribunal in the Compensation Framework and substantially aligns with the Tribunal's previous orders/reasons. Finally, the provisions in relation to multiple removals amount to relief that builds upon the Tribunal's Compensation Orders in a manner that ensures clarity with respect to the entitlement to compensation for victims/survivors and that those with an existing Tribunal entitlement will receive their full due. The Revised Agreement therefore fully satisfies the Compensation Orders in relation to these victims/survivors.

iv. Clarity with respect Jordan's Principle entitlements

87. With respect to Jordan's Principle, the AFN was clear in its submissions in the motion on the 2022 FSA that the claims process developed by the plaintiffs would seek to follow the principles established by the Tribunal and set criteria that would be amenable to objective assessment and implementation. The goal was ensuring that those children who suffered discrimination and were objectively impacted would be compensated consistent with the Tribunal's reasoning that the compensation process should be objective[120] and efficient[121], and the definition of essential services must be reasonable.[122] The focus remained on where there existed a confirmed need for an essential service that was the

[120] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2020 CHRT 15 at para 45 ("2020 CHRT 15").
[121] Compensation Decision at para. 258.
[122] 2020 CHRT 15 paras. 148-151.

subject of a delay, denial or service gap within the bounds of reasonableness.[123]

88. The Tribunal did not reject this approach. However, the Tribunal stated that it felt uncertainties existed regarding compensation owing to the outstanding definition of an "essential service". The Tribunal was not able to find that the 2022 FSA satisfied its orders with respect to Jordan's Principle, premised on this and the possibility for reduction in compensation for some victims/survivors and potentially disentitlement for others.[124] The AFN submits that the Revised Agreement provides for robust guardrails that fully satisfy these concerns.

89. The AFN submits that further efforts have been undertaken with respect to estimating the size of the class, for the purposes of ensuring the adequacy of the budget. The 2022 FSA estimate was reliant on data that Canada shared with the AFN and Moushoom class counsel on the number of approved Jordan's Principle claims for a quarter of the 2019-2020 fiscal year. Extrapolating from this limited data, the Jordan's Principle Class (now the "Essential Service Class") size was estimated to be between 58,385 and 69,728 for the relevant time period, between December 12, 2007 to November 2, 2017 (now the "Essential Service Class Period").

90. Since the Motion Decision, the parties have conducted further investigation in relation to the estimated class size and remain confident in the original class size which was based upon 65,000 potential claimants.[125]

91. In order to satisfy the Tribunal that all Jordan's Principle claimants with an existing Tribunal entitlement to $40,000 plus interest would receive their compensation, the Revised Agreement provides for two newly defined separate classes:

a) **Essential Service Class:** those First Nations individuals who did not receive from Canada, whether by reason of a denial or a service gap, an Essential Service relating to a confirmed need, or whose receipt of said Essential Service was delayed by Canada, on grounds including, but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional

[123] Revised Agreement art. 1.01 Definitions "Jordan's Principle Class Member", art. 6.08(10)
[124] Motion Decision at para. 379.
[125] Gideon Affidavit at para. 70-71.

dispute, during the period between December 12, 2007 and November 2, 2017, while under the age of majority, who are expected to receive up to, but no more than $40,000.

b) **Jordan's Principle Class:** those First Nations individuals who are Essential Service Class members who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the delay, denial, or service gap of an essential service that was the subject of a confirmed need. The Parties intend that the way the highest level of impact is defined, and the associated threshold for membership in the Jordan's Principle Class, fully overlap with the First Nations children entitled to compensation under the Compensation Order <u>who will receive a minimum of $40,000 in addition to interest.</u>

92. The definition of the Jordan's Principle Class explicitly provides for the class action parties' and the Caring Society's intention that those with a Tribunal entitlement will be afforded same. Based on the estimate of 65,000 approved claimants for Essential Services Class and the Jordan's Principle Class, all members of the Jordan's Principle Class would be able to receive at least $40,000. The Jordan's Principle Class is also entitled to interest in accordance with the Tribunal's orders, which has been ring-fenced in the Interest Reserve Fund, described below.[126]

93. If the number of claimants was unexpectedly higher, the Revised Agreement provides that Jordan's Principle Class Members (those who suffered the highest level of impact, which is intended to overlap with all the Jordan's Principle children entitled to compensation under the Tribunal's Compensation Orders) will receive a minimum of $40,000, in addition to interest. The remaining funds in the budget would be shared *pro rata* by the lesser impacted Essential Service Class Members.[127] Conversely, if the number of claimants is lower, upon the advice from the Federal Court-appointed Actuary, Jordan's Principle Class Members may be entitled to enhancement payments.[128] From the above, it is clear that the Revised Agreement's primary focus in relation to the Essential Service Class

[126] Revised Agreement art. 6.15(1)-(2)
[127] Revised Agreement, Art. 6.08(10)-(12).
[128] Revised Agreement, art. 6.08(15)

is to ensure that Jordan's Principle Class members receive their entitlements as directed by the Tribunal.

