Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 44
Date: September 26, 2023
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

Decision

Members: Sophie Marchildon
Edward P. Lustig

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I. Introduction

[1] This is a good day for human rights, First Nations children and families in Canada and a significant step towards reconciliation. The Panel congratulates the parties and all people involved in reaching this milestone and more importantly, the Panel recognizes the First Nations children and families who were harmed as a result of Canada's discriminatory practices and whose lives are paving the way for justice. This is the largest settlement of its kind in Canadian history. Sadly, this stems from the magnitude of harms that were inflicted upon First Nations children, families, communities and Nations. Canada ought to bear this in mind as an important reminder so as to never repeat history. The cycle of harm must be broken.

> "History will judge us by the difference we make in the everyday lives of children."
>
> — Nelson Mandela

[2] The Panel honors the First Nations leadership in Canada who voiced the importance of not leaving anyone behind and the First Nations parties' courage for leading further negotiations. It took great leadership for the Assembly of First Nations (AFN) and Canada to collaborate and arrive at the previous historic Final Settlement Agreement (FSA). It took even greater leadership from the AFN and Canada's Ministers and their teams to receive the Tribunal's criticism of some aspects of the FSA (for example, leaving out some of the victims/survivors already recognized by this Tribunal), consult the Chiefs-in-Assembly, bring the Caring Society back to the negotiation table and arrive at this transformative and unprecedented Revised Settlement Agreement.

[3] The Tribunal declined to fully endorse the previous FSA because it did not fully satisfy the compensation orders the Tribunal found the victims/survivors were entitled to under the *Canadian Human Rights Act*, RSC 1985 c H-6. The Tribunal in rejecting the previous FSA was really hoping for a better outcome as a result of further negotiations. The Tribunal believes that even if this took many additional months to arrive to this Revised Settlement, it was well worth it for the victims/survivors of human rights violations.

[4] According to the parties, this is the largest compensation settlement in Canadian history so far and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister. The Tribunal believes this was an example of grace under pressure and commends the parties to the Revised Agreement and everyone involved for this outstanding achievement that will provide some measure of justice to First Nations children and families who have unjustly suffered because of their race instead of being treated honorably and justly.

[5] First Nations children ought to be honored for who they are - beautiful, valuable, strong and precious First Nations persons. Governments, leaders and adults in any Nation have the sacred responsibility to honor, protect and value children and youth, not harm them.

[6] Complete justice will be achieved when First Nations children will have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have when systemic racial discrimination no longer exists. The compensation in this case is only one component. The Tribunal, assisted meaningfully by the parties, has always focused on the elimination of the systemic racial discrimination found and the need to prevent similar practices from arising. The Tribunal has found this requires a complete reform. Making available to First Nations children and communities the rights, opportunities and privileges they have been denied and ensuring Canada ceases the discriminatory practices at issue in this case requires a transformation that will protect generations to come. This continues to be the Tribunal's focus.

[7] The Panel is grateful for the Commissions' human rights centered contributions and for the Caring Society's courageous leadership ensuring that no child is left behind and that no one loses entitlement to compensation ordered by the Tribunal. The Panel also commends the First Nations Chiefs-in-Assembly at the AFN for their leadership in adopting a resolution in the spirit of reconciliation and prompting further negotiations on compensation to ensure that no child is left behind.

[8] The Panel recognizes the valuable contributions of the Chiefs of Ontario and the Nishnawbe Aski Nation.

[9] The Panel also recognizes Amnesty International's past contributions on this important issue of compensation.

[10] Finally, the Panel recognizes the AFN's and the Caring Society's instrumental role in an effort to obtain meaningful compensation for First Nations children and families.

[11] The Panel wishes to recognize and honor the true overcomers and heroes in this case, the First Nations children and families.

[12] The Panel Chair speaks **peace** to every First Nations child, youth and young adult's heart in Turtle Island (Canada) and, to all First Nations individuals and their Communities and Nations.

[13] The Panel is pleased that Canada demonstrated effective leadership in going back to negotiations and for doing the right thing in reincluding the victims/survivors that were left out of the previous settlement agreement (2022 FSA).

[14] The work is not finished, there is much more to do. Compensation is but one aspect of this case. Racial and systemic discrimination must be eliminated and similar practices must not arise or be perpetuated.

[15] Finally, while there is more to do, this milestone deserves to be celebrated as it will be transformative for thousands of First Nations children and families.

A. Context

[16] In 2016, the Tribunal released *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was that

the FNCFS Program failed to provide adequate prevention services and sufficient funding. This created incentives to remove First Nations children from their homes, families and communities as a first resort rather than as a last resort. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that beyond providing adequate funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal established Canada's liability for systemic and racial discrimination and ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief and program reform and financial compensation so as to allow immediate change followed by adjustments and finally, sustainable long-term relief. This process would allow the long-term relief to be informed by data collection, new studies and best practices as identified by First Nations experts, First Nations communities and First Nations Agencies considering their communities' specific needs, the National Advisory Committee on child and family services reform and the parties.

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

> **Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Canadian Charter of Rights and Freedoms*, the *Convention on the***

> ***Rights of the Child*** **and the** ***UNDRIP*** **to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.** (emphasis changed)

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

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

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

[21] The Tribunal encouraged the parties for years to resolve compensation issues.

[22] The Panel was clear in 2016 CHRT 10 that it hoped that reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than

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

[23] The issue left unresolved, the Tribunal was obligated to rule on compensation and the compensation process. In addressing compensation, the Tribunal was required to make challenging decisions addressing novel issues. Canada advanced multiple arguments opposing compensation. The Tribunal has made legal findings based on the evidence and linking the evidence to harms justifying orders under the *CHRA*. This exercise is made by the Tribunal who exercise a quasi-judicial role under quasi-constitutional legislation. The Tribunal, guided by all the parties in this case, including the AFN, made bold and complex decisions in the best interests of First Nations children and families. The Tribunal's decisions have been upheld by the Federal Court. Now that the Tribunal has issued those compensation decisions on quantum and categories of victims, they are no longer up for negotiation. They are a baseline. Negotiation involves compromise, which can sometimes result in two steps forward and one step back and this may be found acceptable by the parties to the negotiation. However, negotiation cannot be used to take a step backwards from what the Tribunal has already ordered.

[24] Once it found systemic discrimination, the Panel worked with rigor to carefully craft sound findings of fact and law that recognized fundamental rights for First Nations children and families in Canada and protect and vindicate those rights.

[25] Indeed, on September 6, 2019, the Tribunal rendered its decision on compensation (2019 CHRT 39), wherein it ordered Canada to compensate and pay interest to: (i) certain victims of discrimination under the FNCFS Program who were removed from their homes, families and communities; (ii) their parents or caregiving grandparents and, (iii) certain victims of Canada's discriminatory application of Jordan's Principle. Included in the decision were First Nations children on-reserve and in the Yukon who were unnecessarily removed from their homes and communities from 2006 onwards (later confirmed to include children

in out-of-home placements on January 1, 2006), and First Nations children who were denied the essential services needed, or received the essential services after an unreasonable delay, because the Government of Canada failed to meet the legal requirements of Jordan's Principle (the "Compensation Entitlement Order").

[26] The Tribunal ordered Canada to consult with the Caring Society and the AFN to develop a compensation distribution framework to arrive at a final order for the distribution of the compensation ordered.

[27] On October 4, 2019, Canada applied for judicial review of the Compensation Entitlement Decision and sought a stay of the Tribunal's proceedings. After the Federal Court dismissed the stay motion on November 27, 2019, Canada agreed to work with the Caring Society and the AFN on the framework.

[28] On February 21, 2020, the Caring Society, the AFN, and Canada submitted a first draft compensation framework to the Tribunal (the "Compensation Framework"). From February 2020 to December 2020, the Caring Society, the AFN and Canada worked to finalize the Compensation Framework. While many aspects of the compensation framework were the result of negotiation and consensus, certain issues were resolved through adjudication before the Tribunal.

[29] The Tribunal ultimately addressed the issues raised before it by the parties and issued further orders clarifying various elements of its Compensation Entitlement Order, including: the age of majority, eligibility for those who remained in care as at Jan 1, 2006 and the eligibility for the estates of deceased victims (2020 CHRT 7); the definitions of "service gap", "essential service" and "unreasonable delay" for the purpose of Jordan's Principle compensation (2020 CHRT 15); the definition of a "First Nations child" in relation to eligibility under Jordan's Principle (2020 CHRT 20); and that compensation owing to minor beneficiaries and those without legal capacity be held in trust (2021 CHRT 6).

[30] On February 12, 2021, the Tribunal approved the final Compensation Framework as revised by the parties (2021 CHRT 7). While this Order substantively addressed aspects of the distribution process for compensation, the parties understood that a significant amount of future work would be required by the parties to address items which included, but were

not limited to, how eligibility would be determined, the operation of the implementation process and the continued role of the Tribunal. This work remained subject to Canada's judicial review of the Compensation Entitlement Order and the Tribunal's orders regarding eligibility under Jordan's Principle (2020 CHRT 20 and 2020 CHRT 36), as addressed in Federal Court File Nos. T-1621-19 and T-1559-20.

[31] The judicial reviews were heard on June 14-18, 2021. On September 29, 2021, the Federal Court dismissed Canada's applications in their entirety (2021 FC 969).

[32] On October 29, 2021, Canada appealed the Federal Court's order (2021 FC 969) upholding the Compensation Entitlement Decision to the Federal Court of Appeal (Federal Court of Appeal File No. A-290-21).

The Class Actions and Procedural History of the Revised Final Settlement Agreement

[33] 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 on April 1, 1991 (Federal Court File No. T-402-19) ("Moushoom Class Action").

[34] On January 28, 2020, a proposed class action was filed by the AFN and other representative plaintiffs seeking compensation for removed First Nations children and those who experienced discrimination under Jordan's Principle (Federal Court File No. T-141-20) ("AFN Class Action"). A separate class action involving Canada's discrimination in the provision of essential services, products and supports prior to December 2007 was commenced on July 16, 2021 by the AFN and the representative plaintiff Zacheus Trout (Federal Court File No. T-141-20) ("Trout Class Action").

[35] The Moushoom Class Action and the AFN Class Action were consolidated on July 7, 2021 and certified on November 26, 2021 (2021 FC 1225). The Trout Class Action was certified on February 11, 2022 (together, the three class actions are referred to as the "Federal Court Class Actions").

[36] On December 31, 2021, the parties to the to the Federal Court Class Actions concluded an Agreement-in-Principle ("AIP") addressing compensation. On June 30, 2022, a final settlement agreement was reached (the "2022 FSA") and in July 2022, the AFN and Canada brought a motion to the Tribunal seeking a declaration that the 2022 FSA was fair, reasonable, and satisfied the Compensation Entitlement Order and all related clarifying orders (the "Joint Motion"). In the alternative, AFN and Canada sought an order varying the Compensation Entitlement Order, the Compensation Framework Order and other compensation orders, to conform to the 2022 FSA.

[37] The Panel agreed the victims/survivors have been waiting long enough and emphasized that they could have been compensated at any time since the Tribunal's decision in 2016 and even more so after the *Compensation Decision* in 2019.

[38] The Tribunal heard the Joint Motion in September 2022 and dismissed the Joint Motion by letter decision on October 25, 2022, with full reasons set out in 2022 CHRT 41 and can be accessed online at: https://canlii.ca/t/k08tm.

[39] The Tribunal in 2022 CHRT 41 on the Joint Motion found that the 2022 FSA substantially satisfied the Compensation Entitlement Order. However, the Tribunal identified three (3) key areas where the 2022 FSA departed from the compensation orders, disentitled or reduced entitlements for certain victims already entitled to compensation which, as it will be explained below, was contrary to human rights principles carefully applied in the Tribunal's findings on compensation and corresponding orders. These derogations included the following:

> (a) children removed from their homes, families and communities and placed in non-ISC funded placements were improperly excluded from receiving compensation (2022 CHRT 41 at paras. 283-331);
>
> (b) the estates of deceased caregiving parents and grandparents were excluded from receiving compensation, which was not in keeping with 2020 CHRT 7 (2022 CHRT 41 at paras. 332-350);
>
> (c) certain caregiving parents and grandparents would receive less compensation either in circumstances of multiple removals or if there was an unexpected number of claimants which required a reduction in compensation

> to the class to ensure that all caregiving parent and grandparent victims received compensation (2022 CHRT 41 at paras. 351-360).

