Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent

- and -

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

Interested Parties

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

JOINT MOTION RE COMPENSATION

JULY 5, 2023

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Table of Contents

PART I - STATEMENT OF FACTS

A. Honouring

Spirit Bear represents all the First Nations children, youth, and families both past and present and the non-Indigenous children and youth who stood with them for justice during this long legal struggle for justice. The biggest price of Canada's discrimination was paid by the First Nations children and youth who lost their childhoods and, tragically, sometimes their lives. We honour them and their families and pay tribute to the Residential School Survivors, families of Murdered and Missing Indigenous Women and Girls and Sixties Scoop Survivors who share a sacred wish- that this generation of First Nations children grow up proudly and safely at home. The best apology Canada can offer is changed behaviour, so may this be the last generation of First Nations children and youth that have to recover from their childhoods.

B. Overview

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.[1]

1. 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[2] 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***").

2. Ensuring just compensation to victims in this case has been challenging. Canada vigorously argued against paying any compensation during its submissions to the Tribunal in 2013 and 2019 and then unsuccessfully challenged the Tribunal's compensation orders in Federal Court. This coincided with the introduction of a series of outside class actions seeking

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[1] 2022 CHRT 41 at para 236.

[2] Consistent with the *Canadian Human Rights Act*, the term "victim" is used in these submissions. The Caring Society recognizes and honours the dignity and humanity of all those who endured Canada's discrimination, whose experiences may not be fully captured in that legal term.

relief that overlapped with the Tribunal's compensation orders, and an attempt to use negotiations in those class actions to circumvent some of the compensation orders in this case in the name of compromise. All of this created further hardship for victims and delayed payment of compensation and the provision of related supports. As the Tribunal correctly noted in 2022 CHRT 41, the compensation orders recognized the pain and suffering and infringement of dignity that victims endured. No victim can be left behind.

3. In the wake of 2022 CHRT 41, the class actions' plaintiffs and Canada invited the First Nations Child and Family Caring Society (the "**Caring Society**") to the negotiating table. As the Caring Society is not a party to any class action, the Caring Society focused its expertise on the victims identified by the Tribunal as eligible for compensation under the *CHRA*. As a result, the class action parties executed a Revised Final Settlement Agreement (the "**Revised Agreement**") that, in the Caring Society's view, now satisfies the Tribunal's compensation orders and respects the human rights of all victims entitled to compensation.

4. The Revised Agreement, signed by class actions' plaintiffs and Canada, respects the compensation rights of the victims and affirms that human rights cannot be abrogated, vacated, ignored, or compromised. As the Caring Society is not a party or signatory to the Revised Agreement, position is set out in in Minutes of Settlement which are being filed on this motion setting out a path to clarify and implement this Tribunal's orders. The Minutes of Settlement also includes clear obligations for the Assembly of First Nations and Canada to discontinue their respective challenges of the Tribunal's compensation orders before the Federal Court of Appeal (Canada) and the Federal Court (Canada and AFN).

5. First Nations Leadership played a critical role in the Revised Agreement. Following the Tribunal's October 24, 2022 letter decision dismissing the AFN and Canada's motion to approve the former settlement agreement, the First Nations-in-Assembly passed Resolution No. 28/2022, directing AFN to support compensation for all victims entitled to compensation pursuant to the Tribunal's compensation orders.[3] First Nations-in-Assembly later approved the Revised Agreement in Resolution No. 04/2023, calling on the AFN to seek approval of the Revised Agreement with the Tribunal and the Federal Court.[4]

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[3] Resolution 28/2022, Exhibit "D" to the Affidavit of Craig Gideon, dated June 30, 2023 (the "**AFN Affidavit**").
[4] Resolution 04/2023, Exhibit "E" to the AFN Affidavit.

6. Taking into account the direction of the Tribunal in 2022 CHRT 41 (the reasons and orders following the October 24, 2022 letter decision) and the guidance from First Nations Leadership, the Caring Society, AFN and Canada bring this joint consent motion before the Tribunal, *inter alia*, for the following relief:

a) a finding that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; 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 definition and approach to Jordan's Principle;

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

c) 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

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

e) an order declaring that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (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

f) 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); and

g) 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.

7. In the wake of the Tribunal's 2022 CHRT 41 order and clear direction from First Nations Leadership, the Revised Agreement significantly increases the available amount of compensation by $3.343 billion for a total value of $23.343 billion. Based on the available evidence, this amount will now provide at least $40,000 plus interest to all eligible victims entitled to CHRT compensation. Indeed, the clarification and variation orders sought on this motion propose refinements to existing orders to aid in the effective implementation of the compensation orders and preserve the recognized human rights compensation rights of all eligible victims.

8. The Revised Agreement remedies the concerns identified by the Panel in 2022 CHRT 41 and includes additional features to enhance individual compensation remedies, including (a) interest payments to all victims; (b) a $90 million fund (with associated growth and interest allocated thereto) to provide some additional supports to high needs members of the approved Jordan's Principle class between the age of majority and the class member's 26th birthday; and (c) specific training for those who will be involved in the implementation of the Revised Agreement, including cultural competency training, training regarding the history of colonialism, and training regarding this proceeding, with a particular focus on the impacts of systemic discrimination.

9. While the Caring Society is pleased that agreement has been reached to finalize the compensation remedies phase, this is a significant moment of sadness and reflection as compensation is only paid when children, youth and families have already been hurt. This compensation recognizes the preventable, long-standing and widespread discrimination by Canada and its adverse impacts for First Nations children and families for the infringement on their dignity. For some children, this meant being moved from their families during child

welfare involvement due to Canada's lack of funding for child welfare prevention services. For others, it was harms arising from deficits or lack of access to education, health or social services, products or supports. Tragically, for too many children it meant a loss of life. These harms, the Tribunal found, perpetuate the historical disadvantages resulting from Canada's role in the residential school system and the Sixties Scoop.[5]

10. In recognition of this sacred and sombre occasion, the Revised Agreement and the Minutes of Settlement each open with an honouring statement to the victims of Canada's discrimination. It reads in part:

> We honour all children, you and families affected by Canada's discriminatory conduct in child and family services and Jordan's Principle. We acknowledge the emotional, mental, physical, spiritual, and yet to be known harms that this discrimination hard on you and your loved ones. We stand with you and admire your courage and perseverance while recognizing that your struggle for justice often brings back difficult memories. We pay tribute to those who have passed on to the Spirit World before seeing their experiences recognized in this Agreement.

11. Approval of the Revised Agreement is an important step in the remedial phase of this case: it will serve to deter the recurrence of the discriminatory conduct by Canada and validate the experiences of the victims. It further promotes public confidence in the administration of justice under the *CHRA* by demonstrating that honouring human rights is fundamental to the rule of law and that no one and no government is above the law.

C. The Facts

1) Proceedings leading up to the September 2022 hearing on the 2022 settlement agreement

12. The proceedings leading to this joint motion seeking the relief set out in paragraph 6 above respecting compensation has been lengthy. It has been more than sixteen years since the complaint was filed on February 27, 2007, and more than seven years since the Tribunal's historic judgment on the merits (2016 CHRT 2). The Tribunal's substantiation of discrimination regarding the FNCFS Program and Canada's discriminatory defintion and approach to Jordan's Principle expressly acknowledged the "suffering" of First Nations children impacted by Canada's discriminatory conduct, compounded by the legacy of residential schools and the Sixties Scoop.[6] The Tribunal found that Canada engaged in this

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[5] Merits Decision at paras 218, 226-228, 404, 413-427, 459; 2018 CHRT 4 at paras 115, 119, 124, 143, 150.

[6] Merits Decision at paras 218, 404, 412, 458 and 467.

discriminatory conduct knowingly, knew about the harms being caused, and failed to implement evidence-based solutions that it had participated in creating.[7] This wilful disregard by Canada was later held by the Tribunal to be the "worst-case scenario under our *Act*."[8]

13. The Tribunal turned to the compensation phase of the remedial proceedings in 2019. The Panel posed clarification questions in March 2019, with the parties making written submissions and oral arguments at a two-day hearing in April 2019.

14. On September 6, 2019, the Tribunal ordered Canada to provide the maximum amount of compensation available under the *CHRA* to victims who experienced the "worst case scenario" of discrimination under the FNCFS Program or due to Canada's discriminatory definition and approach to Jordan's Principle (**"Compensation Entitlement Order**"). The Tribunal found that Canada's discrimination caused "trauma and harm to the highest degree causing pain and suffering"[9] and that Canada's conduct was "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[10]

15. The Compensation Entitlement Order required Canada, the Caring Society and the AFN to develop a compensation distribution framework to arrive at a final order for compensation. Throughout 2020, the parties worked to refine a compensation framework, seeking direction from the Tribunal on a number of issues, including: (1) the age at which victims could access compensation (2020 CHRT 7); (2) whether children in care as of January 1, 2006, but removed from their homes, families and communities prior to that date, were eligible for compensation (2020 CHRT 7); (3) eligibility of deceased claimants for compensation (2020 CHRT 7); (4) the definition of "essential service", "unreasonable delay" and "service gap" for the purpose of Jordan's Principle compensation (2020 CHRT 15); (5) applicability of the Compensation Entitlement Order to removed children off-reserve (2020 CHRT 15); (6) eligibility of caregivers for compensation who are not parents or caregiving grandparents (2020 CHRT 15); and (7) whether funds for minor victims and victims lacking legal capacity would be held in trust (2021 CHRT 6).

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[7] Merits Decision at paras 150-185, 270-275, 362-372, 385-386, 389, 458, 461 and 481.
[8] 2019 CHRT 39 at para 234.
[9] 2019 CHRT 39 at para 193.
[10] 2019 CHRT 39 at para 231.

16. The Tribunal approved the Compensation Framework on February 12, 2021 (2021 CHRT 7). The Compensation Framework set the broad guidelines for compensation, which the parties were to further detail in an implementation Guide, with the possibility of returning to the Tribunal to resolve further disputes if necessary.