94. For clarity, and to emphasize the overlap to the Tribunal entitlements afforded to Jordan's Principle children, a "jurisdictional dispute" is not required in order to be eligible for compensation. The Essential Service Class definition (which encompasses Jordan's Principle) of "on grounds including, but not limited to, lack of funding or lack of jurisdiction, as a result of a jurisdictional dispute during the period between December 12, 2007 and November 2, 2017 …" is a non-exhaustive list of examples of the reasons for which an Essential Service may have been delayed, denied or otherwise unavailable to a child. The parties' intention was not to impose a requirement that the delay, denial or unavailability be the result of a jurisdictional dispute.

95. The Revised Agreement further addresses the Tribunal's concerns regarding Jordan's Principle uncertainty by amending the language associated with eligibility into the Jordan's Principle Class. The Revised Agreement provides that claimants may qualify if they have a confirmed need for an essential service and "experienced the highest level of impact (including pain, suffering or harm of the worst kind) in relation to a delay, denial or service gap".[129] This aligns with the Tribunal's language in the Compensation Decision, specifically accounting for the harms and the impacts of Canada's discrimination.[130]

96. While the Revised Agreement still provides for the need to develop the threshold by which the highest level of impact with be objectively determined, it now specifies that the underlying basis for developing this threshold necessary for inclusion in the Jordan's Principle Class is ensuring full overlap with those children entitled to compensation under the Tribunals Compensation Orders, which is set out within the definition of the Jordan's Principle Class.[131]

97. This underlying principle informs each element of the means by which the threshold of impact level shall be determined under the Revised Agreement, and thereby whether an individual falls under the Essential Services Class or the Jordan's Principle Class, including

[129] Revised Agreement at para. 6.08(10).
[130] Compensation Decision at para. 250.
[131] Revised Agreement art 1.01 Definition "Jordan's Principle Class".

the framework for essential services, accompanying instruments, such as the claims forms and questionnaire, as well as the associated robust and broad piloting.[132]

98. The "framework of essential services", as developed with the assistance of experts[133] facilitates the streamlining of the compensation process and facilitates professional confirmation of the individual's need for an essential service. The framework is designed to allow claimants to identify whether they had a confirmed need for a service that was essential for the purposes of compensation. These objective criteria allow for the expedient administration of claims, avoiding the need for case-by-case individual and subjective inquiry for inclusion in the Essential Service Class.[134]

99. The Revised Agreement continues to provide for instruments such as culturally sensitive claims forms and a questionnaire, which will assist the Administrator at the second stage of the analysis, being a determination of whether a child's circumstances indicate the highest level of impact and thereby eligibility for inclusion into the Jordan's Principle Class, with the accompanying minimum compensation of $40,000 and interest, in alignment with their Tribunal entitlement under the Compensation Orders.[135] Critically, these instruments and questionnaire remain subject of Jordan's Principle expert consultations, which are First Nations-led and continue to be facilitated by the AFN.[136]

100. Finally, the Revised Agreement also provides that the threshold of impact for qualification as a member of the Jordan's Principle Class is subject to the results of piloting of the method developed in accordance with the framework of essential services. The AFN is currently involved with advancing these piloting efforts, which will include a number of potential Essential Service Class and Jordan's Principle Class members, in a manner that respects the need for full overlap with those with an existing entitlement under the Tribunal's compensation orders, and which minimizes any burdens on the victims/survivors. The piloting efforts will also assist in refining the framework of essential

[132] Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3), 6.08(10)(a)-(b), Gideon Affidavit at para. 69.
[133] Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3).
[134] Gideon Affidavit at para. 74.
[135] Revised Agreement 6.08(10)(a).
[136] Gideon Affidavit at paras. 73-74.

services, as well as the supporting instruments, such as the claims forms and questionnaire.[137]

101. The pilot is to be evidence-based, premised on the efforts of the AFN's circle of experts, as well as additional independent researchers. All are of the view that the finalization of an effective approach premised on the framework of essential services, as well as the development of the threshold for inclusion in the Jordan's Principle Class premised on the highest level of harm, requires piloting. This pilot is intended to gauge the quality and efficiency of the approach to compensation established for Jordan's Principle in the Revised Agreement, allowing for the refinement of each component of the claims assessment process and ensure that it is in alignment with the Tribunal's Compensation Orders. This is the central component of these efforts, and is the primary outcome measured. The pilot will also assist in other important aspects of the compensation process, including gauging the effectiveness of the cultural and trauma-informed supports. All of these efforts and the ultimate determination remain subject to Federal Court approval and oversight.

