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

Interested Parties

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

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PART I - STATEMENT OF FACTS

A. Overview

1. Canada concedes that the Consultation Protocol exists and remains in effect.[1] First Nations-in-Assembly have adopted resolutions clearly identifying the path forward on long-term reform for First Nations Child and Family Services and Jordan's Principle.[2] What remains in dispute is whether Canada, the discriminator, can dictate the scope, terms and timing of the consultations required by the Consultation Protocol—including by refusing to negotiate on the long-term reform of First Nations child and family services outside of Ontario, which negotiations have been called for by First Nations rights holders.

2. The answer is no. For the reasons that follow, the Caring Society argues that Canada must consult with the Caring Society and AFN on a good faith basis and in a manner that is in keeping with the Tribunal's clear orders, Canada's contractual commitments, its obligations to First Nations rights holders pursuant to the honour of the Crown, and the guidance expressed in rights holders' direction for long-term reform as reflected in the First Nations-in-Assembly's Resolutions.

3. The honour of the Crown is engaged in this litigation and entails positive duties towards reconciliation. First, it provides a lens through which to assess Canada's compliance with the Tribunal's orders. Second, it gives rise to a duty of diligent implementation that attaches to Canada's own promises in the *Act respecting First Nations, Inuit and Métis children, youth and families* and the *United Nations Declaration on the Rights of Indigenous Peoples Act*. Third, it sets the parameters for implementing the Consultation Protocol and exchanging with parties in the pursuit of a final settlement agreement, which falls within the ambit of the agreements considered in *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*. In this case, Canada's attempts to dictate the terms of the Consultation Protocol and its refusal to

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[1] Letter from Deputy Minister of ISC to CS, AFN, COO and NAN (February 6, 2025), Exhibit "H" to Affidavit of D. Farthing-Nichol, affirmed March 13, 2025 [**Farthing-Nichol Affidavit**]: "Canada remains committed to fulfilling its consultation obligations pursuant to 2018 Canadian Human Right's Tribunal 4 [sic], and as outlined in the Consultation Protocol."

[2] AFN Resolutions 2024/60 and 2024/61, Exhibit "E" to Affidavit of A. Potts affirmed March 3, 2025 [**Potts Affidavit**]; AFN Resolutions 2024/88, 2024/89, 202490, Exhibit "D" to Affidavit of K. Quintana-James affirmed Feb. 13, 2025 [**Quintana-James Affidavit**].

consult with the Caring Society and AFN in a manner consistent with the direction of First Nations rights holders runs afoul of Canada's obligations pursuant to the honour of the Crown.

4. Seven years after Canada signed a Consultation Protocol aiming to facilitate inter-party discussions consistent with the dialogic approach and three years after the Panel's expression of hope that reform would come quickly,[3] it is time for Canada to be directed to consult with the AFN and the Caring Society in good faith so that the important work of nationwide long-term reform of the FNCFS Program can be completed.

5. The Caring Society acknowledges that First Nations children, youth and their families are waiting for Canada to end its discriminatory conduct and ensure it does not happen again. The Tribunal's retention of jurisdiction to ensure its orders are fully satisfied has been essential. The over 25 procedural and non-compliance orders made since the decision on the merits demonstrate the Tribunal's commitment to reconciliation and Canada's slow progress in ending its discriminatory conduct. First Nations children are entitled to reform that is grounded in evidence-informed solutions, that exceeds the status quo, that entrenches their rights to substantive equality and that places their best interests at the forefront for generations to come. The Caring Society is confident that this is achievable—if Canada discharges its obligations under the Consultation Protocol and works with the AFN and the Caring Society in good faith.

B. Background

6. Before providing a more detailed description of the events preceding this motion, a brief summary is in order. Three years ago, in concluding remarks in 2022 CHRT 8, the Panel Chairperson noted that "[t]here is a real need to study the past to change minds and ways informed by the whole truth. The real goal is that minds and ways are changed to create a true shift giving birth to transformative justice and lasting change. This is a minimal requirement to honour the children and their families who were harmed and those who lost their lives."[4] This echoed the hope expressed in the Panel's closing remark that "reform and real transformative change which will be the hallmarks of true justice will now be swift and future issues that may arise will be resolved expeditiously."[5]

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[3] 2022 CHRT 8 at para 170.
[4] 2022 CHRT 8 at para 171.
[5] 2022 CHRT 8 at para 170.

7. Much work has been done in the three years since these concluding remarks. However, Canada has not yet reached what the Panel has identified as "[t]he ultimate objective" of these proceedings, which is "to achieve sustainable long-term reform informed by the many studies, expert committees, First Nations, the parties, etc. for generations to come."[6]

8. *The Final Agreement on Long Term Reform of the First Nations Child and Family Services Program* ("**Draft FSA**") negotiated on a confidential basis by Canada, Assembly of First Nations ("**AFN**"), Chiefs of Ontario ("**COO**") and Nishnawbe Aski Nation ("**NAN**") was released on the last day of the 2023 summer AFN Special Chiefs Assembly, in English only. It was released in French in mid-August, following advocacy from First Nations.[7]

9. The Draft FSA is not before the Tribunal for determination, nor is the process leading to its drafting material to this motion. Therefore, the Caring Society will not reiterate its positions on the Draft FSA (which are already a matter of public record), save where Canada's conduct regarding the Draft FSA and text is material to this motion and Canada's duties related to the honour of the Crown.

10. It is sufficient to note that in October of 2024, First Nations rights holders exercised their right to not approve the Draft FSA as it did not achieve the purpose of the draft FSA, namely to eliminate the discrimination found by the Tribunal and prevent its recurrence. First Nations overwhelmingly directed a reset of negotiations with Canada, overseen by a regionally representative National Children's Chiefs Commission ("**NCCC**") in collaboration with AFN Executive and the Caring Society.[8]

11. Canada then refused to return to the negotiating table to discuss long-term reform on First Nations child and family services outside of Ontario. It proceeded to only negotiate reform of First Nations child and family services agreement in Ontario with COO and NAN. This runs afoul of the objects of the Action Plan required by the *United Nations Declaration on the Rights of Indigenous Peoples Act* to eliminate all forms of discrimination.[9] It is not enough for Canada

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[6] 2025 CHRT 6 at para 237.
[7] Affidavit of M. Sioui in support of CSSSPNQL & AFNQL's Motion to Intervene.
[8] AFN Resolutions 2024/60 and 2024/61, Exhibit "E" to Potts Affidavit; AFN Resolution 2024/88, Exhibit "D" to Quintana-James Affidavit.
[9] The *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan: 2023-2028* at p. 26.

to take measures to relieve the discrimination for some of its victims—it must take measures to relieve the discrimination for all of its victims.

12. Progress towards the ultimate objective of stopping Canada's discrimination and preventing its recurrence for every child is now at an impasse. Despite multiple orders requiring Canada to eliminate discrimination within the FNCFS Program and prevent its recurrence, Canada now states that it will not take further steps to consult on long-term reform, citing its lack of a "mandate". This refusal reflects Canada's old mindset, as it fails to recognize that the Tribunal's orders have provided substantial direction regarding the need for timely action. Canada is subject to orders under quasi-constitutional federal legislation and must act in a manner consistent with the honour of the Crown.

13. The following subsections describe (1) the Complaint and the Tribunal's findings; (2) the rationale for the Consultation Protocol; (3) consultation efforts in the lead-up to the Draft FSA; (4) Canada's rejection of further consultation after First Nations-in-Assembly rejected the Draft FSA and proposed a path forward.

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

14. On February 27, 2007, the Caring Society and the AFN filed a human rights complaint pursuant to s. 5 of the *Canadian Human Rights Act* ("***CHRA***"), alleging that Canada was discriminating against First Nations children and families based on race and national and/or ethnic origin. The Complaint alleged that Canada's FNCFS Program discriminated against First Nations children, youth and families, in all provinces and the Yukon and that its failure to implement Jordan's Principle discriminated against First Nations children and youth. The discrimination was described as "systemic and ongoing".

15. The Complaint was filed as a last resort. For the preceding decade, both the AFN and the Caring Society advocated for reform by conducting research, which Canada participated in and commissioned. This research showed that First Nations children received less child welfare and social services than all other Canadian children and provided recommendations to end the discrimination. Canada chose not to implement the recommendations despite its knowledge that the under-funding was linked to growing numbers of children in care, leaving the Caring Society and the AFN with no other choice but to bring the Complaint.