17. Work on the implementation Guide was not started as Article 7.1 of the Compensation Framework was subject to an Implementation Date, to be set within 15 days of all judicial reviews or appeals being resolved. In October 2019, Canada filed an Application for Judicial Review followed by an amended Notice of Application for Judicial Review on March 5, 2021. Canada's judicial review was heard in June 2021 and dismissed on September 29, 2021 (2021 FC 969). Canada appealed the Federal Court's order dismissing its judicial review to the Federal Court of Appeal (Federal Court of Appeal File No. A-290-21), which has been in abeyance since November 16, 2021.

18. On December 31, 2021, the AFN, Canada and the representative plaintiffs in three Federal Court class actions concluded an agreement in principle (the "**AIP**") regarding class action compensation to victims of Canada's FNCFS Program and Jordan's Principle discrimination, from 1991-2022.[11] 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. 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 (the "**Joint Motion**").

19. The Tribunal heard the Joint Motion in September 2022. The Caring Society and the Canadian Human Rights Commission (the "**Commission**") opposed to the motion. The Caring Society made three principle arguments: (i) the Tribunal was *functus* such that the relief sought could not be granted; (ii) the relief sought was premature; and (iii) the 2022 FSA derogated from the Tribunal's compensation orders in direct violation of the human rights framework

[11] T-402-19: *Moushoom et al v Attorney General of Canada* (representative plaintiffs: Xavier Moushoom, Jeremy Meawasige, Jonavon Meawasige and, until her death, Maurina Beadle); T-141-20: *Assembly of First Nations et al v His Majesty the King* (representative plaintiffs: Ashley Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, Dick Eugene Jackson); T-1120-21: *Trout et al v Attorney General of Canada* (representative plaintiff: Zacheus Trout). The class proceedings in T-402-19 and T-141-20 were consolidated on July 7, 2021, and certified on November 26, 2021 (2021 FC 1225). The class proceedings in T-1120-21 were certified on February 11, 2022.

under the *CHRA*. In particular, the Caring Society urged the Tribunal (a) to critically examine the evidence in relation to the victims who would be adversely impacted by the deviations in the 2022 FSA; (b) to consider the nature of compensation awarded as a quasi-constitutional right under the *CHRA*; (c) to incorporate a best interests approach to First Nations children and their families, given the historical and intergenerational trauma flowing from Canada's conduct; and (d) to assess the perils of creating a dangerous precedent where human rights compensation can be bargained by outside interests that are not subject to the Tribunal's dialogic approach and the *CHRA's* protections for victims.

20. The Tribunal dismissed the Joint Motion by letter decision on October 25, 2022, with full reasons set out in 2022 CHRT 41. The Tribunal found that it is not *functus*: it remains seized of all its compensation orders to ensure effective implementation of its orders and to consider clarifications and further orders on process and implementation. However, the Tribunal made a clear distinction between its jurisdiction to amend the orders in relation to quantum and its ability to make further orders regarding interpretation, clarification and variation:

> [t]he 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.
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> […]
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> The compensation process continues at this time and the Tribunal foresaw that the parties could appear before the Tribunal to seek clarifications and further orders on process and implementation.[12]

21. The Tribunal recognized that the 2022 FSA substantially satisfied its compensation orders but dismissed the Joint Motion on the basis that the 2022 FSA disentitled certain victims from compensation, while creating significant uncertainty in relation to other victims: "once entitlements are recognized under the *CHRA* they cannot be removed".[13] In particular, the Tribunal identified the following derogations from its compensation orders in the 2022 FSA:

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[12] 2022 CHRT 41 at paras 169 and 176.
[13] 2022 CHRT 41 at para 504.

a) the failure to compensate First Nations children removed from their homes, families and communities and placed in non-ISC funded placements;

b) the failure to compensate the estates of deceased parents/caregiving grandparents;

c) the failure to fully compensate certain parents/caregiving grandparents in circumstances of multiple removals or in the event of a higher-than-expected claimant pool; and

d) uncertainty regarding eligibility under Jordan's Principle, including a lack of clarity regarding the definition of "significant impact", "essential service" and "delay".

22. The Tribunal also raised concerns regarding the short opt-out timeframe and accessibility of related information, which placed some victims in an "untenable situation". On this matter, the Caring Society notes the AFN's submissions regarding the nature of information available in the Short Form of Notice and Federal Court approval of the information products the Tribunal reviewed. However, we also note that neither the Short Form of Notice, the Notice Plan, or the how those items could be accessed by victims/survivors,[14] were in evidence before the Tribunal in its consideration of the 2022 FSA. The Caring Society submits that Canada and AFN have a shared duty to ensure that important information relating to the compensation of victims be easily accessible, accurate, and timely.

23. The Tribunal determined that the compromises made in the 2022 FSA did not align with a human rights approach given the adverse derogations from the Tribunal's compensation orders. On this particular point, the Tribunal stated:

> 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 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 proceeding.[15]

24. The Tribunal urged the parties to take a different approach by including all victims in the settlement or by removing the requirement in the 2022 FSA for the Tribunal's approval.[16]

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[14] Affidavit of Cindy Blackstock, dated June 30, 2023 (the "**Blackstock Affidavit**") at para 20.
[15] 2022 CHRT 41 at para 502.
[16] 2022 CHRT 41 at para 522.

25. In November 2022, applications for judicial review were commenced by Canada (Federal Court File No. T-2438-22) and the AFN (Federal Court File No. T-2438-22). These applications for judicial review have been in abeyance since December 22, 2022.

2) The Focus of Compensation: the Victim's Experience

26. The Compensation Entitlement Order, the Compensation Framework and the Compensation Payment Order all focus on the infringement of victims' dignity resulting from the discrimination in the case and the direct harm and suffering experienced by the victims. The Tribunal centred its analysis on the specific and immediate experiences of each category of victims, linking their adverse impacts directly to Canada's discrimination. Indeed, the Tribunal opened the Compensation Entitlement Order with an acknowledgement of the actual experiences of the victims, stating, "[t]he Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices."[17] The Federal Court upheld this focus, finding "that the quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victims".[18]

27. For First Nations children removed from their homes, families and communities, the Tribunal focused on the experiences of loss and the harm that flows from that loss: loss of family, loss of culture, loss of connection to territory, and the loss of one's right to be free from discrimination. The Tribunal reviewed the extensive evidence in the record, recounting experiences described by experts like Marie Wilson, Commissioner, Truth and Reconciliation Commission of Canada and evidence from the AFN regarding the losses described in the Indian Residential School Settlement Agreement (the "**IRSSA**")[19]:

> 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.[20]

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[17] 2019 CHRT 39 at para 13.
[18] 2021 FC 969 at para 156. See also 2021 FC 969 at para 190.
[19] 2019 CHRT 39 at paras 170, 171, 243 and 259; 2021 CHRT 7 at para 6.
[20] 2019 CHRT 39 at para 147.

28. Similarly, for the parents/caregiving grandparents of removed children, the Tribunal identified loss as a significant and devasting impact resulting from Canada's discriminatory conduct, making clear that parents/caregiving grandparents experienced direct pain and suffering as a result of the removal of their children. Citing evidence from the Wen:de reports and the Supreme Court of Canada's decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* the Tribunal held as follows:

> According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46.
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> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
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> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.[21]

29. The Tribunal emphasized its focus on this significant and devastating impact in its reasons, finding that:

> [t]he 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.[22]

30. For First Nations children adversely affected by Canada's discriminatory definition and approach to Jordan's Principle, the Tribunal focused its analysis on loss of well-being and experiences of direct suffering, including specific experiences of mental and physical pain.[23] In the Compensation Entitlement Order, the Tribunal recalled a case that embodies the tragic human consequences of Canada's unreasonable delay in providing services, products and supports to First Nations children in need, wherein a child was required to wait sixteen months

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[21] 2019 CHRT 39 at para 167.
[22] 2022 CHRT 41 at para 356.
[23] 2019 CHRT 39 at para 226; 2022 CHRT 41 at para 103.

to obtain a hospital bed that could to alleviate the respiratory distress that resulted from her fatal disease.[24]

31. In crafting the compensation eligibility criteria for victims of Canada's discriminatory definition and approach to Jordan's Principle, the Tribunal focused on two fundamental concepts: (a) substantive equality for First Nations children seeking social services, and (b) consideration of whether the child and parent/caregiving grandparent suffered "real harm" resulting from the lack of support.[25]

32. With respect to the eligibility for parents/caregiving grandparents under Jordan's Principle, the Tribunal made clear throughout its various decisions that an experience of harm is required in order to be eligible for compensation, finding that "there [was] sufficient evidence in the record […] to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53(2)(e) of the *CHRA* [has been] experienced by First Nations children and families as a result of Canada's discriminatory definition and approach to Jordan's Principle".[26] The evidence has made clear and the Tribunal has determined that eligibility is linked to the nature of the impact of Canada's discriminatory conduct rising to the level of the worst case scenario of discrimination:

> The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grandparents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.[27]

33. Indeed, as the Tribunal held in its reasons dismissing the AFN and Canada's joint motion for approval of the 2022 FSA, the lens to be applied is "a human rights framework that centers the child and parent/caregiver experience of harm".[28]

34. With respect to estates of children, youth and adults, the Tribunal focused squarely on the harms experienced by deceased victims while making clear that deterrence is an important

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[24] 2019 CHRT 39 at para 224.
[25] 2019 CHRT 39 at paras 224 and 226.
[26] 2019 CHRT 39 at para 225. See also 2019 CHRT 39 at paras 226, 234 and 241.
[27] 2019 CHRT 39 at para 242.
[28] 2022 CHRT 41 at para 244.

public policy goal in relation to individual compensation.[29] Indeed, Canada should not benefit financially because some victims have died:

> […] paying compensation to victims who have suffered discrimination but died before a compensation order is made is consistent with the objectives of the *CHRA*. Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.[30]

35. As set out below, the fundamental premise that compensation ought to be awarded to those who have suffered loss, harm and a direct experience of discrimination of the worst kind is the basis for the clarification of the Compensation Entitlement Order sought in relation to parents/caregiving grandparents under Jordan's Principle and the variation of 2020 CHRT 7 sought in relation to the distribution of compensation to the children of deceased parents/caregiving grandparents.