[40] The Tribunal also raised concerns regarding eligibility under Jordan's Principle and the uncertainties introduced in the 2022 FSA regarding the class action approach, with questions around the meaning of "significant impact" and the definition of "essential service". The Tribunal determined that uncertainty existed with respect to whether the implementation of Jordan's Principle under the 2022 FSA would result in the victims identified by the Tribunal receiving $40,000.

[41] The Tribunal also expressed concern about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390).

[42] The Tribunal said in 2022 CHRT 41 at paragraph 10:

> that the same Panel that made those liability findings against Canada is asked to let go of its approach to adopt a class action approach serving different legal purposes. The Panel was conscious that class actions were forthcoming and made sure in its compensation decision they were not hindered by the Tribunal's compensation process. Now it is the Tribunal's decisions that are being hindered by the FSA applying an early-stage class action lens. Indeed, the parties did not finalize the compensation distribution process to allow for the distribution of funds for the compensation already ordered by this Tribunal in 2019. They pursued another approach instead that did not fully account for the CHRA regime and the Tribunal's orders.

[43] Notably, in 2022 CHRT 41 at paragraph 169, the Tribunal stated the question of quantum of compensation was never up for discussion and no suggestion was made by the Tribunal or the parties to modify the quantum of compensation or to reduce or disentitle categories already recognized by the Tribunal in its compensation orders. In fact, this aspect was final and supported by findings and reasons and sent a strong deterrent message to Canada and a message of hope to the victims/survivors whose rights were vindicated by those findings and corresponding orders. Further, the Tribunal's reasons illustrate the significant difference between systemic human rights remedies and those flowing from tort law. The Tribunal noted the important purpose of 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.
> (2019 CHRT 39 at para 14).

[44] The Tribunal reiterated that in the Compensation Entitlement Decision, 2019 CHRT 39, at para. 206, the Tribunal also made clear that its obligations are to safeguard the human rights of the victims/survivors 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 in this case.

[45] The Tribunal in its reasons rejecting the 2022 FSA, the Tribunal mentioned that it is responsible for applying the *CHRA* and the human rights framework reflected in that legislation.

[46] Moreover, in 2022 CHRT 41, the Tribunal reasoned as follows:

> More importantly, the Tribunal frowns on reducing compensation or disentitling victims/survivors once they have been vindicated at the Tribunal and upheld by the Federal Court. This dangerous precedent would send a very negative message to victims/survivors in this case and other human rights cases in Canada and could potentially become a powerful deterrent to pursue human rights recourses under the *CHRA*. Victims/survivors would never have the peace of mind that their substantiated complaints and awarded remedies would be forthcoming to them if, at any time before remedies are implemented, these remedies can be taken away from them without the need for a successful judicial review (See at, para. 259).
>
> This is even more troubling when we consider the nature of the complaints before the Tribunal in this case. The very nature of human rights rests upon the protection of vulnerable groups. From the beginning the Tribunal found and wrote that this case is about children and the Tribunal's mandate to eliminate discrimination and prevent similar practices from arising. Permitting reductions or disentitlements of compensation for victims/survivors who have been recognized in evidence-based findings and corresponding orders does not breathe life into human rights. Rather, it takes its breath away, (See at, para. 260).
>
> This cannot be how the human rights regime is administered in Canada (See at, para. 261).

> Once rights have been recognized and vindicated (which is no small task for complainants and victims who often face powerful respondents challenging their claim at every turn), they
>
> are no longer up for debate by outside actors or respondents who may disagree with the orders made against them and therefore cannot contract out of their human rights obligations under the *CHRA* (See 2022 CHRT 41. at, para. 236).
>
> The Tribunal cannot overstate the importance of securing victims/survivors' rights across Canada. […] Human rights are fundamental rights that are not intended to be bargaining chips that parties can negotiate away. Similar to how human rights
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> legislation establishes minimum standards parties cannot contract out of, the Tribunal's compensation orders generate binding compensation obligations on Canada. Canada cannot contract out of these obligations through an alternative
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> Proceeding, (See 2022 CHRT 41, at, para. 502).

[47] The Tribunal urged the parties to this proceeding and the parties to the Federal Court Class Actions to work together to allocate additional funds to cover all victims/survivors entitled to compensation as already ordered by the Tribunal and to uphold the human rights regime in a manner that respects and acknowledges those orders and the pain and suffering of all victims/survivors identified by the Tribunal in its previous reasons and orders.

[48] On December 7, 2022, the First Nations-in-Assembly unanimously adopted Resolution 28/2022 regarding compensation for the victims of Canada's discrimination. Resolution 28/2022 included the following critical direction:

> Support compensation for victims covered by the 2022 FSA on compensation and those already legally entitled to $40,000 plus interest under the Canadian Human Rights Tribunal (CHRT) compensation orders to ensure that all victims receive compensation for Canada's wilful and reckless discrimination.
>
> Support the principles on which the FSA is built, including taking a trauma-informed approach, employing objective and non-invasive criteria, and ensuring a First Nations-driven and culturally informed approach to compensation individuals.
>
> Continue to support the Representative Plaintiffs and all victims of Canada's discrimination by ensuring that compensation is paid out as quickly as

> possible to all those who can be immediately identified and to continue to work efficiently to compensate those who may need more time.

[49] With the guidance set out by the Tribunal in 2022 CHRT 41 and the direction and support provided by First Nations leadership, the parties to the Federal Court Class Actions and the Caring Society engaged in negotiations resulting in the Revised Agreement. The Revised Agreement was approved by the First Nations-in-Assembly on April 4, 2023, and executed by the parties to the Federal Court Class Actions on April 19, 2023. As the Caring Society was not a party to the Federal Court Class Actions, the AFN, the Caring Society and Canada executed Minutes of Settlement in this proceeding on April 19, 2023.

B. Issue to be decided by this Tribunal

[50] The parties submitted the following notice of motion to the Tribunal:

> **MOTION FOR APPROVAL OF THE REVISED COMPENSATION FINAL SETTLEMENT AGREEMENT and CONSENT RELIEF OF THE ASSEMBLY OF FIRST NATIONS, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ATTORNEY GENERAL OF CANADA**
>
> **THIS CONSENT MOTION IS MADE** under Rule 3 of the *Tribunal's Rules of Procedure (Proceedings Prior to July 11, 2021)* and is for orders under paragraph 53(2)(b) of the *Canadian Human Rights Act* (the "CHRA") and under Rule 1(6) and 3(2)(d) and pursuant to the Tribunal's continuing jurisdiction in this matter. …
>
> **AND TAKE NOTICE THAT THIS CONSENT MOTION IS FOR** orders confirming that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Final Settlement Agreement (the "**Revised Agreement**"), made respecting Federal Court File Nos. T-402-19 (*Moushoom et al v Attorney General of Canada*), T-141-20 (*Assembly of First Nations et al v His Majesty the King)* and T-1120-21 *(Trout et al v Attorney General of Canada)* dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding.

[51] The parties jointly submit that the Revised Agreement presented to the Tribunal on this motion heeds the Tribunal's guidance and the direction from the First Nations-in-Assembly: the derogations have been remedied; the uncertainties in relation to eligibility under Jordan's Principle have been addressed; the approach to compensation in relation to

the estates of parents/caregiving grandparents has been varied to ensure a better outcome for children impacted by Canada's discrimination; and compensation to parents and caregiving grandparents under Jordan's Principle has been aligned with the spirit and intent of the Tribunal's finding in this case. The Assembly of First Nations, the Caring Society, the Human Rights Commission, the Chiefs of Ontario, the Nishnawbe Aski Nation and Canada consent to this motion. The Revised Agreement can be consulted online at: https://afn.bynder.com/m/21fa33f66e9b73d1/original/04-2023-Compensation-Final-Settlement-Agreement-April-17-with-schedule

C. Decision

[52] After careful consideration, the Panel agrees.

The joint motion is allowed.

D. Legal framework

[53] The Tribunal relies on the same legal framework detailed in length in its reasons in 2022 CHRT 41 to support the finding that it has jurisdiction to determine if the Revised Settlement fully satisfies the Tribunal's compensation orders. The Panel outlined the proper approach to reviewing a request for a consent order in 2020 CHRT 36 at para. 51:

> The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[54] Moreover, the legal framework pertaining to the requested orders will be addressed in turn in the analysis below.

E. Analysis

(i) Has the Revised Agreement addressed the Tribunal's concerns raised in 2022 CHRT 41 and does it now fully satisfy the Tribunal's orders?

[55] The Tribunal will not embark on a clause-by-clause comment of a very voluminous document. The Tribunal has carefully reviewed the Revised Agreement and will comment only on the parts that it had found problematic in 2022 CHRT 41 and that needed changes in order to fully satisfy the Tribunal's orders. In sum, the Tribunal agrees that the rest of the Settlement Agreement and claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. The Revised Agreement does not require children to testify and will be culturally appropriate and safe. This formed part of the Tribunal's compensation orders. Indeed, the Tribunal stressed the importance of avoiding the retraumatizing of children in its compensation orders. The Revised Agreement adopts a trauma informed approach best suited in this case. Further, subject to the Federal Court's approval, a Settlement Implementation Committee composed of five members will be established and will include two First Nations members and three Counsel members. As per the Tribunal's orders, subject to some exceptions, the compensation will be paid directly to the victims/survivors or in a trust fund until they have reached the age of majority as determined by law and administered by a Court appointed independent Trustee. Upon careful consideration and, in applying a human rights lens, the Tribunal finds the Revised Agreement in the best interests of First Nations children and families who are entitled to compensation under the Tribunal's orders.

[56] For the above reasons, the Tribunal only needs to focus on the sections that will be discussed below.

[57] Of note, the Revised agreement now includes a request for an apology from the Prime Minister, standing in Federal Court for the Caring Society, a longer opt-out deadline for victims/survivors and interest on compensation as per the Tribunal's compensation orders. The Tribunal will also discuss these in turn below.

[58] While the Tribunal ruled that a settlement need not mirror all the Tribunal's compensation orders as long as the spirit of its orders is honoured, it cannot disentitle, reduce or strip away the victims/survivors' compensation guaranteed in the Tribunal's orders. Therefore, ensuring this is remedied in the Revised Agreement is the focus and the framework in the Tribunal's analysis of the Revised Agreement.

[59] A summary of joint submissions from the parties is reproduced below. The Tribunal decided that it was wise to use the parties' own description of how they consider having addressed the Tribunal's concerns instead of rewording them. The Tribunal will address them in turn and provide its reasons under each of the parties' descriptions.

(ii) The Derogations Regarding Kith Placements and Multiple Removals Have Been Remedied

[60] In 2022 CHRT 41, the Tribunal found that the 2022 FSA settlement amount of $20,000,000,000 did not include a budget to compensate First Nations children removed from their homes, families and communities who were placed in placements not funded by Canada ("Non-ISC Funded Placements").

[61] The joint parties submit that the Revised Agreement now includes compensation for First Nations children removed from their homes, families and communities and placed in alternative non-ISC funded placements and compensation for their parents/caregiving grandparents. These placements are referred to as "Kith Placements" in the Revised Agreement. Children placed in Kith Placements, as well as their parents/caregiving grandparents, are entitled to $40,000 plus applicable interest.

