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

Interested Parties

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

MOTION TO APPROVE THE ONTARIO FINAL SETTLEMENT AGREEMENT

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PART I - STATEMENT OF FACTS

A. Overview

1. "*This decision concerns children*."[1] With these words, the Canadian Human Rights Tribunal ("**Tribunal**") grounded its landmark 2016 Merits Decision in the human rights of First Nations children and in its statutory duty under the *Canadian Human Rights Act* ("***CHRA***") to eliminate and prevent discrimination.[2] Canada engaged in systemic, wilful and reckless discrimination, leading the Tribunal to issue final injunctive orders to protect those children and to ensure that such discrimination does not recur. The Tribunal is now being asked to vacate its binding orders and replace them with a time-limited, contingent agreement that does not eliminate the discrimination or provide enforceable guarantees of substantive equality for First Nations children. Human rights remedies cannot be bargained away, and children's rights cannot be placed on a jurisdictional cliff with no safety net. The First Nations Child and Family Caring Society of Canada (the "**Caring Society**") submits that the Tribunal lacks the jurisdiction and the evidentiary basis to grant the relief sought on this motion.

2. The Attorney General of Canada ("**Canada**"), supported by the interested parties, the Chiefs of Ontario ("**COO**") and Nishnawbe Aski Nation ("**NAN**"), has brought a motion seeking extraordinary and unprecedented relief. The Further Amended Notice of Motion seeks (i) an order that the Ontario Final Settlement Agreement on the long-term reform of the First Nations Child and Family Services Program ("**Ontario FSA**") be approved without condition; (ii) an order that the Ontario FSA and the Trilateral Agreement in Respect of Reforming the 1965 Agreement (the "**Trilateral Agreement**") satisfy, supersede, and replace all orders of the Tribunal related to the First Nations Child and Family Services Program (the "**FNCFS Program**") in Ontario and the 1965 Agreement; and (iii) an order ending the Tribunal's jurisdiction and terminating all permanent cease-and-desist child and family services orders made to remedy proven national systemic discrimination against First Nations children (the "**Ontario Motion**").[3]

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[1] 2016 CHRT 2 [**Merits Decision**] at para 1 [emphasis added].
[2] *Canadian Human Rights Act,* RSC, 1985, c H-6 [***CHRA***].
[3] Further Amended Notice of Motion, filed by Canada, August 11, 2025 [**Further Amended NOM**]. In relation to the relief sought in paragraph 5, the Panel has ruled that the question of whether COO and NAN's status as interested parties restricts them from filing the Ontario Motion (absent being joined by Canada) is now moot - Canada is a party to the Ontario Motion.

3. The record confirms that the Tribunal's orders flowing from the *Merit Decision* have provided concrete and necessary protections for First Nations children ordinarily resident on reserve[4] by compelling Canada to fund services that otherwise would not have been delivered, including statutorily required protection, prevention and least disruptive measures, capital, mental health supports, and First Nations Representative Services. Those orders were designed to give effect to children's rights to substantive equality and to remedy the very funding uncertainty and discretionary decision-making found to be discriminatory in the Merits Decision. None of the evidence has demonstrated that the Ontario FSA will provide equivalent, enforceable protection for children once those orders are vacated.

4. The Caring Society opposes the relief sought on this motion. First, the Tribunal lacks the jurisdiction to extinguish or vacate its injunctive remedial orders. Second, the evidentiary record does not establish that Canada has eliminated the discriminatory features of the FNCFS Program in Ontario. Instead, Canada is relying on prospective commitments, assumptions and discretionary funding structures, the sufficiency of which has not been demonstrated in the evidence. Third, the record does not demonstrate that the Ontario FSA contains enforceable and durable safeguards capable of preventing the recurrence of discrimination. Finally, because the Ontario FSA is presented without condition or an option for amendment, the Tribunal is being asked to relinquish its supervisory jurisdiction without the ability to address identified structural deficiencies or to ensure continued compliance with its injunctive orders. In these circumstances, the Ontario FSA does not demonstrate that the rights of First Nations children will be protected by sustainable, enforceable and evidence-based remedies to which First Nations children are entitled.

5. The Ontario FSA also creates a jurisdictional cliff for First Nations children, erasing the orders that have been protecting them since 2016—orders that are built to recognize the discrimination experienced by children and their families and that are tailored to hold Canada accountable in a manner that eradicates and ultimately prevents discrimination in the future. The Tribunal is being asked to eviscerate its orders, wipe the slate clean and trust that Canada will do the right thing for generations to come. Indeed, the only safeguards for First Nations

[4] Throughout these submissions "First Nations children" refers to First Nations children ordinarily resident on-reserve.

children seven years from now is a funding review that Canada can consider but is not bound to implement.

6. The Tribunal does not have the jurisdiction to erase its own injunctive orders, as doing so would erode the human rights framework to its core and violate the principle of finality. On this basis, the Ontario Motion should be dismissed, and Canada should be asked to revisit the Ontario FSA with guidance from the Tribunal regarding the pillars of long-term reform, as discussed throughout these submissions.

7. Irrespective the Tribunal's jurisdiction to approve the Ontario Motion (which the Caring Society clearly states it does not) there are serious structural deficiencies with the Ontario FSA that cannot be remedied given that Canada is seeking an approval without condition. It is of great concern that, under the Ontario FSA, Canada retains exclusive authority over the overall funding envelope, including the terms and conditions under which funding is being provided. While the Ontario Reform Implementation Committee (the "**ORIC**") can monitor implementation and provide recommendations, Canada retains ultimate control over whether such recommendations are accepted or implemented.

8. Similarly, the dispute resolution process is tailored to only resolve discrete disputes. The Arbitral Tribunal has limited powers and is expressly precluded from making findings of discrimination, ordering systemic remedies, or increasing the overall funding commitment. Instead, their jurisdiction is limited to enforcing Canada's existing contractual commitments under the Ontario FSA, absent the guidance that flows from the Tribunal's injunctive orders and absent the oversight of the Tribunal at a time of critical transition.

9. Critically, the Ontario FSA does not reform the *1965 Agreement*—a core injunctive order that grounds the Tribunal's landmark decision in 2016: Canada was ordered to cease its discriminatory practices and reform the *1965 Agreement* to reflect the findings of the Tribunal.[5] Not only has Canada failed to reform the *1965 Agreement*, it has led no evidence on this motion to demonstrate that it has made any efforts to comply with the Tribunal's order in this regard. This failure is not simply a matter of policy, as the Ontario FSA fails to redress one of the core discriminatory aspects of the *1965 Agreement*: there is no provision for long term or sustainable funding for mental health services.

[5] Merits Decision, at para 481.

10. The Ontario FSA also fails to ensure that First Nations children will receive the full scope of services they are entitled to under the *Child, Youth and Services Act, 2017* (the "***CYFSA***") and *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "***Federal Act***"): Canada is relieving itself of this legal obligation and placing its legal responsibilities in the hands of First Nations. First Nations will have the option of accepting the full prevention allocation under the Ontario FSA while having no obligations to deliver statutory prevention and least disruptive services. While this approach, in and of itself, is not objectionable, there is no evidence that First Nations children who require statutory child welfare services will receive them. To this end, the Tribunal's order that Canada cease its discriminatory practice of failing to ensure First Nations children have access to statutory prevention services is not satisfied.

11. The time-limited nature of the Ontario FSA, the limited scope of the Arbitral Tribunal's jurisdiction and the lack of an enforceable program extension following the Second Program Assessment make clear that the Ontario FSA fails to satisfy the Tribunal's order that Canada will prevent the recurrence of discrimination.

12. Irrespective of its structural shortcomings, Canada, COO and NAN urge the Tribunal to accept the agreement and the relief sought on the basis of self-determination and because "it is the path forward chosen by First Nations."[6] Rightsholders are entitled to profound respect and the right to exercise self-determination is protected by UNDRIP. UNDRIP also makes clear that self-determination must be exercised in a manner consistent with international human rights, including the rights of First Nations children to equality, security and the right to live free from discrimination. Framing the final remedial step through the lens of collective rights misapprehends the nature of this human rights complaint– the rights at issue here are those of First Nations children who are coming into contact with the child welfare system. While collective and individual rights can co-exist (as we saw in the final determination of compensation), the onus remains on Canada to prove to the Tribunal and its victims that the Ontario FSA will eradicate the discrimination in the Ontario child welfare system for First Nations children and prevent its recurrence.

13. For clarity, the Caring Society fully supports the release of the $8.5 billion in the Ontario FSA and encourages Canada to waive or otherwise revoke paragraph 294 of the

[6] Attorney General of Canada Written Submissions dated January 19, 2026 [**Canada's Written Submissions**] at para 2.

Ontario FSA, which takes an "all or nothing" approach by making the funding conditional on both the Tribunal's approval of the agreement in its entirety and resolution of any resulting judicial review. The Caring Society recognizes the importance of ensuring that First Nations children continue to have access to the full continuum of child protection and prevention supports and services.

B. The Facts

1) Canada's Sustained Efforts to Dismiss and Disrupt the Complaint

14. On February 27, 2007, the Caring Society and the Assembly of First Nations ("**AFN**")[7] filed this human rights complaint pursuant to s. 5 of the *CHRA,* alleging that Canada was discriminating against First Nations children and families based on race and national and/or ethnic origin (the "**Complaint**"). The Complaint alleged that Canada's FNCFS Program adversely impacted First Nations children and families, and that its implementation of Jordan's Principle caused First Nations children to be denied services and to experience service delays resulting in inequitable outcomes. The discrimination was described as "systemic and ongoing".[8]

15. The Complaint was filed as a last resort. For the decade prior to filing the Complaint, both organizations played pivotal roles in research commissioned by Canada that demonstrated adverse differentiation and denial of statutorily mandated services in Canada's First Nations child and family services. They proposed evidence-informed solutions to the discrimination.[9] However, Canada repeatedly declined to implement recommendations to address the discrimination, leading to more First Nations children entering care.

16. Unpacking the history of the Complaint and Canada's conduct throughout this proceeding is important to the context of the Ontario Motion given the relief sought. Indeed, as the Tribunal has noted on many occasions, effective remedies must consider the historical conduct of the perpetrator.[10] After the Complaint was filed, Canada immediately sought to

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[7] Resolution 53/2006 passed unanimously, authorizing AFN and the Caring Society to file the Complaint: Opening Statement, Assembly of First Nations, dated February 25, 2013, at p 78, lines 5-11.
[8] Human Rights Commission Complaint Form, filed by Dr. Blackstock and Regional Chief Joseph, February 23, 2007.
[9] Joint National Policy Review ("**NPR**"), CHRC Book of Documents ["**CBD**"] Vol 1 at Tab 3; Bridging Econometrics: Phase One Report, CBD Vol 1 at Tab 4; Wen:De: We are Coming to the Light of Day, CBD Vol 1 at Tab 5; Wen:De: The Journey Continues, CBD Vol 1 at Tab 6.
[10] See for example, 2016 CHRT 10, at para 18.

have it dismissed, asking the Canadian Human Rights Commission (the "**Commission**") to decline to deal with the Complaint under section 41(1)(c) of the *CHRA*. Canada argued that the Complaint was outside of the Commission's jurisdiction and that it did not disclose a *prima facie* case of discrimination.