16. After years of delay occasioned by Canada's procedural litigation and technical arguments, this Panel was appointed on July 10, 2012, to hear this case.[10] Repeatedly, the Tribunal heard compelling and largely uncontradicted evidence of Canada's discriminatory conduct, and the perpetuation of harm and trauma through its provision of First Nations child and family services ("**FNCFS**") and its failure to implement Jordan's Principle.

17. The evidence underscored Canada's abject failure to take action to redress the discrimination of which it was fully aware. In the Merits Decision, the Tribunal upheld the key allegations of discrimination made in the Complaint. It determined that Canada's FNCFS and approach to Jordan's Principle discriminated against First Nations children and families on the prohibited grounds of race and national or ethnic origin contrary to s. 5 of the *CHRA*.[11] The Tribunal ordered Canada to cease its discriminatory practices, reform FNCFS, and to take measures to immediately implement the full meaning and scope of Jordan's Principle.

18. The Tribunal also found that Canada knew about: (i) its discriminatory conduct; (ii) the inequality in the FNCFS; (iii) the harm caused to First Nations children; (iv) the disparity facing First Nation children in accessing essential services; and (v) the harmful impacts of misconstruing Jordan's Principle.[12] It further ruled that Canada had evidence-based solutions to remediate these adverse impacts, as reflected in reports it funded and participated in.[13] Despite having opportunities to act, the Tribunal found Canada failed to make any substantive change to alleviate the discrimination, further exacerbating the harm to First Nations children across the country.[14] This wilful and reckless disregard by Canada was later held by the Tribunal to be the "worst-case scenario under our *Act*."[15]

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

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[10] 2012 CHRT 16.
[11] Merits Decision at paras 456-467.
[12] Merits Decision at paras 168, 362-372, 385-386, 389 and 458.
[13] Merits Decision at paras 150-185, 270-275, 362-372, 389 and 481.
[14] Merits Decision at para 461.
[15] 2019 CHRT 39 at para 234.

20. In addition to making orders directing Canada to cease its discriminatory conduct, the Tribunal stated that the discrimination was ongoing, and that further orders and remedies would follow. These decisions document Canada's ongoing discriminatory conduct against First Nations children, and its failure to comply with the Merits Decision.

2) Canada's Unilateral Decision-Making and the Genesis of the Consultation Protocol

21. Canada's failure to meaningfully consult with, and properly implement guidance from, First Nations, experts, and stakeholders has been a consistent theme in this proceeding. Indeed, Canada's unilateral decision-making and piecemeal approach to evidence-based solutions resulted in this proceeding, serious harms to countless children, youth and families, and the need for the parties to consistently return to the Tribunal in instances of Canada's non-compliance with the Tribunal's orders.

22. In 2016 CHRT 2, the Tribunal underscored that the FNCFS Program and the provincial and territorial agreements "were undertaken and are controlled by the Crown" and that Canada has "discretionary control over the FNCFS Program through policy and other administrative directives".[16] The Tribunal found that this unilateral decision-making had detrimental impacts on First Nations children, youth and families.[17]

23. In 2016 CHRT 16, the Tribunal outlined that "Immediate relief is a temporary measure to remove as many adverse impacts as possible with the understanding that <u>consultation</u>, studies and data collection will translate into a more comprehensive and effective change of the FNCFS Program" [emphasis added].[18]

24. In 2018 CHRT 4, the Tribunal stated that despite Canada advancing that it cannot make unilateral decisions, it did on many occasions.[19] The Tribunal found that Canada's unilateral decision-making was harming First Nation children, particularly in relation to: i) providing

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[16] Merits Decision at para 105.
[17] See e.g. Merits Decision at paras 136, 185, 236-237, 392 and 425, 461.
[18] 2016 CHRT 16 at para 31.
[19] 2018 CHRT 4 at para 438. See also para 176.

incremental funding for all agencies in budget 2016;[20] ii) funding children in care rather than prevention programs;[21] and iii) not fully examining the gaps in mental health services.[22]

25. By 2018 it was clear that Canada could not (or would not) take meaningful steps to change its approach, in keeping with the guidance and orders of the Tribunal. As a result, in 2018 CHRT 4, Canada was ordered to consult with the Commission, the AFN, the Caring Society, COO and NAN and to enter into a consultation protocol with the parties to ensure consultation would be consistent with the honour of the Crown and eliminate the discrimination identified by the Tribunal in 2016.[23] The Consultation Committee on First Nations Child Welfare (the "**CCCW**") was constituted as a result of a consultation protocol entered into by the parties on March 2, 2018.[24]

26. The Tribunal's order for consultation and the work of the CCCW has resulted in significant progress in this case, particularly as it relates to compensation and the consent order in 2022 CHRT 8. In tandem with the consultation orders, a dialogic approach has developed, ensuring that the rights of First Nations children are placed at the centre of decision-making by allowing the Parties to work together in an accountable manner and to return to the Tribunal for guidance and tailored remedies when necessary.

3) The Road to the Draft FSA and the Caring Society's Attempts to Consult

27. The CCCW met regularly until the Caring Society, the AFN and Canada entered into mediation on compensation and long-term reform, following the Tribunal's 2019 CHRT 39 Order, from December 2020 to September 2021.[25] A second round of mediation was entered into on long-term reform regarding the FNCFS Program and Jordan's Principle, which concluded on December 31, 2021 with the parties, including COO and NAN, entering into the Agreement-in-Principle ("**AIP**").

28. In December 2022, First Nations-in-Assembly adopted Resolution 40/2022 directing that the Parties return with options and supporting evidence for decision-making by First Nations-in-Assembly and noting that the FSA should not preclude parties "from seeking orders

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[20] 2018 CHRT 4 at paras 140-143.
[21] 2018 CHRT 4 at paras 119 and 150.
[22] 2018 CHRT 4 at para 295.
[23] 2018 CHRT 4 at para 400.
[24] Quintana-James Affidavit at para 2; see also Potts Affidavit at paras 8-9.
[25] Potts Affidavit at paras 10-11.

from the Tribunal to ensure that all First Nations children, youth and families will be free from discrimination and its recurrence for all generations to come."[26]

29. The Caring Society, AFN, COO, NAN and Canada worked confidentially to develop a long-term reform agreement in 2022 and 2023, while the Institute of Fiscal Studies and Democracy's ("**IFSD**") research work was ongoing. Reforms related to Jordan's Principle were ultimately bifurcated from this process, as research on child and family services was more advanced than that on Jordan's Principle. The discussions related to FNCFS did not progress for several months in 2023, due to Canada's stating that it required a new "mandate".[27]

30. As detailed in the evidence and submissions on the Caring Society's non-compliance motion related to Jordan's Principle and Canada's cross-motion, the Caring Society left the AIP in order to file the non-compliance motion on Jordan's Principle against Canada as such action was not permissible under the AIP. The Caring Society rejects the bald assertion in Canada's affidavit that "the Caring Society progressively withdrew from […] negotiations."[28] To the contrary, and as described in Dr. Blackstock's March 27, 2024 reply affidavit affirmed in the context of the above-noted motion, the Caring Society clearly advised the AIP Parties of its interest in participating in negotiating long-term reform outside of the AIP, which had abetted Canada's discriminatory conduct regarding Jordan's Principle. Terms of the Caring Society's participation were not agreed to and the remaining AIP Parties, Canada, AFN, COO and NAN continued to negotiate the Draft FSA.[29]

31. Despite this impasse, the Caring Society continued providing its positions to the AIP Parties consistent with its practice of providing constructive evidence-informed advice. This included providing feedback on the draft FSA in April 2024.[30] In addition, the Caring Society published its positions document and updated it based on the strength of advice from First Nations and First Nations experts. When the Draft FSA was made public, the Caring Society continued to provide its views to the AIP Parties, as explained below.[31]

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[26] AFN Resolution 40/2022 at paras 3-9, Exhibit "A" to Potts Affidavit.
[27] Potts Affidavit at paras 22-24; Farthing-Nichol Affidavit at paras 39-40.
[28] Farthing-Nichol Affidavit at para 42.
[29] Affidavit of C. Blackstock affirmed March 27, 2024 at paras 88-89. See also Affidavit of C. Blackstock affirmed January 12, 2024 at paras 19, 34, 39, 74, and 175.
[30] Farthing-Nichol Affidavit at para 46.
[31] Correspondence from S. Clarke to Canada, COO, NAN (September 12, 2024), Exhibit "B" to Quintana-James Affidavit; Letter from S. Clarke to Canada (October 29, 2024), Exhibit "E" to Quintana-James Affidavit.