3) The Revised Agreement Directly Addresses Each Derogation

36. After the Tribunal's October 24, 2022 letter decision, but before the release of the Tribunal's full reasons in 2022 CHRT 41, the Caring Society participated in the AFN's December 2022 Special Chiefs Assembly. First Nations-in-Assembly passed Resolution No. 28/2022 supporting the minimum $40,000 plus interest in compensation already ordered by the Tribunal and set out several other parameters for future discussions in light of the Tribunal's ruling.[31]

37. Following the release of 2022 CHRT 41, the class actions' plaintiffs, the Caring Society and Canada explored ways of amending the 2022 FSA in order to fully satisfy the compensation orders. The class actions' plaintiffs, the Caring Society and Canada engaged in negotiations throughout January-April, 2023. As the Caring Society is not a party to any class actions, it focused its involvement on the victims identified by the Tribunal.[32]

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[29] 2020 CHRT 7 at paras. 128, 140 and 147.
[30] 2020 CHRT 7 at para 130.
[31] Blackstock Affidavit at paras 22 and 23.
[32] Blackstock Affidavit at para 24.

38. These negotiations resulted in the Revised Agreement. On April 4, 2023, the First Nations-in-Assembly unanimously adopted the Revised Agreement by way of Resolution 04/2023.[33]

39. On April 19, 2023, the AFN, the Caring Society and Canada executed Minutes of Settlement, which annexes the executed Revised Agreement. [34] The Revised Agreement responds directly to the derogations and uncertainties identified by the Tribunal in 2022 CHRT 41 and, in the Caring Society's view, now satisfies the Tribunal's compensation orders, as set out herein.

PART II - ISSUES

40. This Joint Consent Motion raises the following issues:

a) Have the derogations identified in 2022 CHRT 41 been redressed?

b) Should 2020 CHRT 7 be varied, such that compensation payable to the estates of parents/caregiving grandparents will be paid directly to the children of those deceased parents/caregiving grandparents?

c) Should 2019 CHRT 39 be clarified to confirm that eligibility for compensation for a parent/caregiving grandparent of a Jordan's Principle victim shall be determined by their having experienced impacts at the highest levels associated with Canada's definition and approach to Jordan's Principle?

d) Is the Revised Agreement's limitation on compensation to adults to $80,000 per child who has experienced a removal from their home, family and community consistent with the Tribunal's approach in its compensation orders?

e) Based on the conclusions on issues (a)-(c) above, does the Revised Agreement fully satisfy the Tribunal's compensation orders, taking into account the guidance and direction set out in 2022 CHRT 41?

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[33] AFN Affidavit, at paras 30 and 31, Revised Agreement, Exhibit F to the AFN Affidavit.
[34] Minutes of Settlement, Exhibit "B" to the Blackstock Affidavit.

PART III - SUBMISSIONS

A. The Approach to the Joint Consent Motion

1) The Jurisdiction to Vary and Amend the Compensation Orders

41. In 2022 CHRT 41, the Tribunal made clear that it has and continues to retain jurisdiction over the compensation orders in order to ensure they are effectively and efficiently implemented in the best interests of the victims in this case.[35] While the Tribunal has stated that it will not revoke or narrow its remedial orders, it has confirmed its jurisdiction to clarify and amend its orders where appropriate:

> The Tribunal is not stating that it cannot amend its orders if the FSA does not mirror the Tribunal's orders. The Tribunal can amend its orders to clarify, enhance, or reflect the parties' wishes if they consent and do not remove recognized rights.[36]

42. The Tribunal's approach to amending and clarifying its orders is longstanding. Since the Merits Decision, the Tribunal has exercised its expertise and retained jurisdiction over its orders to issue amendments and clarifications where changes and refinements would further advance the human rights of the victims and operationalize the purpose and intent of the Merits Decision and the *CHRA*.[37]

43. However, the Tribunal has stated that it does not have the jurisdiction to reduce the quantum of compensation or make further orders that disentitle or otherwise adversely affect victims. Taking a human rights approach, the Tribunal held that those who are found to have discriminated against a victim cannot avoid liability by reaching a settlement that reduces or disentitles compensation to certain victims:

> [I]t would undermine the *CHRA*'s ability to protect human rights if respondents were able to avoid liability by reaching an agreement with only certain parties to a human rights case to remove the case from the Tribunal's jurisdiction in favour of an alternative forum. It would reduce the ability of victims to receive a remedy that acknowledges that their human rights have been violated.[38]

44. In the result, the Tribunal has clear jurisdiction on this motion to improve, refine and clarify its compensation orders to advance the effectiveness and efficiency of the eligibility and

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[35] 2022 CHRT 41 at para 513.
[36] 2022 CHRT 41 at para 492.
[37] See for example 2019 CHRT 7 and 2020 CHRT 20; 2017 CHRT 14 and 2017 CHRT 35.
[38] 2022 CHRT 41 at para 253.

distribution process, but it cannot adversely change the compensation remedy for victims who have suffered the worst case scenario of Canada's discriminatory conduct.

2) Application of a Human Rights Approach to the Joint Consent Motion

45. Three requests are being made on this motion: (a) confirmation that the derogations have been addressed, (b) variation and clarification of previous orders, and (c) a finding that the Revised Agreement satisfies the Tribunal's compensation orders. The Caring Society submits that these requests ought to be determined in accordance with human rights case law and in a manner that protects the integrity of the human rights regime.

46. In response to the AFN and Canada's joint motion for approval of the 2022 FSA, the Caring Society argued that the Tribunal ought to apply a human rights framework that centers on the child and parent/caregiving grandparent experience of harm, with reference to four guiding criteria:

> (i) a critical examination of the evidence adduced in relation to the victims who will be impacted;
>
> (ii) the nature of compensation awarded as a quasi-constitutional right under the *CHRA*;
>
> (iii) the best interests of First Nations children, youth and their families, particularly given the historical and intergenerational trauma experienced by the victims, as already acknowledged by the Tribunal; and
>
> (iv) the potential of creating a dangerous precedent where human rights compensation can be bargained for outside of the dialogic approach and outside of the protections that the human rights regime provides.[39]

47. The Tribunal agreed with these criteria in 2022 CHRT 41, which, in the result, protected and promoted the rights of the victims in this case. The Caring Society is of the view that these four criteria ought to be applied to the relief sought on this motion.

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[39] 2022 CHRT 41 at para 244.

B. The Revised Agreement addresses the derogations identified in 2022 CHRT 41

1) Kith Placements are now included in the Revised Agreement

48. The Revised Agreement now includes entitlement to compensation of $40,000, plus applicable interest, for all First Nations children covered by the FNCFS Program who were removed from their homes, families and communities between January 1, 2006 and March 31, 2022 (including children who were in care as of January 1, 2006). Children that were placed in "non-ISC funded" homes, as well as their parents/caregiving grandparents are now specifically provided for under the Revised Agreement. Under the Revised Agreement, these placements are referred to as "Kith Placements", defined as "where a First Nations child resides with a Kith Caregiver outside of the Child's Family and off-Reserve, and a Child Welfare Authority was involved in the Child's Placement."[40]

49. Article 7 of the Revised Agreement sets out the principle 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**").[41] No member of the Kith Child Class will be required to submit to any form of interview or *viva voce* evidence taking and the claims process will be designed with the goal of minimizing risk of causing harm.[42]

50. The Revised Agreement provides for a budget of $600 million for the Kith Child Class and $702 million for the Kith Family Class.[43] These are new amounts being committed by Canada and are not a redistribution of funding under the 2022 FSA.

51. These amounts meet or exceed the Caring Society's estimates of the budget required to compensate the likely number of victims in each category.[44] 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

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[40] Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit.
[41] Article 7.01(8), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[42] Article 7.01(1) and (2), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[43] Article 7.02 (5) and 7.04(2), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[44] See Annex A.

First Nations children. 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.

52. 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.[45] 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.

2) Compensation for Parents/Caregiving Grandparents of Removed Children Now Aligns with the Orders

53. While the 2022 FSA budgeted at least $40,000 for parents/caregiving grandparents of removed children, the budget was capped at $5.75 billion and there were no guarantees that the full $40,000 would be paid to parent/caregiving grandparent victims who were eligible for compensation under the Tribunal's orders.[46] Moreover, parents/caregiving grandparents were only entitled to a maximum of $60,000 in the event that multiple children were removed from their homes and placed in other communities, rather than multiples of $40,000, as set out in the Compensation Framework.[47]

54. The Tribunal made clear that derogating from the established right of parents/caregiving grandparents entitled under the Tribunal's orders to receive multiple payments of $40,000 was not in keeping with the human rights regime and the analysis employed by the Tribunal in the Compensation Entitlement Order: "Losing more than one child heightens the presence of wilful and reckless behaviour; it does not reduce it. The Tribunal

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[45] Blackstock Affidavit at para 40.
[46] 2022 FSA, Article 6.04, Exhibit "F" to the Affidavit of Janice Ciavaglia, dated July 22, 2022 (the "**Ciavaglia Affidavit**")
[47] 2022 FSA, Article 6.04(9), Exhibit "F" to the Ciavaglia Affidavit.

emphasized that, give this was the worst-case scenario, maximum compensation should be paid for the removal of each child." [48]

55. The Revised Agreement directly ameliorates this derogation. A parent/caregiving grandparent is now entitled 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.[49] 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.[50]

56. 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.[51] 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.[52] 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.

3) The Approach to Compensation Entitlements for Children in the Jordan's Principle Class now reflects the Tribunal's Orders

57. As set out in 2022 CHRT 41, the Tribunal raised significant concerns regarding the eligibility parameters for Jordan's Principle victims under the 2022 FSA.

> The Tribunal agrees with the Caring Society that 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. This remains a source of uncertainty and there is little evidence of whether Jordan's Principle eligibility under the FSA will be interpreted

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[48] 2022 CHRT 41 at para 356.
[49] Article 6.06(1), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[50] Article 6.06(2), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[51] Article 6.06(6), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[52] Blackstock Affidavit at para 32.

> 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.[53]

58. Those uncertainties were focused primarily on the definition of "Significant Impact" and the definition of "Delay". The 2022 FSA provided that only children in the Jordan's Principle class who have experienced a "Significant Impact", as defined through a separate yet undetermined Framework of Essential Services, would be guaranteed a minimum of $40,000 in compensation.

59. 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.

