Tribunal File No. T-1340/7008

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 CANADA, NISHNAWBE ASKI NATION, TAYKWA TAGAMOU NATION and CHIPPEWAS OF GEORGINA ISLAND

Interested Parties

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA RESPECTING THE MOTION TO APPROVE THE ONTARIO FINAL AGREEMENT

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OVERVIEW

1. The *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario* ("OFA") is a First Nations-led solution that contains monumental reforms that will fundamentally alter the funding, design, and administration of the First Nations Child and Family Services ("FNCFS") Program in Ontario and address the discrimination found by the Canadian Human Rights Tribunal ("Tribunal") in 2016. Canada anticipates the reforms will have a transformational impact on the lives of many First Nations children and families in Ontario.

2. The OFA should be approved because it is the path forward chosen by First Nations in Ontario. The comprehensive reform it contains reflects First Nations' priorities. It provides First Nations with flexibility to design and provide the types of services that best suit their needs, recognizes that differing approaches may work best for particular communities, and provides funding that is tailored to account for the specific circumstances of each First Nation.

3. The OFA is also a reflection of true reconciliation in action. Chiefs of Ontario ("COO"), Nishnawbe Aski Nation ("NAN"), and Canada reached the OFA following years of productive and collaborative research, discussion, negotiation, and collaboration. The result is a reformed program that places greater control in the hands of First Nations over the delivery of child and family services in their respective communities and provides them with a significant role in determining the overall future of the program in Ontario. This type of negotiated resolution presents a desirable alternative to continued litigation and should be supported by the Tribunal.

4. The OFA contains the necessary reforms to address the discrimination identified by the Tribunal. Perhaps most notably, the OFA places prevention services at the forefront and provides sufficient funding for First Nations to provide those services in a holistic and fulsome way. The reforms are evidence-based and are designed to advance the overall well-being of First Nations children and families. The reforms also include numerous systemic measures that allow for assessment, monitoring, and

adjustments to the approach as it is implemented, as well as other safeguards to ensure discrimination does not recur. In other words, the OFA does not seek to add support pillars; it seeks to build a solid foundation for the program.[1]

5. As the Tribunal itself has stated, the time for reform is now. Reform should not be delayed in pursuit of a perfection that may be impossible to achieve. What has been achieved in this agreement is a groundbreaking, responsive, and robust approach that addresses the discrimination and is supported by the overwhelming majority of Ontario First Nations. We therefore request that the Tribunal approve the OFA.

PART I - FACTS

A. The FNCFS Program prior to 2016 and the *Merits Decision*

6. In 2016, the Tribunal determined that Canada's design, management, and control of the FNCFS Program, along with its corresponding funding formulas and related provincial/territorial agreements, resulted in a denial of services and created adverse impacts for First Nations children and families on reserves. The Tribunal determined that the main adverse impacts relating to the FNCFS Program were as follows:

a. The design and application of the Directive 20-1 funding formula provided inadequate fixed funding for operations and prevention while maintenance expenditures were reimbursable at cost. This created an incentive to bring children into care.

b. The structure and implementation of the Enhanced Prevention Funding Approach ("EPFA") funding formula perpetuated the incentive to remove children from their homes and incorporated the flawed assumptions of Directive 20-1 in determining funding for operations and prevention.

c. Canada failed to adjust Directive 20-1 and EPFA funding levels to account for inflation/cost of living; and

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[1] *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 at para 458 [*Merits Decision*].

d. The application of the *1965 Agreement* in Ontario had not been updated to ensure on-reserve communities could fully comply with Ontario's *Child and Family Services Act.*[2]

7. In Ontario, the FNCFS Program was not funded pursuant to either Directive 20-1 or the EPFA. In Ontario, funding was provided through a cost sharing agreement between Canada and Ontario called the *1965 Agreement*.[3] The Tribunal determined there were shortcomings in the funding and structure of the *1965 Agreement*, including that it had not kept up to date with legislative changes in Ontario.[4] In particular, the Tribunal stressed the important role of band representatives in Ontario's *Children, and Family Services Act* and how the failure of Canada to fund those services resulted in a lack of culturally appropriate services.[5]

B. Collaborative efforts with COO and NAN

8. In the years since the *Merits Decision,* Canada has collaborated with COO and NAN to address long-term reform of the FNCFS Program. NAN and Canada have worked together at the NAN-Canada Remoteness Quotient Table ("RQ Table") since 2017 to advance work on a remoteness adjustment for child and family services. The RQ Table undertook detailed research in several stages, which ultimately resulted in the creation of the Remoteness Quotient Adjustment Factor ("RQAF").[6] The RQAF will be brought to fruition in the OFA, which uses the RQAF to calculate increased child and family services costs associated with remoteness and provides additional funding to remote communities to cover those costs.[7]

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[2] *Merits Decision* at para 458.
[3] Exhibit HR-11, Tab 214, *Memorandum of Agreement Respecting Welfare Programs for Indians,* October 1, 1966 (hereinafter the "*1965 Agreement*").
[4] *Mertis Decision* at paras 217, 225 & 392.
[5] *Mertis Decision* at paras 228-230, 236-238 & 348.
[6] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 95-101.
[7] OFA at para 33.

9. Separately, Canada funded the Chiefs of Ontario to undertake the Ontario Special Study to consider the adequacy of the *1965 Agreement* in achieving comparable and culturally appropriate services.[8]

10. Since late 2021, Canada, COO and NAN have worked intensively to develop a long-term approach to reforming the FNCFS Program in Ontario: first through the negotiations resulting in the Agreement-in-Principle dated December 31, 2021; then, in the negotiations leading to a national draft agreement dated July 11, 2024; and finally, in the negotiations leading to the OFA dated February 26, 2025.[9]

C. The OFA and Trilateral Agreement

11. The OFA anticipates full-scale reform of the FNCFS Program in Ontario. It provides a new evidence-based funding model, updated policies, and structural changes to the FNCFS Program's administration and oversight to address the discrimination found by the Tribunal and prevent its recurrence. The *Trilateral Agreement in Respect of Reforming the 1965 Agreement* ("Trilateral Agreement") charts a path forward for COO, NAN and Canada to reform the *1965 Agreement*. Canada relies upon the Moving Parties Overview of the OFA and Trilateral Agreement set out in paragraphs 41 – 128 of COO and NAN's written submissions for a detailed description of the contents of both agreements.

PART II – POINT IN ISSUE

12. The only point in issue is whether the reforms contained in the OFA and the Trilateral Agreement remedy the discrimination found by the Tribunal and take measures to prevent its recurrence.

13. Canada's position is that they do. Accordingly, the Tribunal should approve the OFA and order that it satisfies, supersedes and replaces all previous orders of the Tribunal concerning the FNCFS Program in Ontario and the *1965 Agreement* and end

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[8] 2018 CHRT 4 at para 364.
[9] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 10, 17-20, 26-27.

its jurisdiction on all aspects of the complaint in Ontario save for those in relation to Jordan's Principle.

PART III - SUBMISSIONS

A. Legal framework

The Tribunal's remedial jurisdiction is to address the discrimination found in the Merits decision

14. The Tribunal's remedial jurisdiction stems from section 53 of the *Canadian Human Rights Act.*[10] The Tribunal has the authority based on paragraph 53(2)(a) to issue the requested orders as they are measures to redress the discriminatory practice and prevent the same or a similar practice from occurring.

15. Human rights legislation is intended to give rise to individual rights of vital importance and capable of enforcement.[11] The Tribunal's remedial powers should therefore be given such fair, large, and liberal interpretation as will best ensure that those objectives are obtained.[12] As the Panel has stated, constructing remedies in a complex dispute such as this demands innovation and flexibility, which is provided for under section 53 of the CHRA.[13] This remedial discretion "must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented".[14]

16. At the same time, the Tribunal must be careful not to "overreach" beyond the context of the case before it in determining remedies.[15] As stated by the Supreme Court in *Moore,* the Tribunal is "an adjudicator of the particular claim that is before it, not a Royal Commission" and the "remedy must flow from the claim".[16] In other words, the

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[10] *Canadian Human Rights Act*, RSC 1985, c H-6, s 53 [the "*CHRA*"].
[11] *CN v Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at p 1134.
[12] *Ibid.*
[13] *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 10 at paras 15-16 [2016 CHRT 10].
[14] *Mertis Decision* at para 468, citing *Hughes v Elections Canada*, 2010 CHRT 4 at para 50.
[15] *Aiken v Ottawa Police Services Board*, 2019 HRTO 934 at para 25 [*Aiken*].
[16] *Moore v British Columbia (Education),* 2012 SCC 61 at para 64.

remedy must be carefully tailored to the specific claim raised in the proceeding and not improperly expand beyond those bounds.[17]

17. This point was illustrated by the Ontario Human Rights Tribunal in *Aiken:*

> [30] Having said that, any public interest remedy that may be ordered must nonetheless be tailored to address the specific claim raised in the proceeding. A good example of a tailored public interest remedy comes from the Supreme Court of Canada's decision in *C.N. v. Canada (Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114. In that case, the tribunal found that C.N. had engaged in discriminatory hiring and promotion practices by denying employment opportunities to women in certain blue-collar positions. Having made this finding, the tribunal ordered public interest remedies that included permanent measures, special temporary measures, and submission of data to the Canadian Human Rights Commission. The important point is that these public interest remedies were specifically tailored to address not every problem that women may confront in the context of their employment at C.N., but the specific claims of the women who appeared before the tribunal relating to discriminatory practices in the context of "non-traditional jobs" at C.N. and the need to remedy those discriminatory practices both directly, by prohibiting certain practices, and indirectly, by imposing an employment equity program to increase the representation of women in non-traditional jobs.