[62] Article 7 of the Revised Agreement sets out the principal eligibility requirements for First Nations children removed from their homes, families and communities, and placed in Kith Placements. Given the challenges with the available documentation for Kith Placements, the parties will craft a separate and unique approach for the verification of eligible class members under this category. The approach will involve the participation of the Caring Society, as well as input from youth in care and youth formerly in care and First Nations Child and Family Services Agencies ("FNCFS Agencies"), (See, Article 7.01(8),

Revised Agreement, Exhibit “F” to the AFN Affidavit). No member of the Kith Child Class will be required to submit to any form of interview or *viva voce* (oral) evidence taking and the claims process will be designed with the goal of minimizing risk of causing harm. Further, the joint parties state that compensation in relation to Kith Placements will require a specific approach given that data relevant to Kith Placements is often collected in a different manner than those in ISC-funded placements. The process for determining eligibility will be structured with guidance from records management experts, youth in care and youth formerly in care, and input from the Caring Society. The Revised Agreement fully satisfies the Compensation Entitlement Order in relation to these victims (See, Article 7.01(1) and (2), Revised Agreement, Exhibit “F” to the AFN Affidavit).

[63] The Revised Agreement provides for a budget of $600 million for the Kith Child Class and $702 million for the Kith Family Class, (See, Article 7.02 (5) and 7.04(2), Revised Agreement, Exhibit “F” to the AFN Affidavit). These are new amounts being committed by Canada and are not a redistribution of funding under the 2022 FSA. These amounts meet or exceed the Caring Society’s estimates of the budget required to compensate the likely number of victims in each category, (See Annex A).

[64] As set out in Annex A, the Caring Society based its estimates on data obtained from iterations of the Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS-2019) providing information on placements for First Nations children. The Caring Society reviewed existing data from the Canadian Incidence Study on Reported Child Abuse and Neglect (2019 FN-CIS) to extrapolate the number of First Nations children in Non-ISC Funded Placements.

[65] This data was used to extrapolate population sizes based on information available regarding children in “ISC-funded” placements, provided by the Parliamentary Budget Officer and experts retained by the class action parties. Recognizing the ongoing gaps in child welfare data, the evidence used for these calculations is the best available. The data is valid and reliable and the Caring Society’s calculation assumptions are conservative, in order to avoid underestimating the number of potential victims.

[66] Table 16 of the 2019 FN-CIS attached to Dr. Blackstock's affidavit dated, June 30, 2023, as Exhibit "F", notes that 2,365 First Nations children were removed to placements not funded by Canada in 2019. This amounted to roughly 40% of all placements made in 2019.

[67] The Caring Society also verified the proportion of placements not funded by Canada in the 2003 report Understanding Overrepresentation of First Nations Children in Canada's Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003) (also known as Mesnmimk Wasatek: catching a drop of light) ("2003 FNCIS"), which estimated 1,554 First Nations children being removed to placements not funded by Canada in 2003. This amounted to roughly 45% of all placements made in 2003. A true copy of Table 7-6 from the 2003 FN-CIS is attached to Dr. Blackstock's affidavit dated, June 30, 2023, as Exhibit "G".

[68] Using these two figures, the Caring Society assessed that the estimated number of children removed to placements funded by ISC under the FNCFS Program from January 1, 2006 to March 31, 2022 (including children already in care on January 1, 2006) would represent roughly 57.5% of all First Nations children living on-reserve who had been removed from their homes.

[69] The Caring Society is of the view that the budgeted amounts for the Kith Child Class and the Kith Family Class are fair and reasonable. These amounts reflect the Caring Society's own work to extrapolate, based on existing data, the number of First Nations children likely in the Kith Child Class in order to evaluate the sufficiency of proposed budgets, (See Dr. Blackstock' s Affidavit dated, June 30, 2023, at para 40). As a result, the Caring Society is comfortable and confident that the budgets in relation to Kith Placements will fully satisfy the Tribunal's orders in relation to these children and families.

[70] The Caring Society also received analysis of the 2019 FN-CIS data from Dr. Fallon regarding the proportion of First Nations children resident on-reserve who were removed in 2019 and placed in Non-ISC Funded Placements located more than a 30-minute drive from their residence. A true copy of this analysis is attached to Dr. Blackstock's affidavit dated, June 30, 2023, as, Exhibit "H". This data was used to serve as a proxy for children placed

outside of their communities. Data regarding unfunded placements with “kith” (adults who do not have a blood relationship to the child, also referred to as “fictive kin”) as opposed to “kin” (a child’s relatives) are unclear. A 2017 Policy Brief from the Children’s Advocacy Alliance in Nevada estimated that 20-30% of children in “kinship” places are placed with “fictive kin” (i.e., individuals to whom the child is not related, but with whom there is a relationship of trust with the family). A true copy of the Children’s Advocacy Alliance Policy Brief is attached to Dr. Blackstock’s affidavit dated, June 30, 2023, as Exhibit “I”.

[71] Furthermore, data in a 2017 report produced by researchers at the University of Melbourne noted that 17.5% of children in statutory kinship care in Australia were placed with non-relatives. A true copy of Table 2 from this report is attached to Dr. Blackstock’s affidavit, dated, June 30, 2023, as Exhibit “J”.

[72] The Attorney General submits that during the negotiations that followed the Tribunal’s rejection of the 2022 FSA, Canada agreed to add an additional $3.34394 billion to the $20 billion already committed to in the Agreement-in-Principle and June 2022 Final Settlement Agreement. This amount includes additional funds to ensure that: a. Non-ISC funded or “kith” placements are compensated, including children and their caregivers, (See Dr. Valerie Gideon’s affidavit dated June 30, 2023, at para. 10).

[73] The victims/survivors forming the Kith Child Class are First Nations children placed with a Kith Caregiver (an adult who is not a member of the Child’s Family who lived off reserve and cared for the child without receiving funding in terms of the placement), in a Kith Placement (a First Nations Child residing with Kith Caregiver and the placement was associated with a child welfare authority) during the period between April 1, 1991, and March 31, 2022, thus extending the compensation for these children contemplated by the Tribunal back to the advent of the Direction 20-1, in line with the timeline for compensation for the Removed Child Class. Members of the Kith Child Class are not eligible for enhancements, but will receive the full compensation they would have received under their CHRT entitlement plus Tribunal-directed interest, which has been preserved in the Revised Agreement by way of an Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2), 7.02(2)). The amount of $600 million with respect to the budget for the Kith Child Class was drawn from the Caring Society’s evidence-based consideration of the potential class size for

children between 2006-2022. The AFN defers and relies upon the Caring Society's submissions as to the 2006-2022 class size.

[74] With respect to the caregiving parents or in their absence, caregiving grandparents of Kith Child Class members, compensation has been limited to the period of the Tribunal's Compensation Orders, being from January 1, 2006 to March 31, 2022, (See, Revised Agreement art. 7.03(1)). These Kith Family Class Members, (See, Revised Agreement art. 1.01 definition "Kith Family Class"), similar to the Removed Child Family Class, are not eligible for compensation if they abused an eligible child in alignment with the Tribunal Compensation Orders, (See, Revised Agreement art. 7.03(2)). The Kith Family Class members may also receive multiples of compensation where multiple children were removed and placed in a Kith Placement between January 1, 2006 and March 31, 2022, (See, Revised Agreement art. 7.03 (4)). The budget for the Kith Family Class was set at $702 million in compensation, which was extrapolated from the projected size of the Kith Child Class over the period covered by the Tribunal's compensation orders, (See Dr. Gideon's affidavit dated June 30, 2023, at. para. 55). The AFN again defers to the Caring Society in this regard.

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

[76] Given this category of beneficiaries was found to have been excluded completely under the 2022 FSA, the Tribunal needs to determine 1) Does the Revised agreement now include this category of beneficiaries previously excluded under the 2022 FSA? 2) If the answer is yes, is this category of beneficiaries included in a fair and equitable manner ensuring there are sufficient compensation funds set aside for the compensation ordered by this Tribunal. In order to make this finding, the Tribunal must also look at the evidence provided and determine if the process to locate the beneficiaries is fair and, if this process is reasonable and supported by reliable evidence.

[77] Further, the Tribunal explained its jurisdiction to analyse the 2022 FSA in order to determine if it fully satisfies the Tribunal's orders in 2022 CHRT 41. The Tribunal continues to rely on those legal findings and framework. Briefly, the Tribunal found that it was not functus officio to consider if the 2022 FSA fully satisfies the Tribunal's orders. The same reasoning applies here for the Revised Agreement. In sum, the purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders. A careful reading of the Tribunal's decisions makes this clear (See, para. 513). The Tribunal detailed its reasons at length in the 2022 CHRT 41 and they will not all be repeated here. The Tribunal found this category of victims and survivors was excluded from the 2022 FSA and did not reflect the Tribunal's compensation orders.

[78] The Tribunal stated at para. 297:

> (…) the systemic and racial discrimination is focused on how the Federal FNCFS Program adversely impacted First Nations children and families on reserve and in the Yukon, the Tribunal did not focus on ISC funded placements.
> (emphasis omitted)

[79] Further, at paragraph 314, the Tribunal found that:

> The Panel agrees with the Caring Society that there appears to be a fundamental misunderstanding regarding the scope of Canada's discriminatory conduct in this case: the Tribunal ordered compensation for Canada's conduct (including the under-funding of prevention services and least disruptive measures) incentivizing children being unnecessarily moved from their home, family and community during child welfare involvement. The

> case did not address whether a child was placed in care funded by ISC after their removal. The Tribunal never limited Canada's liability, and children's eligibility, based on whether a child's placement after removal was funded by ISC. Canada's funding of actual maintenance costs contributed to the systemic racial discrimination by creating an incentive to place children in care but did not limit discrimination to those children placed in care funded by ISC. The Panel's experience throughout has been to focus on the harm experienced by the affected children based on Canada's discriminatory an underfunded provision of child and family services.

[80] Moreover, at paragraph 317, the Tribunal found:

> [317] The Tribunal recognized that removing a child from their family is always a harmful event and particularly problematic when it could have been prevented with appropriate services. The Tribunal found that the discriminatory underfunding of prevention services increased the likelihood of children being unnecessarily removed from their homes (2016 CHRT 2 at paras 314 and 346; 2019 CHRT 39 at paras 165 and 177). This initial removal was discriminatory regardless of whether the child's subsequent placement was funded by ISC.

[81] Furthermore, at paragraph 472 The Tribunal found that the:

> Tribunal's main reason not to endorse the FSA is that it derogates from the Tribunal's existing orders in reducing compensation to some victims/survivors to accommodate the fixed quantity of funds under the FSA and the much larger number of victims/survivors in the class actions competing for these funds. No substantive findings or orders have been made concerning the victims in the class actions, yet in the FSA some displace some of the victims/survivors whose rights have been vindicated in these proceedings. In others, those victims/survivors had to be included for the Tribunal to make a finding that the FSA fully complied with the Tribunal's orders.

[82] Moreover, the Panel agreed with the AFN that compensation is linked to the systemic discrimination found by this Tribunal in the provision of services through the Federal FNCFS Program. However, the Tribunal found that the nuance newly made by the AFN and Canada did not reflect the spirit of the Tribunal's rulings. It transformed the focus from what led to the removals to who pays for a removed child's care (See, 2022 CHRT 41 at, para. 331).

[83] Upon consideration, the Tribunal accepts the joint parties' uncontested evidence. The data analysis and process to identify this category of beneficiaries is fair and reasonable and while this is untested evidence, all parties consent on this point. Moreover, the Tribunal finds the evidence provided is relevant and reliable and supports a finding on a balance of

probabilities in favour of this process adopted on consent of the parties. The Tribunal finds the evidence demonstrates that it is more probable than not that the compensation funds will cover all the victims/survivors included in this category of beneficiaries that is now aligned with the Tribunal's compensation orders.

[84] For these reasons, the Tribunal finds the victims/survivors in this category of beneficiaries have now been included in the Revised Agreement in full compliance with this Tribunal's orders under section 53(2) of the *CHRA* and as identified in 2019 CHRT 39 and further clarified in 2022 CHRT 41. Furthermore, the Tribunal has jurisdiction to make the requested order and finds this fully satisfies the Tribunal's compensation orders on this category of victims/survivors.

