Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

\- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

\- and -

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

Respondent

\- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION and FEDERATION OF SOVEREIGN
INDIGENOUS NATIONS

Interested Parties

WRITTEN SUBMISSIONS OF FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

David Taylor
M. Alyssa Holland

CONWAY BAXTER WILSON LLP/s.r.l.

Suite 400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Tel: 613-691-0368
dtaylor@conwaylitigation.ca
aholland@conwaylitigation.ca

Sarah Clarke

CLARKE CHILD & FAMILY LAW
Suite 950 – 36 Toronto Street
Toronto, ON M5C 2C5
Tel: 416-260-3030
sarah@childandfamilylaw.ca

ANNE LEVESQUE
University of Ottawa
Faculty of Law, Fauteaux Hall
57 Louis Pasteur St.
Ottawa ON K1N 6N5

anne@equalitylaw.ca
Tel: (613) 447-4699

Lawyers for the
First Nations Child and Family
Caring Society of Canada

Table of Contents

PART I - STATEMENT OF FACTS **1**

A. OVERVIEW 1
B. THE FACTS 5
1) The Complaint and the Findings of Discrimination by the Tribunal *5*
2) The Request for Compensation and the Tribunal's Orders *12*
3) The Dialogic Approach in Action *17*
4) The Essential Components of the Compensation Framework *21*
5) The Class Actions and the Caring Society's Involvement *24*
6) The Key Departures from the Tribunal's Orders *26*
Non-ISC Funded Placements 26
Estates of Deceased Parents 28
Compensation for Parents (and Caregiving Grandparents) 29
Uncertainty regarding Jordan's Principle 31

PART II - ISSUES **36**

PART III - SUBMISSIONS **36**

A. CAN THE TRIBUNAL MODIFY ITS EARLIER DECISIONS AFFIRMED BY THE FEDERAL COURT WITHOUT THE CONSENT OF THE PARTIES? 36
B. IS THE MOTION PREMATURE GIVEN THE OUTSTANDING ISSUES? 40
C. IF THE TRIBUNAL CAN DECIDE THE MOTION, WHAT GUIDING PRINCIPLES SHOULD BE APPLIED TO THE DETERMINATION OF THE MOTION? 43
1) The Critical Examination of Evidence as a Principle for Considering this Motion *43*
2) Application of Human Rights Law and Protecting the Integrity of the System *45*
3) Apply the Best Interests of the Child – Every Child *49*
4) Setting a Dangerous Precedent without the Dialogic Approach *52*

PART IV - ORDER SOUGHT **54**

PART V - LIST OF AUTHORITIES **55**

PART I - STATEMENT OF FACTS

A. Overview

1. "*This decision concerns children*."[1] The Canadian Human Rights Tribunal ("**Tribunal**") began its landmark 2016 Merits Decision by putting the human rights of First Nations children at the forefront of its analysis. After extensive analysis of the evidence placed before it the Tribunal ruled that Canada's conduct resulted in harm, trauma and victimization of First Nations children and their families stemming from Canada's systemic violations of the *Canadian Human Rights Act* ("***CHRA***"). The Tribunal properly understood that the compensable harm inflicted on the victims in this case, many of them still children today, must be measured and considered through their own experiences.

2. The discrimination in this case flows from the federal government's flawed and inequitable child and family services and the denial, delay, and disruption of services for First Nations children caused by its improper implementation of Jordan's Principle. Therefore, the starting point is acknowledging the existence of that discrimination and its adverse impacts for First Nations children and families infringing on their dignity. For some children, this meant being moved from their families during child welfare involvement due to Canada's lack of funding for child welfare prevention services. For others, it was harms arising from deficits or lack of access to education, health or social services, products or supports. Tragically for too many children it meant a loss of life. These harms, the Tribunal found, perpetuate the historical disadvantages resulting from Canada's role in the residential school system and the Sixties Scoop.[2]

3. The Tribunal acknowledged the suffering of the victims of the federal government's discriminatory conduct in its many written reasons including the 2016 Merits Decision and the many non-compliance decisions that followed. The Tribunal also ordered a critical and unprecedented human rights remedy that directly impacts the victims in the case: human rights compensation for the

---

[1] 2016 CHRT 2 ["**Merits Decision**"] at para 1 [emphasis added].
[2] Merits Decision at paras 218, 226-228, 404, 413-427, 459; 2018 CHRT 4 at paras 115, 119, 124, 143, 150.

infringement of dignity and acknowledgement of the federal government's wilful and reckless conduct.[3]

4. The importance of the rights entrenched by the Tribunal and the gravity of Canada's harms comes into sharp focus given that over half of the victims entitled to human rights compensation are still children. Positive measures must be made to safeguard children's human rights given their unique developmental characteristics.

5. The harms experienced by the children and their families are found throughout the record on the Merits Decision and in the decisions that followed. They include testimonies from residential school survivors, child welfare professionals who had no option but to separate children from their families to provide the services they and their families needed,[4] and families who required services for their children that were unmet due to the federal government's discriminatory definitions and approaches to Jordan's Principle.

6. The compensatory and other remedies crafted by the Tribunal flow directly from the discrimination and harm caused by the federal government. These remedies are tailored to the specific children and families identified in the record, and from the Tribunal's specific findings regarding the systemic nature of the discrimination they experienced. Indeed, the Tribunal grounded its decisions regarding compensation in robust and largely uncontroverted evidence – most of it adduced or generated by the government. This Panel has gained significant expertise on matters at issue in this case over the past 10 years. Throughout the case, the Panel has grounded its legal analysis squarely within the evidence and within its *CHRA* jurisdiction and in the human rights framework enacted by Parliament.

7. The Attorney General of Canada ("**Canada**") challenged almost every step of the compensation process, including opposing compensation in its final submissions on the Merits decision. It also sought judicial review of the initial compensation decision in 2019 and the compensation framework decision in 2021. The Federal Court dismissed the application for judicial review, giving vindication and assurance to victims that their entitlement to human rights compensation under

---

[3] 2019 CHRT 39 and 2021 CHRT 7.
[4] 2019 CHRT 39 at para 158.

the *CHRA*, pending Canada's further appeal, is legally binding and enforceable. Indeed, not withstanding the class actions addressed in this motion, the Caring Society takes the view that Canada ought to have paid the human rights compensation immediately after the Federal Court decision was issued - something that Canada remains obligated to do.

8. Now, an outside class action proceeding in the Federal Court[5] is seeking to capitalize on the success of this case, including the finding that Canada is financially liable for the harms it has caused. In a landmark settlement, which the Caring Society acknowledges is significant and can provide more compensation to some CHRT victims, the Assembly of First Nations (the "**AFN**") and Canada are asking the Tribunal to approve a final settlement agreement (the "**Compensation FSA**") that has significant adverse deviations from the Tribunal's orders and would oust the jurisdiction of the Tribunal's compensation awards, rendering them null and void.

9. The motion brought by Canada and the AFN raises serious questions about the path forward. While the Tribunal has retained jurisdiction over many aspects of this case (and should continue to exercise this jurisdiction as the parties move towards long-term reform), the compensation orders are now final and cannot be re-examined, refined, or amended. The Federal Court closed the door on such options when it upheld the Tribunal's compensation orders on September 29, 2021.

10. Moreover, the Tribunal must protect against an unfair process, ensuring that issues previously litigated (such as compensation to <u>all</u> children removed from their homes, families and communities and compensation to the estates of deceased parents) are not reopened through an alternative legal process. Such an approach would likely raise difficult questions about the administration of justice. The principles of finality, predictability, *stare decisis* and *functus*, when examined in the context of this case and in the relief sought on this motion, make clear that there is no legal pathway for the Tribunal to make any of the orders requested.

---

[5] *Moushoom et al. v. Canada* (T-402-19), *AFN et al. v. Canada (*T-141-20), *Trout v. Canada* (T-1120-21) (collectively, the "**Consolidated Class Action**")

11. Notwithstanding the question of jurisdiction, the relief sought is premature. There are many aspects of the Compensation FSA that remain unknown, particularly how eligibility for Jordan's Principle will be determined. At this stage, it is impossible to fully understand the extent of the deviations from the Tribunal's compensation orders and how many victims, including children, will be impacted. The Caring Society submits that there is an inherent unfairness in the timing of this motion given that the Tribunal, which has ordered legally enforceable human rights compensation to the victims of this case, is being asked to choose how monetary damages in a separate legal proceeding, over which it has no control, will be distributed when critical questions remain unanswered.

12. If the Tribunal is satisfied that it can proceed despite the considerable issues of jurisdiction and prematurity, the Caring Society submits that the Tribunal ought to apply a human rights framework that centers the child and parent/caregiver experience of the harm in determining this motion. The analysis must include: (i) a critical examination of the evidence adduced in relation to the victims who will be impacted by the deviations in the Compensation FSA; (ii) the nature of compensation awarded as a quasi-constitutional right under the *CHRA* and the meaning of retracting that acknowledgement; (iii) the best interests of First Nations children and their families, particularly given the historical and intergenerational trauma experienced by the victims, as already acknowledged by the Tribunal; and (iv) the potential of creating a dangerous precedent where human rights compensation can be bargained for outside of the dialogic approach and outside of the protections that the human rights regime provides. The Supreme Court has described the human rights regime as the "final refuge of the disadvantaged and the disenfranchised" with exclusive jurisdiction over discrimination complaints.[6] The Tribunal must ensure its process is not circumvented and its jurisdiction is not encroached upon by civil claims.

13. Irrespective of the path chosen by the Tribunal to address this motion, the Caring Society submits that the Compensation FSA does not satisfy the Tribunal's compensation orders. The compensation orders are clear, specific and are grounded

---

[6] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339; *Honda Canada Inc. v. Keayes*, 2008 SCC 39 at para. 63-67.

in both evidence and the principles of substantive equality, justice, and the best interest of First Nations children. The Compensation FSA deviates from the Tribunal's orders in many areas and does not, even on its face, ensure that all victims protected by the Tribunal's orders will receive $40,000 as the floor. The Compensation FSA, while historic and impressive in the amount of $20 billion, is premised on compromise, uncertainty, and financial calculations arising from a fixed pot and an unknown number of claimants. Unlike the *CHRA* compensation, the Compensation FSA also waives the rights of all victims to litigate against Canada on any front, including those who get no financial compensation or less than their $40,000 Tribunal entitlement. The Caring Society recognizes the Compensation FSA provides more compensation for some victims. We simply believe that such agreements should not erode victims' legal entitlement to human rights compensation where it has already been awarded,

14. The Tribunal reasonably concluded from the evidence as a whole that Canada was "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[7] It also found that Canada had continuously focused on "financial considerations rather than on the best interest of First Nations children and respecting their human rights."[8] Indeed, it is not the fault of the victims in this case that Canada's wilful and reckless conduct adversely impacted so many First Nations children and families across the country. No victim should have to give up their legal right to human rights compensation to shield Canada from further liability or to compromise their entitlement after their right to compensation has already been challenged and upheld.

B. The Facts

1) The Complaint and the Findings of Discrimination by the Tribunal

15. On February 27, 2007, the Caring Society and the AFN filed a human rights complaint pursuant to s. 5 of the *CHRA*, alleging that Canada was discriminating against First Nations children and families based on race and national and/or ethnic origin. The Complaint alleged that Canada's FNCFS Program adversely impacted First Nations children and families, and that its implementation of Jordan's

[7] 2019 CHRT 39 at para 230.
[8] 2019 CHRT 39 at para 231.

Principle caused First Nations children to be denied services and to experience service delays resulting in inequitable outcomes. The discrimination was described as “systemic and ongoing”.

16. The Complaint was filed as a last resort. For a decade, both organizations advocated for reform by conducting research – funded and supported by Canada – showing First Nations children received less child welfare and social services than all other Canadian children and by offering solutions to the discrimination.[9] Canada refused to implement the recommendations leaving the Caring Society and the AFN with no other choice but to bring the Complaint. After years of delay occasioned by Canada’s procedural litigation and technical arguments, this Panel was appointed on July 10, 2012, to hear this case.[10]

17. On October 16, 2012, the Tribunal amended the Complaint to include an allegation of retaliation against Dr. Blackstock. The Tribunal found that Canada retaliated against her when she was denied entry to a meeting with the Chiefs of Ontario at the Minister of Aboriginal Affairs and Northern Development Canada’s office (**“Retaliation Decision”**).[11] Dr. Blackstock was awarded $20,000: $10,000 for pain and suffering and $10,000 for Canada’s wilful and reckless conduct. The Retaliation Decision, which Canada did not judicially review, held that: “<u>when evidence establishes pain and suffering, an attempt to compensate for it must be made</u>.”[12]

18. The hearing on the merits began in February 2013. However, it was delayed for several months after the Caring Society received an Access to Information request revealing that Canada had failed to disclose tens of thousands of relevant documents. Many of these documents were central to demonstrating the discrimination perpetrated by Canada. Canada’s obstruction of process resulted in

---

[9] Joint National Policy Review (“**NPR**”), CHRC Book of Documents [“**CBD**”] Vol 1 at Tab 3; Bridging Econometrics: Phase One Report, CBD Vol 1 at Tab 4; Wen:De: We are Coming to the Light of Day, CBD Vol 1 at Tab 5; Wen:De: The Journey Continues, CBD Vol 1 at Tab 6.
[10] 2012 CHRT 16.
[11] 2015 CHRT 14 at paras 58-61.
[12] 2015 CHRT 14 at para 124 [emphasis added].

a 5-month delay to the hearing. The Tribunal later awarded the Caring Society $90,000, on consent.[13]

19. The Complaint was heard over 72 days in 2013 and 2014. The Tribunal heard from 25 witnesses, including four expert witnesses for the complainants. Of particular note, Dr. Amy Bombay, an expert on the psychological effects and transmission of trauma on wellbeing, gave evidence on the collective traumas experienced by Indigenous people, including in Indian Residential Schools, and the cumulative emotional and psychological wounding over time on individual and community health.[14] Her evidence informed the Tribunal's understanding of the inter-generational trauma experienced by First Nations children and their families as a result of removals.

20. Repeatedly, the Tribunal heard compelling and largely uncontradicted evidence of Canada's discriminatory conduct, and the perpetuation of harm and trauma through its FNCFS Program and its failure to implement Jordan's Principle. Some examples include the following:

a) Chief Robert Joseph, a respected Elder and residential school survivor, testified about Prime Minister Harper asking him what Canada should apologize for. In response, he linked Canada's conduct during the Residential School era with its current discrimination. He testified:

> And so, we have the state saying 'Yeah, we made a mistake.' We can't make the same mistake twice. These are the same children and their parents and grandparents and we can't afford to continue losing children into despair and oblivion, detachment, or loneliness, brokenness, or whatever it is.[15]

b) Derald Dubois, a child welfare professional, residential school survivor, son of a residential school survivor, a parent, foster parent, and adoptive parent,

---

[13] 2013 CHRT 16; 2014 CHRT 2; 2015 CHRT 1; 2019 CHRT 1. See also 2019 CHRT 1 at para 13) (the Tribunal noting that a number of the documents "were prejudicial to Canada's case and highly relevant").

[14] Expert Report of Dr. A. Bombay, CBD Vol 13 at Tab 314; Jan 9, 2014 evidence of Dr. A. Bombay; Jan 10, 2014 evidence of Dr. A. Bombay.