18. The Tribunal's remedies therefore should be tailored to address the specific claims of discrimination that were substantiated in 2016. The Tribunal's primary finding was that the way in which Canada structured, calculated, and administered the FNCFS Program funding was flawed. As a result, there was insufficient funding to provide services to First Nation children on reserve in need of care in a way that was substantively equal to services provided being provided to children off-reserve.[18]

19. Conversely, the Tribunal does not have jurisdiction to address issues that go beyond the discrimination found. This includes issues respecting First Nations children living off-reserve and regarding First Nations who are exercising jurisdiction under *An Act respecting First Nations, Inuit and Métis children, youth and families.*[19] The Tribunal

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[17] *Aiken* at para 30; *Association of Ontario Midwives v Ontario (Health and Long-Term Care),* 2020 HRTO 165 at para 185 [*Association of Ontario Midwives*].
[18] *Mertis Decision* at paras 383-393, 454-456 ; see also *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 at para 215 [2018 CHRT 4].
[19] *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24.

is also not tasked with addressing the broader social inequities that First Nations persons on reserve face, even if those inequities may be correlated in some ways with children coming into care. To do so would be to cast the Tribunal's remedial authorities too broadly and lose sight of the specific harm the Tribunal was tasked with remedying.

The Government should be provided discretion in how it remedies policy issues

20. The Tribunal should not be taking on the role of policy maker.[20] Indeed, this Panel has regularly recognized that its role is not that of a policy maker or a manager of public funds.[21] The Panel has indicated that it is not interested "in drafting policies, choosing between policies, supervising policy-drafting or unnecessarily embarking in the specifics of the reform".[22] Canada "maneuvers in a complex situation and should be allowed some flexibility as long as it makes non-discriminatory policy choices".[23]

21. To be clear, this is not to say that the Tribunal cannot issue remedies that impact policy making. In fact, the moving parties are requesting an order of that nature. However, so long as the proposed remedies address the discrimination, the Tribunal should provide deference to Canada, COO, and NAN in determining the mechanism and policies by which discrimination is addressed.

22. The OFA contains robust reforms to the FNCFS Program and ensures adequate funding to recipients. However, as stated by the Tribunal, it does not need to be "perfect".[24] The dispositive question must remain whether the OFA remedies the discrimination and provides safeguards to prevent recurrence.

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[20] *Association of Ontario Midwives* at para 185. See also *Hughes v. Elections Canada,* 2010 CHRT 4 at para 69; *Aiken* at para 55.
[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 41 at para 134 [2021 CHRT 41].
[22] 2018 CHRT 4 at para 48.
[23] 2021 CHRT 41 at para 180.
[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)*, 2025 CHRT 80 at para 113(9) [2025 CHRT 80].

The OFA's requirement for parliamentary appropriation aligns with the Constitution Act, 1867

23. Parliament's role to authorize and provide oversight of government spending is set out in the *Constitution Act, 1867* and the *Financial Administration Act.*[25] There is an appropriation clause in the OFA because Canada requires Parliament's authorization to satisfy its funding commitment.[26] The appropriation of those funds, as public funds, must be authorized by Parliament pursuant to the *Constitution Act, 1867*, which is the supreme law of Canada.[27]

24. Annual appropriation measures, sometimes referred to as supply bills, originate in the House of Commons, and they are approved upon recommendation by the Governor General on the advice of the federal Cabinet. Central to the principle of responsible government in Canada, this recommendation ensures that the executive branch of government is responsible for the initiation of spending bills. However, also in accordance with the principle of responsible government, those spending bills must ultimately have the approval of Parliament.

25. Once an annual appropriation measure is approved and granted royal assent, it provides legal authority to permit expenditures from the Consolidated Revenue Fund to pay for government programs and services. These constitutional and legal requirements bind and constrain Canada.

Section 48.9 of the CHRA supports the approval of the OFA and the Tribunal's relinquishment of jurisdiction

26. Approving the OFA would accord with the requirement that the Tribunal conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. The Tribunal was put in place to provide a fast, flexible

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[25] *Constitution Act, 1867,* 30 & 31 Vict, c 3, ss. 53 and 106 [*Constitution Act, 1867*]; *Financial Administration Act*, RSC 1985, c F-11, ss. 26, 40 (1) [*FAA*].
[26] OFA at para 297.
[27] *Constitution Act, 1867,* s. 53 and 106; *FAA*, s. 26.

and informal alternative to the traditional court system.[28] Complex inquiries may well take considerable time but that does not mean that proceedings should continue indefinitely.[29] Further delays in finalizing remedies is to the detriment of the parties and to other litigants that are waiting for their cases to be heard.[30]

27. The Panel itself has stressed the importance of moving forward with remedies in accordance with section 48.9(1) of the CHRA.[31] As the Tribunal stated, "it is far better for children to complete the long-term remedial phase shortly rather than wait for long periods of time."[32]

28. Further, section 53 of the CHRA, while open-ended in describing the Tribunal's discretion, does not transform the Tribunal into an enforcement body.[33] It is not the Tribunal's role to provide ongoing supervision of the detailed implementation of its own remedial orders. Doing so risks paralyzing the overall work of the Tribunal,[34] and diverts the parties from focusing on the implementation of meaningful and positive solutions to end discrimination.

29. The OFA was agreed to by Canada, COO, and NAN and approved by the Ontario Chiefs-in-Assembly and the NAN Chiefs-in-Assembly after many long years of negotiation. Given it is a non-discriminatory solution reached on consent with the Ontario parties, proportionality, as encapsulated in s. 48.9 of the CHRA, dictates that it should be approved.

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[28] *Richards v Correctional Service Canada*, 2025 CHRT 57 at para 48 [*Richards*].
[29] *Richards* at para 47.
[30] *Thomas v Correctional Service Canada*, 2024 CHRT 139 at para 19.
[31] *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 85 at para 9 [2025 CHRT 85].
[32] Correspondence from the Tribunal on Long Term Reform dated February 10, 2025 at p 2.
[33] *Starr et al v Stevens*, 2024 CHRT 127 at para 158 [*Starr*].
[34] *Starr*.

B. The OFA reflects the will of First Nations in Ontario and contributes to reconciliation

30. The OFA reflects the chosen path forward of First Nations in Ontario. The reforms in the OFA are the result of significant collaboration and negotiation between COO, NAN, and Canada over many years, and as a result, they are reflective of COO and NAN's interests and priorities. They also reflect the interests of their member First Nations, with whom they engaged extensively, and who ultimately voted resoundingly to approve the agreement.

31. Included amongst those interests are long-term remedies to address many of the specific issues raised by COO and NAN over the course of these proceedings. For example, the OFA includes sustainable needs-based funding for First Nations Representative Services.[35] It also recognizes the important role of First Nations in Ontario in delivering child and family services and provides them with more funding and control over these services.[36] In addition, the agreement includes a new co-developed approach for adjusting funding for remoteness that will substantially increase the funding of remote communities in Ontario.[37] These are just a few of the many ways First Nations' interests are reflected in the OFA.

32. The OFA contributes to reconciliation. As the Supreme Court has recognized, the adversarial litigation process is "often antithetical to meaningful and lasting reconciliation".[38] The Court has repeatedly emphasised the importance of reconciliation occurring between Indigenous peoples and the Crown outside the courtroom.[39] Promoting negotiation and just settlements as an alternative to litigation is a first principle of Aboriginal law[40] that should equally be encouraged and not be

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[35] OFA at para 26.
[36] See e.g., OFA at paras 41, 44(b)-(h).
[37] OFA at para 33; Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 101-104.
[38] *Shot Both Sides v Canada,* 2024 SCC 12 at para 71.
[39] See e.g. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 77; *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 186.
[40] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at para 22.

undermined in the human rights context. Indeed, the Panel has expressed on several occasions that it hoped reconciliation could be advanced through the parties resolving remedial issues through negotiations rather than adjudication.[41] The agreement between NAN, COO, and Canada achieves this objective of reconciliation.