(iii) The Revised Agreement now provides compensation in relation to multiple removals as set out in the Compensation Entitlement Order

[85] In 2022 CHRT 41, the Tribunal found the 2022 FSA fell short in terms of the quantum of compensation ordered by this Tribunal for this category of victims/survivors. The Tribunal reasoned as follows:

> [356] The Tribunal's orders account for the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination. The FSA reduces the amount of compensation for those victims/survivors who were retraumatized and suffered greatly. Losing more than one child heightens the presence of a willful and reckless behavior; it does not reduce it. The Tribunal emphasized that, given this was the worst-case scenario, maximum compensation should be paid for the removal of each child. While the harm suffered warrants more than $40,000 per child removed, the *CHRA* places a cap on compensation. The FSA chips away at the heart of the willful and reckless discriminatory practice found and the orders that signal to Canada that its behavior was devoid of caution and caused compounded harm to parents and grandparents in removing more than one child.
>
> [357] Those findings were made after carefully considering the evidence and submissions and nothing in this joint motion changes this. While the Tribunal understands the need for compromise as part of the settlement negotiations, the result is that the Tribunal orders that recognized this category of victims/survivors will be significantly reduced not based on evidence but rather

> to ensure everyone can receive some compensation within the fixed pot of compensation funds.

[86] Therefore, the Tribunal made orders to ensure that parents or grandparents who had children in their care who were removed as a result of the systemic racial discrimination found would receive the maximum compensation of $40,000 under the *CHRA* per child removed. This means one child removed: $40,000, two children removed: $80,000, three children removed: $120,000, etc. In the 2022 FSA, there was an amount of maximum $ 60,000 for multiple removals of children which did not comply with the Tribunal's orders.

[87] In response, the class action parties, with the assistance of the Caring Society, contemplated the number of claimants who could potentially be able to claim for multiple removals and developed a budget in the amount of $997 million for same, which was accepted by Canada and incorporated into the settlement funds of the Revised Agreement (See Dr. Valerie Gideon's Affidavit dated June 30, 2023, at paras. 57-59 and Revised Agreement art. 6.06(6)). While the Revised Agreement provides for the payment for multiplications for all members of the Removed Child Family Class, it does place some restrictions on those members who do not have an existing entitlement under the Tribunal's Compensation Orders. This does not impact upon those with an existing CHRT entitlement. The restriction for non-CHRT compensation includes a cap of $80,000 in compensation for those who had two or more children removed between the period of April 1, 1991 and December 31, 2005 (and who were no longer in care on January 1, 2006) and Stepparents, (See, Revised Agreement 6.06(1)-(4)). These are not deviations from the Compensation Orders as these members of the Removed Child Family Class have no pre-existing Tribunal entitlements. The Revised Agreement also contemplates the potential adjustment of eligibility and compensation for these specific members of the Removed Child Family Class who have no existing Tribunal entitlements, including the potential for increases to the $80,000 cap.

[88] Whether to include stepparents and the appropriate limitations upon eligibility to align with First Nations conceptions of family structures was the subject of a mediation between the Parties to the Revised Agreement in 2022. For clarity:

> a) The Revised Agreement requires that Stepparents, who are not entitled to compensation under the Compensation Orders, be First Nations in order to be eligible for compensation.
>
> b) The requirement that individuals are First Nations does not apply to caregiving parents and/or grandparents who are entitled to compensation under the Compensation Orders.
>
> c) Step-grandparents are not eligible for compensation under the Revised Agreement or under the Compensation Orders, regardless of their First Nations status.

[89] The Revised Agreement also places an $80,000 cap on sequential removals and the potential for adjustment of this compensation on caregiving grandparents where a caregiving parent (not a stepparent) has been approved for compensation under the Revised Agreement with respect to the affected child, (See, Revised Agreement 6.06(4)(c)). The AFN submits that this cap does not amount to a divergence from the Compensation Decision or the Tribunal's related Compensation Orders, but instead acts as a clarification of the Tribunal's intentions, the scope of which was developed by the parties to the Revised Agreement and Minutes of Settlement further to the dialogic process. A minor clarification to the Compensation Framework is required in the following scenario: where a caregiving parent has claimed compensation for the removal of a child, and the child is subsequently removed from the care of a caregiving grandparent, the Revised Agreement limits the multiplication of compensation to $80,000.

[90] In sum, the joint parties submit that a First Nations parent/caregiving grandparent will receive multiple base compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from their family and placed off-reserve with a non-family member. The multiplication of the base compensation payment will correspond to the number of children who were removed from the First Nations parent/caregiving grandparent and placed off-reserve. The parties are of the view that the Revised Agreement now fully addresses this derogation.

[91] The parties to the Tribunal proceedings considered the development of compensation in line with the Tribunals direction, ultimately developing the following text in the Compensation Framework as endorsed by the Tribunal in 2021 CHRT 7 at s. 4.4:

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

[92] The joint parties submit that what is clear upon an examination of the provisions related to the payment for sequential removals is the fact that the Tribunal, via its endorsement of the Compensation Framework, expected that the parents, or one set of caregiving parents, would be entitled to for the removal at first instance, as illustrated by the use of **"shall".** This entitlement for removal at first instance is mirrored in the context of the Revised Agreement, (See, Revised Agreement art. 6.06(1)). The Compensation Framework thereafter establishes the potential for different caregiving grandparent(s) or parents, where not the caregiver at the removal of first instance, to claim compensation for a subsequent removal. To be clear, this provision did not establish an entitlement, but merely the possibility by way of the use of **"may".**

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

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

existing Tribunal entitlement will receive their full due. The Revised Agreement therefore fully satisfies the Compensation Orders in relation to these victims/survivors.

[95] The Tribunal confirms that the joint parties' interpretation of the Tribunal's orders is correct. The Tribunal in its compensation orders envisioned the payment of the maximum compensation amount for each child removed at the first instance. The Tribunal did not envision multiple payments if the same child was removed multiple times. The Compensation Framework adopted by the Tribunal offers this as a possibility however, the parties are correct in their interpretation of the terms "shall" and "may". The Tribunal views the term "shall" as an obligation while the term "may" is only a possibility depending on the specific circumstances that had to be further developed and determined by the parties. The final decision in the event of a disagreement and after the appeal process falls upon this Tribunal under the Compensation Framework in light of the evidence before it. Furthermore, the Draft Compensation Framework includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6). The Tribunal's orders take precedence over the Compensation Framework in the event of any inconsistency.

[96] Moreover, the purpose of the Draft Compensation Framework is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be consistent with, and subordinate to, the Tribunal's orders (1.2).

[97] Further, the AFN submits the Revised Agreement directly ameliorates this derogation. A parent/caregiving grandparent is now entitled under the Revised Agreement to receive multiple base compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from the family home and placed off-reserve with a non-family member, (See, Article 6.06(1), Revised Agreement, Exhibit "F" to the AFN Affidavit). The Revised Agreement sets out that multiplication of the base compensation payment will correspond directly to the number of First Nations children removed and placed off-reserve with non-family, (See, Article 6.06(2), Revised Agreement, Exhibit "F" to the AFN Affidavit).

[98] Again, all parties consent. Consequently, the evidence provided was not refuted or tested. Upon careful consideration of the Revised Agreement and all related materials, the Tribunal finds the available data analysis, calculations and estimates to be fair and reasonable. Moreover, the Tribunal finds the evidence and arguments relevant and reliable and support a finding that the Revised Agreement fully satisfies the Tribunal's orders in this category of victims/survivors entitled to compensation.

[99] For example, the Revised Agreement now budgets $997 million specifically to ensure that parents/caregiving grandparents who have experienced multiple losses of First Nations children from their care will be compensated, (See, Article 6.06(6), Revised Agreement, Exhibit "F" to the AFN Affidavit). Recognizing the limitations of available data, the Caring Society has used the best available evidence to calculate a budget that ought to provide sufficient funds to fully compensate parents/caregiving grandparents for all instances in which their children were removed from their homes, families and communities, (See, Dr. Blackstock's Affidavit dated June 30, 2023, at para 32). As set out in Annex A, the Caring Society's calculations are based on estimates of the number of children impacted by the FNCFS Program provided by the Parliamentary Budget Officer and by experts retained by the class action parties, and on Census data noting the approximate overall number of caregivers per First Nations child.

[100] As mentioned above, the estimates were provided by the Parliamentary Budget Officer and experts and on Census data and accepted by the joint parties. The Tribunal finds this information reliable. Section 50 (3) (c) of the *CHRA* allows the Tribunal to consider other information as part of its consideration of matters. This is particularly useful when the evidence is untested and provided on consent and may have a lesser probative value than when the evidence has been tested in a hearing.

[101] This being said, the Tribunal is satisfied that sufficient evidence and other information support the requested orders for a finding that the Revised Settlement Agreement fully satisfies the Tribunal's compensation orders in this category.

[102] Furthermore, as already mentioned above and in previous rulings, the Tribunal has the authority to clarify its orders. The Tribunal continues to rely on its legal findings and reasons as discussed in previous rulings and further detailed in 2022 CHRT 41.

[103] The Tribunal agrees with the clarification request from the joint parties and in light of the above, finds that it is helpful to provide this further clarification. Therefore, the Tribunal clarifies its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

[104] The Tribunal finds that parents/caregiving grandparents are now entitled under the Revised Agreement to receive multiple compensation payments of $40,000 plus applicable interest if and when more than one child has been removed from their home. Therefore, the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(iv) Estates of Caregiving Parents and Grandparents

[105] The Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (2020 CHRT 7, at paras. 77-151).

[106] The spirit of this order also highlights the important public interest and deterrent components included in the remedy:

> [79] Significantly, Canada ought not benefit from a financial windfall simply because children, youth and family members have died waiting for Canada's discrimination to end. This is particularly so given the Tribunal's findings that Canada's discrimination is wilful and reckless and ongoing in the case of the First Nations Child and Family Service Program. Additionally, the Caring Society contends that one of the purposes of compensation pursuant to the *CHRA* is to remove the economic incentive for discrimination by ensuring that some measure of the cost savings respondents achieve by discriminating are returned to victims. Indeed, allowing Canada to financially benefit due to its own delays in having this case resolved could set a dangerous precedent and entice other respondents to delay cases in the future where a particularly vulnerable group or individual brings a case forward,
> (emphasis added).

[107] In 2022 CHRT 41, the Tribunal found that the 2022 FSA fell short of the compensation ordered by this Tribunal:

> [332] Estates of deceased caregiving parents and grandparents in the FSA are not entitled to direct financial compensation unless the caregiver passes away after submitting an application for compensation. In contrast, the Tribunal's orders provide compensation to the estates of eligible caregivers regardless of when they passed.
>
> [333] This is a clear derogation from the Tribunal's orders.

[108] In response to the Tribunal's concerns regarding the estates of deceased caregiving parents and caregiving grandparents, the Revised Agreement at, section 14.03(1)-(2), provides for claims to be made on behalf of Removed Child Family Class Members (of a child placed off-Reserve with non-family as of and after January 1, 2006), Kith Family Members, or Jordan's Principle Family Class Members. Specifically for these caregiving parents and grandparents, the Revised Agreement provides that where a claim has been approved, base compensation in the amount of $40,000 and interest will be paid directly to their living child or children on a pro rata basis. The AFN submits that this entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[109] The Revised Agreement now includes the estates of deceased First Nations caregiving parents and grandparents and specifically provides for $40,000 in relation to those victims who have passed away while waiting for compensation to be resolved. The joint parties submit this fully aligns with the Tribunal's orders.

[110] However, the Revised Agreement sets out a mechanism to pay compensation owing to the estates of First Nations parents/caregiving grandparents directly to the child(ren) of the deceased. Instead of the $40,000 flowing into the estates of the deceased First Nations parent/caregiving grandparent, the compensation will be paid directly to the children – a variation that puts children at the centre of this process. If there are no surviving children, the compensation will flow to the estate of the deceased First Nations parent/caregiving grandparent.

[111] Therefore, the joint parties seek a variation of 2020 CHRT 7. All parties in this case consent.

[112] This variation achieves multiple benefits: (i) it acknowledges the compounded harm and suffering experienced by a child victim who has lost a parent/caregiving grandparent by providing additional compensation; (ii) it avoids the complex and lengthy procedural requirements related to estates; (iii) it ensures that the full benefit of the compensation for which the estate is eligible is directed to the surviving children of that First Nations parent/caregiving grandparent; and (iv) ensures that the compensation funds will not be subject to potential estate administration taxes.