Jordan's Principle Family Class

102. In the context of the 2022 FSA, the AFN explained to the Tribunal that only caregiving parents and grandparents of Jordan's Principle Class children who suffered a significant impact will receive compensation. This was identified by the Tribunal as a derogation.[138]

103. The Revised Agreement provides that the caregiving parents or grandparents of approved Jordan's Principle Class Members are entitled to compensation if it is determined that such caregiving parents or grandparents themselves experienced the highest level of impact (including pain, suffering or harm of the worst kind).[139] These approved Jordan's Principle Family Class Member would be entitled to $40,000 in compensation, in line with the Tribunal's baseline amount.[140] The Revised Agreement continues to allocate a fixed budget of $2 billion to the Jordan's Principle Family Class and Trout Child Family Class

[137] Gideon Affidavit at paras. 73-75.
[138] Motion Decision at para. 367.
[139] Compensation Decision at para. 251.
[140] Revised Agreement art. 6.09 (1)(2).

collectively.[141]

104. The first stage of confirmation of eligibility for these victims/survivors is that the affected child of the caregiving parent or grandparent fell under the ambit of the Tribunal's Compensation Orders, premised on the provision of the Revised Agreement that membership within the Jordan's Principle Class is intended to fully overlap with those children entitled to compensation under the Tribunal's Compensation Orders. [142] This first stage is thus in alignment with, and effectuates, the Compensation Orders.

105. The second stage of confirmation of eligibility for these victims/survivors is premised on whether such caregiving parents or grandparents themselves experienced the highest level of impact, an approach for which will be further refined and tested in the piloting process. The AFN submits that this approach is evidence informed and principled, in alignment with the *CHRA* framework identified by the Tribunal and will facilitate the effective implementation of the Compensation Orders.

106. The critical distinction which justifies this approach in the context of caregiving parents or grandparents falling under the scope of Jordan's Principle entitlements is tied to the fact that not every First Nations caregiving parent or grandparent necessarily experienced highest level of impact as a result of Canada's discrimination which the Tribunal had contemplated would warrant compensation, nor the commensurate harms. Further, the nature of and extent of the impact that a parent or grandparent may have experienced is different from the impact that a child has experienced. This proposition is premised on the evidence that the impacts to parents of children who faced Jordan's Principle delays, gaps or denials is not necessarily direct or linear in all cases.[143] This necessitates a clarification from the Tribunal.

107. The AFN submits that this approach clarifies the Tribunal's intention within the context of its Compensation Orders, including the fact that the Tribunal did not intend to compensate adults who did not experience a worst case scenario of Canada's discrimination,

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[141] Revised Agreement art. 6.09(8).
[142] Revised Agreement art. 1.01 definitions, "Jordan's Principle Class".
[143] Gideon Affidavit at para. 87-88, Exhibit "I", Affidavit of Dr. Lucyna Lach dated June 20, 2023, Exhibit "A" Report Submitted to Moushoom Class Council Regarding Method for Assessment of Compensation for Caregiving Parents or Caregiving Grandparents at pg. 1, 9 ["Lach Report"].

and that there exists a degree of reasonableness contemplated within the context of its Compensation Orders.[144] The Revised Agreement recognizes these aims in the context of these victims/survivors by way of premising compensation on the highest levels of impact experienced. While the Tribunal opted for a compensation process that would avoid measuring the level of harm borne by each victim/survivor, it was cognizant that a "reasonableness analysis" was required for gauging whether these victims/survivors experienced the requisite adverse impacts as a result of Canada's discrimination and the harms associated therewith.[145] The AFN submits that the highest level of impact analysis with the Revised Agreement is an appropriate and principled expression of the Tribunal's intention, which accounts for the fact that not all First Nations caregiving parents or grandparents experienced the degree of adverse impacts which the Tribunal intended to compensate.