60. At the time the motion was argued in September 2022, it was impossible to know whether the application and implementation of the 2022 FSA compensation definitions related to Jordan's Principle would harmonize with the Tribunal's Compensation Framework order.

61. 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."[54]

62. The Revised Agreement addresses these uncertainties and the overall approach to Jordan's Principle has been refined in harmony with the Tribunal's orders.

63. First, the definition of the "Jordan's Principle Class" has been amended to reflect the definitions and approaches set out by the Tribunal. The definition includes the following critical statement: "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."[55] 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

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[53] 2022 CHRT 41 at para 373.
[54] 2022 FSA, Article 1.01, Exhibit "F" to the Ciavaglia Affidavit.
[55] Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit.

AFN's submission that there is no intention or requirement for a "jurisdictional dispute" in order for compensation to be paid to victims impacted by Jordan's Principle.

64. Second, the definition of "Delay" has also been amended to incorporate the Tribunal's orders, now defined as a presumption that delay is unreasonable when it exceeds the Tribunal-mandated 12-hour (for urgent cases) and 48-hour (for non-urgent cases).[56]

65. The Caring Society is of the view that these changes, coupled with its 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), satisfies the Tribunal's compensation orders.[57] 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.[58]

66. 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.

4) The Opt-Out Has Been Extended

67. The Tribunal raised appropriate concern regarding the limited window provided to victims to opt-out of the 2022 FSA, particularly in light of the adverse derogations and the uncertainties:

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[56] Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit.
[57] Blackstock Affidavit at paras 34-36.
[58] Article 22.05, Revised Agreement, Exhibit "F" to the AFN Affidavit.

> 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.[59]

68. The Federal Court has extended the opt-out deadline to August 23, 2023.[60] In addition, pursuant to the Minutes of Settlement, the AFN and Canada have agreed to seek a further extension to October 6, 2023, subject to the Federal Court's approval.[61]

69. As the Caring Society believes the Revised Agreement satisfies the Tribunal's orders the serious adverse impacts of an early opt out of the 2022 FSA for disentitled victims is no longer an issue. The Caring Society's position is that the revised opt-out terms strike the right balance between preserving the rights of victims wishing to opt out and distributing the compensation as quickly as possible.

5) The Revised Agreement Improves Upon the Compensation Framework

70. The Revised Agreement also sets out a number of new features that will increase the amount of compensation available to victims and improve supports for high needs youth and young adults:

(a) Interest: the 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. That has been addressed in the Revised Agreement and now all victims identified by the Tribunal will receive interest to the date the settlement approval order is final in addition to their base compensation of $40,000;

(b) The Jordan's Principle Post-Majority Fund: The Revised Agreement now includes an additional and separate $90 million cy-près fund to provide additional

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[59] 2022 CHRT 41 at para 388.
[60] Article 1.01, Revised Agreement, Exhibit "F" to the AFN Affidavit and February 23, 2023, order of Justice Aylen in T-402-19.
[61] Minutes of Settlement, Section 9, Exhibit "B" to the Blackstock Affidavit.

supports to high needs members of the approved Jordan's Principle class between the age of majority and the class member's 26th birthday to ensure their personal dignity and well-being. The aim of this fund is to ensure that high needs Jordan's Principle recipients do not need to use their compensation for adult-oriented services upon reaching the age of majority ; and

(c) Training: the Revised Agreement provides that the Administrator, members of the Settlement Implementation Committee, members of the Investment Committee, the Trustee, the Third-Party Assessor, and any other individuals responsible to act in the best interests of the Class Members will receive First Nations-specific cultural competency training, as well as training regarding the history of colonialism, including residential schools and the discrimination addressed in this proceeding, with a particular focus on the egregious impacts of systemic discrimination on children, youth, families and Nations. Training will also be provided on the CHRT Proceeding.

71. 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 submission 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. This provision provides for the ongoing role the Caring Society would have had under the Compensation Framework Order.

72. As addressed below, the Revised Agreement strengthens the Tribunal's compensation orders in two important ways.

73. First, it directly compensates the children and youth of deceased parents/grandparents instead of flowing compensation into those estates.[62] This amendment recognizes the added trauma children experience after losing a parent/caregiving grandparent and exemplifies and prioritizes the parties' collective commitment to the First Nations children and youth in this case. It also affords these children a further opportunity to make for themselves the lives that they are able and wish to have.

[62] Article 14.03(2), Revised Agreement, Exhibit "F" to the AFN Affidavit.

74. Second, the Revised Agreement refines and clarifies the eligibility criteria for parents/caregiving grandparents of First Nations children and youth who were discriminated against as a result of Canada's discriminatory definition and approach to Jordan's Principle. In direct line with the Tribunal's focus on the experiences of the victims in this case, parents/caregiving grandparents are eligible for compensation where they themselves "experienced the highest level of impact (including pain, suffering or harm of the worst kind)".[63]

C. Directly Compensating Children of Deceased Parents/Caregiving Grandparents is in the Best Interests of First Nations Children

75. The Tribunal took great care to ensure that Canada was held accountable for all victims – including those who are deceased:

> Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.[64]

76. The Revised Agreement now includes the estates of parents/caregiving grandparents: they are entitled to receive the Tribunal ordered $40,000 plus applicable interest.[65] This is a significant change to the settlement agreement, given that the estates of parents/caregiving grandparents were completely left out of the 2022 FSA.

77. The Revised Agreement also introduces a change in the distribution of compensation in relation to the estates of deceased parents/caregiving grandparents: it provides that where a claim is approved in relation to a deceased parent/caregiving parent the compensation will be paid directly to the living children instead of flowing to the estate.[66] The Caring Society agrees with the submission of the AFN that this change results in all children of the deceased parent/caregiving grandparent receiving compensation, irrespective of whether that child was the victim of discrimination.

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[63] Article 6.09(1), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[64] 2020 CHRT 7 at para 130.
[65] Article 14.03, Revised Agreement, Exhibit "F" to the AFN Affidavit.
[66] Article 14.03(2), Revised Agreement, Exhibit "F" to the AFN Affidavit.

78. This variation achieves two important goals within the human rights framework: (i) it acknowledges the amplified harms experienced by First Nations children and youth who have lost a parent/caregiving grandparent; and (ii) it maintains the integrity of the Compensation Entitlement Order by avoiding the complexity of estate administration.

1) The Variation to 2020 CHRT 7 Places Children at the Forefront

79. The 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.[67] 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.

80. 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.[68] The Revised Agreement provides a unique opportunity to provide additional compensation to Frist Nations who have lost a parent.

81. In 2019 CHRT 39, the Tribunal acknowledged that the cap under the *CHRA* may not correspond to the level of suffering experienced by the victims in this case.[69] 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 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 in this case and is an amendment that reflects both the spirit and scope of the Tribunal's previous compensation orders.

2) Paying Compensation Directly to the Children Avoids Complexity of Estates Administration

82. In addition to providing further compensation to the children of deceased parents/caregiving grandparents, the proposed amendment would facilitate victims' ability to

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[67] Blackstock Affidavit at para 55.
[68] Blackstock Affidavit at paras 56-58.
[69] 2019 CHRT 39 at paras 13 and 258.

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.[70]

83. Even for deceased parents/caregiving grandparents with a will, distribution of assets to beneficiaries can be a long and complicated process. The general process for applying for probate involves an application for letters of probate is filed with the court, along with the original will; all creditors and beneficiaries will be notified, following which the executor must take inventory and appraise all assets of the deceased, reporting the value to the court. The executors must also pay the applicable probate fees.

84. Before the assets of the estate can be distributed, the executor must first pay all outstanding expenses, debts and taxes ("**Priority Disbursements**"). Only after the Priority Disbursements have been paid can beneficiaries receive money from the estate in accordance with the will.[71]

85. The duration of the probate process in Canada can vary depending on the province or territory in which the deceased person lived, as the complexity of their estate and any legal challenges faced.[72] Generally, the probate process can take anywhere from a few months to a year or more to complete.

86. A further complication would arise if an executor named in the will is deceased and the estate has already been probated. If an alternate executor is named, the "Succeeding Estate

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[70] 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).
[71] 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).
[72] Alberta Law Reform Institute, *Estate Administration: Final Report* (Edmonton: August 2013), at para. 166 (Alberta); Manitoba Law Reform Commission, *Updating the Administration of Small Estates in Manitoba: Final Report* (Winnipeg: March 2018), at p. 4 (Manitoba); Law Commission of Ontario, *Balancing Accessibility and Procedural Protection in a Small Estates Probate Procedure in Ontario* (Toronto: January 2015), at pp. 25-30 (Ontario).

Trustee", will be required to apply to the court for further court authority in order to take control of the estate, receive the compensation, sign any necessary releases required by the settlement agreement and distribute the compensation.[73] A death certificate of the Deceased Victim and their deceased executor will also have to be filed with the court. This process will cause additional cost and delay.

87. If no alternate executor was named in the will, someone must then apply to be appointed as the Succeeding Estate Trustee. A number of further administrative steps are necessary before any further distribution can be made and the Succeeding Estate Trustee may be required to post a surety bond or secure an order to dispense with the bond from court.[74] Arranging for Surety Bonds can be difficult, time-consuming, and expensive since specialized insurance brokers are required.[75]

88. Where a deceased parent/caregiving grandparent did not have a will, an intestacy results and the estate is distributed according to the applicable provincial and territorial law of intestate succession. In general, most provinces and territories provide for intestacy in the following order of priority, but with differing allocations: (1) spouse or common-law partner; (2) children; (3) parents; (4) siblings; (5) other relatives; and (6) if there are no eligible relatives, the estate may be escheat, (i.e. default) to the Crown.[76] However, there are regional variations, and it may

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[73] See for example *Surrogate Rules*, Alta Reg 130/1995, s 32 (Alberta); *Wills, Estates and Succession Act*, SBC 2009, c 13, s 159 (British Columbia); *Rules of Civil Procedure*, RRO 1990, Reg 194, s 74.06 (Ontario).

[74] See for example *Surrogate Rules*, Alta Reg 130/1995 ss. 28-31 (Alberta); *Estates Act*, RSO 1990, c E.21, ss. 35-43 (Ontario); Trustees Act, SNB 2015, c 21, s. 10 (New Brunswick); *The Administration of Estates Act*, SS 1998, c A-4.1, ss 20-25 (Saskatchewan); *Estate Administration Act*, RSY 2002, c 77, ss 17-19 (Yukon).