33. The provisions of the OFA itself also keep Canada, COO, NAN and First Nations in Ontario on the path of reconciliation. Perhaps most notably, the OFA establishes the Ontario Reform Implementation Committee ("ORIC") that will oversee and monitor the implementation of the reformed FNCFS Program in Ontario. ORIC will consist of one member from each of COO, NAN, and Canada and five members appointed by the Ontario Chiefs-in-Assembly.[42] This new structure integrates First Nations into the governance of the program in an unprecedented way that will continue to foster reconciliation.

C. The OFA more than remedies the discrimination found by the Tribunal

34. The OFA more than remedies the discrimination found by the Tribunal. It introduces an evidence-based funding structure and provides sufficient funding to ensure First Nations children are receiving the services they need. It includes a new governance structure, mechanisms for continued improvements to the approach, and fora for complaints and disputes to be heard.

The Agreement injects significant funding into the FNCFS Program in Ontario

35. The proposed FNCFS Program in the OFA is unrecognizable when compared to the program in place at the time of the *Merits Decision.* In 2015-2016, the FNCFS Program's funding in Ontario was $124.5 million. If the OFA is approved, the FNCFS Program's funding in Ontario will be approximately $913 million in 2026-27. That amounts to an approximately 633% increase from 2015-2016.[43]

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[41] 2025 CHRT 80 at para 4; 2016 CHRT 10 at para 42.
[42] OFA at para 123.
[43] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 9.

36. This immense increase in funding, first through incremental reform and now through the OFA, is due to many new and improved funding lines. There are major increases to prevention, remoteness, and capital funding, as well as the introduction of FNRS funding that will be discussed further below. Under the OFA, ISC will also provide additional baseline funding to agencies that supplements what they receive from the Government of Ontario directly and is based on an agency's claims for intake and investigation, legal fees, and building repairs in 2023-23 (adjusted for inflation and population growth).[44] In addition, the OFA commits to long-term funding for post-majority support services ("PMSS"), a program component that did not exist and was not addressed by the Tribunal in 2016, but that Canada agreed to fund as the part of the Agreement-in-Principle negotiations.[45]

37. The OFA also includes new "top-up" funding lines recommended by IFSD to allow service providers to address specific needs. These include:

a. Emergency – flexible funding to respond to unexpected events that could affect the delivery of child and family services;

b. Results – funding to support the implementation of the OFA's performance measurement framework;

c. Information technology – funding to support information technology needs related to the implementation of the reformed Program;

d. Household supports – funding to support meeting the basic needs of families, particularly those needs that if unmet could lead to children being placed in care.[46]

38. ISC will provide all the funding mentioned in paragraphs 36 and 37 directly to First Nations and/or FNCFS Agencies. This funding provides enhanced support *over and above* the funding that FNCFS Agencies receive through the provincial funding model

[44] OFA at para 18.
[45] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 66.
[46] OFA at paras 19-22.

and that ISC continues to reimburse pursuant to the terms of the *1965 Agreement.*[47] In 2015-2016, by contrast, ISC funded the FNCFS Program in Ontario almost exclusively through its reimbursement of Ontario under the *1965 Agreement.*[48] The new funding approach is therefore a monumental change from how ISC funded the FNCFS Program in Ontario in 2016.

Prevention is the driving force behind the new funding model

39. The OFA puts prevention at the forefront. The primary finding of the Tribunal in the *Merits Decision* was that the funding formula under Directive 20-1 created an incentive to take children into care as prevention services were inadequately funded while protection services were reimbursable at cost.[49] The EPFA, though an improvement on Directive 20-1, continued to provide inadequate prevention funding.[50]

40. As mentioned above, these specific findings about the funding formulas did not apply to Ontario as Canada did not fund Ontario FNCFS Agencies directly through either Directive 20-1 or the EPFA. Rather, Ontario funds all designated children's aid societies, *including FNCFS Agencies*, though its own provincial program and funding model that it designs and administers.[51] Canada then reimburses the Government of Ontario approximately 90-95% of the funding Ontario provides for the delivery of child and family services to registered First Nations persons living on-reserve.[52]

41. However, Canada acknowledges and firmly believes that any reformed program in Ontario must be prevention focused, and the OFA successfully achieves that goal. The OFA provides $2,655.62 in prevention dollars per registered First Nations person resident on-reserve in 2025-26.[53] This amount will be adjusted for inflation in subsequent fiscal years, and a First Nation's population count will be updated yearly

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[47] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 39, 41.
[48] Affidavit of Duncan Farthing-Nichol affirmed October 17, 2025 at para 19.
[49] 2016 CHRT 2 at para 384.
[50] 2016 CHRT 2 at para 387.
[51] Supplemental Affidavit of Duncan Farthing-Nichol Affirmed May 15, 2025 at para 16.
[52] *Ibid* at para 18.
[53] OFA at para 23.

as well.[54] Prevention funding will also be upwardly adjusted for remote communities to account for the increased costs of delivering services in those communities.[55]

42. This funding is evidence-based and sufficient to ensure adequate prevention services. The approach was informed by the Institute of Fiscal Studies and Democracy's ("IFSD"'s) report *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* (the "Phase Two Report"), which proposed prevention funding between $800 and $2,500 per person on-reserve.[56] The chosen approach implements the highest option recommended by IFSD (adjusted for inflation). IFSD calculated the amount of $2,500 based on a case study in which funding at that level enabled the prevention agency to deliver comprehensive prevention programming, much of which served the community as a whole.[57] This amount of funding will enable service providers to deliver the best practice life cycle model of prevention.[58]

43. This prevention funding is consistent with the approach agreed to in the 2021 Agreement-in-Principle and approved by the Tribunal as part of the interim consent orders in 2022 CHRT 8.[59] In issuing that order, the Tribunal agreed that the evidence in support of this prevention approach was reliable, that the shift from the request-based nature of actuals to comprehensive community level programming was justified, and that the approach would provide families with the supports they need.[60] The Tribunal indicated it was very pleased to make the order and that it represented a giant

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[54] OFA at paras 23, 36.
[55] OFA at para 23.
[56] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 13; Phase Two Report at pp XXIII-XXIV, Exhibit B, Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025, pp 68-69.
[57] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 13; *Enabling First Nations Children to Thrive* at pp 91-93 ("IFSD Phase One"), Exhibit C, Affidavit of Duncan Farthing-Nichol dated March 7, 2025, pp 639-641.
[58] Affidavit of Stephanie Wellman affirmed March 7, 2022 at para 78; see also 2022 CHRT 8 at para 117.
[59] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 52.
[60] 2022 CHRT 8 at paras 116, 119, and 125.

step forward.[61] The OFA cements this best practice as a fixture of the program in Ontario.

44. Under the OFA, prevention funding may flow to a First Nation, to its affiliated agency or be divided between the two organizations. Funding provided for prevention pursuant to 2022 CHRT 8 in Ontario has generally been divided between First Nations and their affiliated FNCFS Agencies, with both the First Nation and their affiliated agency receiving a portion of the prevention funding attributable to the First Nation's population.[62] The OFA continues this previous approach unless a First Nation elects otherwise.[63] Once the agreement is in effect, a First Nation will have the option to choose a different approach, including providing all the prevention funding to its affiliated agency or electing to receive all the prevention funding itself.[64]

45. Many specific reasons justify this flexible model as to who will provide prevention services. First and foremost, the Tribunal should support this model because First Nations in Ontario want it and voted in favour of it. It allows individual First Nations to decide what types of services best suit their distinct community needs, and which service provider is best placed to address those needs. It also provides First Nations the opportunity to provide culturally appropriate services at the community level.