32. AFN, COO, NAN and Canada's confidential AIP discussions led to the Draft FSA being released on July 11, 2024. Once the Draft FSA was released, the Caring Society attempted to engage with Canada and the other parties, in line with the Tribunal's consultation orders set out in 2018 CHRT 4.

33. On September 12, 2024, the Caring Society wrote to Canada and the other parties proposing a meeting to discuss the Draft FSA, in line with the Consultation Protocol entered into by the parties and the direction from the Tribunal. On September 19, 2024, the Caring Society wrote again to canvas possible dates to meet and advised that the Caring Society would be sending a working document of suggested amendments to the Draft FSA in advance of meeting. On September 26, 2024, the Caring Society wrote to Canada and the parties with their proposed amendments to the Draft FSA.[32] Indeed, the Caring Society saw then, and sees now, a path forward to long-term reform of the FNCFS Program and First Nations child and family services across the country – the parameters set down by the Tribunal in 2016 CHRT 2 and its subsequent orders are achievable for First Nations children.

34. On October 2, 2024, COO wrote to the Caring Society in response to its correspondence of September 19, 2024 and September 26, 2024, and advised that AFN, COO, NAN and Canada would consider a confidential meeting on the Draft FSA and that while these parties welcomed suggestions to the Draft FSA, they would not adopt any significant changes to the agreement.[33]

35. Canada wrote to the Caring Society on October 4, 2024, to advise that they would meet with the Caring Society under the same parameters as COO's correspondence of October 2, 2024.[34] A confidential meeting of this nature is not in keeping with the open and transparent process set out in the consultation protocol nor was it warranted given that the Caring Society's materials that would be the focus of the discussion were public.

36. As noted above, the Draft FSA is not before the Tribunal on this motion. The Caring Society's review of the Draft FSA is a matter of public record and, after doing their own due diligence, First Nations-in-Assembly chose to not adopt it. Nor is this motion about the process leading up to the Draft FSA, except insofar as it assists the Panel in providing appropriate

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[32] Correspondence from S. Clarke to Canada, COO, NAN (September 12, 2024), Exhibit "B" to Quintana-James Affidavit.
[33] Letter from M. Wente to S. Clarke (October 2, 2024), Exhibit "C" to Quintana-James Affidavit.
[34] On those parameters, see Letter from M. Wente to S. Clarke (October 2, 2024), Exhibit "C" to Quintana-James Affidavit.

guidance on prospective consultation. Rather, this motion concerns Canada's refusal to negotiate with First Nations outside of Ontario after the First Nations-in-Assembly exercised their right to disagree with the draft FSA and to call for improvements. In particular, this refusal impugns Canada's commitment to good faith negotiations, undermines its obligations under the honour of the Crown and raises the spectre of retaliation.

4) The First Nations-in-Assembly's Call for a New Approach and Efforts to Engage in Further Consultation

37. On October 16-18, 2024, the AFN hosted a Special Chiefs Assembly ("**SCA**").[35] The First Nations-in-Assembly were presented with the Draft FSA for decision-making in keeping with the terms of the Draft FSA. The Draft FSA was not approved as it did not satisfy the object of the agreement—namely to end Canada's discriminatory conduct and prevent its recurrence.[36]

38. Instead, the First Nations-in-Assembly passed several resolutions including 60/2024: *Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle* and 61/2024: *Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services* directing a reset of negotiations to stop Canada's discriminatory conduct and prevent recurrence.[37]

- Resolution 60/2024 rejected the Draft FSA, outlined several action items, and directed the AFN to establish a National Children's Chiefs Commission ("**NCCC**") to provide strategic direction and oversight of negotiations on long-term reform. The resolution further called upon Canada and directed the AFN Executive Committee to unconditionally include the Caring Society in the long-term reform agreement negotiation processes.[38]

- Resolution 61/2024 also outlined amongst several action items, including directing the NCCC to renegotiate the draft FSA in keeping with the direction of the First Nations-in-Assembly. The resolution further called upon Canada to seek a new negotiation mandate to address the matters identified in the resolution.[39]

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[35] Quintana-James Affidavit at para 6. See also Potts Affidavit at para 32.
[36] Potts Affidavit at para 33.
[37] Quintana-James Affidavit at para 6.
[38] AFN Resolution 60/2024, Exhibit "E" to Potts Affidavit.
[39] AFN Resolution 61/2024, Exhibit "E" to Potts Affidavit.

39. Following the resolutions adopted by the First Nations-in-Assembly in October 2024, the Caring Society wrote to Canada to discuss the direction for "a new approach and a reset to the negotiations in an open and transparent manner" and asking to meet with Canada "to discuss our suggested amendments and positions documents."[40]

40. On December 3-5, 2024, the AFN hosted another SCA.[41] The First Nations-in-Assembly adopted several resolutions including the following:

- 88/2024: *Implementing the Chiefs' Direction to End Canada's Discrimination in First Nations Child and Family Services* - calling on Canada and directing the AFN to fully and publicly commit to respecting the direction of the First Nations-in-Assembly as it relates to the rejection of the Draft FSA, and resolutions 60/2024 and 61/2024.[42]

- 89/2024: *Renewing Negotiations Toward Long-Term Reform of First Nations Child and Family Services and Jordan's Principle* - supporting the NCCC's mandate to establish a negotiation team for long-term reform.[43]

- 90/2024: *Safeguarding First Nations Children and Holding Canada Accountable for its Canadian Human Rights Tribunal Legal Obligations* - further directing Canada to obtain a new mandate for negotiation within thirty (30) days of the passing of Resolution 90/2024.[44]

41. First Nations in eleven regions moved quickly to give effect to the direction of First Nations-in-Assembly by appointing representatives to the National Children's Chiefs Commission which held preparatory meetings as early as December of 2024 and is now fully

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[40] Letter from S. Clarke to Canada (October 29, 2024), Exhibit "E" to Quintana-James Affidavit.

[41] Potts Affidavit at para 37.

[42] AFN Resolution 88/2024, Exhibit "D" to Quintana-James Affidavit.

[43] AFN Resolution 89/2024, Exhibit "D" to Quintana-James Affidavit. Resolution 89/2024 also noted that the draft terms of reference for both the NCCC and its negotiation team contemplate seeking the input and expertise of: (i) First Nations and their rights holders; (ii) national and regional FNCFS and Jordan's Principle service providers and experts; (iii) Youth in and from Care; (iv) the National Advisory Committee and Expert Advisory Committee; and (v) non-AFN member First Nations.[43] Canada's affiant's statements regarding the Expert Advisory Committee ("EAC") note a "difference of opinion" over the EAC's mandate and the attempt to impose terms of reference on the EAC in the Draft FSA.[43] The Caring Society's position in this matter is that the EAC ought to be independent of the parties, should not be bound by the terms of reference in the Draft FSA, and should be free to meet on its own and when needed to formulate recommendations to bring about the departmental reforms contemplated in 2022 CHRT 8.