[15] Jan. 13, 2014 examination-in-chief of Chief R. Joseph at p 97 lines 10-16.

testified about the multi-generational impact of past and present removals which he described as "wreaking havoc on our families".[16]

c) Dr. Blackstock, Executive Director of the Caring Society, testified about the long-term negative impact of removals and provided examples, based on her decades of experience as a social worker, of how a child's life changes when they are removed from their families.[17]

d) Raymond Shingoose, Executive Director of a First Nations Child and Family Services Agency ("**FNCFS Agency**") spoke of having to fundraise for wheelchairs for children in care due to Canada's lack of funding and how the lack of prevention programs drove children into care. He testified that "parents lose hope and eventually stop trying to make changes in their lives as no supports are provided to them" and that some children received less than adequate care or no access to services they needed.[18]

e) Ms. Murphy, Canada's own witness, acknowledged in her testimony that taking children away from their family and communities had harmful impacts on children and their families.[19]

21. The Tribunal also heard about various individual cases that illustrated the harm Canada's discrimination was having on First Nations children. For example, it heard about a 4-year-old girl who suffered brain anoxia during routine dental surgery and needed a hospital bed to breathe. The request went through over a dozen bureaucrats before someone wrote – "Absolutely not". This denial occurred during the Christmas season and at a time when the child's mother was eight months pregnant.

22. The evidence of harm and trauma was also outlined in the NPR and the Wen:De Reports, which Canada funded and partnered in, showing Canada was well aware its child welfare services disparities were hurting First Nations children and their families. The NPR identified harms such as loss of community, culture,

---

[16] 2019 CHRT 39 at para 158.
[17] Feb. 25, 2013 examination-in-chief of C. Blackstock at p 14 lines 11-24; p 144 line 12 to p 146 line 2.
[18] 2018 CHRT 4 at para 179.
[19] Apr. 2, 2014 examination-in-chief of S. Murphy at p 50 lines 3-5.

language, worldview and traditional family, as well as dysfunction, high suicide rates and violence.[20] The Wen:De Reports detailed the funding disparity for FNCFS Agencies, noted detrimental impacts for First Nations children resulting from jurisdictional disputes and recommended fully implementing Jordan's Principle.[21]

23. The Tribunal also heard compelling evidence showing how the FNCFS Program, and the narrow implementation of Jordan's Principle, harmed First Nations children, including: two reports of the Auditor General of Canada, two reports from the House of Commons Standing Committee on Public Accounts, and from several internal federal government reviews.[22] Canada's documents also showed that First Nations children were often denied services available to non-First Nations children. For example, if a child needed three medical mobility devices, Canada would only pay for one device every five years while all devices would generally be covered as the normative standard of care.[23] The Tribunal heard about Canada's failure to provide services due to off-reserve residence or lack of *Indian Act* status. In one case, the Caring Society had to pay for medical transportation so a toddler could get diagnostic testing for a life-threatening condition.[24]

24. The evidence underscored Canada's abject failure to take action to redress the discrimination of which it was fully aware. To illustrate, in 2012, senior officials identified a need for significant amounts of new funding in the FNCFS Program, but no action was taken.[25] More disturbing still, Canada even gave an award to

---

[20] Merits Decision at para 151.
[21] Merits Decision at paras 162 and 183; Wen:De: The Journey Continues at p 16, CHRC BOD Vol 1 at Tab 6.
[22] Merits Decision at para 149. See for e.g. Mar. 28, 2012 Internal Audit Report re Mi'kmaw Children and Family Services Agency, CBD Vol 5 at Tab 52; Mar. 5, 2010 Implementation Evaluation of Enhanced Prevention Focus in Albera, CBD Vol 13 at Tab 271; March 2007 Evaluation of the [FNCFS Program], CBD Vol 4 at Tab 32.
[23] 2017 CHRT 14 at para 70.
[24] 2019 CHRT 7 at paras 57-58.
[25] Merits Decision at paras 292-304. See also: 2019 CHRT 39 at paras 237-240.

those responsible for its failed approach to Jordan's Principle,[26] in which officials worked to ensure no case ever met the definition.[27]

25. In the Merits Decision, the Tribunal upheld the key allegations of discrimination made in the Complaint.[28] It determined that Canada's FNCFS Program and approach to Jordan's Principle discriminated against First Nations children and families on the prohibited grounds of race and national or ethnic origin contrary to s. 5 of the *CHRA*.[29] The Tribunal ordered Canada to cease its discriminatory practices, reform the FNCFS Program, and to take measures to immediately implement the full meaning and scope of Jordan's Principle.[30]

26. The Tribunal expressly acknowledged the "suffering" of First Nations children impacted by Canada's discriminatory conduct, compounded by the legacy of residential schools and the Sixties Scoop.[31] Based primarily on Canada's own documents and witnesses, the Tribunal found entrenched and wide-spread discrimination experienced by First Nations children in relation to the FNCFS Program.[32] With respect to Jordan's Principle, the Tribunal found that Canada's narrow interpretation "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children".[33]

27. The Tribunal also found Canada knew about: (i) its discriminatory conduct; (ii) the inequality in the FNCFS Program; (iii) the harm caused to First Nations children; (iv) the disparity facing First Nation children in accessing essential services; and (v) the harmful impacts of misconstruing Jordan's Principle.[34] It further ruled that Canada had evidence-based solutions to remediate these adverse

---

[26] 2011 Deputy Ministers' Recognition Award Nomination Form, CBD Vol 13 at Tab 327**.**
[27] Merits Decision at para 381; Apr. 30, 2014 examination-in-chief of C. Baggley at p 117, lines 1-12.
[28] While all three panel members presided over the hearings, sadly Member Bélanger passed away weeks before the Merits Decision was released.
[29] Merits Decision at paras 456-467.
[30] Affidavit of C. Blackstock sworn Oct. 24, 2019 ("**October 2019 Blackstock Affidavit**"), at para 13.
[31] Merits Decision at paras 218, 404, 412, 458 and 467.
[32] See for instance: Merits Decision at paras 344, 384, 388-389.
[33] Merits Decision at paras 381-382.
[34] Merits Decision at paras 168, 362-372, 385-386, 389 and 458.

impacts, as reflected in reports it funded and participated in.[35] Despite having opportunities to act, the Tribunal found Canada failed to make any substantive change to alleviate the discrimination, further exacerbating the harm to First Nations children across the country.[36] This wilful disregard by Canada was later held by the Tribunal to be the "worst-case scenario under our *Act*."[37]

28. The Tribunal took great care in reviewing and setting out the evidence of harm experienced by First Nations children, youth, and families resulting from Canada's discriminatory conduct. At all times, the Tribunal's analysis was focused on the experiences of the children as opposed to the government's particular mechanism for underfunding or its reasons for failing to fund equitable services:

> The evidence in this case not only indicates various adverse effects on First Nations children and their families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreement, but also that these adverse effects perpetuate historical disadvantage suffered by Aboriginal peoples, mainly as a result of the Residential School system.
>
> […] In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including denial of adequate child and family services by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreement.
>
> The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those Frist Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserve.[38]

29. In addition to making orders directing Canada to cease its discriminatory conduct, the Tribunal stated that the discrimination was ongoing, and that further orders and remedies would follow.

30. These decisions document Canada's ongoing discriminatory conduct against First Nations children, and its failure to comply with the Merits Decision.

---

[35] Merits Decision at paras 150-185, 270-275, 362-372, 389 and 481.
[36] Merits Decision at para 461.
[37] 2019 CHRT 39 at para 234.
[38] 2016 CHRT 2 at paras 393, 404 and 467.

These repeated failures informed the Tribunal's factual findings in the compensation decisions, ensuring that its legal orders were grounded in the evidence.

2) The Request for Compensation and the Tribunal's Orders

31. While the parties made limited submission on the issue of compensation in 2014, the issue of compensation was addressed pursuant to the Tribunal's phased approach to dealing with remedies. On March 19, 2019, the Tribunal posed questions to the Parties regarding compensation. By that time, the Tribunal had found Canada to be non-compliant with the Merits Decision on at least five occasions, with the Tribunal making clear in many of its orders that Canada had failed to adequately change its conduct and continued to discriminate against First Nations children.[39]

32. In 2014, at the hearing on the merits, the Caring Society requested compensation pursuant to s. 53(3) of the *CHRA* for Canada's wilful and reckless discrimination, including $20,000 plus interest for every First Nations child affected by the FNCFS Program placed in out-of-home care since 2006.[40] The compensable harm is the infringement of dignity arising from a First Nations child being removed from their home, family and community due to Canada's severe underfunding of child and family services and failure to properly define and implement Jordan's Principle. The Caring Society requested that the compensation be paid into an independent trust fund.[41] During the compensation remedy phase, in 2019, the Caring Society also sought $20,000 of compensation under s. 53(3) of the *CHRA*, to be placed in the same trust fund, for First Nations children who experienced discrimination pursuant to Canada's discriminatory interpretation of Jordan's Principle.[42]

---

[39] See for e.g. the discussion in 2016 CHRT 10 at paras 21-23 and 32-34; 2016 CHRT 16 at pars 7-11; 2017 CHRT 14 at paras 75-81; 2018 CHRT 4 at paras 105-108; and 2019 CHRT 7 at paras 71-73.
[40] Caring Society Closing Submissions, Monetary Orders Sought, page 215, August 29, 2014.
[41] 2019 CHRT 39 at paras 21-25.
[42] 2019 CHRT 39 at paras 21-25.

33. The AFN requested an order that Canada, AFN, the Caring Society, and the Commission form an expert panel to establish appropriate individual compensation (pain and suffering as well as willful and reckless) for children, parents and siblings impacted by Canada's discriminatory FNCFS Program. The AFN strongly advocated for the maximum compensation for every victim of Canada's discrimination under the FNCFS Program pursuant to the *CHRA* and did not restrict its request to those in ISC-funded care.[43]

34. Canada argued that "the evidence before the Tribunal was insufficient to award the requested statutory maximum under special compensation" and that the Caring Society's request for wilful and reckless compensation "is also unsupported by the evidence".[44] It opposed the Complainants' requests for monetary compensation because (a) the request was based on the premise that all the children were removed from their homes because of Canada's funding practices; (b) the complainants had not demonstrated their authority to speak on behalf of First Nations children and their families; and (c) Canada's funding to First Nations children services had not remained static over the years. [45]

35. On September 6, 2019, the Tribunal found that certain victims of Canada's discriminatory conduct are entitled to compensation for both pain and suffering (s. 53(2)(e)) and because of Canada's wilful and reckless conduct (s. 53(3)) (**"Compensation Entitlement Order"**). It emphasized the factual findings made in previous decisions were based on its "thorough review of thousands of pages of evidence including testimony transcripts and reports".[46] Notably, it found that Canada's discrimination caused "trauma and harm to the highest degree causing pain and suffering".[47] Based on the entirety of the evidence, the Tribunal held that Canada's discrimination was a "worst-case scenario" under the *CHRA* and "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[48] It also found that Canada had continuously

[43] AFN Submissions, April 4, 2019.
[44] AGC Oct. 3, 2014 Closing Submissions at paras 238 and 242.
[45] AGC Oct. 3, 2014 Closing Submissions at paras 239-245.
[46] 2019 CHRT 39 at para 15 [emphasis added].
[47] 2019 CHRT 39 at para 193.
[48] 2019 CHRT 39 at para 231.

focused on “financial considerations rather than on the best interest of First Nations children and respecting their human rights”.[49]

36. The Tribunal did not grant compensation to all victims. Instead, it ordered compensation only to those who had experienced the greatest pain and suffering:

a) Each First Nations child unnecessarily removed from their home, family and community between January 1, 2006 to a date ordered or agreed upon pursuant to s. 53(2)(e);

b) Each child necessarily removed but placed in care outside of their extended families and communities, temporarily or long-term from January 1, 2006 to an ordered or agreed upon date pursuant to s. 53(2)(e);

c) Each First Nations child who was not removed from the home but who was denied services or received services after an unreasonable delay or upon reconsideration as ordered, and to each parent or grandparent of that child from December 12, 2007 (date of the House of Commons’ adoption of Jordan’s Principle) to November 2, 2017 (date of the Tribunal’s 2017 CHRT 35 ruling on Jordan’s Principle) under s. 53(2)(e);

d) Each caregiving parent (or caregiving grandparent) identified in the orders above under s. 53(2)(e), except for parents (or caregiving grandparents who sexually, physically, or psychologically abused their children); and

e) Each First Nations child and parent or grandparent identified in the orders above under s. 53(3).

37. Pursuant to the ongoing dialogic approach discussed below, the end date for human rights compensation for removed children set out in paragraphs (a), (b) and their parents (or caregiving grandparents) is March 31, 2022.[50]

38. In arriving at its decision, the Tribunal focused on two critical themes: (i) the evidence of harm and infringement to dignity (ii) the human rights of First Nations children, youth, and families.

---

[49] 2019 CHRT 39 at para 231.
[50] 2020 CHRT 7.

39. The Tribunal reviewed the extensive evidentiary record, making clear at the outset that its decision was grounded in the evidence of harm, trauma, pain, suffering, and the evidence of Canada's wilful and reckless approach to the lives of First Nations children and their families:

> The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group, namely First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the Attorney General of Canada's (AGC's) position on compensation unreasonable in light of the evidence, findings and applicable law in this case.[51]

40. On the issue of removed children, the Tribunal importantly made no distinction between First Nations children in ISC-funded placements and those in other care arrangements. As the Tribunal made clear, the harm arose from a child being removed from their family:

> […] the evidence is sufficient to make a finding that each child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation.[52]

41. The operable harm thus flows from the experience of a child being moved to another living situation during at time of child welfare involvement. The issue of whether ISC funded the other living arrangement is immaterial to the child's experience of harm.

42. In fact, there was no evidence adduced at the compensation hearing or in relation to the substance of the complaint regarding any difference between the level

[51] 2019 CHRT 39 at para 15.
[52] 2019 CHRT 39 at para 148.

of harm experienced by children removed and placed in ISC-funded placements and those removed and placed in any other form of out-of-home care, such as kinship or various custody arrangements. Instead, the evidence focused on the removal and the underlying perverse incentives to apprehend First Nations children from their homes as services providers could not offer comparable, culturally appropriate prevention services and least disruptive measures.

43. The Tribunal also focused on the right to compensation as an important human rights remedy. In its reason, the Tribunal made clear that its remedy for compensation was grounded in a breach of the victims' fundamental human rights. Human rights are not subservient to other rights within our justice system and the remedies that flow from a breach of those rights are fundamental to an effective human rights regime that holds wrongdoers accountable and contributes to a system that promotes and protects a free and democratic society. Human rights law, above all, requires that remedies be effective — effective in acknowledging and compensating for the harms experienced by victims of discrimination, and effective in bringing discriminatory practices to an end.[53]

44. At the centre of the Tribunal's analysis was its role to uphold the human rights of the victims, as intended by the *CHRA:* "the proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect."[54]

45. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. For example, the Tribunal noted that individual compensation for victims of discrimination was necessary to "deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly **to validate the victims/survivors' hurtful experience resulting from the discrimination**."[55] In keeping with human rights case law, the

[53] Gwen Brodsky, Shelagh Day and Frances Kelly, "Systemic Remedies and Compensation: Both are Needed" (2019) 20:6 Can Human Rights Reporter 16-17.
[54] 2019 CHRT 39 at para. 135
[55] 2019 CHRT 39 at para 14.

Tribunal assessed the pain and suffering caused by Canada's discriminatory practices to determine the appropriate level of compensation for victims.[56]

46. The Tribunal also made clear that its obligations are to safeguard the human rights of the victims it identified, irrespective of any proposed class proceedings:

> The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy discrimination and if applicable, as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors int this case.[57]

3) The Dialogic Approach in Action

47. On February 21, 2020, the Caring Society, the AFN, and Canada submitted a draft compensation framework to the Tribunal (**"Compensation Framework"**). The Compensation Framework arises from the collaborative efforts of the Caring Society, the AFN and Canada to structure a distribution mechanism in keeping with the Tribunal's orders to ensure an efficient, culturally safe, and effective process. Informed by several expert reports including one by youth in care, it includes the following key components: (a) the guiding principles; (b) definitions of key terms; (c) locating and supporting beneficiaries; (d) the notice plan; and (e) a monitoring mechanism for the distribution.