108. Critically, the threshold associated with determining the "highest level of impact" associated with such worst case scenarios will be the subject of objective criteria and expert advice, as developed through the framework of essential services and the associated piloting exercise as discussed hereinabove. Such piloting is necessary because, as noted by Dr. Lach, while existing theoretical and empirical literature indicates that hardship and suffering can be assessed, such an assessment will require an adaptation of existing measures, piloting of that measure and establishing culturally appropriate methods for its administration.[146] Notably, such criteria also remain subject to approval by the Federal Court.

109. While not determinative to the approach to Jordan's Principle compensation, it is also important to note that caregiving parents or grandparents who do not receive direct compensation are expected to benefit indirectly from the General Cy-près Fund established under the Revised Agreement.[147]

v. Opt-Out Period

110. The Tribunal was clear in the Motion Decision of the importance of ensuring that

[144] 2020 CHRT 15 at para. 148.
[145] 2020 CHRT 15 at para. 148.
[146] Lach Report at pg. 15.
[147] Revised Agreement art. 8.02.

victims/survivors have adequate time to consider the FSA and the Tribunal's Motion Decision and previous Compensation Orders with the benefit of an appropriate opt-out period. It was of the view that the initial opt-out date of February 19, 2023, as described within the AFN's and Canada's materials on the Motion Decision amounted to a short time frame given the fact that the Tribunal had identified certain derogations and certain incomplete definitions of terms and criteria in the 2022 FSA that may affect victims'/survivors' compensation entitlements, and finally, that such concerns were exacerbated by the fact that that they could be put in a position where they would be forced to accept less compensation or opt-out and be forced to litigate against Canada "from scratch".[148]

111. This initial opt-out date within the context of the 2022 FSA was further to the class action parties' agreement that the opt-out period would be six months, following the publication of the notice of certification, with the notice and opt-out forms having been approved by the Federal Court on June 24, 2022.[149] The opt-out deadline has since been extended upon a motion by the parties to the Class Action to the Federal Court, which set an extended opt-out deadline of August 23, 2023.[150]

112. The Revised Agreement remains clear that any individual who wishes to not be bound by the settlement or eligible for compensation under the FSA may pursue their personal path to compensation.[151] However, if the Tribunal declares that the settlement satisfies its Compensation Orders, it would be administered under the Federal Court process, and such an individual would not be able to claim under same.

113. In light of the Tribunal's concerns, and in the interest of ensuring that First Nations are provided with adequate time to consider the implications of the opt-out, the AFN and Canada have agreed to seek a further extension of this deadline to October 6, 2023, as identified within the Minutes of Settlement.[152]

114. By addressing the derogations previously identified by the Tribunal, survivors/victims

[148] Motion Decision at paras. 385-388.
[149] Gideon Affidavit at para. 97.
[150] Revised Agreement, Schedule "A", Order dated February 23, 2023, on Opt-Out Deadline.
[151]Revised Agreement, art. 13
[152] Minutes of Settlement, s. 9.

do not stand to lose any part of the benefit of the Tribunal's Compensation Orders by not opting out of the Class Action. In addition, clarifications have been made to the definitions and criteria that the Tribunal found to be incomplete. The AFN submits that these changes from the previous motion should assuage the concerns of the Tribunal that victims/survivors would not be fully informed as to their entitlements under the Revised Agreement versus their human rights compensation as provided by the Tribunal.[153]

115. The AFN would also stress that the settlement envisioned in the Revised Agreement, having addressed the derogations and concerns of the Tribunal, is in the best interests of the Class. Every victim/survivor contemplated within the Compensation Decision will be receiving compensation in alignment with the Compensation Orders as a baseline, subject to the clarifications and variations provided for herein, the AFN is of the view that the number of individuals who decide to opt-out of the settlement will be exceedingly low, if not outright non-existent. As of today, after several months of a broadly advertised opt-out notice, no survivor/victim has exercised their right to opt-out of the Class Action.[154]

d) Notable additions

i. Cy-près Fund – Increased Supports for vulnerable First Nations survivors

116. As described above, in addition to the establishment of a general First Nations-led Cy-près fund ("Cy-près Fund") endowed with $50 million designed with the assistance of experts with the objective of providing culturally-sensitive and trauma-informed supports to survivors[155], the Revised Agreement also establishes a separate aspect of the Cy-près Fund, focused on providing benefits to approved Jordan's Principle Class Members who require post-majority services which will be endowed with $90 million ("Jordan's Principle Post-Majority Fund").[156]

117. The Jordan's Principle Post-Majority Fund will be administered by a trust entity to be selected by the Caring Society, with input from the plaintiffs. The purpose of this fund will be, on a request basis, to provide additional supports to high needs Approved Jordan's

[153] Motion Decision at para. 388; See Jordan's Principle Clarifications identified hereinabove with respect to satisfaction of Tribunal's reference to "incomplete terms and criteria".
[154] Gideon Affidavit, at para. 98.
[155] Revised Agreement, art. 8.01, 8.02; Gideon Affidavit at para. 93.
[156] Revised Agreement, art. 8.03(1).