[113] The AFN submits that the approach is principled, as it effectively prioritizes the children/grandchildren heirs of these deceased caregiving parents and grandparents at least one of whom would be victims/survivors themselves, and thus the basis for the deceased caregiving parent's or grandparent's claim for compensation. Effectively, the settlement funds to which the deceased's estate would be entitled under the Tribunal's compensation orders would be treated akin to life insurance, allowing it to bypass the estate and be paid directly to the named beneficiary of same (children/grandchildren) with the commensurate benefits. This includes the expedited delivery of compensation, avoiding the potential diminishment of the benefit of settlement funds to surviving First Nations children/grandchildren as a result of the deceased's estate being indebted, as well as the potential levy of estate administration taxes, (See Dr. Valerie Gideon' Affidavit dated June 30, 2023, at para. 64).

[114] This directly accords with the principles enumerated both in the Compensation Framework which sought to avoid the diminishment of victims/survivors' compensation as a result of tax consequences, as well as the efforts of the Revised Agreement to ensure that any compensation payable would remain tax exempt and not negatively impact any social benefits that victims/survivors are receiving (consistent with the Tribunal's guidance in 2019 CHRT 39 at para 265, see also, Compensation Framework at s. 10.9, Revised Agreement art. 10.03).

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

[116] In addition to providing further compensation to the children of deceased parents/caregiving grandparents, the proposed amendment would facilitate victims' ability to access compensation. Distributing money to beneficiaries when someone passes away can be a complex undertaking, with certain procedural requirements varying across the country. This process can be particularly complex when the deceased fails to leave directions, the deceased lived on reserve, or when the estate that receives the compensation has not already been through the court process of probate. Stringent bank rules and regulations for access to and distribution of the Estate funds add to these procedural hurdles, sometimes making distribution to beneficiaries frustrating, costly, and lengthy, (See, Alberta Law Reform Institute, Estate Administration: Final Report (Edmonton: August 2013), at paras. 188-212 (Alberta); Law Commission of Ontario, Simplified Procedures for Small Estates: Final Report (Toronto: August 2015), at pp. 16-17, 25-28 and 48-61 (Ontario). See for example *Wills, Estates and Succession Act*, SBC 2009, c 13, s 144 (British Columbia); *Trustee Act*, RSO 1990, c T.23, s 49 (Ontario); *Estate Administration Act*, RSY 2002, c 77, ss 97 (Yukon)).

[117] There are also concerns regarding who the compensation will benefit if directed to the estates of parents/caregiving grandparents. Pursuant to estate laws across the country, creditors take precedence over beneficiaries, (See, for example *Trustee Act*, RSO 1990, c T.23, ss 53, 57-59 (Ontario); *Civil Code of Québec*, CQLR c CCQ-1991, ss 2644-2659 (Quebec); *Estate Administration Act*, RSY 2002, c 77, ss 96-104 (Yukon). Where an estate is bankrupt, section 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, applies to determine the priority of creditors). For example, in Ontario, an estate trustee is required to pay the debts of the estate in the following order before any distribution can be made to beneficiaries: (i) reasonable funeral expenses; (ii) expenses related to the administration of the estates, including probate fees, professional fees and compensation for the executor/estate trustee; (iii) secured creditors; (iv) taxes; and (v) unsecured creditors, (See, *Trustee Act*, RSO 1990, c T.23, ss 48-59).

[118] The AFN submits that paying compensation directly to the children of the deceased parent/caregiving grandparent avoids many of the complications, costs and delays associated with estate administration. It avoids the complex requirements of probate, circumvents the payment of compensation to creditors, reduces expenses and thus maintains the entirety of the compensation payment and gives control over the compensation directly to the children of deceased parents/caregiving grandparents. It is also entirely in line with the approach taken by Quebec's Tribunal des droits de la personne in *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, in which Quebec's Commission des droits de la personne sought an order that compensation be paid directly to the deceased complainant's children, (See*, Commission des droits de la personne (Succession de Poirier) c. Bradette Gauthier*, 2010 QCTDP 10 at paras 6 and 130).

[119] The Caring Society notes that the Commission’s submission of March 9, 2020, suggesting that payments to estates would be appropriate in the context where it was difficult to locate proper beneficiaries does not apply in this context. There is an unquestionable link between the compensation payable to a deceased parent/caregiving grandparent and the lived experience of that person’s surviving child(ren).

[120] The Caring Society submits that First Nations children and youth in this case have suffered egregious harms as a result of Canada's discriminatory conduct. This harm is compounded by the loss of a parent/caregiving grandparent, (See Dr. Blackstock's Affidavit dated June 30, 2023 at para 55). Thus, distributing the Tribunal's compensation directly to the children and youth of the deceased parent/caregiving grandparent acknowledges this compound harm, allowing the Tribunal to make an order reflective of the suffering experienced by these victims/survivors.

[121] First Nations children who have lost a parent face compounded harms: the harm inflicted by Canada's discriminatory conduct and the harm of losing a parent. Evidence from the National Inquiry into Missing and Murdered Indigenous Women and Girls (the MMIW Inquiry) and academic literature demonstrates that bereaved children face significant challenges, (See, Dr. Blackstock's Affidavit dated, June 30, 2023, at paras 56-58). The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations who have lost a parent.

[122] In 2019 CHRT 39, at paras 13 and 258, the Tribunal acknowledged that the cap under the *CHRA* may not correspond to the level of suffering experienced by the victims in this case. The variation sought on this motion is a meaningful way that First Nations children and youth who have been impacted by Canada's discrimination along with the compounded harm of losing a parent may be compensated in excess of $40,000 plus interest. This is in the best interests of the child victims/survivors in this case and is an amendment that reflects both the spirit and scope of the Tribunal's previous compensation orders.

[123] This variation also reflects the spirit and intent of the *Merit Decision*, the Compensation Entitlement Order and the Tribunal's general approach in putting children first.

[124] A consent order sought as part of a Settlement Agreement provides more flexibility for the Tribunal to approve it as long as the orders sought are within the Tribunal's broad – but not unlimited - powers. In other words, the Tribunal cannot issue a consent order if it does not have the power under the *CHRA*. Further, as already said many times in 2022

CHRT 41, settlements and or consent orders are not a means to disentitle or reduce compensation already ordered. They are a firm foundation to be built upon.

[125] The Tribunal finds this consent order is not a mere clarification request. It is a variation of an order made by this Tribunal. This Tribunal already explained at length in 2022 CHRT 41 why it was not prepared to disentitle compensation to victims who had passed away waiting for the discrimination to be remedied. However, the consent order request does not propose to disentitle or reduce the compensation ordered by the Tribunal. The Tribunal finds the request does not propose a fundamental change of the order. Rather, it proposes a different first step in the process.

[126] The criteria to vary an order were discussed in 2022 CHRT 41:

> [344] While estates are not people, the heirs of those estates are and they were signaled by the Tribunal's decision subsequently upheld by the Federal Court that they were entitled to compensation. It is unfair to now remove this from them because of financial choices resulting from merging proceedings and imposing a financial cap. These arguments are insufficient to justify an amendment to the Tribunal's orders on this point. As it will be revisited below, the Tribunal cannot amend its orders to reduce compensation or to disentitle victims/survivors. The Tribunal could accept variations of its orders if it does not remove gains for victims/survivors or a different compensation process and if supported by the evidence, which is a key consideration for this Tribunal for any order.
> (emphasis added)

[127] The Tribunal continues to rely on this legal finding and other legal findings discussed in 2022 CHRT 41, at paras. 155-201 and in all its other compensation orders.

[128] For example, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. This analysis and factors continue to apply here:

> [36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc.

(emphasis added).

[129] Furthermore, the main points gravitate around the following questions: Is there new evidence and compelling argument to consider that would support a finding to vary an order or a new process that would add and/or help refine the orders? Will this void the previous order and/or reduce the quantum of compensation or disentitle victims or simply add and refine the order in light of the new evidence, information and arguments provided in the best interest of First Nations children and families? The Tribunal believes it is the latter.

[130] Dr. Blackstock affirms in her affidavit that parental estates are now included in the Revised Agreement. The Caring Society set out to extrapolate, based on existing data, the number of parents whose children were removed from their homes, families, and communities, who would not have survived to the date of settlement approval.

[131] The Caring Society selected April 1, 2006 to March 31, 2023 as the date range over which it would estimate the number of parents whose children were removed from their homes, families and communities who passed away prior to the date of settlement approval. The Caring Society selected this period, as the First Nations-specific mortality information that it had access to was based on annualized statistics, making it difficult to select “partial year” periods to reflect deaths between January 1, 2006, and March 31, 2006, or from April 1, 2023 to settlement approval.

[132] More specifically, Dr. Blackstock affirms that the Caring Society’s estimation of the number of parents of First Nations children removed from their homes, families and communities who passed away between January 1, 2006 and March 31, 2023 was based on a 2018 paper authored by Randall Akee, of the University of California, Los Angeles’ Department of Public Policy and by Donna Feir, of the University of Victoria’s Department of Economics, titled First People Lost: Determining the State of Status First Nations Mortality in Canada Using Administrative Data. A copy of Professor Akee and Professor Feir’s paper is attached to Dr. Blackstock’s Affidavit, dated June 30, 2023, as Exhibit “K”.

[133] The Caring Society did not conduct similar estimates for parents of children who experienced discrimination related to Jordan’s Principle who themselves experienced a “worst case scenario” of compensation. Given that the piloting exercise has not yet been

conducted, there is insufficient information to establish the “cohort” of parents from which to calculate the number of parents who would not have passed away prior to settlement approval. However, the Caring Society’s view is that mortality within this cohort can be considered by the Federal Court, on submissions from all parties including the Caring Society, as one of the factors in determining the reasonableness of the claims process proposed to distribute the $2,000,000,000 budget established for compensation to the parents of victims falling within the Jordan’s Principle and Trout Classes.

[134] For the Caring Society, an important aspect of the Revised Agreement (which we acknowledge is a deviation from the Tribunal’s order in 2020 CHRT 7) includes the provision that compensation that would otherwise be paid to the estates of deceased parents will be paid directly to the children of those deceased parents.

[135] Dr. Blackstock affirms that privileging children as beneficiaries of parental estates is an important and sacred component of the Revised Agreement.

[136] Dr. Blackstock’s evidence refers to the National Inquiry into Missing and Murdered Indigenous Women and Girls (the “MMIWG Inquiry”), where she served as an expert witness, where evidence was shared regarding the harmful impacts on First Nations children who lose a parent, particularly when that loss is the result of a violent death. Experiencing loss of a parent or caregiver, particularly to violence, can result in children and youth harbouring intense feelings of loss and anger, unresolved trauma, depression and, at times, suicide.

[137] The MMIWG Inquiry also noted these children can face an increased risk of experiencing mental health challenges, substance misuse, involvement in the criminal justice system, becoming a young parent, and dying while young. Additional harmful impacts include weakened or permanently ruptured ties with siblings, extended family, and home communities; loss of culture, language, and sense of identity; risks of abuse of neglect; and an increased risk of homeless and poverty. The relevant sections of the MMIW Inquiry Report are attached to Dr. Blackstock’s Affidavit dated June 30, 2023, as Exhibit “L”.

[138] Dr. Blackstock affirms that academic literature also demonstrates that bereaved children face significant challenges.

[139] Evidence suggests that bereaved children are vulnerable for increased risk for social impairment – not only during the immediate post bereavement period but extending into adulthood. They also face educational challenges, social challenges, and mental health challenges. Moreover, depending on the family's circumstances at the time of the death, children and youth may face housing instability, family instability and a significant loss of love and nurturing required for healthy development. A selection of academic literature on this topic is attached to Dr. Blackstock's Affidavit dated June 30, 2023, as Exhibit "M".

[140] Throughout this case, the Caring Society's primary focus has been on supporting and advocating for the rights of First Nations children, youth and families harmed by Canada's discrimination. The Revised Agreement provides a unique opportunity to provide additional compensation to First Nations children and youth who have lost a parent – a traumatic experience for all children but an experience compounded by their experiences of discrimination in this case.