48. The Compensation Framework was not a simple undertaking. While some aspects of the Compensation Framework are the result of negotiation and consensus, many issues had to be adjudicated before the Tribunal, including the following:

- 2020 CHRT 7: At the parties' request, the Tribunal provided guidance and clarification regarding: (i) the age of majority to be applied to determine when child beneficiaries could access compensation, (ii) whether children removed from their homes, families and communities prior to Jan 1, 2006 but who remained in care as of that date were eligible for compensation, and

---

[56] 2019 CHRT 39 at para 125-154.
[57] 2019 CHRT 39 at para 206.

(iii) whether the estates of deceased victims were eligible for compensation.[58]

- 2020 CHRT 15: The Tribunal, again at the parties' request, provided guidance and clarification regarding the definitions of "essential service", "service gap" and "unreasonable delay" for purposes of Jordan's Principle compensation and ruled on requests from COO and NAN to broaden compensation eligibility and for amendments to the draft Compensation Framework.[59]

- 2020 CHRT 20: The Tribunal resolved the Caring Society's request for clarification on the definition of a "First Nations child" for purposes of service eligibility under Jordan's Principle, following the parties' inability to resolve perceived ambiguity in the Tribunal's order that Jordan's Principle applied to all First Nations children.[60]

- 2020 CHRT 36: the Tribunal approved the framework for ISC to receive confirmation of recognition of children without Indian Act status by First Nations, for the purpose of eligibility for services under Jordan's Principle.

- 2021 CHRT 6: The Tribunal provided guidance and clarification regarding the means by which compensation would be held in trust for victims who have not yet reached the age of majority or otherwise lack legal decision-making capacity, responded to two requests from NAN for further amendments to the draft compensation framework and ruled on its continuing jurisdiction over the compensation framework following submissions by the parties in response to a question from the Panel on the matter.[61]

- 2022 CHRT 8: the Tribunal made an order, on consent and after detailed consideration, confirming areas of agreement reached by the parties following intensive discussions in November and December 2021. These

[58] 2020 CHRT 7.
[59] 2020 CHRT 15.
[60] 2020 CHRT 36.
[61] 2021 CHRT 6.

areas of agreement set an end date for FNCFS Program compensation, enhanced the nature and basis of prevention funding for 2022/23 and beyond, introduced superior funding for post-majority care, and established research parameters to support the parties' discussions on long-term reform.[62]

49. The approach of working on the Compensation Framework, with access to the Tribunal created a balanced process that provided adequate time and space for consultation while also ensuring a fair process and opportunity for the parties to make submissions. Further, this process provided the parties with meaningful opportunities to receive information about Canada's efforts and undertakings to implement the Tribunal's orders; to share ideas and perspectives on how best to safeguard the rights of the victims; and ultimately seek direction and further remedies from the Tribunal when necessary.

50. It also provided the opportunity for the Tribunal to provide written detailed reasons that led to a robust compensation distribution process, safeguarding the rights of the victims and ensuring that claims will be considered through a lens of substantive equality and the human rights legal context.

51. On February 12, 2021, the Tribunal released the **Compensation Payment Order,** incorporating the terms of the Compensation Framework into its order.[63] Shortly thereafter, Canada amended its Notice of Application and indicated its intent to seek judicial review of the Compensation Payment Order.

52. On September 29, 2021, the Federal Court dismissed Canada's application for judicial review, finding that the Tribunal's Compensation Entitlement Order and Compensation Payment Order (which incorporates the Compensation Framework) was reasonable, underlining the importance of the evidence led in this proceeding and focus of compensation under the *CHRA*, namely the infringement of dignity.[64]

53. The Federal Court endorsed the dialogic approach and made clear that the process of consultation and dialogue between the parties and with the Tribunal

---

[62] 2022 CHRT 8.
[63] 2021 CHRT 7 at para 40.
[64] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at paras 158, 229 and 230.

contributed to a complex set of human rights remedies tailored to the unique circumstances of this case and the unique experiences of the victims who have suffered as a result of Canada's discriminatory conduct. Indeed, in addition to leading to the reasonable human rights compensation awarded by the Tribunal, the Federal Court endorsed the dialogic approach as contributing to reconciliation:

> The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with the decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.[65]

54. The expertise, dedication and flexibility demonstrated by the Tribunal in this case further demonstrated the importance of the dialogic approach, which ultimately ensured that the human rights compensation awarded by the Tribunal were responsive to the parameters of the Complaint, the experiences of the victims, and upheld the purpose and objectives of the *CHRA*.[66]

55. Importantly, the Federal Court also commented on the impact of the class action in this proceeding and the important distinctions between a human rights complaint and a tort-based class action:

> It is clear that the Tribunal did not order compensation for tort-like damages or personal harm as is required in a class action proceeding. Rather, the Tribunal, as highlighted above, had a staged approach to remedies and specifically afforded the parties with an opportunity to present their positions on compensation. Once the submissions were received, the Tribunal considered the arguments and ordered compensation under section 53 of the *CHRA*.
>
> As seen above, the Tribunal can award both individual and systemic remedies, subject to the sufficiency of the evidence before it. A class action, however, focuses on the individual compensation award and there is no certainty that any systemic remedies will be awarded. The *CHRA* afforded the Caring Society and AFN with a process where both systemic and individual remedies can be sought and the Tribunal did not err when awarding both. The development

---

[65] 2021 FC 969 at para 136.
[66] 2021 FC 969 at paras 138 and 258.

> of a Compensation Framework was consistent with the goals of determining the process for compensation to individuals.
>
> I also note that there is nothing in the *CHRA* that prohibits individuals from seeking remedies by way of class actions or separate legal actions. Other court processes can be pursued by the victims should they opt out of the Compensation Framework. As the Applicant pointed out, the AFN has commenced a class action for a class of people affected by removals. However, I find that the class action proceeding does not have a bearing on the issues at hand for the reasons just stated. The development of the Compensation Framework also does not suggest that a class action was the preferred way or the only way to proceed. I agree with the Caring Society that the option of a class action does not negate the Compensation Orders. Both remedies can be pursued simultaneously.[67]

4) The Essential Components of the Compensation Framework

56. From February 2020 to February 12, 2021, the Compensation Framework was finalized by the parties, as the Tribunal made further orders on issues raised by the parties where there was no consensus. The Compensation Framework outlines a process for distribution and definitions to guide the identification of beneficiaries, including (a) the definition of "necessary/unnecessary removal"; (b) definitions of "service gap", "essential service" and "unreasonable delay" for the purpose of Jordan's Principle compensation; and (c) the incorporation of the Tribunal's order in relation to deceased victims.68

57. The definition of "necessary/unnecessary removal" is found at section 4.2.1 of the Compensation Framework. Importantly, the definition, like the findings of the Tribunal, focus on the impact of the removal on the child and not whether the placement was funded by a particular level of government. Indeed, the focus in the definition is on the intervention itself – a direct result of the discriminatory underfunding that led to the involvement of a First Nations Child and Family Services Agency:

> 4.2.1 "Necessary/Unnecessary Removal" includes:
>
> a) children removed from their families and placed in alternative care pursuant to provincial/territorial child and family services legislation, including but not limited to, kinship and carious

[67] 2021 FC 969 at paras 177-179.
[68] 2020 CHRT 7 (the "**Estates Order**"); 2020 CHRT 15 (the "**Definitions Order**").

> custody agreements entered into between authorized child and family services officials and the parent(s) or caregiving grandparent(s);
>
> b) children removed due to substantiated maltreatment and substantiated risk for maltreatment; and
>
> c) children removed prior to January 1, 2006, but who were in care as of that date.

58. Similarly, the definitions of "essential service", "service gap" and "unreasonable delay" focus on the experience of the child. These definitions are set out in sections 4.2.2.-4.2.4 of the Compensation Framework.

59. The Tribunal's definition of an "**essential service**" is tailored to address the circumstances in which the discrimination arose and Canada's systemic disregard of First Nations children's service needs. The definition captures two fundamental concepts: (a) it ensures substantive equality for First Nations children seeking social services, which, until this Complaint was brought, did not exist, and (b) it speaks to "essential" nature of the service, without which the child will suffer "real harm".

60. Moreover, the Tribunal was clear that not all supports, products and services currently approved under Jordan's Principle will meet the definition and that some measure of reasonableness is required. [69] To that end, the Caring Society generated a very specific list of services that would potentially engage a right to compensation.[70] The listed services are consistent with what the Minister of Indigenous Services is required to provide pursuant to s. 6(2) of the *Department of Indigenous Services Canada Act*.[71]

61. The definition of "**service gap**" evolved in response to Canada's insistence that (a) there must have been a "request" for a service; (b) there must have been a dispute between jurisdictions or departments as to who should pay; and (c) the service must have been normally publicly funded for any child in Canada. This approach was rejected by the Tribunal. Instead, a balanced approach was introduced

---

[69] 2020 CHRT 15 at para. 148.
[70] Apr 30, 2020 Caring Society Written Submissions re Compensation Definitions at Annex B.
[71] *An Act respecting First Nation, Inuit and Métis children, youth and families*, SC 2019, c 29, s 336, s. 6(2).

by the Tribunal, providing that the First Nations child's need must have been "confirmed" and the service requested must have been "recommended by a professional".[72]

62. The Tribunal further agreed that an objective confirmation of a service need was required for compensation. However, due to the nature of Canada's discrimination, Canada's knowledge of the specific individual service need was not a prerequisite. Indeed, as Ms. Baggley explained during her examination-in-chief, Canada did not provide its public servants with a mandate to publicize Jordan's Principle and it was not possible for families to make an application for services pursuant to Jordan's Principle.[73] If Canada's officials were unaware of unmet needs resulting from service gaps, it is due to Canada's discrimination.

63. With respect to "**unreasonable delay**" the Tribunal held that a delay of more than 12 hours was unreasonable for urgent requests and more than 48 hours for non-urgent requests, with the onus falling on Canada to show the delay had no prejudice to the child in question.[74] This rebuttable presumption stems from the Tribunal's conclusion in the Merits Decision that delays were built into Canada's response to Jordan's Principle, as well as its conclusion that Canada failed to develop a defined process for dealing with Jordan's Principle cases until 2017.[75]

64. In the Compensation Entitlement Order, the Tribunal recalled a case that embodies the tragic human consequences of Canada's unreasonable delay in providing services, products and supports to First Nations children in need:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could include 30 degrees in order to alleviate the respiratory distress that resulted from her condition.[76]

65. Given that Canada's system for considering Jordan's Principle cases was rife with built-in delays, the Tribunal agreed that claimants should not bear the onus

---

[72] 2020 CHRT 15 at paras 106 and 117.
[73] Apr. 30, 2014 examination-in-chief of C. Baggley at p 128 lines 13-23 and May 1, 2014 cross-examination of C. Baggley at p 32 lines 8-14. See also 2020 CHRT 15 at paras 84-86.
[74] Compensation Framework: section 4.2.4
[75] 2016 CHRT 2 at para 379.
[76] 2019 CHRT 39 at para 224.

of proving that their delay was unreasonable if it exceeded the 12- or 48-hour standards for evaluating and determining requests. However, the Tribunal introduced safeguards into the approach, making it clear that Canada could rebut the presumption for unreasonable delay by providing the Central Administrator with the particulars related to an individuals' compensation application. This approach ensures that minor deviations from the standards set by the Tribunal may not be compensable while also ensure that the burden rests solely on Canada.[77]

66. On the issue of estates, while Canada did not directly challenge the Tribunal's order by way of judicial review, it did initially resist compensating the estates of deceased victims. In its reasons, the Tribunal made clear that there would be an inherent unfairness to not compensating those victims who had passed away while waiting for the complaint to advance to the compensation stage and Canada should not benefit financially because some victims have died:

> […] paying compensation to victims who have suffered discrimination but died before a compensation order is made is consistent with the objectives of the *CHRA*. Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.[78]

5) The Class Actions and the Caring Society's Involvement

67. On March 4, 2019, a class action was commenced in the Federal Court seeking compensation for First Nations children who suffered comparable discrimination related to a lack of prevention services leading to the placement of First Nations children in out-of-home care as well as the discriminatory application of Jordan's Principle, beginning in April 1, 1991.[79] The representative plaintiffs

---

[77] 2020 CHRT 15 at para 171.
[78] 2020 CHRT 7 at para 130.
[79] Affidavit of J. Ciavaglia, sworn July 22, 2022 ("**Ciavaglia Affidavit**") at para 10; *Xavier Moushoom v. The AGC* Court File No. T-402-19, Tab 27 of the Attorney General's Book of Authorities, April 16, 2019.

include Xavier Moushoom, Jeremy Meawasige by his Litigation Guardian, Jonavon Joseph Meawasige and Jonavon Joseph Meawasige.

68. On January 28, 2020, the AFN and the representative plaintiffs Ashley Dawn Louise Bach, Karen Osachoff, Melisa Walterson, Noah Buffalo-Jackson by his Litigation Guardians Carolyn Buffalo and Dick Eugene Jackson filed a proposed class action seeking compensation for removed First Nations children and those who experienced discrimination under Jordan's Principle.[80] A separate class action involving Canada's discrimination in the provision of services, products and supports prior to December 2007 was commenced in July 16, 2021. These three class actions where then consolidated into one class action, pursuant to which the Final Settlement Agreement applies (the "**Consolidated Class Action"**).[81]

69. The Caring Society is not a party to the Consolidated Class Action. However, as set out in the AFN's materials, the Caring Society did participate in some discussions regarding compensation leading up to the Consolidated Class Action Agreement-in-Principle and some minimal discussions with the class action parties leading to the Compensation FSA. Dr. Blackstock set out her overarching concerns in her letter dated January 21, 2022, making it clear that the Caring Society would not support amendments to the Tribunal's compensation orders that reduced the awarded amount of $40,000 for any child victims, including deceased children and those who are now adults.[82] Dr. Blackstock received no formal response from the parties regarding the Caring Society's concerns.[83]

70. The Caring Society did receive a draft copy of the Compensation FSA in April, 2022.[84] However, the Caring Society had limited ability or agency to influence to terms of the what is now the final Compensation FSA, particularly given the Caring Society's limited participation. While certain feedback was shared

---

[80] Ciavaglia Affidavit at para 13; AFN Class Action filed with the Tribunal on February 20, 2020.
[81] Ciavaglia Affidavit at paras 14-16.
[82] Affidavit of Cindy Blackstock, dated August 30, 2022 (the "**August 2022 Blackstock Affidavit**") at para 6; Exhibit A to Affidavit of Jasmine Kaur, dated August 5, 2022.
[83] Answers to Cross Examination Questions, Dr. Cindy Blackstock dated September 9, 2022 ("**Blackstock Cross Examination**"), Question 9.
[84] Blackstock Cross Examination, Question 9.

from time to time, neither the AFN nor Canada invited the Caring Society to the drafting process.[85] Moreover, there was no access to an adjudicator to assist with points of disagreement, contrary to the dialogic approach taken in this proceeding. The dialogic approach taken by the Tribunal – providing guidance, ordering consultation and reporting, making findings of non-compliance where needed, and resolving direct and specific questions related to compensation – resulted in the ground-breaking decisions affirming the human rights of First Nations children and their families and providing compensation as a clear an unequivocal recognition for the violation of their dignity and rights to substantive equality.

6) The Key Departures from the Tribunal's Orders

71. The departures taken in the Compensation FSA from the Tribunal's compensation orders are included in the chart attached hereto as Schedule "A" and include some critical differences: (a) the Compensation FSA disentitles First Nations children from any compensation who were removed as a result of Canada's discriminatory FNCFS Program and placed in alternative non-ISC-funded placements; (b) the Compensation FSA disentitles the estates of deceased parents from any compensation; and (c) the Compensation FSA disentitles certain parents and caregiving grandparents from receiving their full entitlement to compensation as currently protected under the Tribunal orders.

72. In addition to these known deviations, there is also uncertainty regarding several eligibility criteria under Jordan's Principle and a lack of clarity on how the compensation process, including the opt-out provisions, are tailored to the distinct developmental characteristics of children and youth.