[44] AFN Resolution 90/2024, Exhibit "D" to Quintana-James Affidavit.

operational and, nearly two months ago, advised Canada of its readiness to discharge its responsibilities to First Nations rights holders.[45] Despite this state of readiness, Canada has refused to negotiate with the NCCC as directed by First Nations-in-Assembly. Nonetheless, the NCCC has identified ten high-level outstanding issues on long-term reform and has put forward proposals on how to address them.[46]

42. Following the First Nations-in-Assembly's resolutions, the Caring Society again wrote to AFN, COO, NAN and Canada to make progress in light of the resolutions and highlight the "opportunity to develop and implement long-term solutions that will fundamentally improve outcomes for First Nations children, ensuring that we establish a durable, equitable and sustainable structure that ends Canada's discrimination, meets the needs of First Nations children, youth and families, and redresses the structural drivers of child welfare."[47]

43. In January 2025, Canada provided two responses to the Caring Society.

- First, it advised that "Canada's mandate does not permit further negotiations on reform of the First Nations Child and Family Services Program on a national basis. Canada is not currently in a position to engage in any negotiations beyond those with COO and NAN."[48]

- Second, Canada sent a lengthy, expository, letter providing its view of the path to the rejection of the draft agreement by the First Nations-in-Assembly, and the Caring Society's role in that process, but that failed to provide any sense of Canada's intended next steps.[49]

44. In February 2025, ISC's Deputy Minister sent a letter to the Caring Society, AFN, COO and NAN to indicate its view that consultation activities should "focus on matters pertaining to the implementation of the Tribunal's existing orders on the First Nations Child and Family

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[45] Letter from Chief Frost to PM Trudeau, Minister Hadju and Minister Anandasangaree (January 24, 2025), Exhibit "C" to Farthing-Nichol Affidavit.
[46] Letter from Chief Frost to PM Trudeau, Minister Hadju and Minister Anandasangaree (February 21, 2025), Exhibit "F" to Farthing-Nichol Affidavit.
[47] Letter from S. Clarke to Parties (December 9, 2024), Exhibit "F" to Quintana-James Affidavit.
[48] Letter from P. Vickery to S. Clarke (January 6, 2025), Exhibit "G" to Quintana-James Affidavit.
[49] Letter from P. Vickery to S. Clarke (January 10, 2025), Exhibit "I" to Quintana-James Affidavit.

Services Program”,[50] which excludes both FNCFS long-term reform and all Jordan’s Principle discussions (on which Tribunal-assisted mediations are ongoing).[51]

45. On March 4, 2025, AFN National Chief Cindy Woodhouse wrote to Minister Hajdu recalling the Resolutions by First Nations-in-Assembly and calling on Canada “to seek a revised mandate to negotiate a Final Settlement Agreement on First Nations Child and Family Services (FNCFS).” The National Chief went on to state: “We want to be clear that the AFN supports the National Children’s Chiefs Commission (NCCC) in advancing the mandates of First Nations-in-Assembly in relation to negotiating Final Agreements on FNCFS Program and Jordan’s Principle.”[52]

46. It is important to note that Canada previously worked with the CHRT parties when its own mandate has been challenged. For example, Canada worked with the parties to develop the Compensation Framework, notwithstanding its judicial review of the Tribunal’s compensation entitlement order in 2019 CHRT 39. Canada consulted with the Caring Society (and the AFN) following the Tribunal’s initial refusal to approve the compensation final settlement agreement in 2022 CHRT 41. Good things can happen for First Nations children when Canada comes to the table and works with the parties in a principled manner, consistent with good faith negotiations, the honour of the Crown and the Tribunal’s orders and reasons.

PART II - ISSUES

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

a) Does Canada have an obligation to consult with the co-complainants regarding the long-term reform of First Nations child and family services and Jordan’s Principle?

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[50] Letter from Deputy Minister of ISC to CS, AFN, COO and NAN (February 6, 2025), Exhibit “H” to Farthing-Nichol Affidavit.

[51] At paragraph 85 of his affidavit, Mr. Farthing-Nichol notes that the Caring Society has filed an application for judicial review regarding the Deputy Minister’s February 6, 2025 decision. Mr. Farthing-Nichol does not note that counsel for the Caring Society has communicated to counsel for Canada that this was a protective application for judicial review given the deadline in the *Federal Courts Act*. In preserving this procedural right, the Caring Society makes no concession regarding this Tribunal’s jurisdiction over the terms of consultation regarding the implementation of its orders. As noted in Exhibit “I” to Mr. Farthing-Nichol’s affidavit, the Caring Society is presently engaging ISC to attempt to resolve this matter in a mutually-agreeable manner.

[52] Letter from Chief Woodhouse to Minister Hadju, Exhibit “G” to Farthing-Nichol Affidavit.

b) Is Canada's conduct consistent with its obligations arising from the Tribunal's orders, its contractual commitments and the honour of the Crown?

c) What is the appropriate path forward to secure meaningful consultation?

PART III - SUBMISSIONS

A. Does Canada have an obligation to consult with the co-complainants regarding the long-term reform of First Nations child and family services and Jordan's Principle?

1) The Tribunal's orders require Canada to consult with the parties

48. Canada's refusal to consult the AFN and the Caring Society regarding the nationwide reform of FNCFS and Jordan's Principle is irreconcilable with the Tribunal's clear orders.

49. In 2018 CHRT 4, the Tribunal ordered Canada, under section 53(2)(a) of the *CHRA*[53]*,* to consult "directly with the AFN, the Caring Society, the COO and the NAN".[54] This consultation order related not only to the ruling at issue, but to "the *Decision* and its other rulings."[55] In order to implement this obligation, the Tribunal ordered Canada to "enter into a protocol" in order to "ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision* [emphasis added]".[56] Importantly, Canada did not seek judicial review of 2018 CHRT 4.[57]

50. In subsequent decisions, the Tribunal has repeatedly underscored the necessity of consultation in both its analysis and its orders. In 2021 CHRT 41, the Tribunal highlighted the substantial work accomplished through the Collaborative Committee on Child Welfare and its effectiveness in resolving several issues.[58] Importantly, the Tribunal linked consultation to its overall remedial approach, which "has been to provide guidelines to encourage the parties to work out between themselves the details of the remedy".[59] It underscored that the parties' expertise was "invaluable" and that it enabled them to "make recommendations to improve the cultural appropriateness of Canada's response".[60] It also emphasized that Canada has a trust-

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[53] 2018 CHRT 4 at para 431.
[54] 2018 CHRT 4 at para 400.
[55] Ibid.
[56] Ibid.
[57] 2021 FC 969 at para 47.
[58] 2021 CHRT 41 at para 5.
[59] 2021 CHRT 41 at para 23.
[60] 2021 CHRT 41 at para 24.

like relationship with Indigenous peoples that manifests itself in the honour of the Crown, as well as corollary duties such as the duty to consult.[61] Finally, it noted that consultation was consistent with Canada's own stated remedial approach.[62]

51. In 2023 CHRT 44, the Tribunal reflected on the success of consultation in the compensation context. It commended AFN's leadership and Canada's Ministers for receiving the Tribunal's criticism of the compensation FSA and, importantly, to "consult the Chiefs-in-Assembly, bring the Caring Society back to the negotiation table and arrive at this transformative and unprecedented Revised Settlement Agreement."[63] The Tribunal underscored that even if these renewed negotiations took time, it was well worth it for the victims and survivors of discrimination.[64]

52. Most recently, in 2025 CHRT 6, the Tribunal again reiterated its reasons in 2017 CHRT 14 and 2018 CHRT 4 regarding consultation when it ordered the parties to consult on several issues to remedy the backlog of Jordan's Principle requests across the country.[65] It is noteworthy that on that motion, Canada itself was arguing for an approach in which the parties co-developed solutions.[66] The Tribunal emphasized the "importance and its commitment to the dialogic approach to resolving matters" and its strong belief the parties are best positioned to resolve issues amongst themselves rather than through litigation.[67]

53. The Tribunal's approach—including with respect to consultation and negotiation—was endorsed by the Federal Court in 2021 FC 969. There, Favel J. highlighted that the Tribunal's approach is consistent with precedent, contributes to the goal of reconciliation, and "gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with the decisions."[68]

54. Through the exercise of its authority, the Tribunal has repeatedly indicated Canada is not merely encouraged to consult if it wishes to do so but is *obliged* to consult with the parties

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[61] 2021 CHRT 41 at para 24.
[62] Ibid.
[63] 2023 CHRT 44 at para 2.
[64] 2023 CHRT 44 at para 3.
[65] 2025 CHRT 6 at para 35.
[66] 2025 CHRT 6 at para 148.
[67] 2025 CHRT 6 at para 576.
[68] 2021 FC 969 at paras 132–136.

as a foundational component of the Tribunal's remedial approach. The Tribunal could not have been clearer in its orders.

55. It is therefore deeply concerning that Canada has restricted its "mandate" in a way that "does not permit further negotiations on reform of the First Nations Child and Family Services Program on a national basis."[69] Canada cannot simultaneously suggest that it is "committed to fulfilling its consultative obligations pursuant to 2018 [CHRT] 4", while refusing to engage in the very consultation that the Tribunal has ordered.