17. In September 2008, the Commission referred the matter for hearing.[11] Canada attempted to judicially review the Commission's decision, and in response the Caring Society and AFN brought a motion to strike Canada's Notice of Application or, in the alternative, stay the application until the Tribunal could deal with the Complaint on its merits. In November 2009, Prothonotary Aronovitch denied the Caring Society and AFN's motion to strike the Attorney General's application. However, she was satisfied that it would be "just and equitable" to stay Canada's application for judicial review pending the Tribunal's decision.[12] Canada, on the one hand, and the Caring Society and AFN on the other, appealed the decision. On March 30, 2010, the Federal Court denied both appeals, resulting in a stay of Canada's judicial review pending the Tribunal's decision.[13]

18. Also in 2009, COO was added as an Interested Party, and its rights were limited to examining its own witnesses, cross-examining the respondent's witnesses after cross-examination by the Commission and the complainants, and making final submissions.[14]

19. Canada continued to take steps to derail the Complaint. In the fall of 2009, following the replacement of Chairperson Sinclair, Canada again raised the service issue and comparator issue to have the Complaint quashed. Following an invitation from newly appointed Chairperson Chotalia, on December 21, 2009, Canada filed a motion to dismiss the Complaint

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[11] Canadian Human Rights Commission, Letter to Cindy Blackstock and Jonathan Thompson regarding Decision in First Nations Child and Family Caring Society of Canada and Assembly of First Nations v Indian and Northern Affairs Canada (20061060), October 14, 2008.
[12] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada* (24 Nov. 2009), Ottawa T-1753-08 (FC) (Proth).
[13] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canad*a, 2010 FC 343, at para 15.
[14] Letter from Canadian Human Rights Tribunal to the parties, re "First Nations Child and Family Caring Society et al v Attorney General of Canada Tribunal File: T1340/7008" (September 17, 2009). On May 5, 2016, the Tribunal granted NAN interested party status with its participation "limited to written submissions with respect to the specific considerations of delivering child and family services to remote and Northern Ontario communities and the factors required to successfully provide those services in those communities. 2016 CHRT 11 at para 5. See also 2022 CHRT 26 at para 5, and 2020 CHRT 31 at para 6.

for want of jurisdiction, arguing that the Complaint did not come within the purview of sections 3 and 5 of the *CHRA*.

20. The motion to dismiss was heard by the Tribunal in June 2010. When no decision had been made by early 2011, the Caring Society commenced an application in the Federal Court seeking an order of *mandamus* to compel the Tribunal to render a decision. On March 14, 2011, the Tribunal released its decision dismissing the Complaint.[15] The Caring Society's *mandamus* application was thus discontinued.

21. Faced with the unimaginable result of seeing the Complaint dismissed, the Caring Society and AFN, joined by the Commission, quickly brought applications for judicial review. The Federal Court (per McTavish J., as she then was) concluded that the Tribunal's decision to dismiss the Complaint was unreasonable and that the process followed by the Tribunal was not fair.[16] Canada appealed the Federal Court's decision, which was ultimately dismissed by the Federal Court of Appeal in March 2013.[17]

22. The Complaint was heard over 72 days in 2013 and 2014. However, Canada's concerning conduct continued after the hearing on the merits commenced on February 25, 2013. On April 24, 2013, the Caring Society advised the Tribunal that it had received a significant number of prejudicial documents (including documents relevant to proving discrimination in Ontario) in an Access to Information request that had not previously been disclosed by Canada. It was later revealed that over 90,000 documents had not been disclosed.[18] The Tribunal ordered Canada to disclose those documents and later to pay $143,469.70 in compensation[19].

23. The witnesses who spoke specifically to the existing discrimination in Ontario were called by the Commission,[20] with the cooperation of the Caring Society, including the following: Elizabeth Ann Kennedy (Executive Director of the Ontario Native Women's Association and former director of the Association of Native Child and Family Service

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[15] See 2012 CHRT 16.
[16] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445.
[17] *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75.
[18] See 2013 CHRT 16.
[19] 2019 CHRT 1, at para 32.
[20] Examination-in-Chief of E. Kennedy, Transcript for 4 Sep 4, 2013, p 4, lines 5-8; See also Cross-Examination of P. Digby, Transcript for 8 May 2014, [**May 8 2014 XEX of P. Digby**] p 168, lines 7-20.

Agencies of Ontario), Thomas Goff (former Regional Director of Social Development with Indian and Northern Affairs Canada from 1986-1991 and First Nations consultant), and Theresa Stevens (Executive Director for Anishinaabe Abinoojii Family Services in Kenora, Ontario). Canada called Phil Digby, the Manager of Social Programs, Ontario Region who was cross-examined by the Commission, the Caring Society and AFN.[21] The focus was the discriminatory impact of Canada's failure to adequately fund Band Representative services and ensure, through the *1965 Agreement*, that FNCFS Agencies could deliver mandated and statutorily required child and family services, including mental health services.[22]

24. The Complainants and the Commission led compelling and largely uncontradicted evidence of Canada's discriminatory conduct, and the perpetuation of harm and trauma through the FNCFS Program and the *1965 Agreement* as it pertained to mandated child protection services and Canada's failure to implement Jordan's Principle. That evidence included hearing from crucial witnesses called by the complainants, including Chief Robert Joseph, Dr. Amy Bombay, Dr. John Loxley, Dr. Nico Trocmé, and Dr. Cindy Blackstock.[23]

25. The Complainants also led critical documentary evidence of harm and trauma experienced by First Nations children, outlined in the NPR and the Wen:De Reports, which Canada funded and partnered in, showing Canada was well aware that its child welfare services disparities were hurting First Nations children and their families. The NPR identified harms such as loss of community, culture, language, worldview and traditional family, as well as dysfunction, high suicide rates and violence.[24] The Wen:De Reports detailed the funding disparity for FNCFS Agencies, noted detrimental impacts for First Nations children resulting from jurisdictional disputes and recommended fully implementing Jordan's Principle.[25] The Complainants also pointed to government documents to discharge their burden: two reports of the Auditor General of Canada, two reports from the House of Commons Standing

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[21] Examination-in-Chief of Phil Digby, Transcript for 7 May 2014 [**May 7 2014 Ex. of P. Digby**]; May 8 2014 XEX of P. Digby.
[22] See for example, Merits Decision, at paras 217-246.
[23] Examination-in-Chief of Chief R. Joseph, 13 Jan 2014; Examination-in-Chief and Cross-Examination of Chief R. Joseph, 14 Jan 2014; Examination-in-Chief of D. Dubois, 8 Apr 2013; Cross-Examination and Examination of D. Dubois, 9 Apr 2013; Examination-in-Chief and Cross-Examination of R. Shingoose, 25 Sep 2013; Cross-Examination of R. Shingoose, 26 Sep 2013; Testimony of Cindy Blackstock, 2013-2014.
[24] Merits Decision, at para 151.
[25] Merits Decision, at paras 162 and 183; Wen:De: The Journey Continues at p 16, CHRC BOD Vol 1 at Tab 6.

Committee on Public Accounts, and several internal federal government reviews showed how the FNCFS Program, and Canada's narrow implementation of Jordan's Principle, harmed First Nations children.[26]

26. Canada's own witnesses provided further evidence of the discrimination and harm perpetuated against First Nations children. Ms. Shelia Murphy acknowledged in her testimony that taking children away from their family and communities has harmful impacts on children and families.[27] Canada's internal documents conceded that the funding approach had "not let First Nations Child and Family Services Agencies keep pace with provincial and territorial policy changes," leaving them "unable to deliver the full continuum of services offered…to other Canadians," and contributing to rising numbers of First Nations children taken into care.[28] Those same federal briefing materials warned that "circumstances are dire" and that inadequate prevention resources would force agencies to close or children to be taken into care—outcomes Canada understood would be more harmful to children and more costly to the state.[29]

2) The Discrimination is Substantiated and the Remedies Phase Opens

27. In the Merits Decision, the Tribunal made findings that cannot be disrupted and final orders that cannot be set aside: the Tribunal determined that Canada's FNCFS Program, the *1965 Agreement*, and its 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*.[30] The Tribunal ordered Canada to immediately cease its discriminatory conduct and reform the FNCFS Program and *1965 Agreement* to reflect the findings in the decision, cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle.[31]

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[26] Merits Decision, at para 149. See for e.g. Mar 28, 2012 Internal Audit Report re Mi'kmaw Children and Family Services Agency, CBD Vol 5 at Tab 52; March 5, 2010 Implementation Evaluation of Enhanced Prevention Focus in Alberta, CBD Vol 13 at Tab 271; March 2007 Evaluation of the [FNCFS Program], CBD Vol 4 at Tab 32.
[27] Examination-in-Chief of S. Murphy, Transcript for April 2, 2014, at p 50 lines 3-5.
[28] See Examination-in-Chief of C. Blackstock, Transcript for 26 Feb 2013 at pp 216-219; and Fact Sheet FNCFS at CBD Vol 4, at Tab 38, at p 2.
[29] See Examination-in-Chief of C. Blackstock, Transcript for 27 Feb 2013 at pp 36-38; and FNCFS Q's and A's at CBD Vol 6, at Tab 64, at p 1-2.
[30] Merits Decision, at paras 456-467.
[31] Merits Decision, at para 481.

28. The Tribunal also found Canada knew about: (i) its discriminatory conduct; (ii) the inequality and structural flaws in the FNCFS Program; (iii) the harm caused to First Nations children; (iv) the disparity facing First Nation children in accessing essential services; and (v) the harmful impacts of misconstruing Jordan's Principle.[32] It further ruled that Canada had evidence-based solutions to remediate these adverse impacts, as reflected in reports it funded and participated in.[33] 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[34] and perpetuating a system that created "an incentive to remove children from their homes as a first resort rather than as a last resort.[35]

29. In relation to Ontario, the Tribunal found that the evidence demonstrated "shortcomings in the funding and structure of the *1965 Agreement* in Ontario" that ultimately perpetuated the perverse incentives to bring First Nations children into care.[36] The *1965 Agreement* has not been updated since 1981, causing serious gaps in child and family services and mental health services.[37] The Tribunal found that Canada itself highlighted that concerns were raised regarding the format of the *1965 Agreement* and that Canada was not prepared to discuss cost-sharing the programs that fell outside of the mandate of Indian and Northern Affairs Canada.[38] The Tribunal relied on the testimonies of Theresa Stevens, led by the Commission, and Phil Digby, led by Canada, in relation to its findings on FNCFS in Ontario.[39] The particular concerns with the *1965 Agreement* and the steps undertaken by Canada thus far to address them are discussed in more detail below.

30. The Tribunal indicated that a progressive remedial process would unfold, given the complexity of the case and the "far-reaching effects of the relief sought".[40] Since the Merits Decision, the Tribunal has ordered extensive remedies to advance the substantive equality rights of First Nations children, youth and families, many of which have had a direct impact

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[32] Merits Decision, at paras 168, 362-372, 385-386, 389 and 458.
[33] Merits Decision, at paras 150-185, 270-275, 362-372, 389 and 481.
[34] Merits Decision, at para 461.
[35] Merits Decision para 344 and at paras 349, 384, 386 and 458.
[36] Merits Decision, at para 217.
[37] Merits Decision, at para 223.
[38] Merits Decision, at para 225.
[39] See Merits Decision, at paras 218, 221 and 223,
[40] Merits Decision, at para 483

on mandated and statutorily required service delivery. In relation to child and family services, those interim remedies include the following:

- 2018 CHRT 4: the Tribunal ordered funding to FNCFS Agencies for the actual costs for least disruptive measures, building repairs, intake and investigations, legal fees in child welfare, child service purchases in child welfare, small FNCFS agencies, and funding to First Nations at the actual costs for providing First Nations Representatives Services in Ontario (the "**Actuals Order**"). The Actuals Order also includes an order that Canada complete a needs analysis regarding available mental health services to First Nations children and an order that mental services be provided at actuals.[41]

- 2021 CHRT 12: On a motion by the Caring Society and on consent of AFN and Canada, the Tribunal ordered specific funding to non-agency First Nations, ensuring that First Nations children from communities not served by a delegated FNCFS Agency receive funding consistent with the communities with delegated FNCFS agencies per 2016 CHRT 2, and subsequent orders (The "**Non-Agency First Nations Order**"). [42]

- 2021 CHRT 41: the Tribunal ordered Canada to fund the purchase and construction of capital assets for FNCFS and Jordan's Principle. The Capital Order provides funding for the actual costs of capital projects that support the delivery of child welfare and Jordan's Principle, including planning costs and construction costs for the development of capital projects (the "**Capital Order**").[43]

- 2022 CHRT 8: On consent of the Caring Society, AFN and Canada, the Tribunal made orders to enhance the nature and basis of prevention funding for 2022/23 and beyond, introduced funding for post-majority care, and established research parameters to support the parties' discussions on long-term reform. (the "**Consent Order**").[44]

31. These remedies are largely focused on ensuring First Nations children have access to statutorily mandated child welfare services. Indeed, these remedies enable assessment of child maltreatment reports and if a child is at risk or in need of protection, service providers have the ability, capacity and resources to deliver their mandated and statutorily required services. Those orders are complemented with the essential order for actuals funding for First Nations to ensure they can deliver First Nations Representative Services ("**FNRS**") pursuant to the needs in their communities.