46. First Nations in Ontario are prepared to deliver prevention services should they choose to continue to do so. First Nations in Ontario have previously determined that prevention services are often most appropriately provided by, and within, the First Nation.[65] As a result, Canada began funding First Nations in Ontario for prevention under the Community Well-Being and Jurisdiction Initiatives funding stream back in 2018. This funding to First Nations has increased over time with the 2021 CHRT 12

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[61] 2022 CHRT 8 at para 127.
[62] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 52, 54-56. If a First Nation submitted a band council resolution, an alternative distribution may have occurred (see para 54). In the case of non-affiliated First Nations, all prevention funding went to those First Nations (see para 57).
[63] OFA at para 44(d)(iv).
[64] OFA at para 44(d)(i).
[65] 2021 CHRT 41 at para 395. The Tribunal has also made this finding (see 2025 CHRT 80 at para 75; 2022 CHRT 41 at para 431).

consent order for non-agency communities and the 2022 CHRT 8 order for per capita prevention funding.[66] Canada has therefore already been providing First Nations in Ontario with prevention funding for eight years. First Nations in Ontario have also received other FNCFS Program funding during that period under Tribunal orders specific to Ontario (e.g. FNRS per 2018 CHRT 4 and capital per 2021 CHRT 41) that has allowed them to increase their capacity to deliver child and family services. First Nations in Ontario are therefore well positioned to continue to deliver or take on additional child and family services, including prevention services, should they choose to do so.

The OFA addresses the Tribunal's concerns regarding FNCFS Program funding in Ontario

47. The OFA addresses the Tribunal's findings in the *Merits Decision* respecting the inadequacy of FNCFS Program funding in Ontario. As mentioned above, the Tribunal made different findings in Ontario because the program was funded differently. The Tribunal's primary concern respecting the Ontario funding was that certain items were not reimbursed by ISC through the *1965 Agreement*, namely band representative services (now First Nations Representative Services) and capital.[67] The Tribunal also raised concerns about the challenges facing remote communities in Ontario.[68] These items are now adequately funded under the new approach.

48. First Nation Representative Services ("FNRS") are a cornerstone of the new approach. ISC will fund First Nations at the highest level of funding they received for FNRS between 2019-20 and 2023-24, adjusted annually for inflation and population growth.[69] By 2023-24, First Nations would have had six full fiscal years to submit claims at actual costs for FNRS pursuant to the Tribunal's orders. A First Nation's highest one year amount during that time period is therefore a reasonable estimate of

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[66] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 49-52.
[67] 2016 CHRT 2 at paras 228-230, 245, 392.
[68] 2016 CHRT 2 at paras 231-233.
[69] OFA at para 26.

their funding needs in this respect.[70] Moreover, every First Nation in Ontario has received up-front FNRS funding since 2022-23 (while ISC has also continued to accept claims for FNRS funding at actual cost where a First Nation has expended 75% of its start-of-year allocation).[71] Therefore, all First Nations have received funding since at least 2022-23 regardless of whether they have accessed actuals. No First Nation will be left behind by the OFA's approach.

49. The OFA also includes a major $455-million investment in capital to support the delivery of the FNCFS Program in Ontario. The overall investment was calculated based on data drawn from a database of approximately 37,500 ISC-funded capital assets and is intended to be sufficient for: (1) every agency to build and maintain an office building; and (2) every First Nation to build and maintain a recreational centre, a community hall or a cultural centre. For First Nations not affiliated with an FNCFS Agency, the overall funding is intended to be sufficient to build and maintain both: (1) an office building; and (2) a recreational centre, community hall or cultural centre. [72] This funding will ensure that both First Nations and FNCFS Agencies have the space that the Tribunal has emphasised is necessary to provide confidential, safe and culturally appropriate services to children and families.[73]

50. Finally, the OFA includes a new approach for adjusting funding for remoteness: the RQAF. NAN and Canada developed the RQAF following a significant amount of research undertaken at the RQ Table since 2017. The expert evidence of Dr. Martin Cooke, who was involved in its development, confirmed this approach is methodologically sound.[74] Implementation of the RQAF would result in an average remoteness adjustment for funding to First Nations in Ontario of approximately 41.3%.[75] Some very remote First Nations will see funding adjustments of

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[70] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 78.
[71] *Ibid* at paras 75-77.
[72] Supplemental Affidavit of Duncan Farting-Nichol affirmed May 15, 2025 at paras 20-27.
[73] 2021 CHRT 41 at para 142.
[74] Supplemental Affidavit of Dr. Martin Cooked dated May 15, 2025 at para 31.
[75] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 102.

approximately 120%.[76] This approach will therefore guarantee that funding adequately accounts for remoteness and that remote First Nations are not left behind due to the increased costs associated with their geography.

The reforms in the OFA are about much more than increased funding

51. The OFA does not simply provide more funding for child and family services; it re-envisions how the FNCFS Program is structured, designed, and managed. This is accomplished in many ways, including by:

a. Providing a larger role for First Nations in service delivery should they so choose;

b. Providing First Nations greater flexibility to make decisions about what services best suit their needs;

c. Refocusing attention on services that are priorities for First Nations, including prevention and FNRS;

d. Setting up a governance system that provides First Nations an important role in assessing, monitoring, and determining the future of the program;

e. Establishing an independent Ontario FNCFS Data Secretariat to gather, synthesize and develop recommendations respecting the FNCFS Program; and

f. Establishing a Remoteness Secretariat to continue work on the impacts of remoteness on First Nations and FNCFS Agencies.

52. These changes in design and structure will be discussed further in the sections that follow.

[76] Affidavit of Grand Chief Fiddler affirmed March 7, 2025 at para 70.

D. The OFA strives for excellence and meets the Tribunal's expectations for long-term reform

53. The Panel has at various times expressed its expectations on the form long-term remedies should take and certain characteristics that those remedies should possess. Most recently, the Panel provided a list of parameters for long-term remedies in 2025 CHRT 80.[77] The section that follows describes how the approach set out in the OFA meets those parameters.

The reformed funding approach is evidence-based

54. The reformed funding approach is evidence-based and relies on the best currently available research and studies.[78] The significant evidentiary foundation of the approach includes research commissioned, led or endorsed by COO, NAN, the AFN and Caring Society as well as Canada's own research. Additional research and data analysis was conducted during negotiations to develop elements of the reformed funding approach. The reformed funding approach is also based on evidence gathered through Canada's long experience funding the FNCFS Program, including quantitative and qualitative evidence gathered through the actuals funding process.[79]

55. The overall structure of the reformed funding approach draws heavily from research conducted by IFSD, and in particular on the performance-informed budgeting approach detailed by IFSD in their Phase Two Report which they later tested and modelled in their report *Funding First Nations child and family services (FNCFS): A blueprint for program reform* (the "Phase Three report").[80] IFSD describes their funding approach as a "bottom-up, needs-based funding structure."[81]

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[77] 2025 CHRT 80 at para 113.
[78] 2025 CHRT 80 at para 115.
[79] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 8.
[80] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 13; Phase Two Report, Exhibit B, Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025; Phase Three Report, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025.
[81] Phase Three Report at p 3, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 12.

56. As described in more detail in COO and NAN's joint factum, the reformed funding approach substantially follows IFSD's recommended approach and in some cases is more generous. For example, the OFA's remoteness adjustment (the RQAF) will result in an average funding adjustment of 41.3%, which is significantly greater than the adjustment developed by IFSD in their Phase Two Report and the 15% average proposed in the Phase Three Report.[82]

57. The reformed funding approach also includes additional funding lines that IFSD did not include in its model. In particular, the reformed funding approach includes funding for PMSS and FNRS. Though IFSD provided some limited discussion of these two types of services in its final Phase Three Report, IFSD did not model either funding line as part of its proposed funding structure.[83]

58. The reformed funding approach justifiably departs from IFSD's recommendation in its Phase Three Report, finalized following negotiation of the OFA, that funding not be split between First Nations and agencies.[84] As previously described, First Nations in Ontario wish to take over additional service delivery and are prepared to do so. The Parties relied extensively on IFSD's research while adjusting it to meet the reality of First Nations service delivery.

59. The reformed funding approach also relies on the RQAF to adjust funding for remoteness. The RQAF is the result of significant collaborative research by NAN and Canada over many years. COO and NAN's joint factum, along with the evidence, provides a detailed explanation of this research and the RQAF approach.[85]

60. In short, NAN and Canada's research efforts are groundbreaking and will ensure that the circumstances of remote communities are adequately accounted for in the

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[82] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 104.
[83] Phase Two Report at pp XXI-XXIV, Exhibit B, Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025, pp 66-69; Phase Three Report at pp 34-35, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, pp 43-44.
[84] Phase Three Report at p 18, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, pp 27.
[85] See Supplemental Affidavit of Dr. Martin Cooke affirmed May 15, 2025; Cross-examination of Dr. Martin Cooke on December 11, 2025, part 1, generally; Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at paras 95-104.

funding they receive. NAN and Canada built upon previous research and tools available to develop a new evidence-based method for adjusting funding to account for the increased costs of delivering child and family services in remote communities. Numerous technicians and experts from both NAN and Canada were involved in this intensive work.[86] While IFSD proposed a remoteness adjustment in its Phase Two Report, it acknowledged that the amount of compensation would be "arbitrary" as "no reliable standard exists".[87]

61. The reformed funding approach also relies on extensive evidence and financial data gathered by ISC through its experience running the FNCFS Program. Such data includes financial information related to the various actuals processes. Actual costs data reflects what FNCFS Agencies or First Nations spent (in the case of reimbursement) or planned to spend (in the case of advance claims) on eligible expenditures to deliver services in accordance with the Tribunal's orders. It is therefore important evidence respecting "needs-based" funding, and this evidence is integrated into the reformed approach in a variety of ways.