[75] See for example *Estates Act*, RSO 1990, c E.21, s 37(1) (Ontario); *The Administration of Estates Act*, SS 1998, c A-4.1, s 21(1) (Saskatchewan); *Estate Administration Act*, RSY 2002, c 77, ss 16(3) (Yukon).

[76] See for example *Wills and Succession Act*, SA 2010, c W-12.2, ss 58-70 (Alberta); *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 19-35 (British Columbia); *The Intestate Succession Act*, CCSM c I85 (Manitoba); *Devolution of Estates Act*, RSNB 1973, c D-9 (New Brunswick); *Intestate Succession Act*, RSNL 1990, c I-21 (Newfoundland and Labrador); *Intestate Succession Act*, RSNS 1989, c 236 (Nova Scotia); *Succession Law Reform Act*, RSO 1990, c S.26, ss 43.1-49 (Ontario); *Probate Act*, RSPEI 1988, c P-21, ss 86-102 (Prince Edward Island); *Civil Code of Québec*, CQLR c CCQ-1991, ss 653-702 (Quebec); *The Intestate Succession Act, 2019*, SS 2019, c I-13.2 (Saskatchewan); *Intestate Succession Act*, RSNWT 1988, c I-10 (Northwest Territories); *Intestate Succession Act*, RSNWT (Nu) 1988, c I-10 (Nunavut); *Estate Administration Act*, RSY 2002, c 77, ss 78-95 (Yukon).

be a challenge for the Administrator of the Revised Final Settlement Agreement to account for those regional variations.

89. Irrespective of whether the deceased parent/caregiving grandparent had a will, there may be other complications in the distribution of compensation under a settlement agreement. These include the following:

(a) Identifying and locating Executors can be a challenge, and if deceased, there can be a significant delay and procedural hurdles associated with obtaining a death certificate for an Executor who has passed away.

(b) Significant costs may be incurred. Costs may include legal and probate fees, which differ depending on the jurisdiction. Accordingly, probate fees could be charged on the compensation received by the Estate, depending on the size of the Estate, before being disbursed to beneficiaries.

(c) Named Executors and alternate Estate Trustees may be unwilling to act or continue to act as they could face potential personal liability from unsatisfied creditors, particularly if they fail to identify all debts the estate owes.

(d) If an Estate was probated and is considered entirely administered, the Executor/Estate Trustee must file a supplemental affidavit of assets reporting the new asset (i.e. the compensation) to the court. This again, will add additional steps and costs prolonging the delay for beneficiaries to receive compensation.

90. 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.[77] 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.[78]

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[77] 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.
[78] *Trustee Act*, RSO 1990, c T.23, ss 48-59.

91. Where a deceased parent/caregiving grandparent had status under the *Indian Act* and/or was resident on reserve when they passed away, the *Indian Act* and the *Indian Estates Regulation* will apply.[79] This legal framework supersedes the provincial and territorial rules and regulations.

92. Estates administered pursuant to the *Indian Act* compound the complications by adding additional layers of complexity. An estate where there is no will is administered pursuant to the *Indian Act* prioritizes certain family members over others. It splits assets between the spouse and children depending on the number of children. For example, a surviving spouse or the common-law partner receives a portion (Minimum 1/3) of the estate.[80] This may result in differential treatment across the country and create confusion for beneficiaries.

93. In addition, some First Nations communities have developed their own laws and regulations for estate administration, which may differ from those set out in the *Indian Act*. In such cases, the community's laws would pre-empt the *Indian Act* provisions. For the Administrator of the Revised Agreement, this could add to cost and delay.

94. Paying compensation directly to the children of the deceased parent/caregiving grandparent avoids may 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.

95. 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. [81] 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

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[79] *Indian Act,* R.S.C., 1985, c. I-5 and *Indian Estates Regulations*, C.R.C., c. 954.
[80] *Indian Act*, RSC 1985, c I-5, s 48.
[81] *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, 2010 QCTDP 10 at paras 6 and 130.

deceased parent/caregiving grandparent and the lived experience of that person's surviving child(ren).

D. Clarifying Eligibility for Parents/Caregiving Grandparents Under Jordan's Principle

96. This motion seeks to clarify the eligibility criteria for parents/caregiving grandparents of children who were discriminated against as a result of Canada's discriminatory definition and approach to Jordan's Principle ("**Jordan's Principle Parents**"). In particular, the clarification set out in the Revised Agreement, which the Caring Society asks the Tribunal to adopt, specifies that Jordan's Principle Parents will be entitled to receive $40,000 plus interest where a parent/caregiving grandparent has themselves experienced the highest level of impact (including pain, suffering or harm of the worst kind).[82] In other words, compensation will be paid to Jordan's Principle Parents who experienced discrimination of the worst kind.

97. The Caring Society submits that this clarification is directly in line with the Tribunal's reasons in the Compensation Entitlement Order and the well-established case law regarding compensation under sections 53(2)(e) and 53(3) of the *CHRA*. In the Compensation Entitlement Order, the Tribunal thoroughly reviewed the jurisprudence regarding the legal framework for awarding compensation for pain and suffering (s. 53(2)(e)) and wilful and reckless discrimination. Two important principles emerged from the Tribunal's analysis: (i) compensation will be awarded to victims who have experienced direct discrimination (i.e., their claims are not derivative); and (ii) the maximum awards of $20,000 under both remedial provisions are reserved for the most egregious of circumstances.

98. The *CHRA* provides that where a victim has established a *prima facie* case of discrimination and the respondent has not established a justification, the Tribunal may exercise its broad remedial powers on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed by the victim, and the evidence presented.[83] Where the evidence demonstrates that a victim has experienced pain and suffering as a result of the discriminatory conduct, that victim is entitled to compensation under s. 53(2)(e).[84] Where the evidence demonstrates that the respondent's

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[82] Article 6.09(1), Revised Agreement, Exhibit "F" to the AFN Affidavit.
[83] 2019 CHRT 39, at para 98.
[84] 2019 CHRT 39, at para 127.

conduct was devoid of caution for the well-being of the victim, that victim is entitled to compensation for the wilful and reckless discrimination perpetrated by the respondent.[85]

99. Awards of compensation are discretionary, and they must be grounded in the evidence and the circumstances of the case. The maximum award for pain and suffering is $20,000, reserved for the most blatant, striking and worst cases of discrimination. In the Compensation Entitlement Order, the Tribunal underscored that the maximum award of $20,000 is reserved for the most egregious cases, where the victim has significantly suffered as a result of the respondent's discriminatory conduct and the resulting infringement of dignity:

> The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (*see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 [*Jane Doe*], at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para. 115*; and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).
>
> Furthermore, "when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. (…) **However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances**" (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para. 115 recently cited in *Jane Doe,* at, para. 29). (Emphasis added)[86]

100. With respect to compensation under s. 53(3) of the *CHRA*, the Tribunal set out a principled approach to awarding the maximum compensation of $20,000 for wilful and reckless discrimination, indicating that the full amount is reserved for cases where the respondent has been particularly thoughtless and irresponsible in considering the impact of their discriminatory conduct on the victim:

> The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para. 13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

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[85] 2019 CHRT 39, at para 230.
[86] 2019 CHRT 39, at paras 127-128.

> In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). **Again, the award of the maximum amount under this section should be reserved for the very worst cases**. (see *Grant* at, para. 119). (Emphasis added)[87]

101. The Tribunal's approach in the Compensation Entitlement Order was determined to be reasonable by the Federal Court on judicial review. In his reasons, Justice Favel echoed the above legal principles on pain and suffering compensation and compensation for wilful and reckless discrimination, finding that "the quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victim".[88]

102. The Tribunal's approach has also been favourably cited in many decisions that have followed, making it clear that awards for compensation under the *CHRA* are to be principled and grounded in the evidence. Indeed, compensation is awarded when a victim has themselves experienced discrimination and has suffered the direct impacts from an infringement of their dignity and a wilful and reckless disregard for the human rights of that victim.[89]

103. In determining the categories of eligible victims under the Compensation Entitlement Order, the Tribunal extensively reviewed the evidence of pain and suffering experienced by the victims, as well as the significant evidence demonstrating Canada's wilful and reckless conduct, with a particular focus on the children. With respect to the victims of Canada's failure to implement Jordan's Principle, the Tribunal made a number of factual findings underpinning the award for compensation under the Compensation Entitlement Order, finding that disruption, delays and denials in receiving essential services negatively impacts First Nations children and youth. [90] Some of these tragic examples include the following:

- A healthy 4-year-old girl who tragically suffered brain anoxia during routine dental surgery resulting in her needing significant care including a hospital bed so that she could breathe properly. The request went through over a dozen bureaucrats before someone wrote – "Absolutely not". This denial occurred during the Christmas season and at a time when the child's mother was eight months pregnant;[91]

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[87] 2019 CHRT 39, at paras 229-230.
[88] *Canada (Attorney General) v First Nations Child and Family Caring Society et al.*, 2021 FC 969 at para 156.
[89] See for example 2021 CHRT 15, at para 98; 2021 CHRT 33 at para 207.
[90] 2019 CHRT 39, at paras. 218, 220 and 222.
[91] 2016 CHRT 2, at paras 366-367.

- if a First Nations child needed three medical mobility devices, Canada would only pay for one device every five years while all devices would generally be covered as the normative standard of care for other children;[92]

- in one case, the Caring Society paid for medical transportation so a toddler could get diagnostic testing for a rare and life-threatening condition, as Canada had denied her parent's request under Jordan's Principle as she did not have *Indian Act* status;[93]

- Canada's failure to implement the full nature and scope of Jordan's Principle resulted in a lack of necessary mental health services to children causing irremediable harm, include death by suicide;[94]

104. In the Compensation Entitlement Order, the Tribunal also cited the following exchange between AFN legal counsel and Ms. Connie Baggley, Senior Policy Manager of then Aboriginal and Northern Affairs Canada (now ISC) as clear and cogent evidence of the harm experienced as a result of Canada's discriminatory definition and approach to Jordan's Principle:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.
>
> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
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> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?