2) Canada has contractually bound itself to ongoing consultation

56. Canada itself has, for years, relied on its consultative efforts before the Tribunal. Moreover, it consensually agreed to a framework for implementing its consultative obligations in the Consultation Protocol signed March 2, 2018. This protocol "covered significant principles governing the parties' discussions."[70] The Consultation Protocol remains in full force and imposes duties upon Canada.

57. While the framework in the AIP provided a forum through which the parties could focus their efforts towards achieving long-term reform, it did not terminate the principles and obligations set out in the Consultation Protocol. Indeed, participation in the AIP was funded *through* the Consultation Protocol.[71] To that end, it is noteworthy that Canada itself has recognized the ongoing force of the Consultation Protocol. On February 6, 2025, ISC's Deputy Minister indicated that Canada was committed to fulfilling its consultation obligations "pursuant to 2018 Canadian Human Right's Tribunal 4, and as outlined in the Consultation Protocol", though this is belied by Canada's having shown no willingness to consult on long-term outside of Ontario and intention to limit the scope of consultation to the implementation of the Tribunal's existing orders regarding the FNCFS Program.[72]

58. In any event, the AIP did not portend to—nor had the effect of—allowing Canada to regress from its ongoing consultative obligations relating to long-term reform on a national

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[69] Letter from P. Vickery to S. Clarke (January 6, 2025), Exhibit "G" to Quintana-James Affidavit.
[70] 2021 FC 969 at para 48.
[71] Farthing-Nichol Affidavit at para 84.
[72] Letter from Deputy Minister of ISC to CS, AFN, COO and NAN (February 6, 2025), Exhibit "H" to Farthing-Nichol Affidavit.

basis. Accordingly, Canada continues to have contractual obligations to consult that buttress the Tribunal's orders.

3) The Honour of the Crown requires meaningful consultation and negotiation in remedying discrimination

59. Canada must approach consultation and negotiation in a manner that upholds the honour of the Crown. The honour of the Crown is a "grounding postulate of Canadian constitutional law" that gives rise to a variety of duties.[73] It underpins "an ongoing project that seeks the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship".[74] The Truth and Reconciliation Commission's top Calls to Action included reform of child and family services and Jordan's Principle, thereby placing this litigation at the heart of Canada's honour of the Crown obligations to promote reconciliation. In a very real sense, the Crown's honour is and has always been at stake in the parties' efforts to establish long-term reform to end Canada's discriminatory conduct and prevent its recurrence in FNCFS and Jordan's Principle.

60. From the very beginning, the Tribunal has interwoven the honour of the Crown within its analytical and remedial approach. Indeed, as early as 2016 CHRT 2, the Tribunal highlighted that the honour of the Crown "must form part of the context of the Panel's analysis".[75] In 2018 CHRT 4, the Tribunal explicitly ordered Canada to enter into a protocol to "ensure that consultations are carried out in a manner consistent with the honor of the Crown [emphasis added]".[76] In 2021, Favel J. recognized the link between this proceeding and the honour of the Crown in his concluding remarks. After considering the Supreme Court's dictum on the importance of negotiation in *R v Desautel,* he highlighted that "[w]hen there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those negotiations."[77]

61. In the present motion, the honour of the Crown is engaged in three main ways. **First**, the honour of the Crown provides an interpretive lens through which to evaluate Canada's compliance with the Tribunal's orders and to chart the Tribunal's next steps in the exercise of its remedial authority. **Second**, the honour of the Crown is engaged through the Crown's

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[73] *Southwind v Canada,* 2021 SCC 28 at para 55, citing Brian Slattery, "The Aboriginal Constitution" (2014), 67 *S.C.L.R.* (2d) 319, at p. 320 [***Southwind***]; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at paras 219–21.
[74] *Southwind* at para 55, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 10 [***Beckman***]; see also *R v Desautel,* 2021 SCC 17 at para 30.
[75] Merits Decision at para 95.
[76] 2018 CHRT 4 at para 400.
[77] 2021 FC 969 at para 300.

affirmations in the *Act respecting First Nations, Inuit and Métis children, youth and families* and the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("***UNDRIPA***").[78] **Third**, the process of negotiating a final settlement agreement respecting long-term reform engages the specific duties flowing from the honour of the Crown, and meets the test set out by the Supreme Court of Canada in *Quebec (AG) v. Pekuakamiulnuatsh Takuhikan*.

62. The Caring Society argues that Canada's efforts to restrict the Consultation Protocol and its refusal to consult on ending its discriminatory conduct outside of Ontario run afoul of those obligations. Canada cannot, on the one hand, provide that First Nations' approval was a condition precedent for the draft Final Agreement and,[79] on the other, refuse to consult with First Nations outside of Ontario after they did not approve the Draft FSA. The Caring Society also objects to Canada seeking to unilaterally narrow the scope of the Consultation Protocol in a way not aligned with the direction from First Nations rights holders as expressed in AFN resolutions, as set out in Deputy Minister Wilson's February 6th correspondence.[80]

i. The honour of the Crown assists in evaluating compliance with consultative orders and shaping future consultation

63. The Tribunal has favoured a dialogic approach to its remedies. Unlike courts' traditional approach of setting out orders and requiring litigants to use the rigid test of contempt of court to return and allege non-compliance, the Tribunal's approach has pushed all parties to negotiate and bring forward solutions for the Tribunal to entrench in its orders. This has enabled the Tribunal to "do what they do best" and "respond to dynamic contexts in a procedurally fair and evidence-based manner."[81] The cornerstone of the dialogic approach is the Tribunal's imposition of a duty upon Canada to consult with the other parties. The honour of the Crown is the proper interpretive principle through which to evaluate whether Canada is complying with these consultative orders.

64. Through its orders, the Tribunal has effectively required Canada to engage in a "process of fair dealing and reconciliation"[82] that necessarily engages the Crown's honour. It has set Canada on a path whereby it *must* deal with the equality rights of First Nations children and

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[78] *United Nations Declaration on the Rights of Indigenous Peoples Act*, 2021, c 14 [**UNDRIPA**].
[79] Farthing-Nichol Affidavit at para 47.
[80] Letter from Deputy Minister of ISC to CS, AFN, COO and NAN (February 6, 2025), Exhibit "H" to Farthing-Nichol Affidavit
[81] Kent Roach, Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law (Cambridge: Cambridge University Press, 2021), ch 7 at p. 389, BOA, Tab 1 [**Roach, Remedies for Human Rights Violations**].
[82] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32.

families, which it has infringed for decades. And as the Supreme Court has repeatedly emphasized, "the honour of the Crown is 'always at stake' when it deals with Indigenous peoples".[83] In this sense, the Tribunal's orders exist side-by-side with the jurisprudence on the honour of the Crown, which assists in interpreting the parameters for *how* Canada must deal with Indigenous peoples during consultation and negotiation.

65. The honour of the Crown is a particularly useful interpretive principle because the Tribunal's consultation orders reflect a duty of *means.* When assessing compliance, the question is therefore about *how* Canada has engaged (or refused to engage) with the other parties. The honour of the Crown provides interpretive assistance because it speaks directly "to *how* obligations that attract it must be fulfilled."[84]

66. Evaluating Canada's implementation of the Tribunal's consultation orders through the lens of the honour of the Crown reinforces that Canada's must return to the table to on long-term reform.

ii. Canada's statutory affirmations engage the honour of the Crown and entail a duty of diligent implementation that is intertwined with this litigation

67. In the *Act respecting First Nations, Inuit and Métis children, youth and families*, Canada affirmed that Indigenous people enjoy an inherent right of self-government over child and family services. The combined operation of section 7, 8(a) and 18(1) of that *Act* engages the honour of the Crown in the area of child and family services. As the Supreme Court explained:

> [65] … Under the Act, the government formally undertakes to act in accordance with the position that this right has constitutional status (see *Manitoba Metis*, at paras. 69-70). The honour of the Crown is not a mere "incantation", but rather "finds its application in concrete practices"; it "gives rise to different duties in different circumstances" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 16 and 18, quoted in *Mikisew Cree*, at para. 24). As the Court stated in *Manitoba Metis*, "the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it" (para. 75).
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> [66] The fact that s. 7 of the Act requires the Crown to act as though the right of self-government described in s. 18(1) had been proved therefore implies that the Crown must take a broad approach to the interpretation of this right and must act diligently to implement it, as long

[83] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 63 [***Reference re C-92***].
[84] *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 73.