62. For example, FNCFS Agencies will be provided with baseline funding directly from ISC (in addition to what they receive from the Government of Ontario) equal to the amount of that agency's approved actual claims for intake and investigation, legal fees and building repairs in 2022-23, adjusted for inflation and population. Fiscal year 2022-23 was the fifth full fiscal year in which FNCFS Agencies could make actuals claims. [88] FNCFS Agencies had time to adjust to this process and make claims for additional funding if required. Between 2018-19 and 2022-23, 12 out of the 13 FNCFS Agencies in Ontario made such claims.[89] The 2022-23 actuals data is therefore a reasonable measurement of need for additional baseline funding.

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[86] Cross-examination of Dr. Martin Cooke on December 11, 2025, part 1 at p 16, lines 18-25, p 17, lines 1-16.
[87] Phase Two report at p 166, Exhibit B, Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025, p 237.
[88] Affidavit of Duncan Farthing-Nichol affirmed March 7, 2025 at para 41.
[89] Affidavit of Duncan Farthing-Nichol affirmed October 17, 2025 at para 22.

63. Other types of data gathered and consolidated by ISC through its funding of the FNCFS Program informed the reformed funding approach. For example, the methodology for calculating and allocating PMSS funding does not rely upon the amount of approved actuals claims for specific FNCFS Agencies and First Nations; at the time the PMSS approach was being developed, PMSS funding from Canada to FNCFS Agencies and First Nations remained relatively new and there was uncertainty about whether uptake was yet reflective of need.[90] However, ISC was able to use a combination of Statistics Canada data, ISC's children-in-care data, and ISC's data respecting the 2022-23 operation expenditures of FNCFS service providers to calculate the anticipated amount of needs-based funding to provide PMSS, including both direct services (i.e. supports to children) and indirect services (e.g. salaries).[91] Therefore, ISC's data, alongside Statistics Canada data, provided an important source of evidence upon which the new approach was developed.

64. While the reformed approach is based on the best available evidence, it also anticipates potential adjustments as further evidence becomes available. The OFA establishes or continues numerous bodies that will have research or data analysis functions, including the FNCFS Data Secretariat, the Remoteness Secretariat, and the RQ Table.[92] All these bodies will then provide input into the Program Assessment process.[93]

65. The OFA provides an explicit opportunity to account for future research on ferry-connected communities. ISC has proposed a research project with Georgina Island First Nation ("GIFN") and Beausoleil First Nation, who are the only two ferry-connected communities in Ontario that will not receive remoteness funding under the OFA.[94] The research proposal seeks to estimate the added cost of living in communities connected to the main road network only by ferry; GIFN recently responded to that proposal.[95]

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[90] Cross examination of Duncan Farthing-Nichol on December 12, 2025, part 1 at p 133, lines 3-19.
[91] Supplemental Affidavit of Duncan Farthing-Nichol affirmed May 15, 2025 at paras 7-12.
[92] OFA at paras 86-87, 95, 98.
[93] OFA at para 148.
[94] Reply Affidavit of Duncan Farthing-Nichol, affirmed October 17, 2025 at para 6.
[95] Reply Affidavit of Duncan Farthing-Nichol, affirmed October 17, 2025 at paras 6, 10.

Further, Statistics Canada is currently undertaking work on the Index of Remoteness to determine whether there is a method to improve the Index to account directly for ferry-connectedness; they have been consulting with the RQ Table in that process.[96] The OFA provides that the Program Assessment Organization may consider research on measuring the remoteness of communities connected to the main road network by ferry.[97]

The reformed funding approach is flexible

66. The reformed funding approach is flexible in many respects. First, the OFA creates a new funding mechanism (the "FNCFS Funding Mechanism") to allow for increased flexibility in how FNCFS Program funding can be used by recipients. It allows service providers to roll over any unused funds into the subsequent year. Service providers can also reallocate FNCFS funding across various funding streams (with a few principled exceptions).[98] For example, a recipient could use their information technology funding for prevention or could use their PMSS funding for FNRS. This aligns with IFSD's recommendation that funding be transferred in a block that could be used across streams.[99] Doing so provides service providers with flexibility to meet the particular needs in their communities.[100]

67. One of the few exceptions to this flexibility is that prevention funding cannot be reallocated to protection services except for least disruptive measures.[101] This acts as a safeguard to ensure that the prevention-focused objectives of the reformed program are met.

68. The methods for allocating funding amongst service providers are also flexible. Though protection services must be provided by a designated child and family services agency, First Nations can otherwise decide to direct funding to the service provider

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[96] Cross examination of Dr. Martin Cooke on December 11, 2025, part 1 at p 49, lines 5-13, p 50, lines 11-25.
[97] OFA at para 149(c).
[98] OFA at paras 48-53.
[99] Phase Three Report at p 26, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 35.
[100] Phase Three Report at p 27, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 36.
[101] OFA at para 51.

best placed to provide the service (including the First Nation itself).[102] This allows First Nations to organize services in the way that best suits their circumstances.

69. Additionally, the amount of funding provided to a service provider also contains some flexibility. Funding is adjusted yearly to account for changing circumstances through inflation and population adjustments.[103] As a safeguard, the OFA provides for circumstances in which a service provider can make a service provider funding adjustment request ("SPFAR") to receive additional funding. Importantly, circumstances include where FNCFS Agencies are unable within their current funding to provide legislated services or least disruptive measures, or where, due to an unforeseen event, a First Nation has insufficient funding for prevention services.[104]

The OFA provides stable and sustainable funding to First Nations and FNCFS Agencies

70. The OFA provides First Nations and FNCFS Agencies with the stability they need to plan. Under the OFA, a service provider's entire budget (except for capital funding) will be provided up-front annually to be used flexibly across funding lines by the service provider throughout the year. Except for capital, service providers no longer need to apply to receive funding.

71. The importance of stable, up-front funding is highlighted in the evidence. IFSD recommended moving from the current "actuals" process to a fixed annual allocation approach like what is proposed in the OFA. Receiving a set budget each year would assist recipients with planning, problem-solving, and program development and allows them flexibility to "make decisions in the best interests of children and families, in a culturally informed approach, in pursuit of substantive equality".[105] IFSD recommends

[102] OFA at paras 44(d)(i), 52-53; First Nations Child and Family Services Terms and Conditions at 14, A.3, Appendix 8, OFA, pp 155, 160-161.
[103] OFA at paras 8(b), 22, 23, 26, 35-37, 44(b)(v) & (vii).
[104] OFA at paras 166, 167.
[105] Phase Three Report at p 28, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 37.

making limited changes (other than for inflation and population) to budgets within the first five years.[106]

72. The OFA contains specific provisions for new FNCFS Agencies and First Nations transitioning away from existing FNCFS Agencies, including payment of reasonable start-up costs for new agencies and a commitment to consider options to reduce disruption during transitions.[107] These provisions address IFSD's acknowledgement that for organizations that are new "or in a state of crisis", a fixed allocation approach could have some challenges.[108]

73. The OFA also provides flexibility and support to assist with transition of all First Nations and FNCFS Agencies to the reformed FNCFS Program and specifically to the reformed funding approach. Indigenous Services Canada ("ISC") will support FNCFS Agencies and First Nations in the transition, including by informing them as soon as reasonably possible about the reformed funding approach, the changes to funding agreements, and the reporting requirements commencing in fiscal year 2026-2027.[109] ISC is already providing information and education on the reformed FNCFS Program to help prepare FNCFS Agencies and First Nations to the extent possible prior to Tribunal approval.[110]

74. Moreover, IFSD found that the benefits of moving to a fixed allocation approach outweigh potential challenges, and that the existence of a program review process would provide the opportunity to rebalance the approach if needed.[111] The OFA provides for two independent program assessment processes over the course of the agreement, setting out specific dates for their completion to correspond with the end of the initial funding period and then the expiry of the OFA.[112] These processes support sustainable funding by providing detailed recommendations and supporting ORIC's

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[106] Phase Three Report at p 27, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 36.
[107] OFA at paras 63 – 65.
[108] Phase Three Report at p 27, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 36.
[109] OFA at para 56.
[110] Reply Affidavit of Duncan Farthing-Nichol affirmed October 31, 2025 at paras 5-9.
[111] Phase Three Report at p 27, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 36.
[112] OFA at paras 136-137.