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[92] 2017 CHRT 14 at para 70.
[93] 2019 CHRT 7 at paras 57-58.
[94] 2017 CHRT 7 at paras 8-11.

> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).[95]

105. Ultimately, the Tribunal found Canada's flawed definition and narrow interpretation "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children".[96]

106. The Caring Society is of the view that the clarification sought with respect to the Jordan's Principle Parents is in line with the Tribunal's direction and guidance, providing that Jordan's Principle Parents who experienced the worst-case scenario of discrimination and who themselves experienced resulting pain, suffering or harm of the worst kind will be compensated the full amount of $40,000 plus interest. Under the Revised Agreement, those who experienced the worst kind of discrimination and harm as a result of Canada's failure to implement Jordan's Principle will receive compensation, reflecting a human rights approach under the *CHRA* that protects and promotes the substantive equality rights of these victims.

107. The Caring Society accepts that not every parent of a child entitled to compensation under the Tribunal's orders related to Jordan's Principle necessarily experienced the same level of impact. Certainly, many parents experienced extreme negative impacts related to denials, unreasonable delays, and gaps in essential services that their children ought to have received, including removal of their child to receive services, other serious irremediable harms or the tragic death of their child. As Dr. Lach points out in her report, there is no causal link between a child's experience of a delay, denial or gap in service and the harm suffered by a parent/caregiving grandparent.[97]

108. Unlike the removal of First Nations children from their homes, families, and communities, in which there is an undeniable rupture of the parent-child relationship that has a reciprocal impact on both parent and child, not all discrimination related to essential services for First Nations children has the same impact on their parents.[98] As the Lach Report sets out:

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[95] 2019 CHRT 39 at para 244.
[96] 2016 CHRT 2 at paras 381-382.
[97] Report Submitted to Moushoom Class Council Regarding Method for Assessment of Compensation for Caregiving Parents or Caregiving Grandparents, Moushoom et al. v. Canada, Court File Nos. T-402/T-1141-20 and Trout et al. v. Canada, Court File No. T-1120-21, Exhibit A to the affidavit Lucyna M. Lach, dated June 20, 2023 (the "**Lach Report**"), p. 9.
[98] Blackstock Affidavit at para 38.

> […] impact that caregiving parents and grandparents experienced is related to, but not directly associated with (in a causal-linear kind of way), the impact that their children experienced. The lived experience of caregiving parents and grandparents varies based on their individual, family, and community context. Some may have been living in the context of severe deprivation, while others had access to resources that helped them to manage their child's needs. Therefore one cannot directly align the impact of unmet needs on the child with harm that caregivers endured. Impact on caregivers requires a more nuanced and separate evaluation that takes into consideration their individual, family, and community level strengths and abilities. Not doing so would contribute to pathologizing, diminishing, and dismissing the strengths and abilities of First Nations caregiving contexts at the individual, family, and community levels. [99]

109. The Caring Society accepts that clear eligibility criteria are an essential part of a fair compensation process that implements the Tribunal's orders. None of the Tribunal's orders, nor any provision of the Compensation Framework, addressed eligibility criteria for parents whose children experienced discrimination related to Jordan's Principle.[100] The requested clarification will allow the parties to develop the criteria required to implement this aspect of the Tribunal's orders.

110. The piloting contemplated in the Revised Agreement on compensation will provide useful guidance and will allow time for the eligibility criteria to be developed in advance of the Claims Process.[101] The two-staged piloting currently contemplated builds on existing theoretical and empirical frameworks and will be adapted for parents/caregiving grandparents.[102] As set out above, 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 and the many examples where such evidence is easily determined.

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[99] Lach Report, p. 2.
[100] 2021 CHRT 7 at para 22.
[101] AFN Affidavit, at paras 73-75.
[102] Lach Report, p. 15.

E. The Revised Agreement Appropriately Limits Compensation for Adults to $80,000 per Child Removed From Their Homes, Family and Community

111. Article 6.04 of the Revised Agreement sets out a series of rules of priority to determine eligibility among multiple adults who might make a claim for compensation with respect to a First Nations child. These rules of priority will assist the Administrator in determining to whom to pay compensation when a First Nations child experienced multiple removals from multiple caregivers. In this regard, Article 6.05 of the Revised Agreement addresses the same subject matter as Section 4.4 of the Compensation Framework.

112. Article 6.04 of the Revised Agreement and Section 4.4 of the Compensation Framework similarly emphasize compensation to the parent or caregiving grandparents caring for the child at the time of first removal. Section 4.4 of the Compensation Framework contemplates the possibility of compensation to subsequent caregivers, but does not articulate rules for such compensation, beyond noting that compensation may be paid only once. Article 6.04 is more detailed, as it establishes a priority for compensation to parents when the caregivers at first removal cannot be determined and sets a maximum of $80,000 in compensation to adults based on a child having been removed from their home, family and community.

113. Article 6.04 of the Revised Agreement appropriately focuses on the first removal in providing for compensation to caregivers (as did Section 4.4 of the Compensation Framework). The first removal was the point at which the discriminatory FNCFS Program interfered with the family's integrity, and in which the link between child and community was severed. Indeed, in its Compensation Entitlement Order, the Tribunal recognized "first removals" as a worst case scenario, given that the pain and suffering from a first removal will follow a child through their life, even where there have been periods of reunification.[103]

114. Limiting compensation to adults to $80,000 where a child is removed from their home, family and community is also consistent with the Tribunal's logic in its Compensation Entitlement Order. In that decision, the Tribunal took into account the impact on children in determining the parameters for compensation to adults. Specifically, the Tribunal determined that adults would not be eligible for compensation where a removal resulted from physical, psychological or sexual abuse. The reason for this limitation due to the Tribunal's view that "it

[103] 2019 CHRT 39 at para 151.

is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history."[104]

115. Similarly, the Caring Society submits that it would undermine child victims' sense of vindication to see each adult from whose care they were removed compensated, while their own compensation over multiple removals was limited to $40,000. Limiting compensation to adults to $80,000 ensures that proportionality is maintained between the recognition of a child's pain and suffering and the compensation available to the adults who cared for them.

F. The Revised Agreement Satisfies the Tribunal's Compensation Orders

116. In 2022 CHRT 41, the Tribunal indicated that three "important aspects" will inform its decision about whether to approve a final settlement agreement on compensation:

(a) The Tribunal will rely on evidence to support its findings and orders;

(b) The Tribunal will analyze if the requested orders are in line with its previous reasons, findings, and orders; and

(c) The Tribunal will assess whether it should retain its jurisdiction so as to achieve sustainable reform and long-term relief in a way that builds on its short-term and long-term orders in the best interests of First Nations children and families as defined by First Nations themselves.[105]

117. With this framework in mind, the Caring Society submits that the Revised Agreement now satisfies the Tribunal's Compensation Orders and meets the test and analytical approach set out by this Panel to assess whether the relief requested on this motion is in keeping with the Tribunal's findings and orders.[106] In saying this, the Caring Society recognizes the Tribunal has upheld the principle of substantive equality in light of the specific needs of First Nations children, families, and communities, and to eliminate systemic discrimination and prevent its recurrence.[107] Moreover, the Tribunal has sought to do so throughout this complaint on

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[104] 2019 CHRT 39 at para 150.
[105] See 2022 CHRT 41, at paras 224, 227, 229.
[106] See e.g., 2022 CHRT 41, at paras 223-229. In 2022 CHRT 41 at para 223, the Tribunal explained that 2022 CHRT 8 sets out the analysis to determine whether requested orders are in line with its previous findings and orders and whether requested amendments can be made.
[107] See e.g., 2022 CHRT 41 at para 227.

principled, evidence-informed grounds, always bearing in mind that this complaint is first and foremost about First Nations children, youth, and their families.[108]

118. The Caring Society further recognizes that any proposed backsliding or derogating from existing orders is anathema to the Tribunal where that approval involves ceding its supervisory jurisdiction. That is rightly so. The Tribunal has described reducing entitlements and disentitling of victims and survivors as a "grave injustice" that would set a "dangerous precedent" in the country.[109] As the Tribunal has observed, perpetrators of discrimination cannot contract out of their human rights obligations to try to circumvent human rights orders, and permitting derogations from existing orders would erode public trust in the human rights system.[110]

119. Now, however, the Revised Agreement presented to the Tribunal on this motion heeds the Tribunal's orders and guidance, as well as the direction from the First Nations-in-Assembly. This direction, expressed in Resolution no. 04/2023, was vital to the Caring Society's ability to support the Revised Agreement as satisfying the Tribunal's orders.[111] Consistent with its October 14, 2022 submissions in response to the Panel Chair's questions, the Caring Society's position remains that a resolution was required here, particularly in light of the opposition that had been expressed to the 2022 FSA in resolutions passed by First Nations leadership at the regional level and given the very important impact of compensation on the lives of First Nations children, young persons and families.

120. The Revised Agreement remedies the derogations identified in 2022 CHRT 41, including the uncertainties in relation to eligibility under Jordan's Principle. The Revised Agreement also introduces a variation to the compensation approach in relation to the estates of parents/caregiving grandparents to ensure a better outcome for children impacted by Canada's discrimination, and refines the approach to compensation for parents and caregiving grandparents under Jordan's Principle, in keeping with the spirit and intent of the Tribunal's findings and orders.

121. The Revised Agreement provides that all victims identified by the Tribunal will receive interest in addition to their base compensation of $40,000; that high-needs members of the

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[108] See 2016 CHRT 2 at para 1.
[109] See 2022 CHRT 41, at paras 237 and 254.
[110] See e.g., 2022 CHRT 41, at paras 250, 257, 259-260.
[111] Blackstock Affidavit at para 27.

approved Jordan's Principle class between the age of majority and their 26th birthday will receive support from the Jordan's Principle Post-Majority Fund; that those tasked with acting in the best interests of the Class Members under the Revised Agreement, including the Administrator, the members of the Settlement Implementation Committee, and more, receive First Nations specific cultural competency training; that the opt-out deadline has been extended to provide additional runway for informed decision-making, particularly for First Nations children (with the AFN and Canada agreeing to seek a further extension to provide an opt out period lasting six months following the April 2023 Special Chiefs Assembly); and that the Caring Society has standing on all matters that proceed before the Federal Court.