32. The Complainants also sought financial compensation for the victims, which was opposed by Canada despite not seeking judicial review of the Merits Decision. On September 6, 2019, the Tribunal found that certain victims of Canada's discriminatory conduct are

[41] 2018 CHRT 4, at paras 407-450.
[42] 2021 CHRT 12, at paras 1 and 42.
[43] 2021 CHRT 41, at para 542.
[44] 2022 CHRT 8, at paras 172-176.

entitled to compensation for both pain and suffering (s. 53(2)(e)) and because of Canada's wilful and reckless conduct (s. 53(3)) (**"Compensation Entitlement Order**"). It emphasized the factual findings made in previous decisions were based on its "thorough review of thousands of pages of evidence including testimony transcripts and reports".[45] Based on the entirety of the evidence, the Tribunal held that Canada's discrimination was a "worst-case scenario" under the *CHRA* and "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[46]

33. Canada denied discrimination and sought judicial review of the Compensation Entitlement Order, including a stay; the Caring Society sought to stay Canada's application. Both motions were dismissed. Despite the pending review, the parties submitted a proposed compensation framework to the Tribunal on February 21, 2020, portions of which had required adjudication.[47] The Tribunal incorporated the framework into the Compensation Payment Order issued on February 12, 2021, after which Canada amended its judicial review application to challenge that order. On September 29, 2021, the Federal Court dismissed Canada's application, finding the Compensation Entitlement Order and Compensation Payment Order reasonable and affirming the centrality of dignity-based harm under the *CHRA*.[48]

34. Ultimately, the Tribunal's compensation orders were subsumed into the settlement of the Federal Court class action. On June 30, 2022, a final settlement agreement was reached between AFN, Canada and the representative plaintiffs (the "**2022 Compensation FSA**")[49] and in July 2022, AFN and Canada brought a motion to the Tribunal seeking a declaration that the 2022 FSA was fair, reasonable, and satisfied the Compensation Entitlement Order and all related clarifying orders. In the alternative, AFN and Canada sought an order varying the

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[45] 2019 CHRT 39, at para 15 [emphasis added].
[46] 2019 CHRT 39, at para 231.
[47] See 2020 CHRT 7, 2020 CHRT 15, 2021 CHRT 6, and 2022 CHRT 8.
[48] *Canada (Attorney General) v fncfcsc*, 2021 FC 969, at paras 158, 229 and 230.
[49] T-402-19: *Moushoom et al v Attorney General of Canada* (representative plaintiffs: Xavier Moushoom, Jeremy Meawasige, Jonavon Meawasige and, until her death, Maurina Beadle); T-141-20: *Assembly of First Nations et al v His Majesty the King* (representative plaintiffs: Ashley Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson, Carolyn Buffalo, Dick Eugene Jackson); T-1120-21: *Trout et al v Attorney General of Canada* (representative plaintiff: Zacheus Trout). The class proceedings in T-402-19 and T-141-20 were consolidated on July 7, 2021, and certified on November 26, 2021 (2021 FC 1225). The class proceedings in T-1120-21 were certified on February 11, 2022.

Compensation Entitlement Order, the Compensation Framework Order and other compensation orders, to conform to the 2022 FSA (the "**Joint Motion**").

35. With the Caring Society and the Commission objecting to the 2022 FSA, the Tribunal dismissed the Joint Motion by letter decision on October 25, 2022, with full reasons set out in 2022 CHRT 41. Following the release of 2022 CHRT 41, the class actions plaintiffs, AFN, the Caring Society and Canada explored amendments to the 2022 FSA in order to fully satisfy the compensation orders. The class actions plaintiffs, AFN, the Caring Society and Canada engaged in negotiations throughout January-April 2023. These negotiations resulted in the Revised Final Settlement Agreement, which was approved by the Tribunal July 26, 2023, with full reasons released on September 26, 2023.[50] This experience provides hope for a pathway forward in relation to the Ontario FSA.

3) The National AIP Process and the Ontario FSA

36. In December 2021, the Caring Society, AFN, Canada, COO and NAN signed the Agreement-in-Principle on Long-term Reform of the FNCFS Program and Jordan's Principle ("**AIP**").[51] However, due to serious and ongoing concerns regarding Canada's non-compliance with Jordan's Principle, the Caring Society left the AIP in 2023 to file a non-compliance motion on Jordan's Principle, which was not permitted under the AIP.[52]

37. AFN, COO, NAN and Canada's confidential AIP discussions after the Caring Society's departure led to the release of the Draft Final Settlement Agreement on Child and Family Services (the "**Draft FSA**") on July 11, 2024. The Draft FSA included conditions precedent that required the approval by First Nations Leadership and the Tribunal. The Draft FSA, though approved by COO and NAN Chiefs-in-Assembly, was not accepted at AFN's Special Chiefs Assembly. COO Chiefs-in-Assembly later passed a resolution to pursue discussions with NAN and Canada related to an Ontario final settlement agreement.[53]

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[50] Letter decision of the Canadian Human Rights Tribunal, dated July 26, 2023; and 2023 CHRT 44.

[51] Government of Canada, "Executive Summary of Agreement-in-Principle on Long-Term Reform" (updated September 13, 2023); Hearing Exhibit 1a, Affidavit of Grand Chief Abram Vol 1, affirmed March 6, 2025 [**Hearing Exhibit 1a, Grand Chief Abram Affidavit, March 6, 2025**] at para 63.

[52] Affidavit of Amber Potts, affirmed March 3, 2025, at para 25.

[53] Resolution 24/28S, Hearing Exhibit 1b, Affidavit of Grand Chief Joel Abram, Vol 2, affirmed March 6, 2025, at Exhibit "DD".

38. After five weeks of negotiation COO, NAN and Canada reached the Ontario FSA and the Trilateral Agreement on February 10, 2025.[54] On February 25 and 26, 2025, the Ontario FSA was ratified by the NAN and COO Chiefs-in-Assembly, respectively.[55] On March 7, 2025, COO and NAN jointly filed the Ontario Motion. After questions were raised about whether COO and NAN could, as interested parties, seek such relief, Canada filed the Further Amended Joint Notice of Motion, joining COO and NAN in the requested relief.[56]

39. As described in more detail throughout these submissions, the grounds and evidence pleaded in support of the Ontario Motion focus primarily on the engagement efforts of COO and NAN, the importance of a First Nations-led process and an overview of the anticipated impacts of the Ontario FSA. Little is provided about how the proposed reforms address Canada's egregious discriminatory conduct, Canada's obligations under the *CHRA* or how to enforce Canada's commitments within the term of the agreement and beyond to protect the substantive equality rights of First Nations children.

4) Findings and Orders Related to the 1965 Agreement Throughout the Proceedings

40. The *1965 Agreement* is a cost-sharing agreement between Ontario and Canada: Ontario provides or pays for eligible services up front and Canada reimburses Ontario for a share of the costs of those services pursuant to a cost sharing formula.[57] Canada then reimburses Ontario for approximately 93% of the operations and maintenance funding allocated to FNCFS Agencies.[58] As a result, operations and maintenance funding are not captured in the Ontario FSA: that funding structure remains unchanged.

41. In 1984, the *Child and Family Services Act* brought together multiple pieces of legislation in relation to the provision of services for children, including in the areas of youth

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[54] Joint Notice of Motion of the Chiefs of Ontario and the Nishnawbe Aski Nation dated March 7, 2025, at para 16.
[55] Hearing Exhibit 4a, Affidavit of Grand Chief Alvin Fiddler, affirmed March 7, 2025, at paras 72-74.
[56] Further Amended NOM. On May 7, 2025, COO and NAN amended the notice of motion seeking an order that they have authority to bring the Ontario Motion. On August 11, 2025, Canada filed the Further Amended Joint Notice of Motion, joining as a party. The Tribunal later determined the question raised regarding COO and NAN's ability to seek relief is moot.
[57] Merits Decision, at para 219.
[58] Hearing Exhibit 9, Supplemental Affidavit of Duncan Farthing-Nichol, affirmed May 15, 2025 [**Hearing Exhibit 9, Farthing-Nichol Supplemental Affidavit, May 15, 2025**] at para 18; Hearing Exhibit 17, *Our Children, Our Future: Transforming Child Welfare for the Well-Being of Children and Families*, Susan McBroom et al, [**Ontario Special Study**] at pp 9-10.

justice and children's mental health.[59] This change required FNCFS Agencies to offer mental health services to the children that it is servicing; however, when this change was made, the *1965 Agreement* was not updated, as explained by Mr. Digby:

> […] the extension of children's mental health services throughout the Province of Ontario concerns everybody and it certainly makes a difference in everybody's life in terms of children in need having access to the services that they require for mental health. My only point is with respect to the Government of Canada's cost-sharing under the 1965 Agreement, nothing has changed. We did not start reimbursing the cost of children's mental health services in 1984 and that continues to be the government's policy to this day.[60]

42. The mechanism by which FNCFS Agencies receive funding under the *1965 Agreement* shares some similarities with the discriminatory features of Directive 20-1 and EPFA. As Theresa Stevens explained, the funding is largely driven by volume:

> Well, what it means in practice is that you are funded according to the number of cases that you have, so in a sense – you know, it's a system that perpetuates itself because the more children in care you have, the more investigations you do, the more open protection cases you have, the more funding you receive.[61]

43. In addition, Ms. Stevens' evidence made clear that maintenance funding (which supports the cost of caring for First Nations children while they are in the care of the FNCFS Agency) is not sufficient, particularly if a child in care requires specialized treatment, including mental health treatment, as there is no dedicated or allocated funding for such services.[62] Moreover, many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services was spending approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop programs to assist these high-risk children.[63]

44. The Tribunal found that the application of the *1965 Agreement* results in denials of services and adverse effects for First Nations children and families, as the *1965 Agreement* has not been updated to ensure that FNCFS Agencies and First Nations could fully comply

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[59] May 7 2014 Ex. of P. Digby, at pp 69-71.
[60] May 8 2014 XEX of P. Digby, at p 84, lines 4-17.
[61] Examination-in-Chief, Theresa Stevens, Transcript for 5 Sep 2013, [**5 Sep 2013 Ex. of T. Stevens**] at p 77, lines 6-16.
[62] 5 Sep 2013 Ex. of T. Stevens at p 117, lines 1-18.
[63] 5 Sep 2013 Ex. of T. Stevens at p 32, lines 8-16.

with the requirements of the *CYFSA*, including in the provision of mental health services and Band Representative services.[64] Canada was ordered to cease its discriminatory practices and reform the *1965 Agreement* to reflect the Merits Decision.[65]

45. In June 2017, the Ontario Chiefs-in-Assembly passed Resolution 25/17 calling on Canada to fully fund an Ontario "Special Study" to examine the funding arrangements and comparability of child welfare services for First Nations children in Ontario under the *1965 Agreement.*[66] Between 2016 and 2018, Canada led evidence regarding its efforts to reform the *1965 Agreement,* including the following:

- In its reporting to the Tribunal in 2016, Canada reported that it could not flow funds to Ontario via the *1965 Agreement* without Ontario's agreement. Canada stated that it was actively working with the province on immediate measures. Canada asked the Tribunal not to impose a deadline on the reform of the *1965 Agreement* and instead "allow the parties to work collaboratively to address this issue".[67]

- In further 2016 reporting, Canada indicated it was "actively working" with Ontario and stakeholders, "to achieve necessary reforms to the *1965 Agreement*". These efforts included correspondence with the provincial Deputy Minister and meetings with the Ontario Ministry of Aboriginal Affairs.[68]

- In response to the various relief sought pursuant to 2018 CHRT 4, Canada reported that it was working with Ontario and First Nations leadership to reform the *1965 Agreement*, including the creation of a working group and a work plan to review the *1965 Agreement*.[69]