Non-ISC Funded Placements

73. From the perspective of the Caring Society, the most significant difference between the Tribunal's orders for compensation and the Final Settlement Agreement is the exclusion of First Nations children removed from their homes, families, and communities because of Canada's discriminatory conduct and placed in a non-ISC funded placements.

---

[85] Blackstock Cross Examination, Questions 4, 6-15.

74. There appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the compensable discrimination is that Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivized children being unnecessarily moved from their home, family and community during child welfare involvement. The issue of whether the child's placement was paid for by ISC is not where the discrimination starts or stops.

75. In fact, the insidious nature of the discrimination spread throughout the continuum of child and family services: from the moment a referral was received to the long-term placement of a child, and all the services (or lack of services) in between. One of the critical findings of the Tribunal was its determination that the failure to equitably fund prevention services and least disruptive measures led to higher rates of children having to unnecessarily leave their homes.[86]

76. Some First Nations child victims were placed in ISC-funded placements; some were not. But any change of a home situation concurrent with a family situation involving a child well investigation is, by its very nature, a harmful event that could have been prevented if services were available.

77. While the discrimination in this case is made even more egregious by ISC's incentives to place First Nations children in foster care by covering maintenance (child in care) costs at actuals, at no time did the Tribunal restrict a child's eligibility, as suggested by the AFN and Canada87, to only those children who were we placed in ISC funded placements. Such a restriction is not in keeping with the findings of the Tribunal and is contrary to the approach taken by the Tribunal in this case, which has been to focus on the children, the experiences they had, the harm they suffered and the impact of Canada's discriminatory conduct on the services they could have benefited from. Moreover, there is available data that can

---

[86] 2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177.
[87] Answers to Cross Examination Questions, Janice Ciavaglia, question 31; Answers to Cross Examination Questions, Dr. Valerie Gideon, question 19.

assist in identifying First Nations children in non-ISC funded placements who are entitled to human rights compensation.[88]

Estates of Deceased Parents

78. The Compensation FSA disentitles the estates of deceased parents (or caregiving grandparents) from receiving any compensation, contrary to the Tribunal's orders. Before the Tribunal, Canada argued against compensating the estates of any victim who died before compensation was payable. This would have created an egregious situation where Canada could financially benefit by simply waiting for the victims it so badly harmed to die – something the Tribunal was mindful of in its approach. Indeed, such a precedent is to be avoided at all costs.

79. The Tribunal determined that it must not "encourage incentives for respondents to delay the resolution of discrimination complaints" and pointed to the particular concern for "victims who were discriminated against in connection with a terminal illness or advanced old age, where it could be anticipated that death might occur before a hearing can be concluded."89

80. To simply exclude the estates of deceased parents is not consistent with the objectives of the *CHRA*: the remedial nature of human rights law entrenches the right to make victims of discrimination "whole" and to dissuade wrongdoers from discriminating in the future, irrespective of whether they can personally benefit from the compensation.

81. The Tribunal directly and specifically awarded human rights compensation to the estates of deceased parents. The Caring Society submits that the Compensation FSA, and the evidence filed in support of this motion, provides no principled basis to deviate from the Tribunal's order in this regard, except to meet a compromised position as a cost saving measure. This is not a human rights principle and is not an approach that should be endorsed by the Tribunal.

---

[88] Exhibit "J" to Ciavaglia Affidavit, *Review of Data and Process Considerations for Compensation under 2019 CHRT 39*, p. C-10. Table 7 – Estimated Child Maltreatment-related Investigations On-Reserve involving Out-of-Home Placement.
[89] 2020 CHRT 7 at paras 138 and 139.

Compensation for Parents (and Caregiving Grandparents)

82. Human rights compensation for parents (and caregiving grandparents) has been ordered by the Tribunal in the amount of $40,000 as follows:

- a parent, or a grandparent who was the primary caregiver for a First Nations child who was removed from their homes, families and communities before January 1, 2006 for reasons other than physical, sexual or emotional abuse whose child was still in care on that date;
- a parent, or a grandparent who was the primary caregiver for a First Nations child who was removed from their homes, families and communities on or after January 1, 2006 for reasons other than physical, sexual or emotional abuse;
- parent, or a grandparent who was the primary caregiver of a First Nations child who was removed and placed in care to obtain essential services, between December 12, 2007 and November 2, 2017 (and this compensation cannot be combined with First Nations Child and Family Services compensation); and
- a parent or a grandparent who was the primary caregiver of a First Nations child who was not removed from their family, but experienced a denial, gap or unreasonable delay in the delivery of essential services that would have been available under Jordan’s Principle between December 12, 2007 and November 2, 2017.

83. Further, the Tribunal made no distinctions between “biological parents” and “adoptive parents”. In law, these parents have the same rights and the same entitlements to human rights compensation.

84. The Compensation FSA does not provide the same compensation to parents and caregiving grandparents. Instead, the agreement draws unprincipled lines between the parents (or caregiving grandparents) of removed children and parents (or caregiving grandparents) of children who experienced discrimination under Jordan’s Principle. While the Compensation FSA has budgeted at least $40,000 for parents (or caregiving grandparents) of removed children the budget is capped at

$5.75 billion and there are no guarantees that this aspirational amount will be paid to parent/caregiving grandparent victims.[90]

85. Moreover, compensation for parents (or caregiving grandparents) for those impacted by Canada's discriminatory approach to Jordan's Principle is even less uncertain. There is no commitment in the Compensation FSA for any particular base payment and instead the agreement states as follows:

> Only Caregiving Parents or caregiving grandparents of an Approved Jordan's Principle Class Member and Approved Trout Child Class Member who have established a claim under Article 6.06(11), Article 6.06(12), Article 6.07(3) or article 6.07(4) may be entitled to compensation (i.e. "Approved Jordan's Principle and Trout Family Class"). All other Caregiving Parents or Caregiving Grandparents of the Approved Jordan's Principle Class Members and Approved Trout Child Class Members will not receive direct compensation under this agreement.
>
> The Approved Jordan's Principle and Trout Family Class will receive a fixed amount of $2 billion in compensation under this agreement. There will be no reallocation to these classes of any surpluses or revenues.[91]

86. As noted in the evidence provided on this motion, some "compromises" had to be made for the principles and goals of the class action to be achieved.[92] The result is that certain victims, such as the Jordans' Principle parents/caregiving grandparents, will receive very little or will receive nothing.

87. In upholding the human rights of all victims in this case, the Tribunal recognized the unique suffering and infringement to dignity experienced by parents and caregiving grandparents impacted by Canada's discrimination:

> The evidence is ample and sufficient to make a finding that each parent or grandparent who had one or more children under her or his care who was unnecessarily removed from their home, family and community has suffered. Any parent or grandparent if the parents were not caring for the child who had one or more children removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one

---

[90] Compensation FSA, Article 6.04, Exhibit F, Ciavaglia Affidavit.

[91] Compensation FSA, Articles 6.06(16) and 6.06(17), Exhibit F, Ciavaglia Affidavit.

[92] Ciavaglia Affidavit at para 43; Ciavaglia Cross Examination, Questions 11, 25, 46, 68.

> or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grandparents, the grandparents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grandparents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grandparents.
>
> The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities
>
> First Nations children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay **causing real harm to those children and their parents or grandparents caring for them.** The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.[93] [Emphasis added]

88. The Caring Society submits that giving some parents/ caregiving grandparents less and others nothing is not in keeping with the principles and values enshrined in the *CHRA* and is not in keeping with the evidence and factual terminations made by the Tribunal. Fundamentally, it is not in keeping with the human rights approach taken in this case, as there is no principle basis within the human rights framework to reconcile the approach suggested in this motion.

Uncertainty regarding Jordan's Principle

89. The Compensation FSA provides that eligibility for compensation for members of the Jordan's Principle Class and the Trout Child Class will be determined based on their "Confirmed Need" for an "Essential Service."[94] The Compensation FSA provides that only children in the Jordan's Principle class who have experienced a "Significant Impact", as defined through a separate Framework

[93] 2019 CHRT 39 at paras 185, 186 and 226.
[94] Compensation FSA, Article 6.06(2); Exhibit F, Ciavaglia Affidavit.

of Essential Services, will be guaranteed to receive a minimum of $40,000 in compensation. As noted above, this differs from the Tribunal's approach, which awarded $40,00 to a First Nations child who experienced a denial, gap, or unreasonable delay in the delivery of essential services that would have been available pursuant to a non-discriminatory interpretation and application of Jordan's Principle.

90. For this reason, the definition of "Significant Impact" will be critical to determining class members' entitlement to compensation under the FSA. This term is undefined in the agreement and is instead defined through a separate Framework of Essential Services that was developed by the parties to the Compensation FSA and made public on August 19, 2022 (the "**FSA Framework**").[95] The FSA Framework provides that a service is "essential" if "the claimant's condition or circumstances required it and the delay in receiving it, or not receiving it at all, caused material impact on the child." Although the Compensation FSA requires that the FSA Framework be supported by an expert report by August 19, 2022, to the Caring Society's knowledge, no such documents have been made public to date.

91. At this juncture, it is impossible to know whether the application and implementation of the definitions related to Jordan's Principle in the Compensation FSA and those ordered pursuant to the Tribunal's Compensation Framework will be in harmony. As discussed in more detail below, this level of uncertainty requires pause and serious consideration about whether the objects of the *CHRA* and the findings of the Tribunal can be achieved when little evidence has been provided about how the victims already identified by the Tribunal will be impacted by the Compensation FSA.

The Opt-Out and the Release

92. In this case, one half of the victims entitled to compensation are still children requiring special accommodations to ensure their guardians, and older children, can understand and exercise their respective opt out rights under the Tribunal's orders. As described below, the class action seeks to supplant the opt-out provision in the

[95] Framework of Essential Services, attached as Schedule "C".

Tribunal's orders with its own provision which has not been clearly adapted to the special circumstances of child and youth victims of discrimination.

93. The opt out form created by Canada, the AFN and class counsel is a concerning feature of the Compensation FSA. The form was created in the context of a Federal Court class action proceeding. Canada and AFN did not seek the Tribunal's approval despite the opt-out form requiring victims to waive their rights under both the Compensation FSA and the Tribunal's compensation orders if they opt out. The class action opt out form reads in part:

> I do not want to participate in the class action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** and ***Zacheus Trout et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children and families. I understand that by opting out, **I will NOT be eligible for the payment of any amounts** awarded or paid in the class actions, and those associated with the Canadian Human Rights Tribunal File No.: T1340/7008.[96]

94. Under the Compensation FSA, victims will need to opt-out of the class action by February of 2023. The short time to make an opt out decision, particularly for child victims, is made more challenging because the Compensation FSA has incomplete definitions of terms and criteria that will directly affect compensation entitlements. This situation places some victims in an unfair position wherein they are being forced to make a decision to opt out without knowing what they can receive under the Compensation FSA versus their entitlement to human rights compensation pursuant to the Tribunal's orders. The unfairness deepens as the Compensation FSA seems to force victims to opt out of both avenues of compensation if they are dissatisfied with the class action deal struck at the Federal Court. Such an opt-out scheme would place victims who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the Compensation FSA or opt-out of the Compensation FSA and be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims and is therefore inconsistent with a human rights approach.

---

[96] Class Action Opt-Out Form, Exhibit "A" to August 2022 Blackstock Affidavit.

95. The ability for claimants to "opt out" was a fundamental component of the Tribunal's Compensation Entitlement Order. The Tribunal recognized "[s]ome First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out."[97] The class actions parties' attempt to have a class action opt out bind victims in both proceedings without seeking specific Tribunal approval is contrary to the value of individual choice that underlies the Tribunal's requirement that the compensation process include an opt-out.

96. Taking this guidance from the Tribunal, the Compensation Framework provides as follows:

> 3.1 Beneficiaries under the Compensation Entitlement Order shall be presumed to opt into the Compensation Process.
>
> 3.2 Potential beneficiaries under the Compensation Entitlement Order can opt out of the Compensation Process and are not required to accept compensation. This Framework will not apply to those potential beneficiaries who choose not to accept it by opting out. **Those individuals remains free to pursue other legal remedies**. [Emphasis added].[98]

97. Further the Compensation Framework provides at Article 3.3 that "[t]he Parties and the Central Administrator shall develop an opt-out process that is easy to understand and ensures potential beneficiaries are duly notified of the Compensation Process and their right to opt out."[99] The dual opt-out form drafted by the class action parties did not follow this process.

98. If the Tribunal grants the relief requested by Canada and the AFN, the irregularity in the opt out form may not have a substantive impact, as the Tribunal will in effect have suspended its orders in favour of the class action process. But, as outlined elsewhere, such a result is not supported in law, or in the evidence provided by Canada and the AFN.

---

[97] 2019 CHRT 39 at para 201.
[98] Compensation Framework, at 3.1 and 3.2.
[99] December 23, 2020 Compensation Process at 3.3.

99. There is also significant uncertainty surrounding the scope of the release in Article 9.01(1) of the Compensation FSA. This release covers claims (broadly defined and whether known or unknown) that class members now have (or may in the future have) against Canada, that were asserted or capable of being asserted in the class action.

100. It is unclear whether this release would cover future claims related to long-term reform, regarding enforcement of the Tribunal's ultimate order on long-term reform. While the class action addresses compensation, reform-related claims may be a claim that was "capable of being asserted" under the *Charter*. Indeed, other class actions, such as the Federal Court class action related to boil water advisories or the Ontario Superior Court of Justice class action related to solitary confinement, have sought systemic relief.

101. While there is authority for the principle that releases do not extend past the end of the opt out period[100], and while *CHRA*-related claims could not have been advanced in the class action, it is unclear if Canada intends to rely on the release it has secured in the class action in order to stymy the enforcement of this Tribunal's ultimate order to end the discrimination and prevent its recurrence.

102. In the event this Tribunal does not grant the relief requested herein, clarity will be required from the Tribunal as to its view of the legal status of the opt out and the release within this proceeding.

The Key Departures Make Clear the Tribunal's Orders Are Not Satisfied

103. Considering the above, there is no factual basis to find that the Compensation FSA satisfies the Tribunal's compensation orders. Even when taking a flexible, broad, and liberal approach to the relief sought by AFN and Canada in this regard, there is no basis to find that the Final Settlement Agreement satisfies the impugned orders. In its factum, AFN reflected this reality, explaining as follows:

> The AFN recognizes that the settlement is not an implementation of the Compensation Decision, but rather is a complex negotiated resolution built upon the Compensation Decision's foundations.

---

[100] *Reddock v Canada*, 2021 ONSC 6013 at para 30.

> The AFN has highlighted certain aspects of the settlement where compromises were made, primarily due to uncertainty in the number of claimants who will claim compensation. **Whether these uncertainties result in inconsistencies with the Compensation Decision cannot be known until the FSA agreement is well advanced into the implementation phase**.101 [Emphasis added]

PART II - ISSUES

104. The Caring Society submits that this Motion raises the following issues:

a) Can the Tribunal modify its earlier decisions affirmed by the Federal Court without the consent of the parties?

b) Is the Motion premature given the outstanding details in the FSA?

c) If the Tribunal can modify its earlier decision without consent of the parties, what guiding principles should be applied to the determination of the Motion?

PART III - SUBMISSIONS

A. Can the Tribunal modify its earlier decisions affirmed by the Federal Court without the consent of the parties?

105. A basic and paramount rule of the common law tradition is that lower courts and administrative tribunals are required to comply with the binding decisions of higher courts. According to the vertical *stare decisis* this Tribunal is bound to follow the decision of the Federal Court, its reviewing court, which has already disposed of the issue before it. Indeed, after a close review of the Tribunal's reasons, the Federal Court found the Tribunal's compensation orders to be soundly reasoned and supported by an extensive evidentiary record. Justice Favel agreed with this Tribunal that compensation was required in order recognize the harm experienced by victims of discrimination and incentivizes future compliance with the *CHRA*.