[141] In Dr. Blackstock's view, taking a child centered approach to directly compensating these children aligns with the spirit of the Tribunal's work and honours the memories of the children and youth who have passed on. Most children and youth who died during the long history of this case were surrounded by loving families and the child's estate ought to benefit those left behind.

[142] The Tribunal has carefully considered all evidence and arguments and it finds the MMIWG report relevant to this question. As found in previous rulings, the MMIWG Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls vol. 1a and vol. b, report is reliable. This National inquiry heard hundreds of witnesses and experts and this led to calls to justice in the form of recommendations that were accepted by Canada.

[143] The MMIWG report also found that when failure to find continuity or a sense of belonging can lead youth to adopt addictive lifestyles or to adopt unhealthy self-images leading to suicidal thoughts or attempts, (See MMIWG report at page 426). Importantly, the same analysis also showed that the strongest protective influence against Indigenous youth suicide was "high support, whether social or familial, (See MMIWG report at page 427).

[144] Further, Dr. Blackstock was recognized as an expert in child welfare before this Tribunal, she testified and/or provided affidavits for the Tribunal multiple times and her evidence was of great assistance to the Tribunal. Her resume filed in evidence has 50 pages of relevant experience and expertise. In other words, her evidence is reliable. More importantly, Dr. Blackstock has demonstrated throughout this case her quest for the best interest of children and her child-centric approach which is in line with the Tribunal's focus.

[145] The Tribunal finds the process, estimations and calculations part of the evidence and referred to above to be reasonable and accepts this evidence.

[146] Further, on a principled basis, the Tribunal finds it is more probable than not that First Nations children harmed by the systemic racial discrimination found by this Tribunal who lose a parent, experience compound harm - even if the scientific articles filed in evidence as part of this joint motion - are inconclusive and do not support such a finding. The Tribunal agrees with Dr. Blackstock's position on compound harm and her evidence. However, the Tribunal prefers the MMIWG report and other evidence in the record than the scientific articles provided. The Tribunal does arrive at the same conclusion as Dr. Blackstock without the articles. The Tribunal has already made findings of harms linked to the separation between a child and a parent. In 2019 CHRT 39:

> [147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case. (emphasis added)
>
> [155] […]
>
> > […]
> > As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people, (see 2016 CHRT 2 at, para. 394. 2019 CHRT 39, at para. 155),
> > (emphasis changed).

[147] The trauma of losing a parent or grandparent through separation was found by this Tribunal to cause serious harm and suffering to a child and, as found by the Tribunal above, is in addition to the other aspects of the systemic racial discrimination. The Tribunal finds this also applies to the death of a parent or grandparent or family member. Moreover, Mary Wilson, former Truth and Reconciliation Commissioner, provided affidavit evidence on the harm of separating a child and a parent that was considered by this Tribunal:

> She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.
> (see 2018 CHRT 4 at para. 122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system.
> (see 2018 CHRT 4 at para. 123).

[148] Moreover, losing the hope of an opportunity of reunification with a deceased parent or grandparent for example, can add further suffering to the child. Another example would be of a child who was removed and later finally reunited with a parent or grandparent who then passes away. It is reasonable to find that it is more probable than not that these situations would add further harm and trauma to a child's soul.

[149] The Tribunal made findings on the MMIWG report in previous rulings. Therefore, the full MMIWG report is part of the Tribunal's record. This supports Dr. Blackstock's evidence discussed above:

> Noting the inequities, participants across all four Guided Dialogues also emphasized the negative impact that foster care experiences have on the long-term safety and well-being of Indigenous women, girls, 2SLGBTQQIA people, and families as a whole. These impacts include:

> • weakened or permanently ruptured ties with parents, siblings, extended family, and home communities, (See MMIWG report vol. 1 b at page 113).
>
> (…) allow parents and children to remain together throughout the healing process, and provide specialized support for children experiencing trauma, violence, or neglect in their family home;
>
> "Keep the families together during times of healing and a transition. Provide them with the support they need to work out their issues and rebuild their life.", (See MMIWG report vol. 1 b at page 115).

[150] Furthermore, the evidence and findings discussed above demonstrate the suffering and negative consequences associated with the separation between children and their parents. Therefore, it is reasonable to find that permanent separation caused by the death of a parent or of a grand parent can amount to compound harm for their children.

[151] Moreover, the administrative burdens referred to by the AFN are a factor to be considered by the Tribunal in the compensation process as explained above. The evidence supports the AFN's position and qualifies as a refinement of the order for an optimal implementation of the compensation orders. However, the Tribunal does not view the evidence as new evidence that was unavailable at the time the Tribunal heard the compensation matter and that now arises justifying a reopening of a final matter. This would be an incorrect characterization of the facts and of the evidence. This qualifies more appropriately as new considerations and examples of hardship forming part of the process and the implementation of the order. The Tribunal has remained seized of the implementation of its compensation orders and has made clear that refinements and additions during the compensation process and its implementation could be made if justified. This is the case here.

[152] In other words, the authority to vary the Tribunal's order as found in 2022 CHRT 41 flows from its ongoing supervisory role of the implementation of its orders and its retained jurisdiction. Moreover, this consent order request does not remove gains for victims/survivors which is in line with the Tribunal's 2022 CHRT 41 ruling.

[153] The Tribunal finds the quantum and spirit of the order honouring deceased victims of Canada's systemic racial discrimination remains unchanged under the Revised Agreement.

Rather, it is a different compensation process at the first step that is requested here and placing the living First Nations children of the deceased victims at the forefront. Further, the compensation payment to estates remains as a second step when the deceased victims do not have living children.

[154] This important information on the administrative burdens and the compound harm was not put before the Tribunal when it arrived at its findings and orders regarding estates. While this is not sufficient to reopen a final matter according to the case law, it is sufficient according to the Tribunal's previous orders, its retained jurisdiction on the compensation process and implementation and the Tribunal's clear intent to leave the door open for possible improvements, refinements and additions to further the implementation of its orders in the best interest of First Nations children and families.

[155] The requested order does not modify final orders on quantum. Moreover, the requested order does not deny, reduce or disentitle compensation to the deceased victims rather it provides a priority rank for their living child or children to receive compensation on a pro rata basis. The Tribunal finds this recognizes both the harms borne by the deceased and their living children and avoids unnecessary administrative burdens and costs.

[156] Moreover, as seen above, in 2021 CHRT 7, the Tribunal indicated some of the important factors that are considered in an effective compensation remedy. The Tribunal also specified that the compensation process ought to be informed by the First Nations parties in this case. The full paragraph is reproduced below:

> [36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc. Consequently, the Panel finds the compensation process remedy in this case can be viewed as a "special program, plan or arrangement" that is informed by First Nations parties in this case and a broad and liberal interpretation of sections 16 (1), 53(2)(a), 53 (2)(e) and 53 (3) of the *CHRA* and Supreme Court and Tribunal decisions discussed in 2021 CHRT 6 at paras. 51-79. Finally, on this point, the Panel determined that the *CHRA* analysis and reasoning found

> in the scope of *CHRA* remedial provisions section in 2021 CHRT 6 at paras. 51-79 and 80 applies to the *Draft Compensation Framework* as a whole and supports the Panel's approval of the *Draft Compensation Framework* dated December 23, 2020,
> (emphasis added).

[157] Both the AFN and the Caring Society refer to some of the above factors to be considered by the Tribunal namely, administrative burdens and the vulnerability of victims/survivors who are minors.

[158] For the above reasons, the Tribunal finds the Revised Agreement provides a base compensation in the amount of $40,000 and interest to be paid directly to the living child or children on a pro rata basis. When there are no living children, the compensation is to be paid to the victims' estate similar to the Tribunal's original order. This entitlement overlaps entirely with the cohort of victims with an existing Tribunal entitlement. If there are no surviving children, the compensation will be paid to the estate of the deceased caregiving parent or grandparent.

[159] In the case at hand, focusing on the children's compound harms first, is in line with a human rights approach and, the spirit of the Tribunal's views in this case.

[160] The same reasoning can be applied here to justify the variation requested.

[161] Moreover, the Tribunal discussed compensation flowing to the heirs of the victims in 2020 CHRT 7 at para. 140:

> In these circumstances, it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[162] Adopting a priority rank that focuses on children who are heirs of the deceased victims is a reasonable variation of the Tribunal's order justifying such an amendment.

[163] For the above reasons, the Tribunal finds there is compelling evidence and arguments in support of the variation in the best interest of First Nations children and families. The requested variation will remove many administrative burdens resulting in an

effective implementation of the Tribunal's compensation orders for this category of victims. The Tribunal finds that it has the jurisdiction to vary the order found in 2020 CHRT 7:

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

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

[165] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(v) The Uncertainties Regarding Jordan's Principle Have Been Addressed

[166] The Tribunal in assessing the 2022 FSA in 2022 CHRT 41 made a number of findings that highlighted some uncertainties for the Jordan's Principle compensation category:

> [373] … it is impossible at the current point in time to know whether the implementation of Jordan's Principle under the FSA will result in the First Nations children identified under the Tribunal's orders receiving $40,000 under the FSA. […] there is little evidence of whether Jordan's Principle eligibility under the FSA will be interpreted in such a manner that it provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders.
>
> […]
>
> [375] The FSA sets out future work that is required before there can be certainty regarding which victims/survivors under the Tribunal compensation orders will be eligible under the FSA.
>
> […]

> [377] In order to be eligible for a guaranteed $40,000 Jordan's Principle compensation under the FSA, First Nations children must have both experienced a denial or delay in receiving an essential service and have experienced a "significant impact" because of the delay or denial. Article 6.06(3) of the FSA indicates that a "significant impact" will be defined in the Framework of Essential Services:
>
> […]
>
> [378] … the Framework on Essential Services does not provide further guidance on a "significant impact" and what is required to engage the higher level of compensation. Neither is "Significant Impact" a defined term in the FSA. Without this information, individual claimants cannot determine whether they could be entitled to more or less compensation under the FSA than they would be eligible to obtain under the Tribunal's orders.
>
> [379] The uncertainties in benefits from the outstanding definition of an "essential service" reflects the early stages of a negotiated settlement. … there is a real potential for reduction in compensation for some victims and disentitlements for others which is not permissible.

[167] The Tribunal found this may depart from the Tribunal's orders for this category and therefore cannot be considered to fully satisfy the Tribunal's orders and the request is premature since there are uncertainties at this time (See 2022 CHRT 41 at para. 379).

[168] This differed from the Tribunal's approach, which awarded $40,000 plus interest 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 definition and approach to Jordan's Principle.

[169] Moreover, the definition of "Delay" did not accord with the requirements of the Compensation Framework and instead were to be defined as "a timeline to be agreed to by the Parties and specified in the Claims Process''.

[170] The joint parties submit the Revised Agreement addresses these uncertainties and the overall approach to Jordan's Principle has been refined in harmony with the Tribunal's orders.

[171] The joint parties submit that the 2022 FSA did not include final criteria for determining eligibility for Jordan's Principle compensation. The parameters for determining eligibility for Jordan's Principle compensation in the Revised Agreement now more clearly reflect the

Tribunal's approach pursuant to Jordan's Principle. The approach for determining eligibility for Jordan's Principle in keeping with this approach is to be subject to robust piloting before implementation.

[172] The definition of Jordan's Principle Class Member has been revised and now states: "Jordan's Principle Class Member" means an Essential Service Class Member who experienced the highest level of impact (including pain, suffering or harm of the worst kind) associated with the Delay, Denial, or Service Gap of an Essential Service that was the subject of a Confirmed Need. The Parties intend that the way that the highest level of impact is defined, and the associated threshold set for membership in the Jordan's Principle Class fully overlap with the First Nations children entitled to compensation under the Compensation Orders who will receive a minimum of $40,000 in addition to interest." (See, Revised Agreement, Article 1.01, Exhibit "F" to the AFN Affidavit). This aligns with the Tribunal's language in the Compensation Decision, specifically accounting for the harms and the impacts of Canada's discrimination.