> as this affirmation is part of the law in force. The fact is that the legislative affirmation regarding the scope of s. 35 "represents a promise of rights recognition, and '[i]t is always assumed that the Crown intends to fulfil its promises'", in this case the promise to act as though Indigenous peoples' right of self-government in relation to child and family services were recognized, while awaiting a formal court ruling on the question (*Haida Nation*, at para. 20, quoting *Badger*, at para. 41).[85]

68. Canada has reinforced these affirmations through its adoption of the *UNDRIPA*, including its recognition of "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child".[86]

69. This proceeding squarely concerns Canada's discriminatory incursions into First Nations child and family services and Jordan's Principle and as such Canada must fulfil its duties in the Tribunal's dialogic process in such a way that upholds the honour of the Crown. Conversely, it is precluded, by its own statutory undertaking, from arguing that the honour of the Crown is not engaged.

70. Moreover, as the Supreme Court highlighted, Canada's affirmations engage a duty of diligent implementation: Canada must "act diligently" to implement First Nations' right of self-government over child and family services. For present purposes, this duty is connected to the CHRT litigation in two ways.

71. First, by their very nature, the Tribunal's orders are necessary to undo the discrimination that has hindered First Nations' autonomy in the area of child and family services. It follows that Canada's overarching duty to diligently implement the promise of First Nations self-government in this area, free from discriminatory incursions, attaches directly to the Tribunal's orders and entails a duty to implement them with diligence.

72. Second, respect for First Nations self-government entails respect for First Nations' voices. Pursuing long-term reform efforts without any *consultation* with First Nations — or walking away from long-term reform altogether when First Nations voice do not adhere to Canada's preferred solution — is inconsistent with an understanding of First Nations as self-governing bodies which are owed respect.

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[85] *Reference re C-92* at paras 65–66.

[86] *UNDRIPA*, preamble.

iii. Consultations towards reforming the First Nations child and family services engage the honour of the Crown

73. Finally, the honour of the Crown is engaged by the substance of the parties' discussions pursuant to the dialogic approach. Whether under the Consultation Protocol or the AIP, the parties have, for years, been engaged in the process of negotiating a binding agreement on long-term reforms to Canada's First Nations child welfare system. This process engages concrete duties flowing from the honour of the Crown.

74. In *Takuhikan,* the Supreme Court confirmed that the honour of the Crown can apply to agreements between the Crown and an Indigenous group and set out a two-part test for whether it is engaged. First, "the agreement in question must be entered into by the Crown and an Indigenous group by reason and on the basis of the group's Indigenous difference".[87] To that end, the agreement must be based on the Crown's "special relationship" with Indigenous peoples and the agreement must have a collective dimension.[88] Second, the agreement must "relate to an Indigenous right of self-government, whether the right is established or is the subject of a credible claim."[89]

75. In the present case, the honour of the Crown is engaged in consultation and negotiation in pursuit of long-term reform of the FNCFS Program and any related agreement. Both parts of the *Takuhikan* test can be examined in turn.

76. First, the entire project of long-term reform of the FNCFS Program arises by reason of, and on the basis of, the distinct needs, cultures and traditions of First Nations peoples. This reform resides in the context of these proceedings, which are expressly about Canada's discrimination on the basis of First Nations difference and disregard for its undertakings to provide "culturally appropriate child and family services". Any contractual agreement that seeks to *rectify* this discrimination is necessarily negotiated on the basis of First Nations' difference. It is squarely concerned with the "negotiation and the just settlement of Indigenous claims" that is the foundation of the honour of the Crown.[90] Moreover, such an agreement clearly has a collective dimension. The consultation process was intended to establish *systemic* reforms that would reset and rebuild Canada's special relationship with First Nations in the area of child welfare. Accordingly, the first part of the test is met.

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[87] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 161 [***Takuhikan***].
[88] *Takuhikan* at para 162.
[89] *Takuhikan* at para 163.
[90] *Takuhikan* at para 148.

77. Second, the agreement being negotiated relates to a right of self-government. Such a right does not have to be recognized by courts to meet the second part of the test.[91] Here, Canada itself has statutorily recognized the right of self-government in relation to child welfare in the *Act respecting First Nations, Inuit and Métis children, youth and families*, by which Canada affirmed that First Nations' "inherent right of self-government… includes jurisdiction in relation to child and family services". The *Act* was one component of giving effect to that right. Any agreement on long-term reforms to Canada's First Nations child welfare system is another component that is just as closely linked to respecting First Nations rights.

78. The fact that the parties have not yet succeeded in reaching a final settlement agreement that garners First Nations' approval at the national level reinforces, rather than negates, that the honour of the Crown is engaged. While *Takuhikan* concerned the implementation and renegotiation of an existing policing arrangement, the Court's framework applies to precontractual negotiations towards an agreement where the subject matter of the agreement being negotiated meets the two-part test. Indeed, the Court specifically highlighted the duties involved in precontractual negotiations as distinct from the additional duties that come to bear if an agreement is entered into. Prior to a final agreement, the Crown must, *inter alia,* "come to the negotiating table with an open mind and with the goal of engaging in genuine negotiations with a view to entering into an agreement [emphasis added]."[92] Moreover, Canada has *already* concluded a Consultation Protocol and AIP whose performance engages the honour of the Crown for the same reasons as those outlined above.

79. It follows that Canada's approach to consultation and negotiation must respect the duties that flow from the honour of the Crown. These are most clearly set out at paragraph 190 of *Takuhikan*:

> When the Crown decides to enter into a contractual relationship that engages its honour, it must act honourably, with integrity and in such a way as to avoid even the appearance of "sharp dealing" (*Haida Nation*, at para. 19; *Badger*, at para. 41). As the expression "sharp dealing" suggests, this standard of conduct demands more than the mere absence of dishonesty. In particular, it requires the Crown not to adopt an intransigent attitude. The Crown must therefore come to the negotiating table with an open mind and with the goal of engaging in genuine negotiations with a view to entering into an agreement. The Crown should not enter into negotiations without intending to keep its promises, nor should it attempt to coerce or unilaterally impose an outcome (A. F. Martin and C. Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018), 41 *Dal.*

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[91] *Takuhikan* at para 164.
[92] *Takuhikan* at para 190.

> *L.J.* 443, at p. 459). Similarly, the Crown cannot change its position for the sole purpose of delaying or ending negotiations (*Kaska Dena Council v. Canada*, 2018 FC 218, at para. 43).

80. These duties can inform the Tribunal's assessment of Canada's conduct, and how it must undertake consultation and negotiation going forward.

81. Taken together, Canada has an ongoing duty to consult that is rooted in the Tribunal's orders, Canada's own contractual commitments, and the honour of the Crown. The next question is the parameters of those consultations and, in particular, whether Canada can unilaterally decide how consultation ought to take place and when that consultation is over.

B. Has Canada breached its consultation obligations?

82. The focus of Canada's consultation obligations must centre on the rights underpinning this proceeding and what is at stake for all First Nations children. As the Tribunal has recognized, individual and collective rights are not mutually exclusive,[93] just as the rights and interests of some collectives coexist with those of others. Canada's engagement with Ontario First Nations can—and must—co-exist with continued engagement with individuals and groups in the rest of Canada. To evaluate Canada's conduct, it is important to centre the discussion on what is at issue on this motion; to apply the principles set out in the prior section; and to propose a clear path forward that respects this Tribunal's remedial role.

1) Re-centering what is at issue on this motion

83. In its letter of January 14, 2025, Canada set out its position respecting its consultation obligations. First, the letter attempts to redirect blame for its own lack of a "mandate" to negotiate away from its own choices and onto the Caring Society. Second, the letter takes issue with the approach set out in the October and December 2024 AFN resolutions—effectively blaming the First Nations-in-Assembly for rejecting the Draft FSA. The contours of Canada's position are replicated in the affidavit of Duncan Farthing-Nichol, which speaks about the Caring Society's role in negotiations at length. Each of these points will be addressed, but only so far as necessary to redirect attention back to what is actually at issue on this motion. There are no cross-examinations on this motion given that it is being heard on an expedited basis in writing. The lack of cross-examination, or of qualifying points in this page-limited submission, should not be taken as an indication of agreement with Mr. Farthing-Nichol's statements.