[101] Assembly of First Nations Written Submissions, dated July 22, 2022 ("**AFN Written Submissions**") at para 248.

Canada and the AFN have failed to provide any reason why the Tribunal ought to sway from this binding decision.

106. The Caring Society has welcomed the flexibility this Tribunal has shown in its remedial approach to this case. Since rendering the decision on the merits, the Tribunal has retained jurisdiction to ensure that its orders are effectively implemented, has ruled upon outstanding remedial requests when needed and has fostered dialogue between the parties.[102] The Federal Court commended the Tribunal for its dialogic approach to this case, stating that it was "necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination"[103]. The Caring Society wholeheartedly supports this view.

107. The Caring Society agrees and respects that the Tribunal is the master of its own house while also acknowledging the limits of its decision-making power within the context of this unique case. Indeed, balancing the retention its jurisdiction in this process[104] with pronounced and final human rights compensation orders is critical to supporting and safeguarding the human rights regime and the hard-fought gains already made in this case. As the Supreme Court has found, the Tribunal's authority ought not include the re-adjudication of final decisions. This is particularly true when the Tribunal's decisions have been upheld by a reviewing court. While calling for greater flexibility in the application of the *functus officio* principle before administrative tribunals, the Supreme Court also held:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances [emphasis added].[105]

108. Both the majority and the dissent in *Chandler v Alberta Associations of Architects* agreed that an administrative tribunal can remained seized or revisit an issue to clarify or make further orders to dispose of a matter fairly but not to issue

[102] 2016 CHRT 10 at paras 36-37; See also 2021 FC 969 at para 136.
[103] 2021 FC 969 at para 281.
[104] 2019 CHRT 39 at para 277; 2021 CHRT 7 at para 41.
[105] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at p 864.

a new order in which it decides *differently*.[106] This motion is different than the requests for amendments made to the Tribunal in the past. Those amendments aimed to seek clarification and facilitate the implementation of remedial orders as was the case in *Grover v Canada.*[107] This motion, on the other hand, asks the Tribunal to decide final issues *differently* - issues that have already been disposed of by the Federal Court. The Supreme Court was clear: the requested relief in this motion is not within the jurisdiction of this Tribunal, as an administrative tribunal to revisit final orders and decide them differently.

109. When deciding *Chandler,* the Court reasoned it was the policy ground which favors finality of proceedings that justified the application of the principle of *funtus* in the context of administrative tribunals. The dissent elaborated on some of the risks to the rule of law and public trust related to administrative tribunals re-opening final decisions. According to Justices La Forest and L'Heureux-Dubé, standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada.[108] These risks are heightened in a context like this one where the Federal Court has already made a binding decision on the very issue that is before the Tribunal.

110. Canada and the AFN ask that, in the event this Tribunal declines to declare that the Compensation FSA satisfies its compensation orders—which it clearly does not—the Tribunal vary those orders to conform to the proposed settlement. Yet Canada and the AFN do not explain which aspects of the orders it seeks to have varied nor did its affiants clarify the requested amendments upon cross-examination. This non-specific motion raises serious and fundamental concerns about procedural fairness, the rule of law, and the principle of finality that Justices La Forest and L'Heureux-Dubé cautioned against in *Chandler.*

111. Furthermore, amendments cannot lower the level of compensation awarded to victims in the compensation orders or exclude classes of victims. It is well

---

[106] *Ibid.* at pp 864 and 867.
[107] *Canada (Attorney General) v. Grover,* 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC).
[108] *Ibid.*

established that "contracting out of" a human right is not permissible. As emphasized by the Supreme Court:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy….*The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.[109]

112. Just as human rights legislation sets out a floor beneath which the parties cannot contract out, the Tribunal's compensation orders should also be considered the minimum standard for compensation level and classes of victims.

113. Human rights tribunals are created by legislatures to help fulfil Canadians' collective aspiration of eradicating discrimination in our society. They are "unique in our system of government" because "they operate under a comprehensive and specialized legislative scheme established to address discrimination."[110] Given that discrimination's root causes are often multifaceted and complex, human rights statutes grant these tribunals broad remedial powers to directly tackle the policy issues and social agendas driving discriminatory conduct. The Tribunal is mandated by Parliament to examine and redress inequities perpetrated by federally governed entities (whether public or private in nature), and fashion appropriate remedies in keeping with the *CHRA*'s objects.[111]

114. It would be perverse, and contrary to the *CHRA*'s objectives, for discriminating respondents to shield themselves from broader human rights obligations by reaching agreement with some parties and/or third parties to change

---

[109] *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202.

[110] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies*"*, (2017) 6:1 Can J Hum Rts at 29 ["**Brodsky et al 2017**].

[111] Brodsky et al 2017 at 31.

venues during the adjudication of a human rights complaint, and ultimately results in the erasure of a human rights remedy. Such an interpretation of the *CHRA* would result in an absurd situation where acts of discrimination and the responsibility to compensate victims could be usurped by an outside process absent all parties to the complaint.

115. Just as the Tribunal's jurisdiction to hear a human rights complaint is not impacted by a complainant's ability to challenge a government service via the *Charter*, the potential for a civil class action in tort has no bearing on the Tribunal's remedial powers. While the *CHRA* allows for the dismissal of complaints that can or have been dealt with in another administrative process,[112] it does not bar the Tribunal from awarding compensation on the basis that other legal recourse may be available to victims. A perpetrator of discrimination should not escape liability under the *CHRA* because its conduct may, in some future proceeding, be found to be tortious or contrary to the *Charter*.

B. Is the Motion premature given the outstanding issues?

116. In its factum, the AFN sets out future work that is required before there can be certainty regarding which victims under the Tribunal compensation orders will be eligible under the Compensation FSA.[113]

117. As noted above, there is significant ambiguity in the definition as to whether victims of Canada's discriminatory approach to Jordan's Principle will meet the threshold set by the Tribunal in the Compensation Framework. While it is important and positive that the FSA Framework and the "Safety Clause" under Article 6.07 seem to allow for a contextual inquiry looking at each child's unique circumstances, the threshold of materiality under the Compensation FSA definitions is so vague as to be meaningless. This vagueness means that a Jordan's Principle class member cannot meaningfully assess whether their circumstances will meet this threshold. Clearly, more information is required, with evidence, to fully assess this important category.

---

[112] *CHRA*, s 41. See also for e.g.: *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 83 and 91.
[113] AFN Written Submissions at para 81.

118. Moreover, the denial or delay in receiving an "essential service" is only one threshold that must be met for a Jordan's Principle or Trout class member to receive compensation. The Compensation FSA also contemplates that only those class members who experienced a "significant impact" because of this delay or denial will receive a minimum of $40,000 in compensation, commensurate with the amount awarded by the Tribunal. Article 6.06(3) provides that the process for distinguishing such "significant impact" from "other impact" will be prescribed in the Framework of Essential Services, as follows:

> 3) The Framework of Essential Services will establish a method to assess two categories of Essential Services based on advice from experts relating to objective criteria:
>
> (a) Essential Services relating to Children whose circumstances, based on an Essential Service that they are confirmed to have needed, are expected to have included significant impact ("**Significant Impact Essential Service**"); and
>
> (b) Essential Services that are not expected to have necessarily related to significant impact ("**Other Essential Service**").

119. Contrary to Article 6.06(3), the Framework of Essential Services made publicly available on August 19, 2022, does not offer any guidance on how these two categories will be assessed nor is "Significant Impact" a defined term in the Final Settlement Agreement. There are important unresolved issues on a claimant's ability to understand what compensation, if any, they will be entitled to under the Final Settlement Agreement and whether it will be greater or less than the compensation awarded by the Tribunal, as the definitions used in the Final Settlement Agreement are not part of the Tribunal's order or process for compensation distribution.

120. Finally, the definition of "delay" does not accordance with the parameters ordered by the Tribunal. Instead, "delay" under the Final Settlement Agreement "means where a member of the Jordan's Principle Class or Trout Class requested an Essential Service from Canada and they received a determination on their request beyond a timeline to be agreed to by the Parties and specified in the Claims Process."[114] As far as the Caring Society is aware, the Claims Process has not been

[114] Compensation FSA Article 1.01, Exhibit F, Ciavaglia Affidavit.

finalized and there is no current definition of "delay" available to victims to know whether their own experience of delay would meet the definition in the FSA.

121. With respect to removed children, the Compensation FSA denies compensation to First Nations children moved from their homes, families and communities and placed in non-ISC funded placements.

122. The Tribunal never squarely defined the meaning of "in care" in its reasons. From the perspective of the Caring Society, such a definition was never needed, as the discrimination acutely arose from the discriminatory underfunding and lack of preventative services and least disruptive measures that led to the removal. This discrimination was further exacerbated by Canada's funding models that covered the actual costs of maintenance, further incentivizing the removal of First Nations children to be placed in foster care and other state funded placements. But the discrimination was never confined in the way that is now being suggested in this motion – First Nations children who were removed were harmed and experienced an infringement of their human rights and dignity when they were disentitled to receive preventative services and least disruptive measures due to Canada's discriminatory conduct.

123. Across the country, child protection legislation provides a host of different placement options when an investigation begins and a child is moved, ranging from a place of safety, kin placements, supervision orders, kin-in-care, kin-out-of-care, customary care, traditional customary care, voluntary service placements, and various other custodial arrangements.[115] The nomenclature attributed to these placements varies from province to province, and different service providers use different terms, depending on the circumstances. It was for this reason the parties were careful about the definition of "necessary/unnecessary removal" under section 4.2.1 of the Compensation Framework, ensuring that all eligible children who were

[115] See, for example, Ontario's *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, ss 81, 71(1) and (4); Manitoba's *The Child and Family Service Act*, CCSM c C80, s 21(1) and definition of "place of safety" at s 1(1); British Columbia's *Child, Family and Community Service Act*, RSBC 1996, c 46 at s. 3, and Yukon's *Child and Family Services Act*, SY 2008, c 1, s 36.

removed from their homes, families and communities as a result of Canada's discriminatory conduct would be compensated.

124. In any event, if there is now a dispute about the meaning of "in care" or "out-of-home-care", the solution is not to decide such a critical issue in the context of this motion. Instead, the parties should engage in the dialogic approach in the same manner as they addressed the issue of "First Nations child"[116]: with consultation, and if necessary, the filing of evidence and submissions to be considered by the Tribunal. Indeed, if Canada (and the AFN) were of the view that "in care" referred only to ISC-funded placements it ought to have sought clarity from the Tribunal before bringing this motion. To this end, the Caring Society suggests that a key principle to consider in the analysis to be undertaken by the Tribunal is procedural fairness and collateral attack on what has already been decided by the Tribunal pursuant to the Compensation Process Order.

125. Finally, the uncertainty regarding the opt out and the potential for the release to impact long term reform is concerning. More information is needed to understand these important issues and in particular how they intersect with the long term reform that has been ordered by the Tribunal.

C. If the Tribunal can decide the Motion, what guiding principles should be applied to the determination of the Motion?

126. The Caring Society submits that this motion ought to be determined in accordance with human rights case law and in a manner that protects the integrity of the human rights regime. Indeed, the Truth and Reconciliation Commission of Canada's adopted a human rights approach when it proposed the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

1) The Critical Examination of Evidence as a Principle for Considering this Motion

127. As has been made clear throughout these submissions, the Tribunal properly considered the request for compensation by direct and specific reference to the evidence in this case.

---

[116] 2020 CHRT 20.

128. This fundamental tenant of justice was underscored by the Federal Court in its upholding of the Tribunals' orders, concluding that the Tribunal's jurisdiction to make the orders flowed not only from the parameters and objectives of the *CHRA*, but also from the evidentiary foundation upon which the Tribunal grounded its decisions:

> Ultimately, the Compensation Decision is reasonable because the *CHRA* provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify to establish individual harm. The Tribunal already had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada's knowledge of that harm. Further, the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. From the outset, First Nations children and families were the subject matter of the complaint and Canada always knew that the Respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding.[117]

129. As outlined in the sections above, the Compensation FSA departs in a number of significant areas impacting victims in this case: (a) limiting compensation for removed children to only those placed in ISC-funded placements; (b) completely disentitling the estates of deceased parents from receiving any compensation; (c) compromising and potentially disentitling some parents (or caregiving grandparents) from receiving the Tribunal ordered compensation; and (iv) potentially leaving some Jordan's Principle victims without access to compensation, which remains unknowable at this stage. Evidence was led and relied on by the Tribunal for each of these categories of victims. The Tribunal acknowledged their suffering, their infringement to dignity and awarded compensation accordingly.

130. The Caring Society submits that before any of the suggested departures can be taken from the Tribunal's orders, evidence must be led to demonstrate how and why the suffering of these victims and the infringement to dignity of these

---

[117] 2021 FC 969 at para 231.

victims is not worthy of the full amounts of compensation awarded for pain and suffering and wilful and reckless discrimination. Any deviation from the principle of an evidentiary burden on the moving parties on this motion would be unjust, unfair and not in keeping with the approach taken by the Tribunal throughout the life of this Complaint.

2) Application of Human Rights Law and Protecting the Integrity of the System

131. The Tribunal must apply a human rights lens – and not the law of torts or class actions - to this motion. This motion arises squarely in the context of the human rights complaint and an extensive series of factual findings and orders made by the Tribunal. The fact that Canada, AFN, and class counsel wish to resolve the class actions and the Complaint in the same agreement does not alter the legal framework that governs this Tribunal's jurisdiction and enabling statute. The Tribunal, as a creature of statute, is governed by the *CHRA*. Its role is to interpret and apply the *CHRA* and not the law of torts or class actions.

132. As such, the Tribunal's role on this motion is <u>not</u> analogous to that of a Court faced with a motion for settlement approval in a class action. The *CHRA* does not grant the Tribunal with the power to approve class actions. The question before the Tribunal is not simply whether the Compensation FSA is reasonable in the circumstances. Instead, the Tribunal's function is to apply human rights principles, including the dialogic approach that has guided its work throughout this proceeding, to determine whether a change to its earlier orders is justified based on the evidence before it.

133. The Caring Society, Commission and AFN defended the Tribunal's use of the dialogic approach in their responses to Canada's application for judicial review of the compensation orders in Federal Court. The Court agreed, finding that this approach reflects the flexibility that is required for the Tribunal to fulfill its challenging statutory mandate, and reflects the CHRA's encouragement of flexibility and innovation in determining effective remedies.[118]

[118] 2021 FC 969 at para 138, citing to *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC).

134. The AFN and Canada now ask the Tribunal, under the guise of the dialogic approach, to modify its orders on compensation despite those orders being grounded in a voluminous body of uncontested evidence, despite those orders being upheld on judicial review, and despite concerns expressed by other parties to this proceeding. This is not the dialogic approach, which encourages parties to work together to narrow issues, identify areas requiring clarification, and resolves disputes by consent wherever possible, with the Tribunal's guidance. The AFN itself highlights the consensual nature of the dialogic approach in its written submissions on this motion.[119] Yet such a consensual process, whereby the parties and Tribunal engage in dialogue to move the complaint towards resolution, is entirely thwarted by the AFN and Canada's request that the Tribunal amend its orders to accommodate a settlement reached outside the Tribunal's human rights process and without the consent—and indeed, despite the opposition—of the Caring Society.

135. Professor Kent Roach, Canada's leading expert on human rights remedies, has also cautioned against applying the dialogic approach in manner that "ignore(s) the plight of individual litigants."[120] He further expressed concern about the risk that interest of victims be sacrificed by the dialogic approach.