122. While the Revised Agreement again takes a "fixed funds approach", the Caring Society's position is that the budgets established for each victim category under the Tribunal's orders are supported by evidence and are reasonable. Unlike the 2022 FSA, the "fixed quantity of funds under the FSA" has not resulted in compromises that "displace some of the victims/survivors whose rights have been vindicated in these proceedings."[112] Furthermore, there are important safeguards built into the Revised Agreement. The most important safeguard is the addition of growth on the settlement funds held in trust to the overall budget available for compensation. The Revised Agreement reinforces this safeguard by principally redirecting such additional funds to any shortfalls in the amount of compensation required to satisfy the Tribunal's orders.

123. Given its position that the Tribunal's Compensation Orders have been satisfied through the Revised Agreement, the Caring Society is now requesting that the Panel approve the Revised Agreement and cease its jurisdiction over the compensation orders. In 2022 CHRT 41, the Tribunal indicated that it might be willing to cede its supervisory jurisdiction over the compensation process in certain circumstances. For instance, the Tribunal suggested that "if all recognized victims/survivors in the Tribunal's orders are included in the FSA", then it could contemplate "ending the Tribunal's jurisdiction on compensation by changing who exercises the supervisory role of the compensation process for a single process supervised by the Federal Court".[113] The Caring Society believes that all recognized victims/survivors are so included, and it therefore asks the Tribunal to endorse the Federal Court's supervision of the implementation of the Tribunal's orders via the Revised Agreement.

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[112] 2022 CHRT 41 at para 472.
[113] 2022 CHRT 41 at para 470.

124. For over 16 years, the Caring Society has been advocating for the best interests of First Nations children, youth, and their families in this complaint. In the future, should the Tribunal approve the Revised Agreement and cede its supervisory jurisdiction over compensation, the Caring Society will continue to take a principle and child and family focused approach before the Federal Court. The forum may change, but the Caring Society will continue to advocate for the best interests of First Nations children, youth and families.

PART IV - ORDER SOUGHT

125. The Caring Society requests the following relief:

a) a finding that the Revised Agreement fully addresses the derogations identified by the Tribunal by providing full compensation to all those entitled further to the Tribunal's Compensation Orders, including: First Nations children removed from their homes, families and communities; 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 definition and approach to Jordan's Principle;

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

c) 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

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

e) an order declaring that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (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

f) 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);

g) 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; and

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

126. All of which is respectfully submitted, this 5th day of July, 2023.

David P. Taylor
Sarah Clarke
Kevin Droz

Counsel for the Caring Society

PART V - LIST OF AUTHORITIES

	STATUTES
1.	*An Act respecting First Nation, Inuit and Métis children, youth and families*, SC 2019, c 24
2.	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
3.	*British Columbia's Child, Family and Community Service Act,* RSBC 1996, c 46
4.	*Canadian Human Rights Act*, RSC 1985, c H-6
5.	*Canadian Human Rights Tribunal Rules of Procedure*
6.	*Child, Family and Community Service Act*, RSBC 1996, c 46
7.	*Child, Youth and Family Enhancement Act,* RSA 2000, c C-12
8.	*Child, Youth and Family Services Act, 2017*, SO 2017 c 14
9.	*Children and Family Services Act*, SNS 1990, c 5
10.	*Child and Family Services Act,* SY 2008, c 1
11.	*Civil Code of Québec*, CQLR c CCQ-1991
12.	*Devolution of Estates Act*, RSNB 1973, c D-9
13.	*Estates Act*, RSO 1990, c E.21
14.	*Estate Administration Act*, RSY 2002, c 77
15.	*Indian Act*, R.S.C., 1985, c. I-5
16.	*Indian Estates Regulations*, C.R.C., c. 954
17.	*Intestate Succession Act*, RSNL 1990, c I-21
18.	*Intestate Succession Act*, RSNS 1989, c 236
19.	*Intestate Succession Act*, RSNWT 1988, c I-10
20.	*Intestate Succession Act*, RSNWT (Nu) 1988, c I-10
21.	*Probate Act*, RSPEI 1988, c P-21
22.	*Rules of Civil Procedure*, RRO 1990, Reg 194

23.	*Succession Law Reform Act*, RSO 1990, c S.26
24.	*Surrogate Rules*, Alta Reg 130/1995
25.	*The Administration of Estates Act*, SS 1998, c A-4.1
26.	*The Child and Family Service Act*, CCSM c C80
27.	*The Intestate Succession Act*, CCSM c I85
28.	*The Intestate Succession Act, 2019*, SS 2019, c I-13.2
29.	*Trustee Act*, RSO 1990, c T.23
30.	*Trustees Act*, SNB 2015, c 21
31.	*Wills and Succession Act*, SA 2010, c W-12.2
32.	*Wills, Estates and Succession Act*, SBC 2009, c 13
	CASE LAW
33.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada,* 2021 FC 969
34.	*Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15
35.	*Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, 2010 QCTDP 10
36.	*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
37.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7
38.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14
39.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35
40.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4

41.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7
42.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39
43.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7
44.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15
45.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20
46.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 7
47.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41
48.	*R.L. v. Canadian National Railway Company*, 2021 CHRT 33
	OTHER SOURCES
49.	Alberta Law Reform Institute, *Estate Administration: Final Report* (Edmonton: August 2013)
50.	Law Commission of Ontario, *Balancing Accessibility and Procedural Protection in a Small Estates Probate Procedure in Ontario* (Toronto: January 2015)
51.	Law Commission of Ontario, *Simplified Procedures for Small Estates: Final Report* (Toronto: August 2015)
52.	Manitoba Law Reform Commission, *Updating the Administration of Small Estates in Manitoba: Final Report* (Winnipeg: March 2018)

ANNEX “A”

Caring Society Methods to Calculate Additional Funding Needs to Satisfy 2022 CHRT 41

July 5, 2023

Background:

This document sets out the data and calculation methods that the Caring Society employed to estimate the compensation awarded by the Canadian Human Rights Tribunal.

Please note that the data and calculations are based on the best available evidence available to the Caring Society during the course of the compensation negotiations from January 2023 to April 2023.

The calculations pertain only to children, youth and families affected by the Canadian Human Rights Tribunal compensation orders.

The number of First Nations children removed from their homes, families and communities to placements funded by ISC

The Caring Society estimates that there were 53,000 First Nations children removed from their homes, families and communities to placements funded by ISC.

This is a foundational estimate, as it provides a reference point for the number of "units" of parental compensation required, is a reference point for a ratio-based calculation of the number of First Nations children eligible for compensation who were in placements not funded by ISC, and is the basis on which an estimate of interest attributable to this group can be calculated.

As set out in the affidavit of Cindy Blackstock at para 16, this estimate is based on a total number of First Nations children in care under the FNCFS Program of 67,200, calculated based on the following sources:

Time Period	Number of First Nations children in/entering care funded by ISC	Source
Jan 1, 2006	8,500 children (already in care)	PBO Report
Feb 24, 2006 to Mar 31, 2019	49,600 children (entering care)	Gorham/Trocmé/Saint-Girons Report
Apr 1, 2019 to Mar 31, 2022	9,100 children (entering care)	Gorham letter
Subtotal	67,200	

To reflect children entering care between January 2, 2006 and February 23, 2006, the Caring Society rounded this subtotal up to 68,000.

However, not all of these 68,000 First Nations children are eligible for compensation under the Tribunal's orders, as some of these children would have been placed with family members or within their communities.

Tables 2-1 and 2-2 of the PBO report set out the PBO's estimates of the total number of First Nations children placed into care funded by ISC between 2006-2020 (Table 2-1) as well as the number of those children who were placed outside of their homes, families and communities (Table 2-2). The percentage of children placed off-reserve in foster, institutional or group home settings was 77.18%. Kinship placements were excluded due to the eligibility criteria requiring placement outside of a First Nations child's family.

Applying this "on-reserve placement rate" to the 68,000 estimate of total removals to ISC-funded care leads to an estimate of 52,428 children placed outside of their homes, families and communities, which the Caring Society rounded up to **53,000**.

The number of "parental units of compensation" corresponding to 53,000 First Nations children removed from their homes, families and communities

The PBO estimated, based on Census data, that there were 1.47 caregivers per First Nations child.

The Caring Society rounded this ratio to 1.5 caregivers per First Nations child.

Applying the assumed 1.5 caregivers-per-First Nations child ratio to the estimate of 53,000 First Nations children removed from their homes, families and communities to placements funded by ISC yielded a total number 79,500 "parental units of compensation" corresponding to 53,000 eligible First Nations children (bearing in mind that in cases of multiple removals (i.e., removal of multiple First Nations children from the same caregiver(s)), some parents will receive more than one "parental unit of compensation").

The Tribunal's Compensation Order and the Compensation Framework specified that parents whose children were removed due to physical, psychological or sexual abuse would not themselves be eligible for compensation. While the 2019 FN-CIS estimated that 30% of removals related to physical abuse, emotional maltreatment and sexual abuse, the Caring Society used a 10% ineligibility estimate due to the difficulties of proving such maltreatment in a process that does not involve interviews of child-victims.

As a result, the Caring Society estimated that **71,550** "parental units of compensation" would be required.

The shortfall in the 2022 FSA's budget for parental compensation applicable to compensating for CHRT-eligible parents/caregiving grandparents

Applying the "1.5 parents per child" assumption to the Gorham/Trocme/Saint-Girons estimate of 115,000 total First Nations children removed leads to a total of 172,500 "parental units of compensation".

$6,900,000,000 would be required to fund 172,500 "parental units of compensation" at $40,000 per removal. However, the 2022 FSA only provided for $5,750,000,000 in compensation to the Removed Child Family Class, leaving a shortfall of $1,150,000,000.

Not all of this shortfall was attributable to parents eligible for CHRT compensation, as children may have been in care, and left care, prior to January 1, 2006, may have been placed with family members, or may have been placed in-community. As such, the Caring Society sought to estimate a proportion of the shortfall attributable to CHRT-eligible parents.

As noted above, the Caring Society estimated 71,550 "parental units of compensation" for CHRT-eligible parents, which is 41% of the total number of "parental units of compensation" arising from the Gorham/Trocme/Saint-Girons estimate.