84. The paragraphs in Mr. Farthing-Nichol's affidavit that relate to the Caring Society's participation in negotiations provide Canada's one-sided perspective regarding the Caring

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[93] 2022 CHRT 41 at para 465.

Society. As noted above, the Caring Society does not agree with Canada's characterization of events. For the purposes of this motion, however, those paragraphs ought to be disregarded because their probative value is outweighed by their prejudicial effect. The discussions that the Caring Society had with the other parties, and the efforts it made to maintain a role in negotiations to reach an agreement, are covered by settlement privilege. In his affidavit, Mr. Farthing-Nichol expressly confirms that Canada does not waive settlement privilege. However, his affidavit nonetheless seeks to selectively waive that privilege in order to tarnish the Caring Society. Canada cannot be permitted to wield settlement privilege as a sword when it suits its purpose and to find shelter in it when it does not. Accordingly, Mr. Farthing-Nichol's evidence on this point must be given no weight.

85. Elsewhere, Mr. Farthing-Nichol also appears to fault the Caring Society for critiquing the Draft FSA and suggests that the Caring Society urged First Nations to vote against the agreement. Insofar as this is an allegation that the Caring Society, as opposed to the substantive content of the Draft FSA, somehow persuaded First Nations to oppose the agreement, the vote margin of Chiefs in Assembly speaks for itself. After what Mr. Farthing-Nichol characterizes as extensive engagement sessions by Canada and AFN to provide First Nations with a clear understanding of the agreement, those First Nations rejected the draft FSA in its current form based on their own concerns.

86. On that point, Canada's reflections on the Chiefs in Assembly are most troubling. In Canada's January 16 letter, it wrote as follows:

> The October and December 2024 AFN resolutions would expand the FNCFS Program to off-reserve funding and maintain the Tribunal's jurisdiction over the Program indefinitely. Canada is not prepared to negotiate in line with resolutions that exceed both the AIP's framework and the complaint on which the Tribunal made its findings of discrimination.
>
> It is disappointing that the First Nations-in-Assembly rejected the Final Agreement, which would have legally bound Canada to provide $47.8 billion in stable and predictable funding over 10 years for a fully reformed Program. The Final Agreement would have resulted in a Program that gives First Nations the tools, the funding and the predictability to make child and family services work better for their communities. Maintaining funding at actuals and Tribunal jurisdiction over the FNCFS Program are incompatible with the objective of developing long-term solutions for comprehensive reform.
>
> Canada is negotiating an agreement with COO and NAN for First Nations in Ontario because they have asked for an agreement for FNCFS Program reforms specific to Ontario that reflects what was proposed in the Final Agreement.

> Canada disagrees with your assertion that, in negotiating a separate agreement with COO and NAN for FNCFS Program reform in Ontario, Canada is acting contrary to the Tribunal's 2016 order to reform the FNCFS Program. In fact, the FNCFS Program has undergone extensive and incremental reform since the Tribunal's 2016 ruling on the merits, developed and implemented in consultation with the parties to the complaint. The negotiation of an agreement specific to Ontario First Nations responds to the desires of those First Nations to adopt the negotiated terms of the Final Agreement following the refusal of others to accept that Agreement [emphasis added].[94]

87. It is open to Canada to move forward with COO and NAN to adopt the negotiated terms of the Draft FSA, subject to the Tribunal's evaluation of the agreement. It is also open to Canada to engage in dialogue on mutually agreeable parameters for new negotiations if it has concerns about the AFN resolutions. It is not, however, open to Canada to close the door to negotiations with all other First Nations because they refused to endorse the only form of agreement Canada was willing to consider, due to their concerns about aspects of it.

88. Canada's conduct is reminiscent of the conduct criticized by the Federal Court in *Indigenous Police Chiefs of Ontario v. Canada (Public Safety)*.[95] Although this decision came in the context of an interlocutory injunction, the court's analysis at the irreparable harm stage is apposite. In that case, Canada argued that any harms to the applicant Indigenous Police Chiefs could have been avoided had it accepted to abide by the Terms and Conditions for funding and retreated from its own preconditions. The Court took issue with this position:

> It is true that Canada is ready and willing to renew the funding agreements for the T3PS, APS, and UCCM police services, including with significant new, additional money. However, [Public Safety Canada] is only ready and willing to do so on its own terms, and more specifically on the basis of the Terms and Conditions that it has itself determined, and that IPCO and the Three Police Services consider offending.[96]

89. In the present motion, Canada has effectively argued that it is ready and willing to implement long-term reform at the national level, but only so long as it occurs on the terms of the Final Agreement that it supports, but that many First Nations consider deeply flawed. Canada cannot shift blame onto First Nations for expressing criticism of the agreement presented to them. The present case is arguably more preoccupying, because it concerns

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[94] Letter from P. Vickery to S. Clarke (January 10, 2025), Exhibit "I" to Quintana-James Affidavit.
[95] 2023 FC 916 [***IPCO***].
[96] *IPCO* at para 135.

Canada's conduct after it has *already* been found to be engaged in ongoing discrimination and after Canada has been expressly ordered to consult with the parties.

90. Put simply, Canada cannot blame the Caring Society, or the First Nations-in Assembly, for its own actions. Efforts to do so are red herrings antithetical to reconciliation, which the Tribunal should not entertain.

2) Canada's (in)actions are in breach of its obligations

91. Canada's refusal to return to the table is a clear breach of the Tribunal's orders. The Tribunal ordered Canada to consult with the parties "to eliminate the discrimination substantiated in the *Decision*".[97] The parties have not yet reached a final agreement that would eliminate the discrimination at the national level. Yet, Canada is no longer consulting with the complainants. Importantly, while Canada attempts to shift the blame for the impasse onto the AFN resolutions, it has offered <u>no alternative path forward</u> for consultations. Accordingly, Canada's suggestion that it continues to respect the Tribunal's consultation orders is untenable.

92. Canada is also in breach of its obligations under the Consultation Protocol. Despite conceding that the protocol is still in force, Canada has recast its scope in a way that allows Canada to dictate when it is willing to consult and on what terms. In particular, in her February 6th letter, Deputy Minister Gina Wilson suggested that "for the time being, the consultation workplan focus on matters pertaining to the implementation of the Tribunal's existing orders on the First Nations Child and Family Services Program."[98] She did not invite a dialogue on this regression, which is fundamentally at odds with the Tribunal's staged approach to remedying discrimination. The Consultation Protocol is a consensual, multilateral agreement that is designed to provide a foundation for both immediate, medium-term and long-term solutions. Canada is therefore in breach of its obligations by showing no willingness to consult on long-term outside of Ontario and by acting to limit the scope of consultation to the implementation of the Tribunal's existing orders regarding the FNCFS Program.

93. Finally, and as explained above, Canada's conduct ought to be evaluated through the lens of the honour of the Crown. This lens reinforces that Canada's conduct is incompatible with the letter and spirit of the Tribunal's orders. Canada has also breached the duty of diligent fulfillment—which flow from Canada's affirmation of the right of self-government in the area of child and family services—and the duties set out in *Takuhikan*—which flow from the performance of the Consultation Protocol and the exchanges toward a final agreement on long-

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[97] 2018 CHRT 4 at para 400.
[98] Letter from Deputy Minister of ISC to CS, AFN, COO and NAN (February 6, 2025), Exhibit "H" to Farthing-Nichol Affidavit.

term reform. Following the decision of the Chiefs-in-Assembly to reject the Draft FSA (an outcome that this document should be taken to have been open to, given that endorsement by the Chiefs-in-Assembly as a condition precedent was integral to the agreement's essence), Canada has adopted an "intransigent attitude".[99] Despite its prior undertakings in relation to consultation — which it has referenced before this Tribunal and in the Consultation Protocol — it now refuses to come to the table or engage in any discussion or dialogue at all on the issues set out in the constructive feedback of the Chiefs in Assembly.