136. The Federal Court was clear that human rights compensation is not equivalent to damages in tort law. It wrote:

> The CHRA is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim's loss of freedom from discrimination, experience of victimization, and harm to dignity.[121]

137. As such, it would be inappropriate for this Tribunal to assess this motion using standards set out in the context of class actions. In fact, such an assessment falls outside this Tribunal's authority. This Tribunal must instead determine whether the motion sought by Canada and the AFN would promote the purposes of compensation in human rights law. The Caring Society submits that excluding

---

[119] AFN Written Submissions at paras 95-96.
[120] Kent Roach, "Dialogic remedies", *International Journal of Constitutional Law*, Volume 17, Issue 3, July 2019, pp 860–883.
[121] 2021 FC 969 at para 189.

certain victims whom the Tribunal has already found to be entitled to compensation or providing less compensation to others who experienced "worst case scenario" violations, would be contrary to the objective of recognizing the infringement of dignity and harm caused by discrimination. Protecting the integrity of human rights regimes must guide the determination of this motion. To that end, the Caring Society urges the Tribunal to consider the broader implications of this motion on the integrity of human rights regimes throughout Canada, including for other First Nations human rights cases.

138. There is a serious risk of the public's trust in the human rights system being eroded if this motion is allowed. Human rights—and remedial orders from human rights tribunals—must be seen by the public, and respondents, as obligatory and final and not as something that can be bargained away. Throughout this litigation, the complainants and the interested parties have been requited to return to the Tribunal on several occasions to compel Canada to comply with its remedial orders. The Tribunal has had to remind Canada that its remedial orders are legally binding and not mere recommendations.[122] Allowing this motion would send conflicting messages about the nature of obligations under the *CHRA* and orders of this Tribunal. The Caring Society urges the Tribunal to once again reassert the important principle that human rights orders are binding. Compliance is not a matter of discretion or something that can be traded off in private agreements. As explained by Professor Paré:

> The fact that a decision from the Tribunal that recognizes the right to compensation of right holders can be invalidated without their express consent could undermine public trust in the human rights regime. Human rights culture in Canada is best protected when the public knows that orders from tribunals are enforceable, legally binding and non-negotiable.[123]

139. Section 48(1) of the *CHRA* further highlights the unique features of the federal human rights regime. It requires the terms of the settlement to be referred and approved to the Commission to be valid. As the Commission is not required to

---

[122] 2018 CHRT 4 at para 41.

[123] Mona Paré, "Courts are not substitutes for human rights tribunals" (“**Paré , Not Substitutes**”) online: National Magazine <https://nationalmagazine.ca/en-ca/articles/law/opinion/2022/courts-are-not-substitutes-for-human-rights-tribunals>.

approve agreements arising from a civil action, there is no party in private settlement agreements who has the express mandate of protecting the public interest. It would be contrary to Parliament's intention for the Tribunal to allow a settlement agreement that has not been approved by the Commission to circumvent one of its orders.

140. The Tribunal ought to stake its territory as the proper forum for discrimination claims. Human rights regimes were designed to have exclusive judication over discrimination claims.[124] They are meant to offer comprehensive protection over discrimination complaints. Allowing settlement agreements reached in the context of a civil claim to invalidate ruling made by human rights tribunals could have a series of unintended negative consequences on human rights regimes. As warned by the CCD, as intervenor in *Honda v Keays* and echoed by Justice Abella, permitting civil claims to act as a substitute for human rights complaints could erode human rights regime by causing confusion amongst victims. As explained by Mona Paré, expert researcher in human rights, victims need to know where to go to have their allegations of discrimination dealt with by decision makers with an expertise in human rights and in a manner that accounts for their needs. She writes:

> We created human rights regimes with the distinct purpose of adjudicating discrimination complaints in a manner that protects the public interest and recognizes the social harm caused by discrimination. The Tribunal ought to maintain the finality of its compensation orders so that victims of discrimination in Canada know that the regime is the appropriate, fair and flexible forum where they can bring their claims.[125]

141. Parliament's intention when it adopted the *CHRA* was to create a system particularly tailored to the address the social wrong of discrimination. The Tribunal must exercise its discretion in a manner that discourages the encroachment of civil courts in its exclusive jurisdiction over discrimination complaints.

---

[124] See *Seneca College v. Bhadauria,* 1981 CanLII 29 (SCC), [1981] 2 SCR 181 and more recently affirmed in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362.

[125] Paré, Not Substitutes, *supra*, note 122.

142. Finally, the Caring Society urges the Tribunal to consider the unique context in which this case was litigated. Because of the now repealed section 67 of the *CHRA*, there was formerly a widespread perspective amongst many members of First Nations communities that they did not benefit from any human rights protection in Canada. This litigation was instrumental in changing that perception. The Tribunal's compensation orders were celebrated in the communities across the country, thus building trust in the human rights system. The notion that Canada is required to pay compensation for human rights violations had helped validate the experience of victims and offers vindication for the social wrong they have experienced. Modifying the compensation orders could undermine the trust that had been gained in the human rights regime within First Nations communities and fuel the perception that the human rights of First Nations Peoples, including First Nations children, are second class and can be bargained away.[126]

3) Apply the Best Interests of the Child – Every Child

143. The Tribunal has always placed First Nations children at the forefront of its decision making in this case. The Tribunal's commitment to children's rights as human rights is undeniable:

From 2016 CHRT 2:

> […] human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.[127]

From 2018 CHRT 4 :

> The TRC recognized that children's rights, enshrined in the UNDRIP and other international instruments as well as in domestic law have to be a priority. The child welfare services have to be deemed essential services and the services must be prevention oriented rather than removal oriented if Canada wants to reverse

---

[126] August 2022 Blackstock Affidavit at paras. 13-14
[127] 2016 CHRT 2 at para 465.

> the perpetuation of removal of children that is 3 times higher than at the heights of the residential school era.[128]

144. To this end, if the Tribunal is of the view that it can entertain the relief sought in this motion, the Caring Society submits that a continued focus on the rights First Nations children and their experiences of victimization, harm and infringement of dignity by Canada's discriminatory conduct ought to form a principled part of its analysis.

145. The Compensation Entitlement Order, the Compensation Framework, and the Compensation Payment Order place no restrictions on the type of placement in relation to the eligibility of compensation to First Nations children removed from their homes, families, and communities. As indicated above, the definition of "necessary/unnecessary removal" in the Compensation Framework does not restrict eligibility to ISC-funded placements and the Caring Society submits that this was drafted in a purposive manner, driving at the critical aspects of the discrimination that resulted in child welfare involvement for First Nations children and their families: a purposeful and discriminatory lack of culturally relevant and available prevention services that contributed to children and families being more apt to becoming involved in child welfare and to children being moved from their families during the course of such involvement.

146. As the case law makes clear, placement in ISC-funded care (or any kind of formalized foster or institutional care) is not the hallmark of a child welfare removal. The provincial/territorial child protection legislation that ISC required as a funding condition of its FNCFS Program does not stipulate that the placement payment arrangements ought to be considered when deciding whether a child can remain safely at home or requires an alternative placement. Removal is not predicated on any particular type of placement. Instead, these decisions are based on the best interests of the child, the risks to the child's safety and wellbeing and whether the risks can be redressed through least disruptive measures (such as prevention services). According to the Supreme Court, moving children from their

[128] 2018 CHRT 4 at para 167.

families due to child welfare issues, "should be used only as a measure of last resort where no less disruptive means are available."[129]

147. As the Tribunal noted, "experts in the child welfare field are coming to believe that the removal of any chid from his/her parents is inherently damaging in and of itself […] The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart".[130] Likewise, every child welfare law in Canada recognizes the integrity of the family and harm caused by separating children from their parents and caregivers: the removal of a child is the last resort when seeking to keep them safe. In *Winnipeg Child and Family Service*s, the Supreme Court explained:

> The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. Indeed, no one would dispute the fact that the task of raising a child can be difficult, especially when parents experience the types of personal, social and economic problems faced by the appellant in this case.[131]

148. Serious consideration must be given to the impact of disaggregating the right to compensation for First Nations children based on a factor (whether they are or are not in ISC-funded care) that is completely outside of their control: First Nations children who come into the system have no say in how their out-of-home-care placement is determined. Instead, the evidence in this case makes clear that these children are in the child welfare system because their family had little to no opportunity to access preventative services and least disruptive measures. To this end, the Caring Society submits that children in non-ISC funded placements should not be disentitled to their human rights compensation.

---

[129] *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at para 117.
[130] 2019 CHRT 39 at para 168.
[131] *Winnipeg Child and Family Services v. KLW*, 2000 SCC 48 at para. 72. See also *New Brunswick (Minister of Health and Community Services) v. G(J),* [1999] 3 SCR 46 at paras 61, 76-77.

4) Setting a Dangerous Precedent without the Dialogic Approach

149. Protecting the integrity of human rights regimes must be a guiding principle in determining this motion. The potential for setting a dangerous precedent is significant and could have widespread impacts on the human rights system. To that end, the Caring Society urges the Tribunal to consider the broader and precedential implications of this motion on the integrity of the human rights regimes throughout Canada, including its specific impact on other First Nations human rights cases. If entitlement to human rights damages can be set to the side by an alternative civil process that releases liability on the part of the wrongdoer, serious questions will be raised (and should be raised) about the vulnerability of complainants and victims. This is particularly acute when the wrongdoer is the federal government. This Tribunal has taken great care to hold Canada accountable for its discrimination:

> Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.[132]

150. Permitting outside parties, who are not parties to a human rights complaint, to negotiate agreements with respondents that aim to bypass human rights orders could undermine the rights of victims of discrimination. It places complainants in an unfair position of having to defend for a second time a hard-fought victory before human rights tribunals. Though the human rights system is meant to be more accessible than courts, successful complainants are not entitled to their legal fees and compensation is capped is many jurisdictions.[133] As such, many complainants simply will not have the resources to hire a lawyer to defend remedial orders they obtained before human rights tribunals. This is unfair to victims of discrimination.[134]

---

[132] 2020 CHRT 7 at para 130.
[133] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471.
[134] Paré, Not Substitutes, *supra*, note 122.

151. Further, allowed the federal government to negotiate down from remedies already ordered – when those negotiations take place in an outside proceeding – could set a dangerous precedent that could erode the sanctity of human rights victories. Setting this precedent could have serious and unanticipated consequences for future victims and complainants.

152. If the Tribunal is of the view that the Compensation FSA ought to be considered as an alternative to the Tribunal's compensation orders (ultimately making those orders null and void), the Tribunal must consider ways to insulate its decision from being applied by future wrongdoers who may attempt to capitalize on the approach suggested in this motion. The Caring Society is mindful that Canada continues to exhibit its "old mindset" in ways that could have serious consequences for First Nations children and their families.

153. Moreover, the Caring Society is of the view that the Tribunal must give serious consideration to the exercise of its jurisdiction in a way that ensures consultation and protects the dialogic approach—even in the face of an outside class action. There is room for flexibility and creativity within the human rights regime, in keeping with the overall objectives and purposes of the *CHRA*. It therefore remains open to the Tribunal to order the parties to consult, to report back to the Tribunal within a fair and reasonable timeframe, and to have any disputes fully adjudicated on an evidentiary record by the Tribunal.

PART IV - ORDER SOUGHT

154. The Caring Society requests the following relief:

a) The motion be dismissed.

b) In the alternative, the motion be dismissed with leave to the moving parties to return following consultation with the Caring Society and the Commission, with detailed amendments to the existing Tribunal orders, evidence to support those amendments, and further information regarding the uncertainties identified in the Compensation FSA.

155. All of which is respectfully submitted, this 9th day of September, 2022.

Sarah Clarke, Alyssa Holland
Anne Levesque and David P. Taylor

Counsel for the Respondent,
First Nations Child and Family Caring Society of Canada

PART V - LIST OF AUTHORITIES

	STATUTES
1.	*An Act respecting First Nation, Inuit and Métis children, youth and families*, SC 2019, c 24
2.	*British Columbia's Child, Family and Community Service Act*, RSBC 1996, c 46
3.	*Canadian Human Rights Act*, RSC 1985, c H-6
4.	*Canadian Human Rights Tribunal Rules of Procedure*
5.	*Child, Family and Community Service Act*, RSBC 1996, c 46
6.	*Child, Youth and Family Enhancement Act*, RSA 2000, c C-12
7.	*Child, Youth and Family Services Act, 2017*, SO 2017 c 14
8.	*Children and Family Services Act*, SNS 1990, c 5
9.	*Child and Family Services Act*, SY 2008, c 1
10.	*Indian Act*, R.S.C., 1985, c. I-5
11.	*The Child and Family Service Act*, CCSM c C80
	CASE LAW
12.	*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52
13.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969
14.	*Canada (Attorney General) v. Grover*, 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC)
15.	*Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848
16.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 16
17.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2013 CHRT 16

18.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2
19.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 1
20.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14
21.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2
22.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 10
23.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 16
24.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14
25.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35
26.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4
27.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 1
28.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7
29.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39

30.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7
31.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15
32.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20
33.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36
34.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 6
35.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 7
36.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12
37.	*Honda Canada Inc v Keays*, 2008 SCC 39
38.	*New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46
39.	*Ontario Human Rights Commission v. Etobicoke,* 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202.
40.	*Reddock v Canada,* 2021 ONSC 6013
41.	*Seneca College v. Bhadauria,* 1981 CanLII 29 (SCC), [1981] 2 SCR 181.
42.	*Winnipeg Child and Family Services v KLW, 2000 SCC 48*
43.	*Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321
	OTHER SOURCES
44.	Gwen Brodsky, Shelagh Day and Frances Kelly, "Systemic Remedies and Compensation: Both are Needed" (2019) 20:6 Can Human Rights Reporter 1

45.	Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies", (2017) 6:1 Can J Hum Rts
46.	Mona Paré, "Courts are not substitutes for human rights tribunals", September 8, 2008, National Magazine

Schedule A: Comparison of CHRT Orders/Compensation Framework with Final Settlement Agreement

Topic	CHRT Orders / CompensationFramework	Final Settlement Agreement
Eligibility of Removed Children	**2019 CHRT 39 and 2022 CHRT 8:** • First Nations children unnecessarily removed from their *home, family and community* between Jan. 1 2006 to March 31, 2022. • First Nations children necessarily removed but placed in care outside of their extended families and communities, temporarily or long-term form Jan. 1, 2006 to March 31, 2022. **Compensation Framework s. 4.2.1** "Necessary/Unnecessary" Removal includes: a) children removed from their families and placed in alternative care pursuant to provincial/territorial child and family services legislation, including, but not limited to, kinship and various custody agreements entered into between authorized child and family services officials and the parent(s) or caregiving grandparent(s); b) children removed due to substantiated maltreatment and substantiated risks for maltreatment; and c) children removed prior to January 1, 2006, but who were in care as of that date.	**Art. 1.01 – Definitions: "Removed Child Class"** or **"Removed Child Class Member"** means First Nations individuals who, at any time during the period between April 1, 1991 and March 31, 2022 (the "**Removed Child Class Period**"), while they were under the Age of Majority, were removed from their home by child welfare authorities or voluntarily placed into care, and whose placement was funded by ISC, such as an Assessment Home, a Non-kin Foster Home, a Paid Kinship Home, a Group Home, or a Residential Treatment Facility or another ISC-funded placement while they, or at least one of their Caregiving Parents or Caregiving Grandparents, were Ordinarily Resident on a Reserve or were living in the Yukon, but excluding children who lived in a Non-paid Kin or Community Home through an arrangement made with their caregivers and excluding individuals living in the Northwest Territories at the time of removal.
Removed Child Class Compensation	**2019 CHRT 39 at paras 245, 249**: Each removed First Nations child is entitled to $40,000	**Art 6.03(2)** An Approved Removed Child Class Member will be entitled to receive Base Compensation of $40,000.
Eligibility of Removed	**2019 CHRT 39 at paras 253-4, 256:** Each caregiving parent/caregiving grandparent for a First Nations	**Art. 6.04(1)** Amongst the Removed Child Family Class, only the Caregiving Parents or Caregiving Grandparents may receive direct

Caregiving Parent/Caregiving Grandparent: Exclusions for Abuse	child who was unnecessarily or necessarily removed, except for parents/grandparents who sexually, physically or psychologically abused their children **Framework 8.4:** The entities noted in section 8.3 will also, based on the judgment of the social worker at the time of the removal as recorded in the file, list parents or caregiving grandparents who sexually, physical, or psychologically abused their children on an "**Exclusion List"**. Generally, both parents or grandparents will be denied compensation in these circumstances. However, where a non-offending parent or grandparent did not know the abuse was occurring, or was incapable of stopping it, they may be entitled to compensation where, for example: • a non-offending parent or grandparent was also a victim of abuse by the other parent; • a non-offending parent or grandparent was absent from the home for extended periods for unavoidable reasons (e.g. military service); • a non-offending parent or grandparent suffers from a disability that either prevented them from intervening or of being aware of the abuse.	compensation if otherwise eligible under this Agreement. Brothers and sisters are not entitled to direct compensation but may benefit indirectly from this Agreement through the Cy-près Fund **Art. 6.04(4)** A Caregiving Parent or Caregiving Grandparent who has committed Abuse that has resulted in the Removed Child Class member's removal is not eligible for compensation in relation to that Removed Child. However, a Caregiving Parent or Caregiving Grandparent is not barred from receiving compensation if the Caregiving Parent or Caregiving Grandparent is otherwise eligible for compensation as a member of another class defined under this Agreement. **Art. 1.01 – Definitions:** "Abuse" means sexual abuse or serious physical abuse causing bodily injury, but does not include neglect nor emotional maltreatment.
Removed Caregiving Parent/Caregiving Grandparent Compensation	**2019 CHRT** 39 at paras 247-248, 254: Each parent or grandparent is entitled to $40,000. The order for payment of $20,000 for pain and suffering order applies for each child removed as a result of the discrimination. If a parent or grandparent lost 3 children, it should get $60,000, the maximum amount of $20,000 for each child apprehended.	**Art. 6.04 Caregiving Parents or Caregiving Grandparents of Removed Child Class** **(3)** The Base Compensation of an Approved Removed Child Family Class Member will not be multiplied based on the number of removals or Spells in Care for a Child or the number of Children in care. No Approved Removed Child Family Class Member will receive more than one Base Compensation.