46. In the Actuals Order, the Tribunal found that Canada's efforts to meet the requirements of the Merits Decision had substantially failed and that the government had not taken meaningful steps to address the gaps in services that are causing harm to First Nations children. Indeed, Canada's evidence on the issue of mental health demonstrated a troubling lack of understanding of the gaps in children's mental health services, and a lack of urgency to address this pressing issue.[70] Canada was ordered to analyze all of its programs that fund mental health to First Nations on reserves and in the Yukon and clearly establish which ones fund what in order to identify gaps in services to First Nations children.[71] Canada was also

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[64] Merits Decision, at paras 217-246, 458 and 461.
[65] Merits Decision, at para 481.
[66] Hearing Exhibit 1a, Grand Chief Abram Affidavit, March 6, 2025, at paras 30, 110-116.
[67] 2016 CHRT 16, at para 85.
[68] 2016 CHRT 16, at paras 70-71.
[69] 2018 CHRT 4, at para 11.
[70] 2018 CHRT 4, at paras 291-296.
[71] 2018 CHRT 4, at para 305.

ordered to fund the actual costs of mental health services to First Nations children and youth in Ontario with the "Child First Initiative" retroactive to January 26, 2016.[72]

47. In May 2018, Canada filed its gaps analysis: *Gaps Analysis: Federally Funded Mental Wellness Services for First Nations Children*. The report analyzes ISC programs that fund mental health for First Nations on reserve and in the Yukon and identifies potential gaps in mental health services to First Nations children:

> Gaps in mental health supports that are specific to First Nations children and youth have been identified through various engagement process is to include: mental health promotion and prevention aimed at children, including supports to heal from intergenerational trauma; culturally appropriate early intervention, assessment, diagnosis, and referral for children; access to specialized supports for children (i.e. child psychologists, psychiatrists, play therapists, etc.) and efficient communication and coordination between providers; addictions services for children and youth, including treatment centres; family-centred mental wellness; mental health supports in school settings; opportunities for children and youth to access traditional, culture-based, and land-based approaches to wellness; services for children in crisis; specialized services for children and youth born with needs related to maternal drug or alcohol use; **and targeted services for children and youth in the child welfare system**. Across the board capacity building was identified as a key need with training highlighted as a priority. The shared delivery of mental health services for children and lack of coordination between different jurisdictions can serve to exacerbate gaps in access to the continuum of needed supports and services. [73]

48. On cross-examination regarding the reimbursement of mental health services set out in the Actuals Order, Dr. Gideon testified that such services are currently accessed through Jordan's Principle, rather than through funding mechanisms associated with the *1965 Agreement*.[74] She did not identify any alternative mechanisms to address gaps in mental health services within the *1965 Agreement* framework.

49. Leaving the gap in mental health services to be plugged by Jordan's Principle is not a long-term solution or in keeping with the findings of the Tribunal. Indeed, the gaps in mental health services persist and were recently highlighted by the Tribunal in 2025 CHRT 6: "On multiple occasions, the Panel Chair asked Canada's witnesses about their plan to eliminate the gaps and lack of coordination in federal programs offered to First Nations children. A

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[72] 2018 CHRT 4, at para 306.
[73] Affidavit of Dr. Valerie Gideon dated May 24, 2018, at p 9, Exhibit A: "*Gaps Analysis: Federally Funded Mental Wellness Services for First Nations Children*.".
[74] Cross-Examination of Dr. Valerie Gideon, Transcript for 30 Oct 2018, p 147, lines 16-22.

clear detailed plan with targets and deadlines was never provided."[75] It is clear that Jordan's Principle is not an appropriate mechanism to ensure that First Nations children who require mental health services under the *CYFSA* can receive them. Canada's most recent update filed with the Tribunal dated January 17, 2025, indicates that the current backlog approximately 129,000 requests.[76]

50. The Caring Society submits that the Tribunal's findings and orders in the Merits Decision, as reinforced in subsequent decisions, require that equitable mental health services be treated as a central component of any long-term reform of child and family services in Ontario. The Tribunal found that the denial of such services causes foreseeable and serious harm to First Nations children and families, including increased family disruption and child apprehensions. Any reform proposal must therefore be assessed against its ability to remedy these impacts. The Ontario FSA fails in this regard, as it does not address the discriminatory denial of mental health services inherent in the *1965 Agreement*, despite the Tribunal's clear findings and remedial direction.

PART II - ISSUES

51. The Caring Society submits that this motion raises the following issues:

a) Whether the Tribunal has the jurisdiction to vacate and replace all orders of the Tribunal related to the discrimination found by the Tribunal concerning all elements of the Complaint in Ontario relating to the FNCFS Program and the *1965 Agreement*, as required by the Ontario FSA?

b) Whether the Ontario FSA and Trilateral Agreement satisfy the Tribunal's injunctive orders that Canada permanently cease its discriminatory practices?

c) Whether the Ontario FSA and Trilateral Agreement satisfy the Tribunal's orders requiring Canada to reform the FNCFS Program and the *1965 Agreement* in a manner that prevents the recurrence of discrimination, as required by the *CHRA*?

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[75] 2025 CHRT 6, at para 365.
[76] Status Report on Operational Backlogs: Jordan's Principle (January 2025 Update) filed by Canada on January 17, 2025, at p 4.

PART III - SUBMISSIONS

A. The Findings and Orders of the Tribunal Cannot be Extinguished

52. The Caring Society submits that the Tribunal does not have the jurisdiction to vacate and replace all its Ontario orders related to child and family services in Ontario. As a result, the Ontario Motion must be dismissed, and the Ontario FSA must be rejected.

53. Paragraphs 299 and 301 of the Ontario FSA require a full erasure of the Tribunal's orders:

> 299. Within 30 days following all Parties signing the Final Agreement, the Parties shall file a joint Notice of Motion with the Tribunal seeking an order from the Tribunal that:
> […]
>
> the **terms of the Final Agreement supersede and replace all orders of the Tribunal related to the discrimination found by the Tribunal concerning all elements of the Complaint in Ontario, including the FNCFS Program in Ontario and the 1965 Agreement**, except for Jordan's Principle.
>
> 301. For clarity, the terms of this **Final Agreement shall supersede and render void all previous orders of the Tribunal concerning the 1965 Agreement and the FNCFS Program in Ontario** provided by Canada through ISC and any previous or successor entities, unless an order or part of an order of the in force following this Final Agreement. [emphasis added]

1) The Tribunal Does Not Have Jurisdiction to Vacate its Injunctive Orders

54. A decade ago this year, the Tribunal issued the Merits Decision, making critical findings of systemic discrimination and ordering Canada to cease its discriminatory practices, reform the FNCFS Program and the 1965 Agreement, and to cease its narrow application of Jordan's Principle.[77] The Tribunal did so pursuant to its broad remedial powers under section 53(2)(a) of the *CHRA*.

55. The Tribunal's orders arise from findings of profound discrimination that cannot be undone. They are permanent, injunctive in nature, and binding, as required by the *CHRA*.[78] These findings and final orders give effect to the living nature of individual human rights, which cannot be extinguished or replaced by an agreement of some of the parties.

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[77] Merits Decision, at para 481.
[78] 2025 CHRT 6, at para 602; 2025 CHRT 80, at para 63.

56. As a general rule, the Tribunal cannot revisit or replace its orders if its statutory mandate has been discharged, even if the parties who are requesting such relief agree.[79] The Supreme Court has echoed this principle, making it clear that the Tribunal's authority does not include the re-adjudication of final decisions. While calling for greater flexibility in the application of the *functus officio* principle before administrative tribunals, the Supreme Court also held:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.[80]

57. Both the majority and the dissent in *Chandler v. Alberta Associations of Architects* agreed that an administrative tribunal can remain seized or revisit an issue to clarify or make further orders to dispose of a matter fairly but not to issue a new order in which it decides differently.[81]

58. When deciding *Chandler*, the Court reasoned it was the policy ground which favors finality of proceedings that justified the application of the principle of *functus* in the context of administrative tribunals. The dissent elaborated on some of the risks to the rule of law and public trust related to administrative tribunals re-opening final decisions. According to Justices La Forest and L'Heureux-Dubé, standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada.[82]

59. This relief sought on the Ontario Motion and the requirement that the Ontario FSA supersede and replace all orders of the Tribunal related to the discrimination found by the Tribunal is an extraordinary and unprecedented request. While the Tribunal has the jurisdiction to determine whether the Ontario FSA and the Trilateral Agreement satisfy its orders, and it has the authority to vary its interim orders, it does not have the jurisdiction to supersede and replace its injunctive orders. In fact, the very relief sought by the Moving Parties has been expressly rejected by the Tribunal in 2022 CHRT 41:

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[79] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, at paras 33, 62 and 64; 2021 CHRT 7, at para 34; *Walden et al Attorney General of Canada*, 2016 CHRT 19, at para 22; and *Lake Babine Nation v Williams,* 2012 FC 1085, at para 46.
[80] *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, [***Chandler***] at p 861.
[81] *Chandler*, at pp 861 and 869.
[82] *Chandler*, at p 869.

> Moreover, the parties could not contract out or ask the Tribunal to amend its evidence-based findings establishing systemic racial discrimination and related orders in the *Merit Decision* to a finding that there never was racial discrimination and, therefore, no remedy is required.[83]

60. Indeed, this Panel underscored the principle of finality in its 2025 CHRT 80 decision, stating that "while the Panel has no authority to bind Tribunal members in other cases, in this instance, the final orders found in 2016 CHRT 2 cannot be abrogated or amended by this Panel or by any new Panel members, if applicable."[84] The Tribunal itself stated that "a careful consideration of the Panel's work in this case makes clear the Panel views its role under the *CHRA* as proactive to eliminate and prevent discrimination, not make orders and take them away."[emphasis added][85] The Tribunal has time and time again stated that it has retained jurisdiction over its remedial orders for the purposes of ensuring their effective implementation. [86]

61. This proceeding spans nearly two decades and has involved repeated turnover in legal counsel and senior officials on the part of Canada. In that context, remedies addressing systemic discrimination cannot depend on interpretive assurances or institutional memory; they must be durable on the face of the governing text. Where an agreement is said to preserve the Tribunal's findings and cease and desist order, that preservation must be stated expressly in the operative provisions themselves. This is particularly so where the Ontario FSA parties have insisted, through the Ontario Motion, that the Tribunal approve the agreement without condition, thereby foreclosing the Tribunal's ability to correct defects through conditional approval.

62. Contrary to Canada's submissions that the "cease and desist order will remain in effect permanently",[87] the plain text of the Ontario Motion and the Ontario FSA states that the Tribunal's remedial orders shall be superseded and replaced, thus extinguishing the findings and injunctive orders made in the Merits Decision. The extinguishment of the Tribunal's orders would be an unprecedented erasure of the hard-fought rights for First Nations children that are now firmly entrenched in our jurisprudence. The dangers in this approach are

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[83] 2022 CHRT 41, at paras 178-179
[84] 2025 CHRT 80, at para 70.
[85] 2022 CHRT 41, at para 495.
[86] 2020 CHRT 7, at para 55.
[87] Canada's Written Submissions, at para 92.

unfathomable and risk nullification of the last nineteen years of litigation for First Nations children in Ontario in need of child and family services.

63. The Tribunal's existing orders are not merely remedial in theory but protective in practice. They ensure children receive services today, prevent service denial and delay, support prevention that keeps families together, and provide enforceable safeguards during an ongoing transition. On the evidentiary record, these orders continue to deliver concrete benefits to children on the ground, and their removal would withdraw protections that the evidence shows remain necessary.

2) If the Tribunal Has Jurisdiction to Vacate its Orders it Should Not Do So

64. Should the Tribunal determine that it has the jurisdiction to approve the Ontario FSA notwithstanding the foregoing, it should nonetheless decline to do so. First, the Ontario FSA contains an explicit mechanism of avoidance, permitting Canada to resile from its funding commitments where Parliament fails to appropriate the necessary funds or in the application of undefined "necessary approval processes". The agreement's contingent nature, which depends entirely on Canada's continued political and fiscal willingness, is a fatal defect, as the rights of First Nations children—such as they are protected by the agreement—are rendered inherently unenforceable and incapable of guarantee. Second, reliance on the collective political will of Ontario's First Nations is not enough to overcome this fatal flaw or the other serious and systemic deficiencies of the Ontario FSA set out in these submissions. Canada remains responsible for fulfilling its human rights obligations and it cannot contract out of those requirements.