[173] The definition of the Jordan's Principle Class explicitly provides for the class action parties' and the Caring Society's intention that those with a Tribunal entitlement will receive it. Based on the estimate of 65,000 approved claimants for Essential Services Class and the Jordan's Principle Class, all members of the Jordan's Principle Class would be able to receive at least $40,000. The Jordan's Principle Class is also entitled to interest in accordance with the Tribunal's orders, which has been ring-fenced in the Interest Reserve Fund, (See, Revised Agreement art. 6.15(1)-(2)).

[174] If the number of claimants was unexpectedly higher, the Revised Agreement provides that Jordan's Principle Class Members (those who suffered the highest level of impact, which is intended to overlap with all the Jordan's Principle children entitled to compensation under the Tribunal's Compensation Orders) will receive a minimum of $40,000, in addition to interest. The remaining funds in the budget would be shared pro rata by the lesser impacted Essential Service Class Members, (See, Revised Agreement, Art. 6.08(10)-(12)). Conversely, if the number of claimants is lower, upon the advice from the Federal Court-appointed Actuary, Jordan's Principle Class Members may be entitled to enhancement payments, (See, Revised Agreement, art. 6.08(15)). The Revised

Agreement's primary focus in relation to the Essential Service Class is to ensure that Jordan's Principle Class members receive their entitlements as directed by the Tribunal.

[175] The term "Compensation Orders" is defined in the Preamble of the Revised Agreement as 2019 CHRT 39, 2020 CHRT 15, and 2020 CHRT 7, thus encompassing the terminology, guidance and approaches set out by the Tribunal in those orders. The Caring Society agrees with the AFN's submission on Jordan's Principle that there is no intention or requirement for a "jurisdictional dispute" in order for compensation to be paid to victims.

[176] The joint parties submit the definition of "Delay" has been amended to reflect the 12-hour and 48-hour timeframes ordered by the Tribunal in the Compensation Framework Order. While the 2022 FSA had left the definition of "Delay" as something to be determined in the future, the Revised Agreement is now directly in line with the Tribunal's orders, (See, Article Revised Agreement, 1.01, Exhibit "F" to the AFN Affidavit).

[177] The AFN submits that while the Revised Agreement still provides for the need to develop the threshold by which the highest level of impact with be objectively determined, it now specifies that the underlying basis for developing this threshold necessary for inclusion in the Jordan's Principle Class is ensuring full overlap with those children entitled to compensation under the Tribunals Compensation Orders, which is set out within the definition of the Jordan's Principle Class, (See Revised Agreement art 1.01 Definition "Jordan's Principle Class").

[178] This underlying principle informs each element of the means by which the threshold of impact level shall be determined under the Revised Agreement, and thereby whether an individual falls under the Essential Services Class or the Jordan's Principle Class, including the framework for essential services, accompanying instruments, such as the claims forms and questionnaire, as well as the associated robust and broad piloting, (See, Revised Agreement arts. 1.01 Definitions "Framework of Essential Services", "Essential Services", "Schedule F: Framework of Essential Services", 6.08(2)-(3), 6.08(10)(a)-(b)).

[179] The "framework of essential services", as developed with the assistance of experts, facilitates the streamlining of the compensation process and facilitates professional confirmation of the individual's need for an essential service. The framework is designed to

allow claimants to identify whether they had a confirmed need for a service that was essential for the purposes of compensation. These objective criteria allow for the expedient administration of claims, avoiding the need for case-by-case individual and subjective inquiry for inclusion in the Essential Service Class, (See, Revised Agreement arts. 1.01 Definitions “Framework of Essential Services”, “Essential Services”, “Schedule F: Framework of Essential Services”, 6.08(2)-(3).33).

[180] The Revised Agreement continues to provide for instruments such as culturally sensitive claims forms and a questionnaire, which will assist the Administrator at the second stage of the analysis, being a determination of whether a child’s circumstances indicate the highest level of impact and thereby eligibility for inclusion into the Jordan’s Principle Class, with the accompanying minimum compensation of $40,000 and interest, in alignment with their Tribunal entitlement under the Compensation Orders, (See, Revised Agreement, art. 6.08(10)(a)). Critically, these instruments and questionnaire remain subject to Jordan’s Principle expert consultations, which are First Nations-led and continue to be facilitated by the AFN.

[181] The AFN states that the Revised Agreement also provides that the threshold of impact for qualification as a member of the Jordan’s Principle Class is subject to the results of piloting of the method developed in accordance with the framework of essential services. The AFN is currently involved with advancing these piloting efforts, which will include a number of potential Essential Service Class and Jordan’s Principle Class members, in a manner that respects the need for full overlap with those with an existing entitlement under the Tribunal’s compensation orders, and which minimizes any burdens on the victims/survivors. The piloting efforts will also assist in refining the framework of essential services, as well as the supporting instruments, such as the claims forms and questionnaire, (See Dr. Valerie Gideon’s affidavit dated June 30, 2023, at paras. 73-75).

[182] Further, the pilot is to be evidence-based, premised on the efforts of the AFN’s circle of experts, as well as additional independent researchers. All are of the view that the finalization of an effective approach premised on the framework of essential services, as well as the development of the threshold for inclusion in the Jordan’s Principle Class premised on the highest level of harm, requires piloting. This pilot is intended to gauge the

quality and efficiency of the approach to compensation established for Jordan's Principle in the Revised Agreement, allowing for the refinement of each component of the claims assessment process and ensuring that it is in alignment with the Tribunal's Compensation Orders. This is the central component of these efforts, and is the primary outcome measured. The pilot will also assist in other important aspects of the compensation process, including gauging the effectiveness of the cultural and trauma-informed supports. All of these efforts and the ultimate determination remain subject to Federal Court approval and oversight.

[183] Finally, the Caring Society submits that with respect to the budget of $3,000,000,000 for compensation to children eligible for compensation under the Tribunal's orders regarding discrimination related to Canada's implementation of Jordan's Principle, the Caring Society's view is that, based on available evidence, this budget is sufficient. As detailed in Annex A, the Caring Society's best estimate of the number of children eligible for compensation under the Tribunal's Jordan's Principle orders is approximately 61,500 (based on demographic data from ISC regarding the number of individual children accessing services through Jordan's Principle in FY 21-22). However, there is significant uncertainty regarding that number, such that the $3 billion budget is an essential element of the Revised Agreement's ability to satisfy the Tribunal's compensation orders. This budget allows for base compensation for up to 75,000 First Nations children, and possibly more with growth on the portion of the settlement funds that will remain in trust.

[184] The Tribunal finds the evidence supports the joint parties' methodology described above. The Tribunal finds the calculations to set aside sufficient compensation funds for all eligible claimants to be thoughtful, reasonable and fair. Consequently, the Tribunal accepts those calculations and this methodology.

[185] Furthermore, the Revised Agreement ensures that those who suffered a worst-case scenario of discrimination in relation to Jordan's Principle receive $40,000 plus interest. This is directly in keeping with the guidance of the Tribunal in the Compensation Entitlement Order and the Eligibility Decision.

[186] The Tribunal finds that all the uncertainties described above have now been carefully addressed in the Revised Agreement in a manner that fully satisfies this Tribunal. There is now a clear methodology, clear definitions and clear criteria. There is no reduction in compensation for any victims/survivors, nor any disentitlements. There will be sufficient funds set aside to cover all eligible claimants. There is evidence that Jordan's Principle eligibility under the Revised Agreement will be interpreted in a manner that provides the victims/survivors under the Tribunal's orders the full entitlement they would have received under those orders. The future work that is required is clearly identified and accompanied by a defined and reasonable process and oversight by the Federal Court if the Revised Agreement is approved by the Federal Court.

(vi) Need for Clarification regarding Parents/Caregiving Grandparents under Jordan's Principle

[187] The AFN, the Caring Society and Canada seek a clarification of the Compensation Entitlement Order in relation to parents/caregiving grandparents under Jordan's Principle.

[188] In the case of a removed child, both the First Nations child and First Nations parent/caregiving grandparent are directly impacted by the lack of equitable FNCFS services available to the family. When a child is removed from a parent/caregiving grandparent, both experience direct discrimination, pain and suffering of the worst kind.

[189] Conversely, where a child experienced discrimination as a result of Canada's failure to fully implement Jordan's Principle, the First Nations parent/caregiving grandparent may not have a derivative experience of harm that equates to their child's experience. The parties are of the view that the Tribunal intended to compensate adults who were directly impacted at the highest level by Canada's discriminatory conduct.

[190] In order to capture the true intention of the Tribunal, the Revised Agreement provides that parents/caregiving grandparents of a child eligible for compensation pursuant to Jordan's Principle will receive compensation if they experienced the highest level of impact, including pain, suffering, or harm of the worst kind. The Revised Agreement contemplates

different measures of impact to parents and the child who experienced a Jordan's Principle delay, denial or service gap.

[191] This approach is consistent with the Tribunal's overall approach in its Compensation Orders, which target the worst-case scenarios of discrimination in this case. Removals, by their very nature affect a parent's individual dignity in a fundamental way. Denials, service gaps, and the impact of unreasonable delays with respect to essential services are not necessarily interchangeable as between parents and children. To be sure, many First Nations parents (or caregiving grandparents) of a Jordan's Principle child have experienced worst-case scenarios resulting from discrimination against their children, such as: the death or removal of a child, and a family's forced relocation off-reserve. Therefore, the Revised Agreement contemplates differential criteria for assessing impacts to parents as opposed to those experienced by the impacted child.

[192] The impact that Caregiving Parents or Caregiving Grandparents have experienced will be assessed through objective criteria and expert advice, as developed through Schedule F: Framework of Essential Services and through piloting. These criteria will be subject to the Federal Court's approval, wherein the Caring Society will have standing.

[193] The Tribunal has already explained its authority to clarify its orders above. In sum, this flows from the Tribunal's retained jurisdiction and supervisory role for the effective implementation of its orders.

[194] The Tribunal finds that providing clarity as requested by the joint parties would be helpful.

[195] In a previous ruling, the Tribunal determined that some measure of reasonableness is acceptable:

> [147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. The Panel also agrees that a conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering should be compensable

> whenever it occurred, and not only when it had an adverse impact on the health or safety of a First Nations child.
>
> [148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.
> (2020 CHRT 15 at paras. 147-48).

[196] The Tribunal further explained that compensation should accord with a reasonable interpretation of what is "essential":

> The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.
> (2020 CHRT 15 at para. 151).

[197] The Tribunal agrees that some measure of reasonableness is also acceptable in the eligibility criteria applicable for caregiver parents/grandparents. The Tribunal agrees to confirm that caregiving parents (or caregiving grandparents) of Canada's discrimination towards Jordan's Principle victims/survivors must themselves have experienced the highest

level of impact (including pain, suffering or harm of the worst kind) in order to receive compensation ($40,000 plus applicable interest) for their child's essential service denials, unreasonable delays and gaps. This is in line with the Tribunal's reasoning and orders, *(see Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para.115 recently cited in *Jane Doe v. Canada (Attorney General),* 2018 FCA 183*,* at para. 29.). The reasoning above continues to apply and applies to caregiving parents (or caregiving grandparents).

[198] The Tribunal cautions parties not to import the stricter criteria of causal link/connection in human rights cases which was rejected by the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 (CanLII), [2015] 2 SCR 789, at paras 50-51*.* Indeed, the Supreme Court wrote*: "*It is therefore neither appropriate nor accurate to use the expression "causal connection" in the discrimination context" (para. 51*).* This legal criteria has a different connotation than the terms used in other disciplines such as social work. The legal term causal link or causal connection is applied in medical malpractice and many litigation cases. Further, it is applied often in considering wage loss under the *CHRA*. For the Tribunal, the balance of probabilities and analysis to assess harm evaluates whether it is more probable than not that there exists a connection between the discrimination and the pain and suffering. In terms of assessing the pain and suffering (and Canada's wilful and reckless conduct), the Tribunal performs a principled and purposive analysis keeping in mind that the maximum compensation is reserved for the worst-case scenarios.