		(5) The Plaintiffs have estimated a Budget of $5.75 billion for the Removed Child Family Class. **(6)** If a Child lived with a Caregiving Grandparent at the time of removal, such a Caregiving Grandparent may be eligible to seek compensation. **(7)** A maximum compensation amount of two Base Compensation payments per child among Caregiving Parents and Caregiving Grandparents of a child, regardless of number of Spells in Care or removals, may be distributed under this Agreement, if otherwise eligible, according to the following priority list: (a) Category A: Caregiving Parents who are biological parents; then (b) Category B: Caregiving Parents who are adoptive parents or stepparents, if applicable; then (c) Category C: Caregiving Grandparent(s). **(8)** The Parties have budgeted the Base Compensation for an Approved Removed Child Family Class Member to be $40,000. **(9)** An Approved Removed Child Family Class Member may receive an increased Base Compensation in the event that more than one Child of the Approved Removed Child Family Class Member has been removed. Such Base Compensation is budgeted to be $60,000. **(11)** If the Settlement Implementation Committee has allocated a Trust Fund Surplus to Approved Removed Child Family Class Members pursuant to Article 6.08(5), the Settlement Implementation Committee may determine that the maximum combined amount of base and additional compensation to be awarded to an Approved Removed Child Family Class Member who has had more than one Child removed may be greater than $60,000.

		(11) The final quantum of Base Compensation to be paid to each Approved Removed Child Family Class Member will be determined by the Settlement Implementation Committee in consultation with the Actuary, having regard to the number of Approved Removed Child Family Class Members and the Budget for the Removed Child Family Class under this Article, subject to Court approval.
First Nations Child Definition	**2020 CHRT 36** at para 56: Cases meeting any one of four criteria are eligible for consideration under Jordan's Principle. Those criteria are the following: 1. The child is registered or eligible to be registered under the *Indian Act* as amended from time to time; 2. The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*; 3. The child is recognized by their Nation for the purposes of Jordan's Principle; or 4. The child is ordinarily resident on reserve. **Compensation Framework**: **4.2.5.** "First Nations child" means a child who: a) was registered or eligible to be registered under the *Indian Act;* b) had one parent/guardian who is registered or eligible to be registered under the *Indian Act*; c) was recognized by their Nation for the purposes of Jordan's Principle; or d) was ordinarily resident on reserve, or in a community with a self-government agreement.	**Art. 1.01 – Definitions:** "First Nations" means: (a) with respect to the Removed Child Class, Jordan's Principle Class, Trout Child Class, and Stepparents: individuals who are registered pursuant to the Indian Act; (b) with respect to the Removed Child Class, Jordan's Principle Class, and Trout Child Class: individuals who were entitled to be registered under sections 6(1) or 6(2) of the Indian Act, as it read as of February 11, 2022 (the latter date of the Certification Orders); (c) with respect to the Removed Child Class: individuals who met Band membership requirements under sections 10-12 of the Indian Act by February 11, 2022 (the latter date of the Certification Orders) such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List; (d) with respect to the Jordan's Principle Class only: individuals who met Band membership requirements under sections 10-12 of the Indian Act pursuant to paragraph (c), above, AND who suffered a Delay, Denial, or Service Gap between January 26, 2016 and November 2, 2017; (e) with respect to the Jordan's Principle Class only: individuals who were recognized as citizens or members of their respective First Nation by February 11, 2022 (the latter date of the Certification Orders) as confirmed by First Nations Council Confirmation, whether under final agreement, self-government agreement, treaties or First Nations' customs,

<table>
<tr>
<td></td>
<td>4.2.5.1 Children referred to in section 4.2.5(d) (ordinarily resident on reserve or
in a community with a self-government agreement (“First Nations community”)) who do not meet any of the eligibility criteria in section 4.2.5(a) to (c) will only qualify for compensation if they had a meaningful connection to the First Nations community. The factors to be considered and carefully balanced include (without any single factor being determinative):
a) Whether the child was born in a First Nations community or whose parents were residing in a First Nations community at the time of birth;
b) How long the child has lived in a First Nations community;
c) Whether the child’s residence in a First Nations community was continuous;
d) Whether the child was eligible to receive services and supports from the First Nation community while residing there (e.g. school, health services, social housing, bearing in mind that there may have been inadequate or non-existent services in the First Nations community at the time); and
e) The extent of the connection of the child’s parents and/or other caregivers to the First Nation community, excluding those non-status individuals working on a reserve (i.e., RCMP, teachers, medical professionals, and social workers)</td>
<td>traditions and laws, AND who suffered a Delay, Denial, or Service Gap between January 26, 2016 and November 2, 2017.

“Ordinarily Resident on Reserve” means:
(a) a First Nations individual who lives in a permanent dwelling located on a First Nations Reserve at least 50% of the time and who does not maintain a primary residence elsewhere;
(b) a First Nations individual who is living off-Reserve while registered full-time in a post-secondary education or training program who is receiving federal, Band or Aboriginal organization education/training funding support and who:
a. would otherwise reside on-Reserve;
b. maintains a residence on-Reserve;
c. is a member of a family that maintains a residence on-Reserve; or
d. returns to live on-Reserve with parents, guardians, caregivers or maintainers when not attending school or working at a temporary job.
(c) a First Nations individual who is temporarily residing off-Reserve for the purpose of obtaining care that is not available on-Reserve and who, but for the care, would otherwise reside on-Reserve;
(d) a First Nations individual who is temporarily residing off-Reserve for the primary purpose of accessing social services because there is no reasonably comparable service available on-Reserve and who, but for receiving said services, would otherwise reside on-Reserve;
(e) a First Nations individual who at the time of removal met the definition of ordinarily resident on reserve for the purpose of receiving child welfare and family services funding pursuant to a funding agreement between Canada and the province/territory in which the individual resided (including, but not limited to, ordinarily resident on reserve individuals funded through the cost-shared model under the Canada-Ontario 1965 Indian Welfare Agreement).</td>
</tr>
</table>

Jordan's Principle Eligibility	**2019 CHRT 39**: Each First Nations child who was not removed from the home but who was denied an essential service or received an essential service after an unreasonable delay **Compensation Framework:** **4.2.2. "Essential service"** means of support, product and or service recommended by a professional that was reasonably necessary to ensure: (a) substantive equality in the provision of services, product sand or supports to the child (accounting for historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and or supports); and (b) the best interests of the child **4.2.2.1** For the purposes of 4.2.2 "reasonably necessary" means that the failure to provide the support, product or service could have: (a) caused the child to experience mental or physical pain or suffering; or (b) widened the gap in health outcomes between the First Nations child and children in the rest of Canadian society. **4.2.3. "Service gap"** means a situation where there was a service, and/or product and/or support based on the child's confirmed need that: (a) was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;	**Art. 1.01 – Definitions: "Jordan's Principle Class"** or "Jordan's Principle Class Member" means First Nations individuals who, during the period between December 12, 2007 and November 2, 2017 (the "Jordan's Principle Class Period"), 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 relating to a Confirmed Need was delayed by Canada, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a Service Gap or jurisdictional dispute with another government or governmental department while they were under the Age of Majority. **"Delay"** means where a member of the Jordan's Principle Class or Trout Child Class requested an Essential Service from Canada and they received a determination on their request beyond a timeline to be agreed to by the Parties and specified in the Claims Process. **"Essential Service"** means a service that was required due to the Child's particular condition or circumstance, the failure to provide which would have resulted in material impact on the Child, as assessed in accordance with the Framework of Essential Services. **"Service Gap"** means each of the Essential Services that are identified as a Service Gap in accordance with the Framework of Essential Services. **Art. 6.06(2)** Eligibility for compensation for members of the Jordan's Principle Class and the Trout Child Class will be determined based on those Class Members' Confirmed Need for an Essential Service if: (a) a Class Member's Confirmed Need was not met because of a Denial of a requested Essential Service; (b) a Class Member experienced a Delay in the receipt of a requested Essential Service for which they had a Confirmed Need; or

	(b) was recommended by a professional with expertise directly related to the child's need(s). Documentation provided by a medical professional or other registered professional is conclusive, unless Canada can demonstrate to the satisfaction of the Central Administrator that, based on clinical evidence available at the time, the potential risk to the child of the service, product and/or support outweighed the potential benefit; (c) or an Elder or Knowledge Keeper, who is recognized by the child's specific First Nations community, recommends a linguistic or cultural product, support and/or service; and (d) the child's needs were not met. **4.2.4 "Unreasonable delay"** will be presumed where a request was not determined within 12 hours for an urgent case or 48 hours for other cases. In exceptional circumstances and subject to a high threshold, Canada may rebut the presumption of unreasonable delay in any given case with reference to the following list of contextual factors, none of which is exclusively determinate: (a) the nature of the product support and/or service sought; (b) the reason for the delay; (c) the potential for the delay to adversely impact the child's needs as informed by the principle of substantive equality; (d) whether the child's needs was addressed by a different service, product and/or support of equal or greater quality, duration and	(c) a Class Member's Confirmed Need was not met because of a Service Gap even if the Essential Service was not requested. **Art. 6.06(3)** The Framework of Essential Services will establish a method to assess two categories of Essential Services based on advice from experts relating to objective criteria: (a) Essential Services relating to Children whose circumstances, based on an Essential Service that they are confirmed to have needed, are expected to have included significant impact ("Significant Impact Essential Service"); and (b) Essential Services that are not expected to have necessarily related to significant impact ("Other Essential Service"). **Art. 6.07(1)** The non-inclusion of a service on the Framework of Essential Services may not be grounds for the exclusion of a Claimant from eligibility if the following circumstances are established in accordance with this Agreement: (a) The Claimant has submitted Supporting Documentation identifying a service and establishing a Confirmed Need for that service during the Class Period; (b) The service identified in Article 6.07(1)(a) does not qualify as an Essential Service according to the Framework of Essential Services; (c) The Supporting Documentation satisfactorily establishes the reason(s) why the service identified in Article 6.07(1)(a) was essential to the Claimant as a Child; and (d) The Claimant requested the service identified in Article 6.07(1)(a) from Canada but the request was subject to a denial or unreasonable delay taking into consideration the context and the Child's needs. **Art. 6.07(2)** Where a Claimant has met all the conditions in Article 6.07(1), that Claimant will be:

	quantity, otherwise provided in a reasonable time; (e) the normative standards for providing the support product and or services in force in the province or territory in which the child resided, or receive the service, at the time of the child's need. **4.3** For greater certainty, where a child was receiving palliative care with a terminal illness, and a professional with relevant expertise recommended a service, support and/or product to safeguard the child's best interests that was not provided through Jordan's Principle or another program, the service, product and/or support will be considered essential and the delay will be considered unreasonable.	(a) an Approved Jordan's Principle Class Member if the Claimant's Confirmed Need occurred within the Jordan's Principle Class Period; or (b) an Approved Trout Child Class Member if the Claimant's Confirmed Need occurred within the Trout Child Class Period.
Jordan's Principle Compensation	**2019 CHRT 39 at paras. 250 & 254:** Every child who was denied access to a service, experienced an unreasonable delay in accessing a service, product or support, or was taken into care to receive service due to Canada's discriminatory approach to Jordan's Principle is entitled to $40,000.	**Art. 6.06(11)** An Approved Jordan's Principle Class Member will receive a minimum of $40,000 in compensation if: (a) They have established a Confirmed Need for a Significant Impact Essential Service; or (b) They have established a Confirmed Need for an Other Essential Service and have suffered higher levels of impact than other Jordan's Principle Claimants with a Confirmed Need for an Other Essential Service including, but not limited to, impact by reason of conditions and circumstances such as an illness, disability or impairment. Such impact is to be measured based on objective factors assessed through culturally sensitive Claims Forms and a questionnaire designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify under this category will be based on objective factors such as the severity of impact on the Child and the number of eligible Claimants.

		Art. 6.06(13) An Approved Jordan's Principle Class Member who has shown a Confirmed Need for Other Essential Services and has not established a claim under Article 6.06(11)(b) will receive up to but not more than $40,000 in compensation based on a pro rata share of the Jordan's Principle Budget after deducting the total estimated amount of compensation to be paid to Approved Jordan's Principle Class Members who have established a claim under Article 6.06(11). **Art 6.06(15)** In the event of a Trust Fund Surplus pursuant to Article 6.08 based on advice from the Actuary after approved Claims under Article 6.06(13) and Article 6.06(14) are paid, the Approved Jordan's Principle Class Members and Approved Trout Child Class Members who have established a claim under Article 6.06(11) and Article 6.06(12) may be entitled to an Enhancement Payment. **Art. 6.07(3)** An Approved Jordan's Principle Class Member under this Article [Safety Clause for Exceptional Jordan's Principle and Trout Cases] will receive a minimum of $40,000 in compensation if they have established a Confirmed Need in accordance with Article 6.07(1), and have suffered higher levels of impact than Class Members in Article 6.06(13) including, but not limited to, impact by reason of conditions and circumstances such as an illness, disability or impairment. Such impact is to be measured based on objective factors assessed through culturally sensitive Claims Forms and a questionnaire designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify under this category will be based on objective factors such as the severity of impact on the Child and the number of eligible Claimants. **Art. 6.07(4)** An Approved Trout Child Class Member under this Article [Safety Clause for Exceptional Jordan's Principle and Trout Cases] will receive a minimum of $20,000 in compensation if they have established a Confirmed Need in accordance with Article

		6.07(1), and have suffered higher levels of impact than Class Members in Article 6.06(14) including, but not limited to, impact by reason of conditions and circumstances such as an illness, disability or impairment. Such impact is to be measured based on objective factors assessed through culturally sensitive Claims Forms and a questionnaire designed in consultation with experts. Subject to the Court's approval, the selection of which Claimants qualify under this category will be based on objective factors such as the severity of impact on the Child and the number of eligible Claimants. **Art. 6.07(5)** An Approved Jordan's Principle Class Member who has not met the conditions in Article 6.07(3), will receive up to but not more than $40,000 in compensation based on a pro rata share of the Jordan's Principle Budget after deducting the total estimated amount of compensation to be paid to Approved Jordan's Principle Class Members who have established a claim under Article 6.06(11) and Article 6.07(3), collectively. **Art. 6.07(6)** An Approved Trout Child Class Member who has not met the conditions in Article 6.07(4), will receive up to but not more than $20,000 in compensation having regard to the Trout Child Class Budget, based on a pro rata share of the Trout Child Budget after deducting the total amount of compensation to be paid to approved Trout Child Class Members who have established a claim under Article 6.06(12) and Article 6.07(4), collectively. **Art 6.08(5)** In allocating the Trust Fund Surplus, the Settlement Implementation Committee will have due regard to the order of priorities set out below: i) Approved Removed Child Class Members; ii) Approved Jordan's Principle Class Members; iii) Approved Trout Child Class Members; iv) Approved Removed Child Family Class Members.