Program Assessment Opinions, all of which will be made public along with Canada's response.[113] The OFA dispute resolution process is available for disagreements as to the implementation of recommendations respecting the first program assessment, subject to limitations set out in the OFA.[114]

75. Another benefit of moving towards a stable allocation approach, as highlighted by IFSD, is that it restores decision-making authority to recipients. Under the actuals model, ISC is continuously making decisions about what services are or are not eligible for reimbursement. Under a flexible annual allocation approach, service providers have autonomy in how they utilize their overall resources and do not need to seek approvals or reimbursements from ISC.[115] This will be the case under the stable allocation approach provided for in the OFA.

76. The Tribunal's previous rulings and other evidence from these proceedings also highlight the difficulties of the current actuals process and the benefits of moving towards an annual allocation approach. In 2022 CHRT 8, the Tribunal found that the actuals process was causing hardship for First Nations and FNCFS Agencies.[116] As the evidence on that motion demonstrated, transitioning to per capita prevention funding would allow FNCFS Agencies to focus their energies and resources on program development and delivery.[117] The Tribunal determined that moving from ISC determining claims to the per capita approach would allow for comprehensive community-level programming.[118]

77. The OFA also provides stability due to its 9-year term. Constant changes in funding do not allow for medium- and long-term planning.[119] The OFA's lengthy term will allow First Nations and FNCFS Agencies to plan ahead and know what to expect. While funding may be subject to some changes in 2029-30 following the initial

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[113] OFA at paras 159-165.
[114] OFA at paras 121, 196(b), 197(c), 205.
[115] Phase Three Report at p 24, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 33.
[116] 2022 CHRT 8 at para 120.
[117] 2022 CHRT 8 at para 124; Affidavit of Dr. Blackstock dated March 4, 2022 at para 19.
[118] 2022 CHRT 8 at para 125.
[119] Phase Three Report at p 41, Exhibit A, Affidavit of Jasmine Kaur affirmed October 2, 2025, p 50.

program assessment, the OFA commits that the overall funding for the program will not be less than the funding in 2028-29 and can only be upwardly adjusted.[120] First Nations and FNCFS Agencies therefore are able to undertake long-term planning with the knowledge that similar funding will remain available for years to come.

The agreement accounts for the distinct circumstances of First Nations and supports the provision of culturally appropriate services

78. The OFA is designed to recognize the unique circumstances of First Nations. Funding calculations under the reformed funding approach consider aspects of each First Nation's or FNCFS Agency's circumstances in a number of ways. For example, population size influences various funding lines, either through per capita calculations (such as for prevention) or annual adjustments for population growth (such as for FNRS).[121] Eligible First Nations and FNCFS Agencies also receive (often significant) remoteness adjustments based on their specific geographic location.[122] Additionally, two funding lines – baseline and FNRS – are determined in part by the amounts a First Nation or FNCFS Agency previously received through the actuals process, further reflecting their individual circumstances and needs.[123]

79. The OFA also accounts for the distinct circumstances of First Nations through its governance structure. The OFA establishes the ORIC to oversee and monitor the implementation of the reformed FNCFS Program in Ontario. The Ontario Chiefs-in-Assembly, COO and NAN will appoint seven of the eight members.[124] The oversight of the reform will therefore be First Nation led. The Committee will act as both an integral resource to ISC and an important safeguard in ensuring cultural considerations are prioritized and accounted for as the new program rolls out.

80. The OFA also creates new data collection requirements that will assist service providers in understanding a First Nation's distinct circumstances and providing

[120] OFA at para 67.
[121] OFA at paras 24, 26.
[122] OFA at paras 19, 20, 21, 22, 23, 26, 32, 33.
[123] OFA at paras 18, 26.
[124] OFA at para 123.

culturally appropriate services. The OFA requires FNCFS Agencies to collect data and report on 22 indicators drawn from IFSD's Measuring to Thrive framework. The list includes indicators such as knowledge of Indigenous languages; connection to land; community-based activities; spirituality; family reunification; and placement within community.[125] The intent of this data collection is to provide First Nations and FNCFS Agencies with a holistic vision of the people they serve and the context in which they operate to support enhanced decision-making.[126] Its purpose therefore is to understand a First Nation's specific circumstances and be able to account for that in service delivery.

81. The overall significant increase in the funding envelope will also support the provision of culturally appropriate services. As the Tribunal has already determined, the prevention funding will allow for comprehensive community-level programming.[127] Moreover, since 2016 the Tribunal has emphasized the important role of First Nation representatives in providing culturally appropriate services in Ontario;[128] FNRS are now sustainably and adequately funded under the reformed approach. Further, as described above, the FNCFS Funding Mechanism provides recipients the ability to flexibly use their funds to deliver services that are culturally informed and empowers recipients to decide what services are best for their community.

82. Finally, the OFA supports the provision of culturally appropriate services by guaranteeing that First Nations in Ontario exercising jurisdiction over child and family services will not be offered less funding than they would under the Reformed FNCFS Program for the services covered by their jurisdictional agreement.[129] The Panel has previously agreed that the focus of this case in not on *An Act respecting First Nations, Métis and Inuit children, youth and families.*[130] While First Nations exercising inherent

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[125] OFA at para 113.
[126] OFA at para 113.
[127] 2022 CHRT 8 at para 125.
[128] See for e.g. 2016 CHRT 2 at para 392.
[129] OFA at para 106.
[130] 2022 CHRT 8 at para 10.

jurisdiction over child and family services are beyond the scope of this complaint as the FNCFS Program does not fund the exercise of jurisdiction, this provision does guarantee that those First Nations still stand to benefit from the reforms to the FNCFS Program in Ontario should they decide to transition to delivering child and family services pursuant to their own laws. It removes as a potential barrier any potential financial disincentive for First Nations who wish to exercise jurisdiction. The Tribunal has previously confirmed that if such a clause was included in a final settlement agreement, it would address any concerns the Tribunal had on this point.[131]

The OFA respects the human rights of Indigenous children and families and is guided by the best interests of the child

83. The OFA respects the human rights of Indigenous children and families. Under the OFA, the rights in the *United Nations Declaration on the Rights of Indigenous Peoples* and the *United Nations Convention on the Rights of the Child* are principles guiding the Reformed FNCFS Program.[132] Importantly, the *Declaration* and the *Convention* enshrine respectively the right of Indigenous people and children to be free from discrimination.[133] Eliminating discrimination is the purpose of the OFA and therefore the OFA will play an important role in ensuring the right to be free from discrimination is upheld in the context of the FNCFS Program.

84. The OFA also aligns with the *Declaration* because it supports the right to self-determination of First Nations in Ontario. Most notably, the Ontario Chiefs-in-Assembly and the NAN Chiefs-in-Assembly voted resoundingly in favour of the agreement and the reformed approach contained therein. The ability under the OFA for First Nations to take more control and make choices about how best to serve their communities and provide services also supports self-determination. The integration of

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[131] 2022 CHRT 8 at para 22.
[132] OFA at para 2(l).
[133] *United Nations Declaration on the rights of Indigenous Peoples,* art 2; *United Nations Convention on the Rights of the Child,* art 2 [*Convention*].

First Nations governance into the oversight of the program furthers this objective as well.

85. The OFA, like the *Declaration*, also supports the right of self-government. *An Act respecting First Nations, Inuit and Métis children, youth and families* recognizes and affirms the inherent right of self-government respecting child and family services.[134] The primary way Canada supports the exercise of this right is through the framework set out in the Act for Indigenous governing bodies to exercise their jurisdiction over child and family services. However, the OFA also supports this right by guaranteeing a funding floor for First Nations interested in pursuing their own laws, as described in paragraph 82 above. Moreover, by providing additional child and family services funding directly to First Nations and providing them autonomy over how it is spent, the OFA helps create the conditions for First Nations to eventually exercise jurisdiction should they so choose.

86. The OFA also aligns with the *Convention.* Beyond the right to be free from discrimination, the *Convention* stipulates that in all actions concerning children, the best interests of the child shall be a primary consideration.[135] The best interests of children is one of the guiding principles of the OFA and its application is reflected in the terms and effects of the agreement.[136] Critically, the Panel has previously noted that "removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child".[137] The Panel already found in 2022 CHRT 8 that the consent orders in that ruling would ensure that the unnecessary removal of First Nations children from their home, families and communities would cease.[138] The OFA maintains the prevention funding integral to that finding and builds and improves upon previous orders by providing additional funding that will only continue to enhance the services available to First Nations children and their families.