65. The Ontario FSA provides no enforceable mechanism if Canada chooses not to meet its funding commitments under the agreement. Paragraph 297 of the Ontario FSA provides that all funding commitments made by Canada, or amendments agreed to by the parties, remain subject to annual appropriation by Parliament or other necessary approval processes required by the Government of Canada.[88] Further, paragraph 298 explains that in the event

[88] Hearing Exhibit 23, *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario*, dated February 26, 2025 [**Ontario FSA**], at para 297. The Caring Society has serious concerns regarding the interpretation of paragraph 297 provided by Mr. Farthing-Nichol. His evidence suggested that the words "or other necessary approval processes required by Canada" applies only to the words "or amendments agreed to by the Parties." The Caring Society submits that on a strict reading of the clause the qualifier "other necessary approval processes" may apply to "all funding commitments", thus making it very unclear what approvals

Parliament does not appropriate sufficient funding to satisfy Canada's funding commitment under the agreement , a party may seek "an order from a court of competent jurisdiction that the parties are substantially deprived of the benefit of this Final Agreement". In the event a court makes such an order, a party may seek to pursue its remedies under the Complaint or initiate a new complaint at the Tribunal.[89]

66. The Caring Society has serious concerns that the Ontario FSA deprives First Nations children, youth and families of any meaningful enforcement mechanism to ensure Canada appropriates the funding required under the Ontario FSA, leaving the realization of their rights dependent on political discretion rather than legally guaranteed compliance.

67. On the outset, the language in paragraph 298 is inadequate for parties to access the funding committed under the agreement. In the event of inadequate funding allocation as a result of a government decision, COO and NAN's only legal recourse is to obtain a court order that "the Parties are substantially deprived of the benefit of the Final Agreement."[90] This remedy imposes a significant evidentiary burden on non-government parties, requiring them to establish, through litigation, that the high threshold of "substantial deprivation" has been met before any further steps may be taken. Such an order does not compel Canada to honour its promised $8.5 billion dollars in funding over nine fiscal years.[91] At best, it authorizes further litigation, thus further entrenching Canada's already profound delays in implementing and finalizing its commitment to end the discrimination in child and family services. As drafted, the Ontario FSA therefore leaves open the very real possibility that First Nations children, youth and families in Ontario will continue to experience discrimination, either through the absence of negotiated funding or in the persistence of an inadequate framework. That cannot be what this Tribunal intended in its orders.

68. Nor do COO or NAN have recourse to seek a contempt order compelling Canada to appropriate the funds under the Agreement. As confirmed by paragraphs 297 and 320 of the Ontario FSA, Canada's funding commitments remain not only subject to Parliamentary appropriation but also to the discretion of federal officials responsible for approvals and

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are required beyond appropriation to secure the funding. Cross-Examination of Duncan Farthing-Nichol, 12 Dec 2025, Part 2 [**XEX of D. Farthing-Nichol 12 Dec 2025 Part 2]**, at 0:50:24-0:51:22 (no transcript).

[89] Ontario FSA, at para 298.

[90] Ontario FSA, at para 298.

[91] Ontario FSA, at para 5.

implementation. This Tribunal is tasked only with determining whether it will approve the Ontario FSA in its current form. Accordingly, if Canada fails to appropriate or provide sufficient funding, the parties could not leverage the Tribunal's order to support enforcement action or otherwise compel Canada's performance under the Agreement. The result is an Agreement that forecloses meaningful enforcement by design, leaving compliance on this critical point entirely to Canada's unilateral discretion.

69. In any event, and crucially, courts cannot overstep their institutional role and dictate how the legislature will direct its funds. To do so would offend the basic principle that the legislature "holds the purse strings of government" and is thereby the only entity authorized to allocate and spend public funds.[92] This includes s. 96 courts, which, too, cannot empower judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a Charter challenge or concern for judicial independence."[93]

70. The result is that each fiscal year until March 31, 2034, First Nations families would be in Canada's hands on paragraph 5 as read in the context of paragraphs 297 and 302 of the Ontario FSA—the lifeblood term of the Agreement. This leaves children and youth vulnerable to receiving the supports and services they need, as Parliament may choose not to allocate funds towards the Reformed FNCFS Funding Approach in a given fiscal year. The concern is live as protections of substantive equality rights are rendered contingent on changes in government leadership and shifting political and fiscal priorities undermining the permanence and reliability required of human rights remedies.

71. The Caring Society submits that little to no reliance should be placed on Canada that it will do the right thing for First Nations children. Canada's conduct demonstrates that, even when the right choice is before it, Canada will not act in the best interests of First Nations children.[94] Its wilful disregard for the rights of First Nations children is profound and we cannot lose sight of the trauma and devastation inflicted upon First Nations children and families by Canada."[95] Asking First Nations children to trust that Canada will live up to its

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[92] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at paras 28, 69 [***CLAO***]; see also *Ontario English Catholic Teachers Association v Ontario (Attorney General)*, 2024 ONCA 101, at para 309.
[93] *CLAO*, at para 41.
[94] Merits Decision, at para 461.
[95] 2019 CHRT 39, at para 234.

end of the bargain, without the protections of the Tribunal's underlying orders, is a risk too great for the vulnerable children at the centre of this case.

72. Despite the fatal flaw encompassed in paragraphs 297, Canada, along with COO and NAN, are urging the Tribunal to approve the Ontario FSA on the basis that many of Ontario's First Nations support it. The challenge with this approach is that it suggests that the rights of the collective (the First Nations in Ontario) stand in priority to the rights of the individual (each First Nations child in need of equitable child and family services). While individual human rights (including the right to effective and sustainable remedies) and the collectivity's rights can and should co-exist whenever possible,[96] in the context of a human rights complaint grounded in the rights of individual First Nations children, the collective right of self-determination cannot oust entitlement to effective individual remedies.

73. The very nature of human rights rests upon the protection of vulnerable groups. It addresses power dynamics, which arise both in the relationship of First Nations with outside groups (including, most importantly, the federal government) and within First Nations communities. It is this second aspect which bears careful consideration in this case. As the Chiefs-in-Assembly have affirmed by way of their 2007 resolution adopting UNDRIP, human rights must be ensured within Indigenous communities and organizations and redress must be available.[97] Human rights should "also be construed as recognizing the human rights of Indigenous individuals in their relations with their own governments".[98]

74. Children and youth are particularly vulnerable populations. This means they are also subject to the power relationships within the communities.[99] Being mindful of the enhanced vulnerability that children are subject to, article 22.1 of UNDRIP specifically addresses this

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[96] See *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295 [**UNDRIP**] at preamble and article 1.
[97] Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 [**Gender and Violence**], at p 603.
[98] John Borrows, "Special Issue: British Columbia's Declaration on the Rights of Indigenous Peoples Act: Foreword" (2021) 53:4 UBC L REV 957 at p 961. See also p 960: "In addition to necessary state action, rights embedded within the Declaration will not be realized if Indigenous governments disregard or reject its provisions."
[99] Gender and Violence, at p 605: "Indigenous law, like all other forms of law, is not neutral; rather, it is heavily influenced by dominant social norms." On how the relationships of dominance and power imbalance within first nations can also lead to human rights violations see Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) at p 399.

group by ensuring their rights against violence and discrimination. This is entirely consistent with self-government. Indeed, article 34 of UNDRIP clearly states that the promotion and development of Indigenous peoples' institutional structures should be "in accordance with international human rights standards." As a result, the endorsement of UNDRIP by the Chiefs in Assembly shows important First Nations support and acceptance of minimum human rights standards, both for individuals and the collective. Self-government aims to improve the situation of First Nations citizens, and, in this light, even inadvertent breaches of human rights ought to be avoided to safeguard self-government from entrenching oppression and discrimination.[100]

75. Moreover, Indigenous peoples' inherent individual and collective rights are human rights and are not subject to extinguishment or destruction in form or result. According to United Nations treaty bodies, the systemic extinguishment of indigenous peoples' individual human rights is incompatible with their right of self-determination. Further, the Committee on Economic, Social and Cultural Rights concluded that "policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued".[101] The rights of First Nations children in this case cannot be extinguished.

76. This is not to suggest that Ontario's First Nations are seeking to oust or ignore the individual rights of First Nations children by supporting the Ontario FSA. Instead, the Caring Society submits that if the Tribunal finds that the Ontario FSA does not reflect meaningful long-term reform, and that First Nations children will not benefit from the replacement of its orders, the collective will of COO and NAN cannot and should not override the rights of individual First Nations children in this case. The Tribunal provided helpful guidance on this point when it addressed the 2022 Compensation FSA:

> If honoring the inherent right of self-government of First Nations under the *CHRA* means that we must honour the First Nations who change their minds after orders are made with disregard to the evidence that led to those orders, the Tribunal believes it should be clearly expressed in legislative amendments because it is counterintuitive to the current human rights regime and the legitimacy of the Tribunal's mandate. Otherwise, Tribunal orders must be seen as binding and

[100] Gender and Violence, at p 618.
[101] *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*, UN Permanent Forum on Indigenous Issues, 13th session, E/C.19/2014/3 (2013) Note, at para 16.

> victims/survivors regardless of their national origin must be able to rely on these orders once they are made.
>
> [...] There is no doubt that *UNDRIP* and *FPIC* apply to the state of Canada. Canada cannot shield its responsibilities to First Nations rights holders especially when rights holders voice their disagreements on issues affecting them.
>
> The Tribunal supports First Nations-led solutions to eliminate discrimination if the evidence advanced proves to eliminate the systemic discrimination found in an effective and sustainable manner that responds to the specific needs of First Nations children, families and also communities. The Tribunal reminds the parties that it is a Tribunal created by statute with a mandate to eliminate discrimination in Canada once findings are made, always based on evidence and not opinion. The Tribunal is still seized of the matter and will need to make findings before ending its jurisdiction to ensure the racial and systemic discrimination is eliminated and does not reoccur.[102]

77. As set out in these submissions, the Caring Society submits that insufficient evidence has not been advanced to prove that the Ontario FSA will eliminate the systemic discrimination found in this case or prevent its recurrence. Thus, reliance on the political will of First Nations in Ontario cannot be the basis for approval of the agreement.

B. Insufficient Evidence to Demonstrate the Elimination of Discrimination

1. The Tribunal's Approach to Remedies

78. Since 2016, the Tribunal has made multiple, targeted remedial orders reflecting the specific nature of the pervasive discrimination in this case and the needs of First Nations children. Relying on the substantial jurisprudence related to human rights remedies,[103] the Tribunal has set out the following principles:

- The Tribunal must ensure its remedial orders are effective in promoting the rights protected under the CHRA and meaningfully vindicate any loss suffered by the victim of discrimination).[104]
- In crafting remedies that redress and prevent discrimination, the Tribunal must consider any historical practices or patterns of discrimination in order to design appropriate strategies for the future.[105] Tribunal remedies must be effective,

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[102] 2022 CHRT 41, at paras 349, 426 and 503.
[103] See *Hughes v Elections Canada*, 2010 CHRT 4 at para 50; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 25 and 55; and *CNR v Canada (Human Rights Commission)*, 1987 CanLII 109 (SCC) at p 1134. See for example *Entrop v Imperial Oil Limited* (2000), 2000 CanLII 16800 (ON CA); *Turnbull v Famous Players Inc*, 2001 CanLII 26228 (ON HRT), [2001] OHRBID; *Canadian Human Rights Commission v Dumont*, 2002 FCT 1280; *R v 974649 Ontario Inc*, 2001 SCC 81 and *Mills v The Queen*, 1986 CanLII 17 (SCC).
[104] 2016 CHRT 10, at para 14.
[105] 2016 CHRT 10, at para 18.

creative when necessary, and respond to the fundamental nature of the rights in question.[106]

- It is important to distinguish between policy choices made by Canada that satisfactorily addresses the discrimination, in which the Tribunal refrains from intervening, from policy choices made by Canada that do not prevent the discriminatory practice from recurring, which provides justification for the Tribunal to intervene.[107]