Principle Class Members between the age of majority and their 26th birthday to ensure their personal dignity and well-being.[157]

118. The AFN submits that the availability of additional supports for some claimants via the Jordan's Principle Post-Majority Fund is another means by which the Revised Agreement seeks to expand on the Compensation Decision and related Compensation Orders. As found by the Tribunal, First Nations with high needs and with disabilities given the eligibility cut-off when reaching the age of majority stop receiving services under Jordan's Principle and experience barriers and service issues.[158] The needs of First Nations young adults who are no longer eligible for Jordan's Principle have consistently been raised by First Nations leadership and advocates, and the gaps in services for First Nations young adults are currently the subject of a separate human rights complaint in the province of Manitoba.[159]

119. The Jordan's Principle Post-Majority Fund will ensure that many First Nations victims/survivors with high needs reaching the age of majority have some assistance and a pathway for their specific needs to be met in the context of the compensation process, reflecting a substantive equality lens.[160]

120. The AFN submits that this builds upon the Revised Agreement's principles of minimizing trauma and being culturally informed, and additionally, that the significant supports contemplated by the Jordan's Principle Post-Majority Fund for victims/survivors both aligns with and exceeds what the Tribunal contemplated within the Compensation Orders, supporting the Tribunal's endorsement of the Revised Agreement as satisfying same.

ii. Interest Reserve Fund

121. The Revised Agreement contemplates the payment of interest to all the victims/survivors with an existing Tribunal entitlement to compensation[161], further to

[157] Revised Agreement, art. 8.03.
[158] Immediate Measures Decision at para. 68.
[159] Gideon Affidavit at para. 94.
[160] Immediate Measures Decision at para. 71.
[161] Revised Agreement art. 6.15(1)-(2).

Tribunal's direction in the Compensation Decision providing for interest pursuant to subsection 53(4) of the CHRA at the Bank of Canada rate in keeping with the approach in *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20.[162]

122. The Revised Agreement establishes an Interest Reserve Fund with an initial budget of $1 billion which is in effect ring-fenced for the purposes of paying interest to those who have an existing Tribunal entitlement to compensation[163], providing the capacity for the effective implementation of the Tribunals Compensation Orders.

iii. Phased Distribution

123. The Revised Agreement contemplates the potential for phased distribution of compensation.[164] This is premised on the AFN First Nations-in-Assembly's desire to ensure the distribution of compensation to Claimants as soon as reasonably possible following the Federal Court's approval.[165]

124. Once the compensation process and distribution protocol are finalized with respect to one or more classes, the administrator and the SIC will be in a position to seek court approval for the roll-out of the compensation process. This accounts for the fact that some classes will likely require additional efforts to develop an appropriate distribution protocol (for example, Jordan's Principle piloting, information gathering on the Kith Class to account for the varied methods of claims verification, etc.).[166]

125. The expedited payment of compensation remains a significant element of the Revised Agreement. The victims/survivors of Canada's discrimination have been forced to wait for resolution of the issue of compensation for too long. The phased approach will ensure that the settlement funds will be made available to the impacted individuals as soon as is reasonably possible, which the AFN submits amounts to effective implementation of the Tribunal's orders, is in the best interest of First Nations children and families and supports the Tribunal's endorsement of the Revised Agreement.

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[162] Compensation Decision at paras. 271-276.
[163] Revised Agreement art. 6.15(1)-(4).
[164] Revised Agreement, art. 1.01 "Claims Process", 5.01(10).
[165] Gideon Affidavit at para. 89, 91.
[166] Gideon Affidavit at paras. 91-92.

iv. The Revised Agreement advances reconciliation

126. In light of the class action parties' and the Caring Society's efforts at addressing the derogations and concerns identified by the Tribunal in the context of the Motion Decision, the settlement embodied within the Revised Agreement furthers Canada's constitutional promise of reconciliation.[167] The Tribunal was clear that while negotiations require compromise, it did not elevate the obligation to pursue same to a point where the binding orders of the Tribunal issued pursuant to the CHRA could be reduced or ultimately lead to the disentitlement of benefits to victims/survivors.[168] The role of compromise did not extend to derogating from binding orders.[169]