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[134] SC 2019, c 24, *preamble.*
[135] *Convention,* art 3(1).
[136] OFA at para 2(d).
[137] 2018 CHRT 4 at para 180.
[138] 2022 CHRT 8 at para 144.

E. The OFA ensures the discrimination will not recur

87. The Tribunal has jurisdiction under section 53 of the CHRA to order that Canada "take measures, in consultation with the Commission on the general purposes of the measures, to redress the [discriminatory] practice or to prevent the same or a similar practice from occurring in future".[139]

88. At its core, this case is about Canada's discriminatory design and management of FNCFS Program funding which hindered the ability of service providers to deliver statutorily mandated and culturally appropriate services to First Nations children on reserve. By designing a new and non-discriminatory program and funding model that is based on new policies and First Nations-led evidence and negotiations, the Moving Parties have addressed the discriminatory practice and have put in place significant measures that serve as safeguards to prevent a similar practice from occurring in the future. This new program and funding model is sufficient for the Tribunal to conclude that the Moving Parties' proposed remedies fulfil both the redress and prevention purposes of section 53 of the CHRA.

89. Important to this determination is the inclusion of escalators in the funding model. Although this finding did not apply in Ontario, the Tribunal raised concerns in the *Merits Decision* that the funding formulas outside Ontario did not apply an escalator for regular increases in costs.[140] The OFA includes an inflation adjustment based on the Consumer Price Index.[141] In other words, the inflation adjustment is based on actual (not estimated) inflation. The OFA also includes population adjustments.[142] This means that that a service provider's funding will increase each year if the on-reserve population of their affiliated First Nation grows.

90. Moreover, the OFA goes much further than providing a non-discriminatory funding model. It also provides additional mechanisms and elements that act as safeguards

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[139] *CHRA*, s 53(2)(a).
[140] 2016 CHRT 2 at para 311.
[141] OFA at para 35.
[142] OFA at paras 36-37.

against discrimination occurring in the future. Some of those safeguards include the following:

a. **Service provider funding adjustment requests:** These requests are a form of flexibility included in the OFA to ensure funding remains adequate and to account for individual circumstances that service providers might face. Both First Nations and FNCFS Agencies can make service provider funding adjustment requests in certain circumstances where they are unable to deliver services within their current funding. For FNCFS Agencies, this safeguard includes circumstances where they cannot deliver services required by law or that are least disruptive measures. For First Nations, this includes where they have insufficient funding to provide prevention services due to an unforeseen event. The OFA contemplates that such requests can be made for one or multiple fiscal years.[143]

b. **FNCFS Data Secretariat**: The Data Secretariat will play an important role in monitoring the implementation of the reformed program. It will receive data on child, family, and community well-being from First Nations, FNCFS Agencies and ISC and provide analysis and recommendations to both ORIC and the Program Assessment Organization based on its analysis of this data.[144]

c. **Governance**: The governance of the OFA is First Nations led and provides First Nations with an unprecedented and important ongoing role in guiding the implementation of the program. The ORIC will have a comprehensive oversight and monitoring role over the implementation of the reformed program and will make ongoing recommendations to Canada in this respect. Amongst other roles, it will oversee the program assessment process and make recommendations for how the program should be changed following that process. It will also publish annual reports on the progress of implementation of the OFA.[145]

   There are additional governance committees that will help to prevent future discrimination. The Systemic Review Committee will review Service Provider

[143] OFA at paras 166, 167, 170.
[144] OFA at paras 90, 148.
[145] OFA at para 126.

Funding Adjustment Requests and claimant disputes under the dispute resolution process to identify any trends of concern and, if so, make recommendations to the ORIC in this respect.[146] There will also be a Technical Advisory Committee to provide technical advice on implementation and support implementation and development of best practices.[147]

d. **Program assessments**: The OFA provides for two program assessments over the course of the agreement, each of which will provide an opportunity to assess whether the program provides sufficient funding, achieves progress against the OFA's purposes and principles, is effective, and advances the best interests of the child.[148] This process will therefore provide a holistic review of the program that will allow the Parties and ORIC to reflect on what works and what could be better and to adjust the reformed program as needed.

e. **Dispute resolution process:** The OFA also provides a robust dispute resolution process that is available to both the Parties and service providers, including First Nations and FNCFS Agencies.[149] This process will ensure the discrimination does not recur as it will guarantee that the commitments in the agreement are respected and will ensure that Canada properly exercises its decision-making powers under the OFA, including regarding service provider funding adjustment requests, capital requests, and implementing ORIC's recommendations respecting the initial program assessment.

f. **Training of ISC employees**: The OFA requires that all ISC employees supporting the OFA's implementation must complete mandatory cultural humility training.[150] This training is in keeping with the Tribunal's consent order in 2022 CHRT 8. It seeks to ensure that (1) the program is implemented in a culturally humble way, and (2) that the people who implement the program understand its discriminatory history and therefore play a role in ensuring that discrimination does not recur.

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[146] OFA at paras 130, 132.
[147] OFA at para 133.
[148] OFA at para 139.
[149] OFA at paras 191-284.
[150] OFA at paras 175-176.

g. **Term of the agreement**: The OFA ensures the discrimination does not recur because it is a long-term (9 year) agreement.[151] Moreover, Canada is required to work with the parties to develop the reformed program that will be in effect following the expiry of the term. Canada has also committed to considering the availability of legislated funding following the second program assessment. All these terms seek to ensure that the reforms will be sustainable for future generations.[152]

91. Importantly, the Tribunal's authority to order measures to prevent similar practices from occurring does not require the Tribunal to retain jurisdiction. In fact, the Chairperson has explicitly stated that the Tribunal's discretion under section 53 of the *CHRA* to order remedies that will prevent discrimination from happening again does not transform the Tribunal into an enforcement body.[153] Moreover, the CHRA provides a specific mechanism for enforcing the Tribunal's orders; under section 57, they can be made orders of the Federal Court for enforcement purposes.[154] This further demonstrates that the purpose of section 53 is not to imbue the Tribunal with authority to supervise its own orders.[155]

92. The Tribunal ordered that Canada cease the discriminatory conduct and found that the unnecessary removal of First Nations children as a result of the discrimination in this case ceased as of April 1, 2022.[156] As the Tribunal has noted, the cease and desist order will remain in effect permanently.[157] It would therefore be inappropriate to reject the OFA due to concerns that Canada may not comply with that order in the future.

93. As the Panel stated, the program will always be undergoing change.[158] The reforms are highly responsive to the Tribunal's orders and strive for excellence in addressing the discrimination. Further, the OFA provides the parties with the many measures,

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[151] OFA at para 4(nnn).
[152] 2025 CHRT 80 at para 113(1).
[153] *Starr* at para 158.
[154] *CHRA*, s. 57.
[155] *Starr* at para 158; see also *Lock et al v Peters First Nation*, 2023 CHRT 55 at paras 261-267.
[156] 2022 CHRT 8 at paras 144 and 172.
[157] 2025 CHRT 80 at para 67.
[158] 2025 CHRT 80 at para 90.

mechanisms and safeguards mentioned above to continue to improve the approach throughout the implementation of the agreement and beyond. In this way, the continuing evolution of the program acts as a strength rather than a weakness.

F. The OFA, along with the Trilateral Agreement, addresses the Tribunal's order respecting the *1965 Agreement*

The Trilateral Agreement addresses the Tribunal's order respecting the 1965 Agreement

94. The Trilateral Agreement addresses the Tribunal's order respecting the *1965 Agreement.* The Trilateral Agreement includes important commitments from Canada. First, Canada has agreed to have discussions to reform the entire *1965 Agreement* (covering all program areas), rather than solely discussing reform of the child and family services program elements.[159] This is a much larger project that goes beyond the scope of the matter before the Tribunal but is in keeping with COO and NAN's desire to reform all program areas.

95. Second, Canada has agreed to make best efforts to reach agreement with Ontario on a reformed *1965 Agreement* on a short timeline: by March 31, 2027. If no agreement can be reached by that date, the Parties will discuss next steps, including alternative reform mechanisms or termination of the *1965 Agreement*.[160]

96. Third, the Trilateral Agreement provides COO and NAN with an important role in *1965 Agreement* reform. Canada has agreed not to amend or terminate the *1965 Agreement* without consultation with COO and NAN, to advocate for COO and NAN's full participation in reform discussions, and to support COO and NAN should they decide they would like to become parties to the reformed *1965 Agreement*.[161]

97. Fourth, in discussing reform, a lengthy list of principles will guide the parties, including that services to First Nations people on-reserve should be flexible and

[159] Trilateral Agreement, art 2.01.
[160] Trilateral Agreement, art 2.02(3) & (6).
[161] Trilateral Agreement, art 2.02(2), (4), & (5).

culturally appropriate and should advance substantive equality. In discussing reform related to child and family services, the principles articulated in the OFA will also apply.[162]

98. Canada acknowledges that *1965 Agreement* reform is not yet completed. However, the Trilateral Agreement commits its parties to pursuing this reform on a short timeline and in a way that is reflective of the Tribunal's findings.