- The *CHRA* provides considerable discretion to the Tribunal to remedy discrimination and prevent its recurrence. To this end, remedies under the *CHRA* must be effective and "consistent with the 'almost constitutional' nature of the rights protected".[108]

- Human rights legislation is intended to give effect to rights of vital importance, ultimately enforceable by a court of law– rights must be given full recognition and effect.[109]

- Any order made by the Tribunal, especially in systemic cases, has some level of impact on policy or spending of funds. To deny this power to the Tribunal by way of decisions from the executive would actually prevent the Tribunal from doing its duty under the CHRA, which is quasi-constitutional in nature. Throughout its existence, the Tribunal has made orders on numerous occasions that affect spending of funds.[110]

- The Tribunal is willing to make further orders if the discriminatory practices continue. Not to do so would be unfair to the successful parties.[111] Reform must be evidence-informed and it must be informed by the real needs of children, youth and families.[112]

79. As the Tribunal has made clear in numerous rulings, any settlement or resolution of the Complaint must demonstrate an evidence-based, meaningful and sustainable approach to remedying the discrimination identified throughout this proceeding and prevent its recurrence. Indeed, The Tribunal has consistently cautioned that it will not make orders absent strong and reliable evidence. In the Capital Order, the Tribunal noted as follows:

> […] Canada cannot contract out the Tribunal's quasi-constitutional responsibility to eliminate the discrimination found and prevent similar discriminatory practices from arising. It has to occur after an **evidence-based finding that satisfies the Tribunal** that discrimination is eliminated and prevented from reoccurring or on consent of all, not just some, parties in the Tribunal proceedings and **based on**

[106] 2018 CHRT 4, at para 51.
[107] 2018 CHRT 4, at para 54.
[108] 2021 CHRT 6, at paras 58 and 74.
[109] 2021 CHRT 6, at para 61.
[110] 2021 CHRT 41, at para 27.
[111] 2021 CHRT 41, at para 31.
[112] 2021 CHRT 41, at paras 503, 517 and 2022 CHRT 8, at para 76.

> **compelling evidence** that the systemic racial discrimination will be eliminated. [Emphasis added][113]

80. The obligation to meet the standards set by the Tribunal and eliminate discrimination rests solely on Canada. This is not a responsibility that COO and NAN can take on for Canada: they did not perpetrate harm and trauma against First Nations children. It is Canada's obligation to demonstrate, through its evidence, that its long-term reform proposal will eradicate the discrimination and meet the needs of First Nations children.

81. More recently in 2025 CHRT 80, the Tribunal set out clear guidelines for long-term reform remedies, including that long term reform has lasting effects, be flexible and improve upon the Tribunal's orders, and strive for excellence rather than perfect, without narrowing the Tribunal's findings and orders.[114]

82. The Caring Society submits that the Tribunal's underlying remedial orders and the parameters set out in 2025 CHRT 80 must guide consideration of the Ontario FSA and the relief sought in the Ontario Motion.

2. Insufficient Evidence to Demonstrate Elimination of the Discrimination under the 1965 Agreement

83. In 2016 CHRT 16, the Tribunal provided a helpful summary of its findings in relation to Ontario:

> With respect to the *1965 Agreement* in Ontario, the *Decision* found that, while it was seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. The *Agreement* has not been updated for quite some time and does not account for changes made over the years to the Ontario's *Child and Family Services Act* for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under the Ontario's *Child and Family Services Act*. The *Decision* also found that the lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. Finally, the *Decision* indicated there is discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children

[113] 2021 CHRT 41, at paras 503 and 517
[114] 2025 CHRT 80, at para 113.

> and families, for example, through the appointment of a Band Representative and INAC's lack of funding thereof (see *Decisions* at paras. 223-246).[115]

84. The Tribunal ordered Canada to cease its discriminator practice and reform the *1965 Agreement*. Canada has largely ignored this order and has led no evidence that it has made any efforts to reform the *1965 Agreement* prior to tabling the Trilateral Agreement. Although Canada adduced some evidence prior to Actuals Order on its efforts to engage with the province, it has provided no explanation why those engagement efforts were not maintained or continued.

85. Importantly, there is Ontario specific evidence regarding a roadmap to redressing the discrimination under the *1965 Agreement*. On February 27, 2020, after the Ontario Chiefs-in-Assembly accepted the final report of the Ontario Special Study (the "**OSS**"), the OSS was filed with the Tribunal.[116] As directed by Resolution 25/17, the report examines the funding relationships and comparability of child welfare services for on-reserve children in Ontario and to provide options on a new First Nations family well-being policy, program delivery and funding approach that is family-centred, community-directed and supports better outcomes on prevention.[117] The OSS sets out key findings and makes key recommendations about the ongoing and harmful gaps in funding for First Nations children in Ontario who need child and family services:

- Finding: The majority of prevention funding provided by the Ontario Ministry is not cost-shared with Canada under the *1965 Agreement* and is predominately distributed to First Nations communities.[118]
- Finding: The *1965 Agreement* is inadequate given the gap between services eligible for cost-sharing and the culturally appropriate services needed to achieve a holistic focus on well-being, and for preventing children coming into care.[119]
- Finding: The *1965 Agreement* is based on "an outdated and siloed notion of child welfare resulting in a restricted interpretation of 'prevention' activities eligible for reimbursement. […] The highly limited list of eligible 'prevention' activities contributes to the problem identified earlier in this chapter, namely contentious

[115] 2016 CHRT 16, at para 67.
[116] Hearing Exhibit 1a, Grand Chief Abram Affidavit, March 6, 2025, at paras 117-118.
[117] Hearing Exhibit 1a, Grand Chief Abram Affidavit, March 6, 2025, at Exhibit N: Resolution 25/17.
[118] Ontario Special Study, at p 47.
[119] Ontario Special Study, at p 91.

disagreement over which prevention activities are, or should be, eligible for reimbursement."[120]

- Finding: Given that funding formulas rely on cost averages to determine funding entitlements, any blunt application of the formula will result in an inequitable distribution of funds where significant cost differences across communities exist.[121]

- Recommendation #7: That First Nations, federal and provincial governments enter into a comprehensive First Nations child well-being transformation process, anticipated to last approximately 10 years.[122]

- Recommendation #19: That federal and provincial governments commit to supporting the First Nations child and family well-being transformation process and provide all necessary funding for communities to complete bottom-up costs assessments to support their transformed systems, and provide the transitional costs associated with putting those systems in place. […] Actual costs should be covered throughout the transformation process.[123]

- Recommendation #22: That processes for First Nations to exercise self-determination over child and family well-being are fully funded by federal and provincial governments, and include ongoing governance, capacity building, operations, and additional liability, both during and after the transformation period. Funding should extend beyond existing sources so as to cover the costs associated with working out relationships among First Nations, working out relationships with other governments, internal consultation with members, policy-making and law-making processes, system development, capacity-building and start-up within new bodies within that system, training, and legal support.[124]

86. Funding levels in the Ontario FSA are not based on bottom-up costs assessment or individual First Nation or FNCFS Agency needs assessments.[125] Similarly, prevention funding does not include funds for capacity building or program development to account for the presumed capacity that IFSD based the $3500 per capita amount on.[126]

87. In addition, the Ontario FSA fails to plug the gap created by the *1965 Agreement* in relation to mental health services, which are a mandated service under the *CYFSA*. The Association of Native Child and Family Services Agencies of Ontario raised important concerns regarding this unaddressed ground for discrimination:

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[120] Ontario Special Study, at p 91.
[121] Ontario Special Study, at p 111.
[122] Ontario Special Study, at Executive Summary, p x-xi.
[123] Ontario Special Study, at Executive Summary, p xiii-xiv.
[124] Ontario Special Study, at Executive Summary, p xiv.
[125] Cross-Examination of Grand Chief Abram, Transcript for 10 Dec 2025, Part 1, [**XEX of Grand Chief Abram 10 Dec 2025 Part 1**] Transcript Brief at Tab 2, at p 84, line 16 - p 86 line 7.
[126] XEX of Grand Chief Abram 10 Dec 2025 Part 1, Transcript Brief at Tab 2, at p 82, lines 6-15.

> [The Ontario FSA] does not account for prevention funds … necessary to address decades-long chronic needs, mental health crises, substance misuse, traumas and the resulting complex needs of children and parents. These increasingly complex and high needs over the course of the recent few years and the lack of locally available supports have resulted in removal of children to be placed in clinical group homes sometimes hundreds of kilometers outside of their communities and far from their cultures. While population and inflation factors are critical to a responsive review and adjustment of a funding formulation, they do not account of a fraction of the needs currently experienced by communities and agencies.[127]

88. Pursuant to the approach taken by Canada to long term reform, Canada will not be required to reform the *1965 Agreement*—the Trilateral Agreement calls on Canada to make "best efforts to reach an agreement on a Reformed *1965 Agreement* with the Government of Ontario by March 31, 2027".[128] But ultimately if Canada fails to take meaningful and substantive steps as contemplated in the Trilateral Agreement, there are no enforceable remedies available to COO, NAN, First Nations or FNCFS Agencies. More importantly, given that the Tribunal's underlying orders will be erased, First Nations children will have no basis to enforce their right to substantive equality under the *1965 Agreement*.

89. Finally, the Ontario FSA provides that the application of the Reformed FNCFS Funding Approach as it applies to FNCFS Agencies may change as a result of the reformed *1965 Agreement*, thus introducing more uncertainty for agencies.[129] In the event that the funding made available by the Government of Ontario and Canada to FNCFS Agencies is changed or limited in some way by the operation of the *1965 Agreement*, that limitation shall be raised with the Government of Ontario in the discussions on *1965 Agreement* reform, but there are no safeguards to ensure that FNCFS Agencies will continue to receive stable and predictable funding.[130]

3. Insufficient Evidence that Discrimination Related to Lack of Access to Prevention/Least Disruptive Measures Will Be Eliminated

90. A central question that must be answered is whether the Ontario FSA ensures that every First Nations child in Ontario will be able to access prevention services in a substantively equal manner regardless of geography or capacity of their First Nation. The Caring Society

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[127] Hearing Exhibit 12, Affidavit Brief of the Interested Parties, Affidavit of Kristen Murray, affirmed October 2, 2025 [**Hearing Exhibit 12, Murray Affidavit, October 2, 2025**] at Appendix B, p 71.
[128] Hearing Exhibit 24, *Trilateral Agreement in Respect of Reforming the 1965 Agreement*, dated February 26, 2025, at Article 2.02 (3).
[129] Ontario FSA, at para 59.
[130] Ontario FSA, at para 61.

submits that it does not, and the evidence suggests that much of the discrimination identified by the Tribunal will likely repeat itself.

91. In the *Merits Decision* and the variations decisions that have followed, the Tribunal has made clear that prevention and least disruptive measures are not auxiliary or discretionary services. They are essential, as they are the primary mechanism by which discriminatory outcomes in child welfare are avoided. Without equitable access to prevention and least disruptive measures, First Nations children are predictably and disproportionately drawn into the protection system and into placements away from their homes, perpetuating the very discrimination the Tribunal found unlawful.