94. Actions speak louder than words. Canada's correspondence since its January letter has paid lip service to consultation in the same way as, in *Takuhikan,* Quebec argued that its approach involved "'transparency', 'respect' and 'appreciation.'"[100] Regardless of the tone of communications, Canada's *actions* are harming the children, youth and families in First Nations that did not agree to the terms set out in Canada's preferred proposed agreement. By refusing to respect the legitimate criticisms raised by the First Nations-in-Assembly and instead turning its back on long-term reform consultations, Canada is no longer dealing with the parties "on an equal footing"[101] and has backed out of seeking to build a "mutually respectful long-term relationship" in the long-term reform of the FNCFS Program.[102]

95. Consistent with the direction of First Nations-in-Assembly Resolution 90/2024, it would be inconsistent with Canada's duties flowing from the honour of the Crown for it to seek to exclude, cause to exclude or otherwise limit the participation of Parties and interested parties (operating within the scope of their interested party status) that are acting on the expressed authority of First Nations. Consultation is an empty promise if it is limited to only those parties who have already accepted Canada's preferred approach to long-term reform.

C. What is the path forward to secure meaningful consultation?

96. Consistent with the dialogic approach favoured by the Tribunal, it is up to the parties to determine the precise modalities of consultation and negotiation. However, it may be helpful to reaffirm three core principles that ought to inform the parties' forward-looking approach.

97. First, Canada is the discriminator in this proceeding. It cannot impose a consultation process solely on its terms and decide when to provide a "mandate" at its whim. In order for

[99] *Takihikan* at para 190, 214.
[100] *Takuhikan* at para 97.
[101] *Takuhikan* at para 216.
[102] *Beckman* at para 10.

dialogue to occur, the *modalities* of that dialogue must, themselves, be the product of collaboration.

98. Second, consultation must respect the Tribunal's recognition that Canada's discriminatory conduct impacts both rights-holding individuals and rights-holding collectives. It must act consistently with the spirit of the Tribunal's consultation orders, which sought "to ensure that the voices of First Nations and those with significant expertise could be heard via representative organizations in order to inform immediate and long-term relief."[103] Indeed, the views of one First Nation do not bind those of another. Canada cannot prioritize consulting exclusively with organizations which approve of an agreement, while refusing to consult with those representing individuals and First Nations who have concerns. Similarly, it cannot outright refuse the directions provided by the AFN resolutions, while refusing to engage in dialogue on a path forward.

99. Third, the parameters of consultation must allow for transparency. In this respect, the Caring Society echoes that consultations and negotiations must occur in the context of an "open and transparent process".[104] This principle is directly related to the quality and efficiency of consultation.[105]

100. As to quality, the ultimate beneficiaries of long-term reform are First Nations and First Nations children, youth and families themselves. Ensuring that First Nations have input within the process, and not *ex post facto* when they are handed a finalized agreement that can accommodate only minimal amendments, will enhance discussions and decision-making throughout consultation. An approach that eschews secrecy in favour of transparent communications with rights holders is more respectful of the spirit of free, prior and informed consent, which Canada has affirmed through the *UNDRIPA*.[106] As Professor Roach explains, systemic remedies must bear in mind "those that the remedy is supposed to benefit", so that "participatory mechanisms can respond to the danger that institutional litigants […] may not always represent the priorities and immediate interests of those who have suffered a rights violation."[107] While the Complainants each bring a wealth of internal expertise, in order to

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[103] 2022 CHRT 41 at para 465.
[104] Letter from Chief Frost to C. Blackstock (January 24, 2025), Exhibit "H" to Potts Affidavit.
[105] Letter from Panel re "First Nations Child and Family Caring Society et al. v. Attorney General of Canada Tribunal File: T1340/7008" (February 10, 2025) at p. 2.
[106] *UNDRIPA*, Schedule, art. 19.
[107] Roach, Remedies for Human Rights Violations, ch 7 at p. 401, BOA, Tab 1.

meaningfully participate in consultation, they must be able to seek the input and expertise of First Nations and experts working on the ground.

101. As to efficiency, when consultations and negotiations occur in private over a period of years, the parties open themselves to the risk that they will be sent back to the drawing board to rectify concerns that would have been raised at the outset had information been shared on an ongoing basis. This is, in part, what occurred with the rejection of the Draft FSA. It explains the emphasis on *ongoing* reporting to First Nations in the AFN Resolutions.

102. The Caring Society shares the Panel's concerns regarding the multi-year delay following the AIP. In the context of the present motion, emphasizing dialogue and transparency can ensure that the parameters of future consultations and negotiations serve to "maximize the chances of success."[108]

103. While the aforementioned principles can help to inform the Tribunal's guidance, the Caring Society submits that the Tribunal's ultimate orders should follow the model of 2018 CHRT 4.

D. Conclusion

104. In 2022 CHRT 41, the Tribunal stated that it supports First-Nations-led solutions to eliminating discrimination as it relates to long-term reform.[109]

105. The Caring Society has welcomed the flexibility the Tribunal has shown in its remedial approach to this case. Since rendering the decision on the merits, the Tribunal has retained jurisdiction to ensure that its orders are effectively implemented, rule upon outstanding remedial requests when needed, and foster dialogue between the parties.[110] The Federal Court has commended the Tribunal for its dialogic approach to this case, stating that it was "necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination"[111]. The Caring Society wholeheartedly supports this view.

106. The Caring Society agrees and respects that the Tribunal is the master of its own house. Indeed, balancing the retention of the Tribunal's jurisdiction over this process[112] with the human rights of victims solidified in a final order is critical to supporting and safeguarding the

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[108] *Takuhikan* at para 191.
[109] 2022 CHRT 41 at para 503.
[110] 2016 CHRT 10 at paras 36-37; See also 2021 FC 969 at para 136.
[111] 2021 FC 969 at para 281.
[112] 2021 CHRT 6 at paras 127–30.

human rights regime and the hard-fought gains already made in this case. As the conduct that led to this motion demonstrates, the Tribunal's retention of jurisdiction contributes to the goal of reconciliation in that it seeks to hold Canada accountable, works to end Canada's long history of discrimination that has plagued generations of First Nations children and families, and refocuses the parties on moving diligently toward long-term reform.

107. Protecting the integrity of human rights regimes must be a guiding principle in determining this motion. The potential for setting a dangerous precedent is significant and could have widespread impacts on the human rights system. To that end, the Caring Society urges the Tribunal to consider the broader and precedential implications of this motion on the integrity of human rights regimes throughout Canada, including its specific impact on other First Nations human rights cases. If Canada can unilaterally decide if and when it engages in consultation, victims of discrimination face detrimental impacts.

PART IV - ORDER SOUGHT

108. The Caring Society requests the following relief:

(a) An Order directing consultation between Canada, the AFN and the Caring Society on the national long-term reform of the FNCFS Program, First Nations federal child and family services and Jordan's Principle in line with the Tribunal's Order of February 1, 2018 (2018 CHRT 4) and its related consultation orders

All of which is respectfully submitted, this 17th day of March, 2025.

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Sarah Clarke and Robin McLeod

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

PART V - LIST OF AUTHORITIES

STATUTES	
1.	*An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, SC 2019, c 24
2.	*United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14
CASE LAW	
3.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53
4.	*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada,* 2021 FC 969
5.	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2012 CHRT 16
6.	*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
7.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 10
8.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 16
9.	*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
10.	*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
11.	*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
12.	*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
13.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 1

14.	*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
15.	*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
16.	*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
17.	*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
18.	*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
19.	*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 24
20.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36
21.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 6
22.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 7
23.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12
24.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2021 CHRT 41
25.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2022 CHRT 8
26.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2022 CHRT 41

27.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2023 CHRT 44
28.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2025 CHRT 6
29.	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73
30.	*Indigenous Police Chiefs of Ontario v Canada (Public Safety),* 2023 FC 916
31.	*Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14
32.	*Ontario (Attorney General) v Restoule*, 2024 SCC 27
33.	*Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan,* 2024 SCC 39
34.	*R v Desautel,* 2021 SCC 17
35.	*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5
36.	*Southwind v Canada,* 2021 SCC 28
OTHER SOURCES	
37.	Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge: Cambridge University Press, 2021), BOA, Tab 1
38.	Government of Canada, *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan: 2023-2028*