99. Canada cannot unilaterally amend the *1965 Agreement*. The *1965 Agreement* is a bilateral agreement between Canada and Ontario and therefore reform of the *1965 Agreement* is not possible without Ontario. Further, the Tribunal cannot order Ontario to reform the *1965 Agreement* as they are not a Respondent in this matter. This is an important limitation that the Tribunal must consider in determining whether its order to reform the *1965 Agreement* has been satisfied.

The OFA substantially addressed the Tribunal's concerns respecting the 1965 Agreement

100. Regardless of the Trilateral Agreement, the Tribunal's order to reform the *1965 Agreement* has already been substantively complied with indirectly through the reforms contained in the OFA, and through Canada's provision of direct funding to FNCFS Agencies and First Nations.

101. In the *Merits Decision,* the Tribunal's primary concern with the *1965 Agreement* was that ISC was not reimbursing Ontario for certain expenses through the *1965 Agreement*. For example, an important concern was the lack of funding for band representative services (now FNRS).[163] Under the OFA, Canada will directly provide First Nations with adequate and sustainable FNRS funding. Therefore, the underlying concern has been addressed by Canada taking action in a way that is within its own control (i.e. that does not require the Government of Ontario's agreement).

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[162] Trilateral Agreement, art 2.04.
[163] 2016 CHRT 2 at paras 228-230, 392.

102. The Tribunal also raised concerns in the *Merits Decision* (and in 2021 CHRT 41) about the sufficiency of capital funding in Ontario.[164] The OFA addresses this concern by providing capital funding for FNCFS Agencies and First Nations. Similarly, the Tribunal's concerns about the increased costs for remote communities in Ontario has been addressed through the OFA's remoteness funding.[165]

103. The Tribunal did not discuss in any detail in the *Merits Decision* Ontario's funding formula, which determines how much every children's aid society across the province, including FNCFS Agencies, receive from Ontario each year. The Ontario funding formula is outside the scope of the Complaint. Notwithstanding this, to the extent there are any insufficiencies in Ontario's funding to FNCFS Agencies, those agencies have been able to access actuals for intake and investigation, legal fees, and building repairs directly from Canada. Under the OFA, Canada will provide additional funding to FNCFS Agencies based on the amount of actuals accessed in 2022-23. Moreover, FNCFS Agencies and/or First Nations will receive directly from Canada the top-up funding lines for emergency, IT, results, and household supports. FNCFS Agencies and/or First Nations will also receive the $2655.62 per capita prevention funding directly from Canada.[166] Therefore, Canada is confident that the combined funding that Ontario and Canada will provide to FNCFS Agencies and First Nations will be sufficient to meet needs, including any statutory obligations, and the SPFAR process will be available as a safeguard.

104. In 2016, Canada was funding the FNCFS Program in Ontario nearly exclusively through the *1965 Agreement*. In 2015-16, FNCFS Agencies in Ontario received approximately $105.9 million from the FNCFS Program; $104 million of that funding flowed through the Government of Ontario under the *1965 Agreement* and only $1.9 million flowed directly to FNCFS Agencies from Canada.[167] Since that time, in addition to building direct funding relations with First Nations through FNCFS Program

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[164] 2016 CHRT 2 at para 245; 2021 CHRT 41 at para 436.
[165] 2016 CHRT 2 at paras 231-233.
[166] OFA at paras 18(b), 19-23.
[167] Reply Affidavit of Duncan Farthing-Nichol, affirmed October 17, 2025 at para 19.

funding, Canada has built substantial direct funding relationships with FNCFS Agencies. In 2026-27 under the OFA, FNCFS Agencies in Ontario are estimated to receive $96.5 million in FNCFS Program funding directly from ISC (in addition to what they will receive from Ontario).[168]

105. Moreover, those amounts only include the funding to FNCFS Agencies. Overall, ISC will provide approximately $1 billion in funding to FNCFS Agencies and First Nations in Ontario in 2026-27 under the OFA (including the housing funding).[169]

106. As described above, Canada should be provided deference in how it chooses to remedy policy issues so long as it addresses the discrimination and puts in place measures to prevent its recurrence. In this case, Canada, working together with COO and NAN, remedied the discrimination in relation to the *1965 Agreement* by building direct funding relationships with First Nations and FNCFS Agencies. This approach reflects the passage of time since 2016 and the move towards direct funding; it also reflects an approach that was within Canada's power to implement. At the same time, Canada, COO, and NAN all remain committed to *1965 Agreement* reform and have made a significant agreement that seeks to bring that reform to fruition.

107. These remedies achieve the same purpose as what the Tribunal was seeking to accomplish by ordering Canada to reform the *1965 Agreement*. The Tribunal should therefore find that they substantively address the Tribunal's order to reform the *1965 Agreement*.

G. Conclusion

108. In his decision on compensation, Justice Favel stated as follows:

> [301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the

[168] Reply Affidavit of Duncan Farthing-Nichol, affirmed October 17, 2025 at para 21.
[169] Financial Chart, Appendix 1, OFA, p 96.

> parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.

109. COO, NAN, and Canada have heeded this guidance. The OFA provides long-term, adequate, stable, and sustainable funding along with significant structural reform that will allow First Nations and FNCFS Agencies to provide children and families with the services they need. The Ontario Chiefs-in-Assembly have voted in favour of proceeding with this agreement and doing so is in the spirit of reconciliation. The Respondent therefore asks the Tribunal to approve the Moving Parties' evidence-based, jointly developed and agreed-upon approach.

PART IV – ORDER SOUGHT

110. The relief requested below is not intended to alter or replace the Tribunal's findings of fact or its reasons in these proceedings; it pertains solely to the remedial orders issued in connection with those findings.

111. Canada respectfully requests that the Tribunal orders that:

a. The OFA is approved without condition;

b. The OFA and the Trilateral Agreement satisfy the Tribunal's order in 2016 CHRT 2 that Canada cease its discrimination relating to the FNCFS Program in Ontario and the 1965 Agreement;

c. The OFA supersedes and replaces all other remedial orders related to the discrimination found by the Tribunal in relation to the FNCFS Program in Ontario and the 1965 Agreement;

d. For clarity, the orders of the Tribunal relating to Jordan's Principle shall continue to apply to Canada in Ontario; and

e. The Tribunal ends its jurisdiction over all elements of the complaint in Ontario and all associated proceedings, save for jurisdiction over those elements of the Complaint and associated proceedings related to Jordan's Principle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Winnipeg, Province of Manitoba, this 19th day of January, 2026.

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LIST OF AUTHORITIES

STATUTES	
1.	*An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24
2.	*Canadian Human Rights Act*, RSC 1985, c H-6, s 53
3.	*Constitution Act, 1867*, 30 & 31 Vict, c 3
4.	*Financial Administration Act*, RSC 1985, c F-11
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5.	*Aiken v Ottawa Police Services Board*, 2019 HRTO 934
6.	*Association of Ontario Midwives v Ontario (Health and Long-Term Care)*, 2020 HRTO 165
7.	*CN v Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114
8.	*Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010
9.	*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
10.	*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 10
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)*, 2018 CHRT 4
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)*, 2021 CHRT 41
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)*, 2022 CHRT 8

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)*, 2022 CHRT 41
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)*, 2025 CHRT 80
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)*, 2025 CHRT 85
17.	*Hughes v Elections Canada*, 2010 CHRT 4
18.	*Lock et al v Peters First Nation*, 2023 CHRT 55
19.	*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40
20.	*Moore v British Columbia (Education)*, 2012 SCC 61
21.	*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5
22.	*Richards v Correctional Service Canada*, 2025 CHRT 57
23.	*Shot Both Sides v Canada*, 2024 SCC 12
24.	*Starr et al v Stevens*, 2024 CHRT 127
25.	*Thomas v Correctional Service Canada*, 2024 CHRT 139
OTHER SOURCES	
26.	Exhibit HR-11, Tab 214, *Memorandum of Agreement Respecting Welfare Programs for Indians*, October 1, 1966 (hereinafter the "1965 Agreement")
27.	Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario
28.	*United Nations Declaration on the rights of Indigenous Peoples*, art 2; Convention, art 2