92. In Ontario, First Nations children who may be or are in need of protection receive child welfare services pursuant to the *CYFSA*[131] and are entitled to receive services that are least disruptive and are delivered in a manner that respects their culture, their language, their community, the autonomy of the family, and the concept of extended family.[132]

93. FNCFS Agencies, like mainstream agencies, are required to not only investigate allegations that children may be in need of protection, but they are required to provide "guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children", and to protect and care for children who are in their care, in a manner that aligns with the service requirements of the *CYFSA*.[133] Indeed, significant changes were introduced into the *CYFSA* in 2017, with an expanded preamble to include unique and targeted provisions aimed at reducing the number of First Nations children in care.[134]

94. First Nations children are also entitled to receive services from FNCFS Agencies pursuant to the requirements of the *Federal Act*– legislation that was not in place at the time

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[131] *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sched 1 [***CYFSA***] at Part I. Ontario Special Study, at p 7.
[132] See for example *CYFSA*, at section 2, section 75(4) regarding Temporary Care Agreements, section 77 regarding Voluntary Youth Services Agreements, and section 101(3) regarding dispositional orders available to the Court.
[133] *CYFSA* at section 35.
[134] These changes further included: expanded preamble and purposes with specific recognition of FNMI children, UNDRIP, Jordan's Principle, and the importance of culture, language and First Nations-led processes in service delivery [preamble and s. 1]; dispute resolutions requirements to explore First Nations-led dispute resolutions [ss. 17(2)]; provisions related to FNCFS Agencies [s. 70]; customary care subsidies [s. 71]; requirements for consultation with First Nations [ss. 72-73]; and requirements to explore extended family when FNMI children are involved [ss. 101(4)].

of the hearing on the merits.[135] Under the *Federal Act*, First Nations children are to receive child and family services in a manner that, among other things, promotes substantive equality.[136]

95. The *Federal Act* also requires that prevention and least disruptive measures be given priority over other services if so doing is consistent with the best interests of the child.[137] FNCFS Agencies must make reasonable efforts to keep children in their homes if possible through the delivery of preventative and least disruptive measures[138] and, "to the extent that providing a prenatal service that promotes preventive care in consistent with what with what will likely be in the best interests of an Indigenous child after he or she is born, the provision of that service is to be given priority over other services in order to prevent the apprehension of the child at the time of the child's birth."[139] The *CYFSA* does not include a provision for prenatal care.

96. The unique provisions in the *CYFSA* combined with the *Federal Act* reflect a clear intention on the part of the legislature to redress the overrepresentation of First Nations children in the Ontario child welfare system, providing direction to FNCFS Agencies that removal must be a last resort. In *Kina Gbezhgomi Child and Family Services v M.A.*, Justice Wolfe explained as follows:

> Indigenous families have felt the negative and sometimes fatal impacts of colonization most acutely in the dismantling of Anishinaabe laws and kinship structures. This intentional disruption to the transmission of culture was achieved through the removal of Indigenous children into the residential school system, and now through the disproportionate removal of Indigenous children from their families through the child welfare system (see: *Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015). This overrepresentation is well known, and I am entitled to take judicial notice of not only the statistics in relation to this, but also the alienation, disempowerment and frustration that Indigenous families and communities feel when it comes to child welfare.
>
> This history is what prompted not only the preamble and remedial sections of the *CYFSA*, but also the most recent federal legislation in Bill C92, *An Act*

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[135] *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, SC 2019, c 24 [***Federal Act***].
[136] *Federal Act*, at section 11.
[137] *Federal Act*, at section 14.
[138] *Federal Act*, at section 15.1.
[139] *Federal Act,* at section 14(2).

> *respecting First Nations, Inuit and Métis Children, Youth and Families, S.C. 2019, c. 24* which came into force in January 1, 2020. Both Acts instruct the courts on the need to approach child welfare differently when dealing with Indigenous families, and with a view to recognizing the importance of continuity of culture and family. This is, as the preamble of the *CYFSA* instructs, to be done "in the spirit of reconciliation…working with First Nations, Inuit and Métis peoples to help ensure that wherever possible, they care for their children in accordance with their distinct cultures, heritages and traditions".[140]

97. First Nations–even when delivering primary prevention services–are not required to meet these standards.[141] That is not to suggest that First Nations and FNCFS Agencies cannot and do not cooperate. However, it is the child who is ultimately entitled to receive full access to the mandated services under the child welfare legislation.

98. First Nations children in Ontario who are the subject to child welfare investigations face unique and complex challenges, including disproportionally higher rates of concerns related to child functioning, caregiver wellbeing and housing conditions.[142] In addition, First Nations children often experience multiple co-occurring concerns, resulting in greater and more complex needs that must be addressed.[143] As a result, the funding to be allocated to FNCFS Agencies must be tailored to ensure that adequate needs-based and culturally appropriate services can be provided.

99. Under the Ontario FSA, each FNCFS Agency will receive operations and maintenance funding as set out under the *1965 Agreement* plus the same amount as claimed for actuals in 2022-2023 for intake and investigation, legal fees and building repairs.[144] This amount will operate as the **Baseline Funding** for Year 1 and will then be upwardly adjusted for inflation and population growth in subsequent years.[145] In addition, each FNCFS Agency shall receive 50% of emergency funding, calculated at 2% of its Baseline Funding.[146]

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[140] *Kina Gbezhgomi Child and Family Services v MA,* ONCJ 414, at paras 42-44. See also *Kina Gbezhgomi Child and Family Services v JM*, 2023 ONCJ 93, at paras 29-32.
[141] Cross-Examination of Duncan Farthing-Nichol, Transcript for 12 Dec 2025, Part 1, [**XEX of D. Farthing-Nichol 12 Dec 2025 Part 1**] Transcript Brief at Tab 6, p 430 lines 6-17, p 457 at lines 9-13 and XEX of D. Farthing-Nichol 11 Dec 2025 Part 2, Transcript Brief at Tab 5, at p 329, lines 1-10. See also Hearing Exhibit 26, November 2023 Bulletin [**Hearing Exhibit 26, November 2023 Bulletin]** at p 1 of English Version.
[142] Hearing Exhibit 14, Affidavit of Dr. Barbara Fallon, affirmed October 2, 2025, at paras 35-38.
[143] Hearing Exhibit 14, Affidavit of Dr. Barbara Fallon, affirmed October 2, 2025, at paras 39-44.
[144] Ontario FSA, at paras 18(a) and 44(a).
[145] Ontario FSA, at paras 18(b) and 33.
[146] Ontario FSA, at paras 21 and 44(b)(iii).

100. The Baseline Funding allocated to FNCFS Agencies includes no dedicated dollars for prevention or least disruptive measures, as it is based on the actuals claimed by FNCFS Agencies in 2022-2023. In 2022-2023, FNCFS Agencies could not claim funding for prevention/least disruptive measures at actuals, as the Panel ordered that these costs would be provided pursuant to the agreed upon $2500 per capita: "as of April 1, 2022, fund **prevention/least disruptive measures** at $2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements."[147] In the result, the Consent Order amended the provisions of the Actuals Order such that prevention and least disruptive measures funding were no longer available at actuals.[148]

101. In turn, ISC amended the FNCFS Transitional Terms and Conditions on April 1, 2022 (the "**April 2022 Terms and Conditions**"), advising FNCFS Agencies that "Canada shall, as of April 1 2022, fund **prevention/least disruptive measures** at $2,500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program".[149] Under section 5.1 of the April 2022 Terms and Conditions, eligible protection services and activities included "intake, assessment and investigation of child maltreatment reports" and "intervention planning implementation and evaluation to address identified risks and promote protective factors", but did not include least disruptive measures as eligible.[150]

102. In November 2023, ISC circulated a bulletin to FNCFS Agencies in Ontario (the **"Ontario Bulletin**"), advising that they could continue to make claims for least disruptive measures at actuals, under intake and investigation: "If the delegated First Nation Agency does not have the financial resources to address gaps in their child protection work (including least disruptive measures), delegated First Nations agencies can continue to access the claims at actuals for intake and investigation."[151] Canada then updated the Terms and Conditions, removing "least disruptive measures" from its description of the per capita prevention funding

[147] 2022 CHRT 8, at para 172(7).
[148] 2022 CHRT 8, at para 172(8).
[149] Hearing Exhibit 25, *FNCFS Transitional Terms and Conditions, dated April 1, 2022,* [**Hearing Exhibit 25, 2022 FNCFS Transitional T&C**] at section 5.3.
[150] Hearing Exhibit 25, 2022 FNCFS Transitional T&C at section 5.1.
[151] Hearing Exhibit 26, November 2023 Bulletin.

and adding "least disruptive measures" as an eligible service and activity under intake and investigations.[152]

103. The Tribunal has made clear that prevention and least disruptive measures are not discretionary policy choices but are core components of substantive equality. Canada's witness asserted that funding for least disruptive measures was not captured in the $2500 per capita funding, notwithstanding the clear language of the Consent Order and the guidance provided to FNCFS Agencies in the April 1, 2022 Terms and Conditions.[153] The Caring Society is of the view that Mr. Farthing-Nichol's opinion on this issue should be given no weight: he was not the author of the Terms and Conditions and he was not intimately involved in its preparation.[154] Moreover, Mr. Farthing-Nichol confirmed that the Terms and Conditions are a critical mechanism used by ISC to communicate eligibility criteria and expenditures with recipients.[155]

104. The Caring Society submits that, based on the clear language of the Consent Order and the April 1, 2022 Terms and Conditions, it is likely that FNCFS Agencies did not seek funding for least disruptive measures at actuals in 2022-2023. While Mr. Farthing-Nichol stated that ISC "anticipates that the baseline funding will be sufficient"[156] Canada has failed to demonstrate that FNCFS Agencies will have sustainable and reliable funding to support the legislative requirements related to prevention and least disruptive measures. Moreover, when asked why 2022-2023 was selected as the year to ground the Baseline for FNCFS Agencies, Mr. Farthing-Nichol advised that it was a matter of "Cabinet confidence".[157]

105. With respect to prevention, this funding will either be split between First Nations and FNCFS Agencies, or First Nations can elect to receive the full prevention amount.[158] The Institute for Fiscal Studies and Democracy ("**IFSD**") developed the $2500 per person amount

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[152] Hearing Exhibit 19, *FNCFS Exhibits to December 10, 2025-December 12,2025 - ISC Documents for OFA Cross-Examinations*, at Tab C: April 1, 2025 Terms and Conditions, at sections 5.1 and 5.3.
[153] XEX of D. Farthing-Nichol 12 Dec 2025 Part 1, Transcript Brief at Tab 6, at p 413, lines 21-p 414, line 15.
[154] XEX of D. Farthing-Nichol 12 Dec 2025 Part 1, Transcript Brief at Tab 6, at p 396, lines 7-11.
[155] XEX of D. Farthing-Nichol 12 Dec 2025 Part 1 Transcript Brief at Tab 6, at p 395, lines 7-11.
[156] Hearing Exhibit 8a, Affidavit of Duncan Farthing-Nichol, Vol 1, affirmed March 7, 2025 [**Hearing Exhibit 8a, Farthing-Nichol Affidavit March 7, 2025**] at para 44.
[157] XEX of D. Farthing-Nichol 12 Dec 2025 Part 1, Transcript Brief at Tab 6, at p 419, lines 1-6.
[158] Ontario FSA, at para 44(d).

for prevention as part of a holistic funding approach that assumed existing service capacity.[159] The evidence is clear that different First Nations are at different stages of readiness to deliver prevention.[160] Importantly for those First Nations that want to deliver prevention services and need to develop their capacity, there is no dedicated capacity funding and the prevention amount does not account for the costs of building, developing and implementing a first time prevention program.[161]

106. This lack of differing levels of readiness coupled with the lack of capacity funding raises serious questions about the level of prevention services that may be available to First Nations under the Ontario FSA. This was highlighted in the evidence of Kristin Murray, Executive Director of Kunuwanimano Child and Family Services.[162]

107. In its Phase 3 study, IFSD stresses that an integrated approach to prevention and protection services prioritizes least-disruptive measures, ensures effective service delivery and emphasizes safety for First Nations children.[163] IFSD Phase 3 highlighted that the split of prevention resources between service providers and First Nations makes it difficult to ascertain who is accountable for which type of prevention service (between tertiary, secondary and primary). The study further recommended an assessment of the effectiveness of prevention funding to First Nations served by an FNCFS Agency to determine whether First Nations children can immediately receive the services they need.[164]

108. As the Ontario Bulletin correctly points out, least disruptive measures are statutory and require appropriate legal authority to deliver. The Ontario FSA Terms and Conditions describe prevention as primary, secondary and tertiary services that create "a continuum of care based on the needs of the child and interventions can be included at all stages of prevention. Stages of prevention are not mutually exclusive."[165] Least disruptive measures include secondary and tertiary prevention, thus raising the question of how FNCFS Agencies

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[159] Institute of Fiscal Studies and Democracy, *Funding First Nations child and family services (FNCFS): A blueprint for program reform* (April 2025) [**IFSD Phase 3**]; also at Hearing Exhibit 13, Affidavit of Jasmine Kaur, affirmed 2 October 2025 at Exhibit A, at p 18, footnote 4..
[160] XEX of Grand Chief Abram 10 Dec 2025 Part 1, Transcript Brief at Tab 2, at p 81, line 21-p 82, line 5.
[161] XEX of Grand Chief Abram 10 Dec 2025 Part 1, Transcript Brief at Tab 2, at p 82, lines 6-15.
[162] Hearing Exhibit 12, Murray Affidavit, October 2, 2025, at para 40.
[163] IFSD Phase 3, at p 37.
[164] IFSD Phase 3, at p 37.
[165] Ontario FSA, at Appendix 8: First Nations Child and Family Services Terms and Conditions, p 129.

will be able to deliver these mandated services in the event that a First Nation elects to receive the full prevention allocation.