127. The AFN submits that this is exactly what the Revised Agreement reflects. With the derogations and concerns raised by the Tribunal addressed, the Revised Agreement truly provides for a negotiated resolution that gives certainty to all parties. The terms of the Revised Agreement continue to call for an apology by the Prime Minister[170], reflect a First Nations-led approach and include First Nations oversight of the administration of compensation.[171]

128. Significantly, the Revised Agreement has also been fully endorsed by the First Nations-in-Assembly. In the context of the 2022 FSA, the AFN advanced the settlement premised on the direction of the AFN Executive Committee pursuant to their delegated authority from the First Nations-in-Assembly. The AFN Executive is comprised of duly elected National and Regional Chiefs who together represent First Nations across Canada further to mandates of the AFN Charter and delegated authority of the First Nations-in-Assembly. This includes the capacity to address fast-paced negotiations and litigation falling under the context of the mandates of the First Nations-in-Assembly, which provides the capacity for necessary expedited decision-making, and remains a practical AFN mandate and convention.[172]

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[167] *R. v. Kapp*, [2008] 2 SCR 483 at para. 121.
[168] Motion Decision at para. 478.
[169] Motion Decision at para. 482.
[170] Revised Agreement at art. 24.
[171] Revised Agreement art. 12.01(5)-(6), (9)-(10).
[172] Gideon Affidavit at para. 24.

129. Despite it being non-determinative to the Motion Decision, the Tribunal was clear that while the AFN Executive Committee amounted to First Nations leadership with the authority to adopt the 2022 FSA on behalf of the AFN, that a resolution of from the First Nations-in-Assembly was its preference, particularly in the face of regional resolutions arguing against its endorsement. For the Tribunal, a resolution of the First Nations-in-Assembly is more reflective of national endorsement by First Nations rights holders and brings with it assurances that rights-holders agree with the requested orders.[173] Further, the First Nations-in-Assembly's endorsement is analogous to sovereign nations meeting to make decisions that concern them and reflects an effective process for their expressing their consent after meaningful consultation.[174]

130. A Special Chiefs Assembly ("SCA") was called for April 4-6, 2023, for discussion on Canada's National Action Plan on the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples,* therefore the AFN was provided with the opportunity to seek the approval of the First Nations-in-Assembly of the Revised Agreement.[175]

131. The Revised Agreement was tabled to the First Nations-in-Assembly at the April 2023 SCA, who unanimously approved its execution by the AFN on April 4, 2023. The First Nations-in-Assembly confirmed by way of Resolution 04/2023 that they fully support the Revised Agreement in principle, authorizing the AFN negotiators to make any necessary minor edits to complete same; and fully supporting the AFN in seeking an order from the Tribunal confirming that the Revised Agreement on compensation fully satisfies its compensation orders. Importantly, it also directed the AFN to continue to support the representative plaintiffs and all survivors and victims of Canada's discrimination, by ensuring that compensation is paid, and adequate supports are provided, as quickly as possible to all those that can be immediately identified and to ensure that compensation reaches all those who are eligible.[176] The Tribunal can thus take comfort in the fact that a resolution has been obtained which, for the Tribunal, reflects that the decision was endorsed

[173] Motion Decision at para. 436, 438-440.
[174] Motion Decision at para. 436.
[175] Gideon Affidavit at para. 31. National Action plan as provided for by s. 6(1) of the *United Nations Declaration on the Rights of Indigenous Peoples Act,* S.C. 2021, c. 14
[176] Resolution 04/2023

by rights-holders, amounting to meaningful consultation.

132. As the derogations and concerns that Tribunal noted has been addressed, and First Nations having been meaningful consulted as per the directions of the Tribunal, the AFN submits that the negotiated terms of settlement represented within the Revised Agreement represent forward progression between Canada and First Nations on the path of reconciliation, supporting the Tribunal's endorsement of the Revised Agreement as satisfying its Compensation Orders premised on it being in the best interest of First Nations children and families.

v. Consent of the Parties to the Tribunal Proceedings – the dialogic process continues

133. While the Tribunal was clear that consent of the parties to the Tribunal proceedings was not a precondition to its jurisdiction or approval of the 2022 FSA, it also clarified that it is willing to consider amending its orders to reflect the parties wishes if they consent and do not remove recognized rights. Its preference for relief to be on consent of all the parties to the Tribunal proceedings is clear, it noting that with respect to systemic discrimination, that its responsibilities could only end "on consent of all, not just some, parties in the Tribunal proceedings and based on compelling evidence that the systemic racial discrimination will be eliminated."[177] As noted by the Tribunal in its Letter Decision: "The real legal difficulties here are first that the FSA is not made on consent of all the parties to these proceedings."[178]