Supports to Beneficiaries	**Framework, 6.1-6.3** 6.1 In order to minimize the risk of traumatizing or unduly inconveniencing potential beneficiaries of the Compensation Entitlement Order, Canada will fund the following supports: (a) Toll-free phone line (b) Navigators (c) Mental health and cultural supports	**Art. 8(1)** The Parties will agree to culturally sensitive health, information, and other supports to be provided to Class Members in the Claims Process, as well as funding for health care professionals to deliver support to Class Members who suffer or may suffer trauma for the duration of the Claims Process, consistent with Schedule C: Framework for Supports for Claimants in Compensation Process, and the responsibilities of the Administrator in providing navigational and other supports under Article 3.02.
Estates	**2020 CHRT 7:** Canada is ordered to pay compensation […] 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	**Art. 13.02** Only the Estates of the deceased members of the Removed Child Class, Jordan's Principle Class or Trout Child Class may be eligible for compensation under this Agreement ("Eligible Deceased Class Member" or "Eligible Deceased Class Members"). The Estates of the Removed Child Family Class, the Jordan's Principle Family Class or the Trout Family Class are not eligible for compensation, unless a complete Claim was submitted by the member of the Removed Child Family Class, the Jordan's Principle Family Class or the Trout Family Class prior to death.
Trust	**Compensation Framework ss. 10.3, 10.4 and 10.5** Funds will be paid into trust where beneficiary does not have capacity to manage their own legal affairs. Trustee will be up to three business entities specializing in holding, administering and distributing funds held in trust for benefit of beneficiaries without legal capacity. Administration fees to by paid by Canada and will not encroach on beneficiaries' entitlement. Trust agreement to be developed, and will include requirement to hold and manage funds for	**Art. 14.01(2)** No later than thirty (30) days following the appointment by the Court of the Trustee, Canada will settle a single trust (the "Trust") with ten dollars ($10), to be held by the Trustee in accordance with the terms of this Agreement. **Art. 14.01(3)** The Plaintiffs will submit the initial investment strategy created with help from experts to the Court for approval together with this Agreement. **Art.14.03** Canada will pay the reasonable fees, disbursements, and other costs of the Trustee relating to the management of the Trust Fund. **Art. 14.04(1)** The Trust will be established for the following purposes:

	beneficiaries' benefit, distribute income and capital, criteria for capital encroachment, removal and replacement of trustees, accounting and reporting, any other appropriate related provisions.	(a) to acquire the Settlement Funds payable by Canada; (b) to hold the Settlement Funds in the Trust; (c) to pay compensation in accordance with this Agreement; (d) to invest cash in investments in the best interests of Class Members, as provided in this Agreement; and (e) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry out the provisions of this Agreement. **Art.14.05** The legal ownership of the assets of the Trust, including the Trust Fund, and the right to conduct the activities of the Trust, including the activities with respect to the Trust Fund, will be, subject to the specific limitations and other terms contained herein, vested exclusively in the Trustee, and the Class Members or any other beneficiaries of the Trust have no right to compel or call for any partition, division or distribution of any of the assets of the Trust or a rendering of accounts. No Class Member or any other beneficiary of the Trust will have or is deemed to have any right of ownership in any of the assets of the Trust.
Taxation	**Framework, 10.9:** CRA has advised that compensation received will not be treated as "income" for income tax assessment purposes	**Article 14.12(2)**: The Parties agree that the payments to Class Members, including payments of any income earned on the Settlement Funds, are in the nature of personal injury damages and are not taxable income and Canada will make best efforts to obtain a technical interpretation to the same effect from the Income Tax Rulings Directorate of the Canada Revenue Agency.
Auditors	Not addressed in orders or Compensation Framework	**Art. 15.01** On the recommendation of the Settlement Implementation Committee, the Court will appoint Auditors with such powers, rights, duties and responsibilities as the Court directs. On the recommendation of the Parties, or of their own motion, the Court may replace the Auditors at any time. Without limiting the generality of the foregoing, the duties and responsibilities of the Auditors will include: (a) to audit the accounts for the Trust in accordance with generally accepted auditing standards on an annual basis;

		(b) to provide the reporting set out in Article 14.08; (c) to audit the financial statements of the Administrator in relation to the administration of this Agreement; and (d) to file the financial statements of the Trust together with the Auditors' report thereon with the Court and deliver a copy thereof to Canada, the Settlement Implementation Committee, the Administrator, and the Trustee within sixty (60) days after the end of each financial year of the Trust. **Art.15.02**: Canada will pay the reasonable fees, disbursements, and other costs of the Auditors in accordance with Article 3.04, as approved by the Court.
Legal Fees	Not addressed in orders or Compensation Framework	**Art. 16.01(1)** Canada will pay Class Counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance, over and above the Settlement Funds. Subject to Article 12.02(1), Canada will also pay the reasonable legal fees of Class Counsel for their work on or for the Settlement Implementation Committee and the Investment Committee. […] **Art. 16.01(2)** No such amounts will be deducted from the Settlement Funds. **Art. 16.01(3)** Class Counsel will not charge individual Class Members any amounts for legal services rendered in accordance with this Agreement. Such assistance to Class Members will not be considered to constitute or be cause for a conflict. **Art. 16.02(1)** Following the Implementation Date, responsibility for representing the interests of the

		Class as a whole (as distinct from assisting a particular Class Member or Class Members, as reasonably requested) will pass from Class Counsel to the Settlement Implementation Committee, and Class Counsel will have no further obligations in that regard. **Art. 16.02(2)** In addition to the legal services provided to the Settlement Implementation Committee in Article 12, Counsel SIC Members may also respond to legal inquiries from Class Members about this Agreement that are beyond the training and/or competence of the navigational support services provided by the Administrator. Legal fees for such services are subject to Article 12.02(1). **Art. 16.03(1)** The Settlement Implementation Committee will maintain appropriate records of payment, fees and disbursements for Ongoing Legal Services. **Art. 16.03(2)** The Settlement Implementation Committee will maintain appropriate records of payment, fees and disbursements for Ongoing Legal Services. **Art. 16.03(3)** The Settlement Implementation Committee will seek approval of its accounts from the Court on an annual basis.
Dispute Resolution	Not expressly addressed Compensation Framework other than going to the Tribunal regarding disputes over amendments, as noted below.	**Art.17: General Dispute Resolution** 1) Where a dispute arises regarding any right or obligation under this Agreement ("Dispute"), the parties to the Dispute will refer the Dispute to confidential mediation in accordance with the ADR Chambers Mediation Rules. If the parties to the Dispute cannot agree on a mediator, they may ask the Court to appoint one (the "Dispute Resolution Process"). 2) If the Dispute cannot be resolved through the Dispute Resolution Process, it can be referred to the Court for determination.

		3) The costs of dispute resolution amongst members of the Settlement Implementation Committee, in accordance with the Dispute Resolution Process, or by referral to the Court, may be paid out of the Trust Fund in circumstances where deemed appropriate by the mediator or the Court. 4) Where Canada is a party to a matter referred to the Dispute Resolution Process, the mediator will have the discretion to award costs of the mediation against any party. 5) For greater certainty, this Article will not apply to disputes regarding Claimants in the Claims Process, including eligibility for membership in the Class, extension of the Claims Deadline for an individual Class Member or compensation due to any Class Member.
Amendment	**Compensation Framework, s. 13.1:** Processes can be amended where necessary if the parties agreed (no Tribunal approval required) or where ordered by Tribunal (if parties do not agree)	A**rt. 18.02** Except as expressly provided in this Agreement, no amendment may be made to this Agreement unless agreed to by the Parties in writing, and if the Court has issued the Settlement Approval Order, then any amendment will only be effective once approved by the Court. A material amendment to the Schedules hereto will require the Court's approval.
Assignment	**Compensation Framework, s. 11.1:** No amount payable under this Framework can be assigned and any such assignment is null and void	**Article 18.04: No Assignment** 1) No compensation payable under this Agreement to a Class Member can be assigned, charged, pledged, hypothecated and any such assignment, charge, pledge, or hypothecation is null and void except as expressly provided for in this Agreement. 2) No portion of the Settlement Funds or amounts accrued thereon that remain will be charged to a Claimant for completing Claims Forms or providing Supporting Documentation. 3) Any payment to which a Claimant is entitled will be made to such Claimant in accordance with the direction that such Claimant provides to the Administrator unless a court of competent jurisdiction has ordered otherwise.

		4) Any payments in respect of a Deceased Class Member or a Person Under Disability will be made in accordance with Article 13.
Destruction of records	**Compensation Framework, s. 8.2:** All records developed or produced by the beneficiaries are the property of each individual beneficiary and shall be destroyed five years after the payment of their compensation or the final decision on compensation. Further details concerning the final disposition of records shall be dealt with in the Guide.	**Art. 20.02(1)** Subject to Article 20.02(2), two years after completing the payment of all compensation under this Agreement, the Administrator will destroy all Class Member information and documentation in its possession, unless a Class Member or their Estate Executor or Estate Claimant specifically requests the return of such information within the two-year period. Upon receipt of such request, the Administrator will forward the Class Member information as directed. Before destroying any information or documentation in accordance with this Article, the Administrator will prepare an anonymized statistical analysis of the Class in accordance with the Claims Process. **Art. 20.02(2)** Prior to destruction of the records, the Administrator will create and provide to Canada a list showing the Approved Class Member's: (i) name (ii) Indian registration number, (iii) Band or First Nation affiliation, (iv) birthdate, (v) class membership, and (vi) amount and date of payment with respect to each compensation payment made. Notwithstanding anything else in this Agreement, this list must be retained by Canada in strict confidence and can only be used in a legal proceeding or settlement where it is relevant to demonstrating that a claimant received a payment under this Agreement. **Art. 20.02(3)** The destruction of records in the possession or control of Canada is subject to the application of any relevant provincial or federal legislation such as the *Privacy Act*, the *Access to Information Act*, the *Personal Information Protection and Electronic Documents Act* and the *Library and Archives of Canada Act*.

First Nations Child and Family Services and Jordan's Principle Class Action

Framework of Essential Services

Who can claim compensation for not receiving an essential service from Canada or receiving it after delay?

A claim for compensation can be made if:

1. An essential service was needed by the claimant; and

2. The claimant or someone on behalf of the claimant asked Canada for an essential service that was denied or delayed in being provided. Or, the claimant needed the essential service, but it was not available or accessible to them (there was a gap in services), even if they did not ask for the service.

What is an "essential service"?

A service is considered essential if the claimant's condition or circumstances required it and the delay in receiving it, or not receiving it at all, caused material impact on the child.

Examples of types and categories of essential services are attached as an appendix to this Framework.

If the claimant needed a service that is not on the list of examples, it may still be considered an essential service under the settlement if not receiving the service had a material impact on the child.

What timeframe is covered?

Claimants are covered by this settlement if they needed the essential service as a child at any time from April 1, 1991 to November 2, 2017.

How to make a claim?

1. If the claimant requested a service from Canada that was delayed or denied, they may provide a copy of the letter, email or other document submitted to Canada requesting the service. If they do not have a copy, they may provide a statutory declaration confirming that they requested the service.

2. If the claimant did not request a service from Canada but required an essential service that was not available or accessible, they need to provide confirmation from a professional saying what essential service they needed, why it was essential and when they needed it, either through historical documentation or contemporary confirmation by a professional.

Confirmation can be in two forms depending on the answer to the following question:

Does the claimant have any kind of historical document stating that an essential service was needed?

If the answer is **YES**, please follow **Procedure A.**

If the answer is **NO**, please follow **Procedure B.**

Procedure A (to be completed if claimant has historical documentation confirming that an essential service(s) was/were needed)

1. Complete the Claim Form (when available).
2. Provide copies of the historical documentation confirming that an essential service(s) was/were needed.
3. If the historical documentation lacks specifics on the confirmed need for the identified essential service, a professional may complete the Professional Confirmation of Essential Services Form.
4. Complete the questionnaire (when available).

Procedure B (to be completed if the claimant has NO historical documentation stating that an essential service(s) was needed.

1. Complete the Claim Form (when available).
2. A professional completes the Professional Confirmation of Essential Services Form (when available).
3. Complete the questionnaire (when available).

What is historical documentation?

Historical documentation refers to old documents such as a health record or an assessment conducted by a health, social care professional, educator, or other professional or individual with expertise and knowledge of the need for this essential service and/or support.

Is there help in claiming compensation?

Yes. Once the claim form and other supporting documents are available, they will be released online at www.fnchildcompensation.ca. Support in completing these forms will be available through the Administrator.

Appendix – Examples of Essential Services

1. Some services provided by, or under the guidance and direction of, health, social care, and educational professionals who specialize in:

    a) Recommending services and supports with activities of daily living and safety in the home, school and community (e.g., occupational therapists, *adapted feeding devices*)

    b) Helping individuals with expressive and receptive language skills (e.g., speech and language pathologists, *augmentative and alternative communication*)

    c) Helping individuals with movement of their hands, arms, and legs (e.g., physiotherapists, *mobility devices*)

    d) Giving and interpreting hearing tests and recommending assistive devices related to hearing (e.g., assessment of hearing by audiologists, *hearing devices*)

    e) Testing vision and recommending corrective eyewear (e.g., optometrists, *advising on eyewear*)

    f) Teaching children with learning needs (e.g., special needs education teachers; supported child development consultants)

    g) Promoting infant, early childhood or adolescent development[1] (e.g., infant development consultants, child and youth workers, or early childhood educators).

    h) Conducting psychoeducational assessments, and provision of counselling (e.g., psychologists, social workers)

    i) Addressing delayed or problematic behaviours (e.g., early childhood educators, behavioural specialists, child and youth workers, social workers,)

    j) Recommending a specialized diet or nutritional intake (e.g., nutritionist, dietitian)

2. Equipment, products, processes, methods and technologies that are recommended in a cognitive assessment or individualized education plan.

3. Medical equipment, such as:

    a) Equipment, products and technology used by people to assist with daily activities (e.g., environmental aids, including lifts and transfer aids and professional installation thereof)

---

[1] Development refers to physical, social, cognitive, and mental health development

b) Products and technology for personal indoor and outdoor mobility and transportation (e.g., mobility aids that include standing and positioning aids and wheelchairs)

c) Hospital bed

d) Medical equipment related to diagnosed illnesses (e.g., percussion vests, oxygen, insulin pumps, feeding tubes)

e) Prostheses and orthotics

f) Specialized communication equipment (e.g., equipment, products, and technologies that allow people to send and receive information that would otherwise be done verbally)

4. Medical transportation related to access to essential services, supports or products where the lack of transportation prevented access to the recommended service (e.g., people in remote/isolated, semi-isolated communities)

5. Specialized dietary requirements

6. Treatment for mental health and/or substance misuse, including inpatient treatment

7. Oral health (excluding orthodontics), such as:

   a. Oral surgery services, including general

   b. Restorative services, including cavities and crowns

   c. Endodontic services, including root canals

   d. Dental treatment required to restore damage resulting from unmet dental needs

8. Respite care

9. Surgeries