41% of the $1,150,000,000 shortfall is **$477,000,000**, which was the Caring Society's estimate of additional funds required so that parents would be compensated for all CHRT-eligible removals.

The number of First Nations children removed from their homes, families and communities, to placements not funded by ISC

Table 16 of the 2019 FN-CIS noted a total of 6,141 placements resulting from investigations involving First Nations children. Of these, 2,365 were "informal placements" (i.e. not funded by the child welfare system). As a result, roughly 40% of placements noted in the 2019 FN-CIS were unfunded, while 60% were funded.

Figure 8 in the 2008 FN-CIS noted that 42% of out-of-home care placements during investigations involving First Nations children were "informal kinship care".

Table 7-6 in the 2003 FN-CIS noted a total of 3,500 placements resulting from investigations involving First Nations children. Of these, 1,554 were "informal placements", such that roughly 45% of placements noted in the 2003 FN-CIS were unfunded.

The Caring Society accordingly estimated that 42.5% of total placements involving First Nations children were "informal" (i.e., unfunded), meaning that 57.5% of placements were funded.

As a result, the 68,000 estimate of children entering care from January 1, 2006 to March 31, 2022 would represent 57.5% of the total number of children in out-of-home placements in that time.

As a result, the Caring Society estimated a total of 50,261 "informal" (i.e. unfunded) out-of-home placements from January 1, 2006 to March 31, 2022 (42.5% of an assumed 118,261 total out-of-home placements). The Caring Society rounded this figure to 51,000.

Based on a custom analysis of data from the 2019 FN-CIS regarding placements more than a 30-minute drive from a child's residence, the Caring Society estimated that 30% of these 51,000 children would have been placed outside of their communities (i.e., 15,300 children).

The number of children placed more than a 30-minute drive from their residence who were placed with family members is highly uncertain, due to the lack of research in this area. However, the Caring Society was prepared to estimate that at least 20% of children would have been placed with family members, such that roughly 3,060 children would have to be removed from the estimate, leaving 12,240 children.

The Caring Society rounded this figure up to **13,000** as an estimate of the First Nations children removed to placements not funded by ISC who would be eligible for CHRT compensation.

The number of "parental units of compensation" corresponding to 13,000 CHRT-eligible First Nations children in to placements not funded by ISC

The Caring Society used the same assumptions noted above regarding "parental units of compensation" (1.5 parents per First Nations child and 10% reduction for physical, psychological or sexual abuse), leading to an estimate of **17,550** "parental units of compensation" for this category.

The number of First Nations children who experienced significant impacts (i.e., the "worst case scenario") of denials, unreasonable delays or gaps with regard to essential services, contrary to Jordan's Principle

Estimating a precise number of First Nations children who were impacted by Canada's failure to implement Jordan's Principle from December 12, 2007 to November 2, 2017 is rendered very difficult by the dearth of information available.

The most straightforward means of attempting to determine the number of First Nations children eligible based on events from 2007-2017 is to consider current need. While Jordan's Principle is now approaching six years of more active implementation by Canada, one of Canada's senior officials recognized in cross-examination that approvals since 2017 can also be a reflection of unmet need prior to the Tribunal's orders.

Based on data provided by ISC regarding administrative data for FY 21-22, the Caring Society is aware that there were 23,195 separate children who received services pursuant to Jordan's Principle. Of these, 4,257 were children aged 0 to 2 years.

It is possible to reach an overall estimate by assuming a core group of 23,195 children who would have been eligible for compensation December 2007, and then by adding 4,257 children every year for ten years, for a total of 61,508 children, which the Caring Society would round up to 65,000 children. While the choice to add 4,257 children every year (the number of children in the 0-2 age group, which would be the most common group from which "new" service requests would arise) tends towards overestimation (given that it results in double counting for some 0-2 year old children), this assumption is reasonable as each year from 2009 to 2017 there would also be "new" members of the group of children eligible for Jordan's Principle compensation in older age ranges.

The Caring Society also notes that estimates based on data arising in the 2020s may be an understatement of unmet need in the late 2000s and in the 2010s. Greater lack of services available for children who came into contact with the child welfare system without being removed, the lack of sensitization of the federal and provincial governments to First Nations communities' greater needs prior to the TRC report in 2015, and higher child poverty rates prior to the introduction of the Canada Child Benefit are all factors that would elevate estimates of unmet needs prior to 2017. As such, it is favourable and appropriate that the $3,000,000,000 budget for Jordan's Principle children would be able to provide for compensation to an additional 10,000 children over and above the Caring Society's conservative estimate.

Interest applicable to compensation for CHRT-eligible First Nations children removed from their homes, families and communities

The Tribunal's Compensation Order specified that interest would be calculated on the basis of simple interest at the September 2019 Bank of Canada rate, which was 1.75%.

Based on the estimates above, the total number of CHRT-eligible children removed under the FNCFS Program (to ISC-funded and non-ISC-funded placements) was 66,000. However, it was not possible to determine the years in which these estimated 66,000 First Nations CHRT-eligible children were removed. As such, the Caring Society divided this group into "even" cohorts of 4,000 children per year, with a 1,160-child cohort to represent children coming into care from January 1 to March 31, 2022.

Simple interest was applied to a principal of $40,000 for each of these cohorts, with terms of one to seventeen years. This provides a total estimate of **$431,760,000** required to provide for interest to this group.

Interest applicable to compensation for First Nations children experiencing significant impacts (i.e., the "worst case scenario") of denials, unreasonable delays or gaps with regard to essential services, contrary to Jordan's Principle

As above, the Caring Society views 65,000 as a reasonable estimate of the maximum number of First Nations children who could be eligible for compensation pursuant to the Tribunal's orders.

Similar to removed children, it is not possible to determine the years in which these estimated 65,000 First Nations children experienced discrimination giving rise to compensation under the Tribunal's orders. The Caring Society followed the same methodology and divided this group into ten "even" cohorts of 6,500 children per year (beginning with 2008 as the first complete year to which the Tribunal's compensation order applied and ending with 2017 as the final year to which the Tribunal's compensation order applied).

Simple interest was applied to a principal of $40,000 for each of these cohorts, with terms of one to seventeen years. This provides a total estimate of **$477,750,000** required to provide for interest to this group.

Interest applicable to compensation for parents of First Nations children removed from their homes, families and communities

The estimated $431,760,000 required to provide for interest to First Nations children removed from their homes, families and communities was multiplied by 1.5 (the PBO's estimate of number of parents per First Nations child), the product of which ($647,640,000) was then reduced by 10% (the figure regarding parental ineligibility related to physical, psychological or sexual abuse), for a total estimate of **$582,876,000**.

Interest applicable to compensation for parents of First Nations children experiencing significant impacts (i.e., the "worst case scenario") of denials, unreasonable delays or gaps with respect to essential services, contrary to Jordan's Principle

The parties are seeking a clarification of the Tribunal's order regarding eligibility of parents of First Nations children who experienced discrimination related to Jordan's Principle. As detailed at paragraphs 109-110 of the Caring Society's factum and at paragraphs 105 and 108 of the AFN's factum, existing methodologies for assessing harmful outcomes will need to be adapted and piloted to determine eligibility for compensation. This process will be supervised by the Federal Court.

It is not possible to provide an estimate of the total number of parents who would be eligible for compensation related to Jordan's Principle based on the Tribunal's orders in advance of the piloting being completed (though the Caring Society is satisfied that the $2 billion budget allocated will be sufficient). As such, it is also not possible to provide an estimate of the interest applicable to these compensation awards.

Compensation to the estates of parents (or caregiving grandparents) who would not have survived to the date of settlement approval

The Caring Society relied on the 2018 paper *First People Lost: Determining the State of Status First Nations Mortality in Canada Using Administrative Data* to estimate the total number of parental (or grandparental) estates that would require compensation. This estimate was made solely for removals to ISC-funded placements, as the Caring Society's proposed budget for parental compensation related to removals for non-ISC-funded placements accounted for all eligible caregivers, regardless of survival to settlement approval.

This paper identified the following age standardized morality rates:

i. Status First Nations Male Age Standardized Mortality Rate: 226 deaths/100,000

ii. Status First Nations Female Age Standardized Mortality Rate: 165 deaths/100,000

It is not possible to identify a gender breakdown of the group of parents (or caregiving grandparents) entitled to compensation under the Tribunal's orders. As such, the Caring Society used a "blended" age standardized mortality rate of 194 deaths/100,000. The Caring Society did not attempt to factor the prevalence of non-First Nations parents, who may be more appropriately represented by a different mortality rate, into this "blended" rate.

Similar to the estimate regarding interest, it is not possible to know the precise years in which parents (or caregiving grandparents) became eligible for compensation. As such, the Caring Society divided the group of parents into annual cohorts of 4,403. For each year from 2006 to 2021, the Caring Society "added" 4,403 to the group and "removed" 0.194% of the total population (representing 194 deaths per 100,000). In 2022, given that only one quarter of the year fell into the eligibility period for the Tribunal's compensation orders, 1,101 individuals were "added" to the group. For 2023 and 2024 (in the event that the revised final settlement

agreement is not approved this year), given that the compensation eligibility period was at an end, no additional individuals were added, however, a further 0.194% was removed each year.

The resulting model is as follows:

Year	**Cohort Size**	**Annual Deaths**
2006	4,303	9
2007	8,797	17
2008	13,183	26
2009	17,561	34
2010	21,930	43
2011	26,290	51
2012	30,642	59
2013	34,986	68
2014	39,321	76
2015	43,648	85
2016	47,966	93
2017	52,276	101
2018	56,577	110
2019	60,871	118
2020	65,156	126
2021	69,432	135
2022	70,399	137
2023	70,262	136
2024	70,126	136

The total of annual deaths over this period is 1,560 deaths. Reducing this number to account for the assumed 10% ineligibility due to physical, psychological and sexual abuse provides 1,404.

The Caring Society rounded the result of the model detailed above to **1,400** CHRT-eligible estates for purposes of compensation to parents (or caregiving grandparents) within the Removed Child Family Class. 1,400 CHRT-eligible estates would require an addition $56,000,000 to meet the requirements of the Tribunal's compensation orders.