134. The AFN is pleased to submit that both of the originating complainants and the respondent agree that the Revised Agreement satisfies the Tribunal's compensation orders and that this motion is being brought on consent. Further, the interested parties have been apprised of the Revised Agreement and Minutes of Settlement and no significant issues are expected to be raised by same. The parties to the Revised Agreement and Minutes of Settlement expect, subject to minor commentary, that each of the Chiefs of Ontario, Nishnawbe Aski Nations and the Canadian Human Rights Commission will consent to the

[177] Motion Decision at para. 517.
[178] *First Nations Child and Family Caring Society et al. v. Attorney General of Canada,* Letter Decision of the Tribunal dated October 24, 2022 ["Letter Decision"].

relief sought herein. This reflects a harmonized position and the ongoing efforts of the parties to resolve the compensation related proceedings by way of the dialogic approach. The Tribunal has always been clear that a compensation process would be defined by the parties and the necessary dialogue to complete said process was essential, the approach also being endorsed by the Federal Court.[179]

135. The Tribunal was clear that the lack of consent to the matter undermined its efforts at creating an expeditious and forthcoming remedy to the victims/survivors, noting that the 2022 FSA would not necessarily address Canada's appeal of the Compensation Decision and related orders as there remained a further risk of delay given the fact that parties to the Tribunal's proceedings opposed the motion which created an ongoing risk of judicial review and delay.[180] Certainty was not necessarily guaranteed. The consent of each of the parties to the Tribunal's proceedings, albeit some of which is expected to be forthcoming, mitigates this risk, and supports the endorsement of the Revised Agreement, particularly as both the Revised Agreement and the Minutes of Settlement reached in the proceedings provide for the discontinuance by Canada and the AFN of their respective judicial review applications of 2022 CHRT 41 with the Federal Court on a without cost basis[181], as well as the discontinuance by Canada of its appeal of the Compensation Decision with the Federal Court of Appeal.[182]

136. As a result, concluding, on consent of the parties, that the Revised Agreement satisfies the Tribunal's compensation orders would lend itself to ensuring the expeditious payment of compensation to the victims/survivors, which as noted above, is a critical component of the Revised Agreement and the latitude therein for a phased approach to distribution. [183] The AFN submits that the consent of the parties supports certainty and the ability of the Revised Agreement to effectively implement the Tribunal's Compensation Orders and thus the Tribunal's endorsement of same.

[179] JR Decision at paras. 135-136; Compensation Decision at para. 269-270.
[180] Motion Decision at para. 485.
[181] Minutes of Settlement at s. 15.
[182] Revised Agreement art. 22.03(1)-(2).
[183] Revised Agreement, art. 1.01 "Claims Process", 5.01(10).

e) Non-determinative concerns of the AFN

137. As discussed above, the Tribunal provided a clear signal in the Motion Decision of its preference for a resolution from the First Nations-in-Assembly endorsing the final settlement agreement, in contrast to it being completed by way of the direction of the AFN Executive Committee. [184] The AFN disagrees that any requirement should exist for a resolution but would highlight that this is a non-issue in relation to the Revised Agreement further to Resolution 04/2023 having been obtained.

138. Further, the Tribunal suggested that the AFN mislead its constituents by virtue of its consideration of the lack of information on the compensation orders posted on the compensation webpage. The AFN notes that the compensation website was both established for and approved by the Federal Court in the Class Actions. Further, the Short Form of Notice widely disseminated in accordance with the Notice Plan approved by the Federal Court clearly provided that some members of the Class may be disentitled to or receive less compensation than awarded by the Tribunal. [185]

f) The Revised Agreement effectively implements and thus satisfies the Tribunal's Compensation Orders

139. This Revised Agreement reflects the tireless efforts of the AFN, Caring Society, Canada and Moushoom Class Counsel to finalize a workable resolution, both for those with existing entitlements under the Tribunal's Compensation orders, and the expansive number of victims/survivors who suffered from Canada's discriminatory conduct that the Tribunal was not able to assist as identified within the related Class Actions. While the Tribunal was only able to find that the 2022 FSA substantially satisfied its Compensation Orders, the class action parties have made significant efforts to ensure that the finding in the within motion will be that the Revised Agreement reflects a pathway for the effective implementation of the Compensation Orders, and thus, fully satisfies same.