[199] The Tribunal believes that it is more probable than not that a parent or grandparent witnessing the child in their care suffering greatly would also suffer greatly. Perhaps not to the same degree as the child - sometimes less and sometimes more. The Tribunal believes this does not discount the parent or grandparent's resilience, courage, and dignity. They often are heroes who are so focused on the well-being of their child that they often discount their own feelings in order to be strong for that child. For example, a young child with terminal cancer who receives pain medication that effectively controls the pain and who does not comprehend the concept of death, suffers on many levels but not because of the concept of permanence attached to death. Their parents or grandparent's while not physically suffering,

have to watch their child suffer and have this added moral and psychological pain of losing their child. It this situation, it is reasonable that both have experienced similar levels of pain and suffering.

[200] While this differs a little from the parties' arguments on this point, it is not in complete contradiction. The Tribunal also accepts that many caregiving parents/grandparents will not experience the same level of pain and suffering as their children. The approach adopted by the parties to the Revised Agreement includes flexibility to consider who has experienced the highest amount of suffering.

[201] The Tribunal accepts to clarify its order. However, the Tribunal does not rely on the articles filed in evidence to do so given they were not particularly helpful or conclusive. Moreover, there seems to be a disconnect between a reasonable understanding of human behaviour and what is found in some scientific studies. Further, the Tribunal is often asked to make compensation orders without the benefit of scientific evidence to support harms. If this were required, many complainants would not get justice.

[202] The Tribunal agrees that not all caregiving parents and grandparents under this category have suffered harm in the worst-case scenario akin to when a child has been removed from their care. In this category, there are some that suffered immensely and others who have suffered less. Not applying reasonableness here could result in some measure of unfairness and discount tremendous harm experienced by some parents/grandparents who, for example, lost children that died versus some parents/grandparents who did not obtain sporting equipment when their children needed it. Such evidence forms part of the Tribunal's record. Further, some of the tremendous harms mentioned above were discussed in previous rulings.

[203] Moreover, the Tribunal is satisfied that the process, explained by the parties above, will ensure that a reasonableness criterion is applied for this category of claimants in a fair manner, ensuring that those who suffered the most receive fair compensation.

[204] For those reasons, and given the Tribunal's previous orders and reasons, the clarification request aligns completely with the Tribunal's approach to the compensation remedies.

[205] Furthermore, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(vii) Opt-out provision

[206] The Tribunal was clear in the 2022 FSA Motion Decision on the importance of ensuring that victims/survivors have adequate time to consider the 2022 FSA and the Tribunal's 2022 FSA Motion Decision and previous Compensation Orders with the benefit of an appropriate opt-out period. It was of the view that the initial opt-out date of February 19, 2023, as described within the AFN's and Canada's materials on the 2022 FSA Motion Decision was too short and placed the victims/survivors in an untenable situation:

> The unfairness deepens as the FSA seems to force victims/survivors 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/survivors who are receiving less than their CHRT entitlement of $40,000 in an untenable situation whereby they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch. Such a proposal deepens the infringement of dignity for victims/survivors and may revictimize them and is therefore inconsistent with a human rights approach. This is concerning. (See 2022 CHRT 41, at para. 388).

[207] The Tribunal's concerns about the opt-out regime in the 2022 FSA (2022 CHRT 41 at paras. 385-390) have now been addressed. The parties to the Federal Court Class Actions have addressed the Tribunal's comments regarding the opt-out deadline. The opt-out deadline has already been extended to August 23, 2023 by the Federal Court (See, Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit and February 23, 2023, order of Justice Aylen in T-402-19), and, in the Minutes of Settlement, the AFN and Canada have agreed to seek a further extension to October 6, 2023, subject to Federal Court approval. Therefore, the Tribunal is now satisfied with this outcome.

[208] The Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders on this point.

(viii) Interest

[209] The Tribunal's Compensation Entitlement Order directed victims to receive interest to the date of judgment pursuant to subsection 53(4) of the *CHRA* at the Bank of Canada rate in keeping with the approach in *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 20. The 2022 FSA did not contemplate the payment of interest to the victims identified by the Tribunal. The Tribunal finds that this has been addressed in the Revised Agreement and now all victims/survivors identified by the Tribunal are entitled to receive interest to the date the settlement approval order is final in addition to their base compensation of $40,000.

[210] Finally on this point, the Tribunal finds the Revised Agreement now fully satisfies the Tribunal's orders.

(ix) Caring Society's standing in Federal Court proceedings concerning the Revised Agreement

[211] The Caring Society will have standing at the Claims Process hearing and therefore, should an issue arise with the applicability of the eligibility criteria, the Caring Society will have the opportunity to provide submissions to the Federal Court regarding the parameters of pain, suffering or harm of the worst kind for Jordan's Principle parents.

[212] The Caring Society will have ongoing involvement in the Federal Court proceedings (in which it will have standing on matters related to the Tribunal's orders, pursuant to the Revised Agreement). The Caring Society will be entitled to notice of proceedings before the Federal Court related to matters impacting the rights of the beneficiaries of the Tribunal's compensation orders, as well as the standing to make submissions on any applications pertaining to the administration and implementation of the Revised Agreement on compensation as it relates to those matters, (See, Article 22.05, Revised Agreement, Exhibit "F" to the AFN Affidavit).

[213] The Revised Agreement also provides for the Caring Society's involvement and participation following the end of the Tribunal's jurisdiction. Specifically, the Caring Society will have standing to make submissions to the Federal Court regarding the administration and implementation of the Revised Agreement after the Settlement Approval hearing,

including approval of the Claims Process and distribution protocol, to the extent that issues impact the rights of the victims identified by the Tribunal. The Tribunal finds this provision provides for the ongoing role the Caring Society would have had under the Compensation Framework Order.

(x) Apology from the Prime Minister

[214] As mentioned above, according to the parties, this is the largest compensation settlement in Canadian history and it now includes a commitment from the Minister of Indigenous Services to request an apology from the Prime Minister.

[215] The terms of the Revised Agreement continue to call for an apology by the Prime Minister, (See, Revised Agreement at art. 24). The Tribunal cannot order apologies. However, the Tribunal completely agrees with this approach included in the Revised Agreement. The Tribunal also agrees with the Caring Society that the best apology Canada can offer is changed behaviour, so that this may be the last generation of First Nations children and youth that have to recover from their childhoods. This Tribunal believes this is true measurable reconciliation and the very reason as to why the Tribunal has remained, and continues to remain, seized of the implementation phase of its orders, and to monitor the reform ensuring the systemic racial discrimination is eliminated.

(xi) Role of the Federal Court

[216] The Revised Agreement is subject to the Supervisory role of the Federal Court should the Federal Court approve the Revised Settlement. This is an optimal approach given the class actions and the representative plaintiffs who are parties to the Revised Agreement. The Tribunal does not have jurisdiction over those class actions - the Federal Court does. This is why the Federal Court is asked to approve the Revised Agreement. Otherwise, the Tribunal alone could not approve it. Federal Court approval of the Revised Settlement would end the Tribunal's jurisdiction on the compensation orders. The Tribunal agrees with this outcome. The details are included in the order below.

(xii) Tribunal's interpretation of specific points in the Revised Agreements

[217] The Panel also wishes to address two points about its interpretation of the Revised Agreement.

[218] First, the Tribunal notes that Canadians cannot prospectively renounce their rights under the *CHRA*. Accordingly, the release in s. 10.01 of the Revised Agreement cannot release Canada from human rights violations for subsequent actions. The Tribunal wishes to explicitly note its observation that any human rights complaints for events post-dating the end of the Revised Agreement (2017 for Jordan's Principle; 2022 for removed children) are not precluded by the releases. The Tribunal understands the releases to intend to prevent Class Members who have not opted-out – as well as their estates, heirs, Estate Executors, estate Claimants, and Personal Representatives – from the Revised Agreement from claiming further compensation from Canada for harms described in the Revised Agreement even after 2017 and 2022.

[219] For non-class members, the Tribunal does not view the release as limiting liability for any discrimination that may occur subsequent to 2017 or 2022 should Canada fail to eliminate the systemic racial discrimination identified in this case and prevent the emergence of similar practices. Finally, the Revised Agreement cannot bar claims of discrimination in other federal programs or services.

[220] The Tribunal does not anticipate that its interpretation of the release differs from that of the parties. Further, the Tribunal clarifies that it has only considered the release from the perspective of the *CHRA*, not a civil or class action claim. The Tribunal intends its comments on the release to confirm what already appears obvious from the language of the release itself. This does not reflect hesitation on the Tribunal's part in finding that the Revised Agreement fully satisfies the Tribunal's compensation orders but the Tribunal's experience that it is often valuable to make wording abundantly clear. These comments should not cause the parties any hesitation in seeking the Federal Court's approval of the Revised Agreement.

[221] Second, the Tribunal finds that the Revised Agreement does not resolve the issue of long-term remedies, reform, eliminating the systemic discrimination found and preventing similar practices from recurring. Accordingly, this ruling does not address those issues.

F. Conclusion

[222] As explained above, the Tribunal finds that all categories of victims/survivors who were originally disentitled or had their entitlements reduced or who were not considered under the 2022 FSA have now been included in the Revised Settlement. This inclusion is done in a manner that fully accounts for the Tribunal's compensation orders on quantum, categories of victims/survivors and interest on compensation. The compensation will also be done in a manner that is culturally appropriate and safe for children and all victims/survivors and avoids having children testify. Therefore, the Tribunal finds the Revised Agreement fully satisfies all the Tribunal's compensation orders.

[223] As part of their submissions for this motion the Caring Society has described the Tribunal's approach in this case:

> Throughout this sacred and important case for First Nations children, youth and families, the Canadian Human Rights Tribunal ("Tribunal") has focused on the human rights of First Nations children and youth, placing their right to substantive equality at the forefront of its analysis. The remedies ordered by the Tribunal acknowledge the egregious and harmful nature of the discrimination flowing from Canada's flawed and inequitable provision of child and family services and its discriminatory definition and approach to Jordan's Principle. The Tribunal awarded individual compensation to victims of Canada's wilful and reckless conduct to recognize the harm, trauma and victimization of First Nations children and families stemming from Canada's systemic violations of the *Canadian Human Rights Act* ("CHRA").

The Tribunal finds this is an appropriate characterization of the spirit of the Tribunal's compensation ruling.

[224] Further, the Tribunal emphasizes that its analysis has always placed the right of First Nations children and families to substantive equality at the forefront of all its rulings and orders including those related to Jordan's Principle, reform, cessation of the discriminatory

practice and preventing it from reoccurring; and immediate, mid-term and long-term remedies. This continues to be the Tribunal's focus.

[225] Finally, the Panel looks forward to the next steps to be completed in this journey - namely complete reform; sustainable, long-term remedies for multiple generations to come; and the cessation of the discriminatory practice and the prevention of its reoccurrence.

G. Orders

Pursuant to section 53(2) of the *CHRA*, the Tribunal makes the following orders:

A) The Tribunal finds that the revised First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement dated April 19, 2023, fully satisfies the Tribunal's Compensation Orders (2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, 2021 CHRT 7 and 2022 CHRT 41) in this proceeding;

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

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

D) The Tribunal makes an order varying 2020 CHRT 7, providing that compensation of $40,000 plus applicable interest shall be paid directly to the child(ren) of the deceased parent/caregiving grandparent on a pro rata basis where the estate of that deceased parent/caregiving grandparent would otherwise be entitled to compensation under

2020 CHRT 7. Where there are no surviving children, the compensation will flow to the estate of the deceased parent/caregiving grandparent;

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

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

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

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

H. Retention of jurisdiction

This ruling does not affect the Panel's retention of jurisdiction on other issues and orders in this case other than as specified in A) and G). Consistent with the approach to remedies taken in this case, the Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief and reform, whether on consent or otherwise, that is found to be satisfactory by this Panel in eliminating the systemic discrimination found and preventing its reoccurrence or, after the adjudication of outstanding issues, if any, leading to final orders or, as the Panel sees fit considering the upcoming evolution of this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 26, 2023

Canadian Human Rights Tribunal

Parties of Record

Motion dealt with in writing without appearance of parties

Written representations by:

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