140. As the AFN has previously noted, the endorsement of this settlement by the Tribunal

[184] Motion Decision at para. 436, 438-440. [185] Revised Agreement, Schedule "A", Gideon Affidavit at para. 23, Exhibit "C" Short Form of Notice. [186] Motion Decision at para. 267.
[185] Revised Agreement, Schedule "A", Gideon Affidavit at para. 23, Exhibit "C" Short Form of Notice. [186] Motion Decision at para. 267.

will accelerate the process of delivering compensation to those individuals impacted by Canada's discrimination, particularly as no party to the Tribunal's proceedings is expected to remain in opposition.

141. The Revised Agreement is the truest product of the dialogic process, with both originators of the complaint before the Tribunal and the Respondent agreeing that it satisfies the Tribunal's compensation orders. It has further gone through the rigours of approval by First Nations leadership, both within the AFN Executive Committee and ultimately by the First Nations-in-Assembly, who have provided a clear national mandate to pursue resolution based upon the terms of the Revised Agreement as advanced within this motion.

142. Ultimately, the AFN is of the position that the settlement represented in the Revised Agreement constitutes a negotiated collaboration that is in the best interests of First Nations. The settlement is built upon the foundation of the Tribunal's critical work in protecting fundamental human rights, fully addresses the terms of its Compensation Orders and critically ensures that the Tribunal can "complete its task to ensure victims/survivors of the discrimination are compensated" and that their entitlements are nor reduced or removed.[186] The derogations and concerns of the Tribunal have all been fully addressed, affirming the Tribunal's signal to all victims/survivors in Canada that their recognized and vindicated rights will be respected and protected by the Tribunal and the Canadian Human Rights regime in Canada.[187]

143. For all of these reasons, the AFN urges the Tribunal to accept the Revised Agreement as effectively implementing and satisfying its Compensation Decision and related Compensation Orders.

V. ORDER REQUESTED

144. The AFN is hereby seeking the following Declaration/Orders from the Tribunal:

a) An order confirming that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Final Settlement Agreement

[186] Motion Decision at para. 267.
[187] Motion Decision at para. 521.

dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding;

b) a finding that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; First Nations caregiving parents/grandparents who experienced multiple First Nations children removed from their homes, families, and communities; and, First Nations children eligible for compensation due to denials, unreasonable delays, and gaps in essential services due to Canada's discriminatory approach to Jordan's Principle;

c) an order clarifying 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

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

e) an order clarifying 2019 CHRT 39, to confirm that caregiving parents (or caregiving First Nations grandparents) of Jordan's Principle survivors/victims must themselves have experienced the highest level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation ($40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps.

f) an order declaring that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. This order supersedes the Tribunal's order in 2021 CHRT 7;

g) an order that, conditional upon the Federal Court's approval of the Revised Agreement, the Tribunal's jurisdiction over its Compensation Orders will end on the day that all appeal periods in relation to the Federal Court's approval of the Revised Agreement expire or, alternatively, on the day that any appeal(s) from the Federal Court's decision on the approval motion for the Revised Agreement are finally dismissed;

h) an order that the parties will report to the Tribunal, within 15 days of each of the following: (1) the result of the Federal Court's decision on approval of the Revised Agreement; (2) the expiry of the appeal period relating to the Federal Court's decision on the Revised FSA or of an appeal having been commenced; and

i) such further and other relief as this Tribunal may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 5, 2023

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VI. LIST OF AUTHORITES

	PRIMARY SOURCES
	Legislation
1.	*Canadian Human Rights Act*, R.S.C., 1985 c. H-6
2.	*United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14
	Jurisprudence
3.	*Attorney General of Canada v. First Nations Child and Family Caring Society et al.*, 2021 FC 969
4.	*Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 SCR 566
5.	*Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45
6.	*Canada (Attorney General) v. Grover*, 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC).
7.	*Canada (Attorney General) v. Moore*, [1998] 4 FC 585, 1998 CanLII 9085 (FC)
8.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2019 CHRT 39
9.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 7
10.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 15
11.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 6
12.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 7
13.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2022 CHRT 8
14.	*First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, Letter Decision of the Tribunal dated October 24, 2022
15.	*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2022 CHRT 41
16.	*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20
17.	*Hughes v. Elections Canada*, 2010 CHRT 4
18.	*R. v. Kapp*, [2008] 2 SCR 483
19.	*Taylor v. Canada (AG)*, 184 D.L.R. (4th) 706, 2000 CanLII 17120 (FCA)
20.	*Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321
	International
21.	*United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15*