109. In addition, FNCFS Agencies will be required to divert their Baseline Funding to various ancillary functions, including reporting, data collection and engagement. While these activities are critical to ensure that First Nations children are receiving the care and services they need, there is no dedicated funding allocated to FNCFS Agencies to undertake this mandatory work, leaving serious questions about the impact on service delivery. FNCFS Agencies will be required to divert their protection funding to this reporting:

- FNCFS Agencies shall co-develop a single child and community well-being plan with each of its affiliated First Nations within six (6) months and be updated annually (the "**CCWP**").[166]

- At least 90 days prior to the expiry of its CCWP, an FNCFS Agency shall submit a subsequent CCWP, co-developed with the First Nation(s) affiliated with that FNCFS Agency. Where the deadlines are not met, ISC shall take any action available to ensure FNCFS Agency compliance.[167]

- FNCFS Agencies are required to fund the co-development of the CCWP for each of their affiliated First Nations out of their existing budgets.[168] FNCFS Agencies are required to report to ISC and its affiliated First Nation(s) on the implementation of its CCWP on an annual basis.[169]

- FNCFS Agencies are required to collect and report on data on at least 22 indicators with respect to children placed in out-of-home care, although there is no designated funding earmarked for these activities – not the 75 child wellbeing indicators recommended by IFSD.[170] ISC shall require FNCFS Agencies to report annually to its affiliated First Nations and the Ontario FNCFS Data Secretariat.[171]

4. Insufficient Evidence that the Funding Envelopes will be Sufficient to Redress Discrimination

110. The Caring Society submits that Ontario FSA relies heavily on "actuals" to form the Baseline budget for both FNCFS Agencies and First Nations' budgets for FNRS. This reliance is not grounded in an evidentiary basis and instead is based on the assumption that the actuals

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[166] Ontario FSA, at para 108.
[167] Ontario FSA, at para 109.
[168] Ontario FSA, at para 111.
[169] Ontario FSA, at para 111(b).
[170] Ontario FSA, at para 113. See also Institute of Fiscal Studies and Democracy, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* (July 2020) [**IFSD Phase 2**] at pp xx; Also at Hearing Exhibit 8a, Farthing-Nichol Affidavit March 7, 2025, at Exhibit B at p 65.
[171] Ontario FSA, at para 115.

claims made by FNCFS Agencies and First Nations is a reliable proxy for need. However, there is little evidence in the record to support this assumption. In fact, the evidence suggests that actuals claims are not reflective of need, as it requires the requester to have the capacity to assess its own needs, to have the resources to make an actuals request, and the ability to monitor whether the requested amount achieves the goal of the request. As noted by Grand Chief Abram: "First Nations often experienced barriers in accessing the First Nations Representative Services funding through the 'actuals' process [...] the 'actuals' process appeared to exacerbate inequalities as some First Nations were receiving little or no funding".[172]

111. COO and NAN similarly call into question the reliability of using the actuals approach as it provided an "advantage [to] higher-capacity First Nations and FNCFS Agencies – those able to spend upfront and navigate the complex reimbursement process or submit advance claims – while leaving others behind."[173] This leads to serious questions about whether the baseline budgets for both FNCFS Agencies and First Nations will meet the real needs of First Nations children.

112. Meanwhile, the capital envelope reflects an entirely different approach. Under the Ontario FSA, capital funding is not tethered to evidenced need[174] and instead is derived from the calculations based on Ontario's portion from the National FSA.[175] Canada calculated these costs based on a generic model for office buildings, with an assumption that each First Nation and FNCFS Agencies likely only requires one office building.[176] This approach is not informed by the specific and unique spatial and administrative needs of FNCFS Agencies or First Nations, and fails to contemplate their actual needs in relation to delivering child and family services.[177] On cross-examination, Mr. Farthing-Nichol indicated that part of the

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[172] Hearing Exhibit 2, Supplemental Affidavit of Grand Chief Joel Abram, affirmed May 21, 2025, at para 22.
[173] Chiefs of Ontario and Nishnawbe Aski Nation Written Submissions, dated January 16, 2026 [**COO and NAN Written Submissions**] at para 143.
[174] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, at p 525, lines 9-25.
[175] Hearing Exhibit 9, Farthing-Nichol Supplemental Affidavit, May 15, 2025, at para 20.
[176] Hearing Exhibit 12, Murray Affidavit, October 2, 2025, at paras 13-14. The evidence of Kristin Murray of Kunuwanimano Child and Family Services indicates that this Agency has at least two offices with a service area of 139,000 sq km.
[177] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, p 521, line 14-p 522, line 2. See also p 522, line 14 - p 524, line 10.

calculations was based on an assumption of met needs.[178] Mr. Farthing-Nichol further suggested that the method used to estimate costs for Capital pursuant to the Ontario FSA was similar to the method used by IFSD Phase 2, but later conceded that notwithstanding, IFSD Phase 2 was released prior to and without the benefit of the data from the Capital Order in 2021 CHRT 41.[179] Mr. Farthing-Nichol also conceded that the suggestion that there would be a high demand in capital requests at the onset of the Ontario FSA and a decline in demand as buildings are built was based on assumption and not based on any form of capital needs assessment.[180]

113. Similarly, funding for Post-Majority Support Services ("**PMSS**") is not based on any form of assessment of the unique needs of First Nation youth leaving care and the costs associated with delivering PMSS. The methodology also assumes only a 75% utilization rate. Under the Ontario FSA, PMSS funding will be allocated to First Nations pursuant to a fixed formula with an envelope of $356.4 million, upwardly adjusted for remoteness.[181] The assumptions for what a First Nation youth needs are derived from calculations using the one-person household expenditures from Canada's Survey of Household Spending.[182] Mr. Farthing-Nichol acknowledged the limitations of using this approach, as it fails to account for the unique circumstances and specific needs of youth leaving care.[183] In other words, it is not based on an analysis of outcomes; rather it is grounded in assumptions about what it costs to live in Ontario. This lack of analysis and the failure to understand the needs of First Nation youth is concerning, given that a Service Provider Funding Adjustment Request is not available for PMSS.[184]

C. Insufficient Evidence to Demonstrate Discrimination Will Not Recur

1. Canada's Historical Conduct Combined with its Discretion Will Not Prevent Discrimination

114. Under the Ontario FSA, Canada retains exceptional authority to control service delivery and service levels, as well as the discretion to ultimately determine whether First Nations

[178] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, at p 519, line 8-p 520, line 6.
[179] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, at p 524, line 12-p 525, line 8.
[180] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, at p 525, lines 9-25.
[181] Ontario FSA, at paras 44(f)(i), (54)(g)(ii) and 72.
[182] Hearing Exhibit 9, Farthing-Nichol Supplemental Affidavit, May 15, 2025, at para 7.
[183] XEX of D. Farthing-Nichol 12 Dec 2025 Part 1, Transcript Brief at Tab 6, p 499, lines 10-13.
[184] Ontario FSA, at paras 166-168.

children will have access to the child and family services available under the Ontario FSA beyond 2034. These broad discretionary powers must be considered against the backdrop of Canada's conduct in this case, which must be measured at the level of the child and not at the negotiation table. Indeed, the Tribunal has already found that Canada's unfettered discretion over funding, eligibility and compliance was a principal driver of the discrimination in this case; the Ontario FSA reproduces — not cures — this risk.

115. In relation to service delivery, recipients cannot control or determine how to spend their *at year* unexpended funds. In order for a First Nation or a FNCFS Agency to roll over any of their surplus from the previous fiscal year, such a roll over must be approved by ISC.[185] This approach is in direct conflict with the recommendations from IFSD, which recommends the ability to carry-forward unexpended funds for a five year block.[186] The Ontario FSA also provides that Canada can amend the Terms and Conditions without the consent of COO and NAN.[187] While paragraph 318 of the Ontario FSA suggests that amendments to the Terms and Conditions are limited, it begs the question as to what Canada will interpret the limits on its own power.

116. Canada also retains sole discretion over all capital requests. Canada will assess and rank capital requests pursuant to Priority Ranking Framework ("**PRF**").[188] At this time, the PRF is not finalized, nor is it available to the Tribunal for its consideration.[189]

117. While Canada points to the Service Provider Funding Adjustment Requests ("**SPFAR**") as a safeguard to First Nations and FNCFS Agencies, those requests are determined in the sole and unfettered discretion of Canada, without any guidelines, criteria or assessment tools.[190] First Nations and FNCFS Service Providers may bring a SPFAR in limited circumstances: a FNCFS Agency can seek a SPFAR only when "it is unable within its current funding, *for reasons beyond its reasonable control*, to deliver services by law" and a First

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[185] Ontario FSA, at Appendix 8: Terms and Conditions, A.6.3.1, p 167. This is counterintuitive to the identified recommendations in the Ontario Special Study regarding breaking the cycle of outside control (see Ontario Special Study at p 127).
[186] IFSD Phase 3, at p 146.
[187] Ontario FSA, at para 320.
[188] Ontario FSA, at para 44(e) and Appendix 11: Funding and Administration of Capital Commitments at p 174.
[189] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2, Transcript Brief at Tab 7, at p 526, line 1-p 527, line 7, and p 528, lines 11-24.
[190] Ontario FSA, at para 173.

Nation is limited to such a request only when it cannot provide prevention services "*created by an unforeseen event(s), beyond its reasonable control*".[191] Canada has the sole discretion to determine these requests, is not required to provide reasons (raising serious concerns regarding procedural fairness) and can simply ignore a request, which will be deemed to be denied.[192] In the event that a First Nation or FNCFS Agency disagrees with Canada's determination of its request, the burden is again placed on that First Nation or FNCFS Agency to either seek recourse outside of the Ontario FSA dispute resolution process (without the protection of the underlying Tribunal findings and orders) or rely on the Ontario FSA dispute resolution process, which offers narrow and confusing remedies, as discussed below.

118. Finally, Canada holds the ultimate discretion regarding whether it will fund child and family services for First Nations children in Ontario now and beyond the terms of the Ontario FSA. First, as discussed above, Parliament may choose not to appropriate the funds under the Ontario FSA, leaving no practical options for First Nations children who are deprived access to substantively equitable child and family services.[193] Second, Canada is not required to extend funding past 2034 and is not required to implement the recommendations from Second Program Assessment, despite the fact that there may be no other source of funding to support the First Nations and FNCFS Agencies as contemplated in the Ontario FSA.

119. The breadth of Canada's discretion must be considered in the context of its conduct, the nature of the discrimination identified in this case, and the severity of impact on vulnerable First Nations children who require and are entitled to substantively equitable child and family services. While the Caring Society is limited by the length of these submissions, the Caring Society urges the Tribunal to consider and recount the history of this case and Canada's conduct throughout when evaluating the risk associated with the scope of Canada's discretion.

2. Discrimination Will Not Be Prevented Under the Dispute Resolution Process

120. The Caring Society is of the view that, in addition to the issues set out above, the Ontario FSA does not provide adequate protections to enforce the rights of First Nations children and specifically fails to incorporate measures that will deter and prevent its recurrence. Indeed, the dispute resolution process (the "**DRP**") lacks a mechanism to compel Canada to make systemic and substantive changes to the Reformed FNCFS Program; lacks

[191] Ontario FSA, at paras 166-167.
[192] Ontario FSA, at paras 170-173.
[193] Ontario FSA, at paras 297-298.

the jurisdiction to award general damages, punitive damages, or damages for discrimination; and (iii) the lack of a safety net that can compel Canada to provide additional funding in the Second Funding Period.

(i) Lack of Systemic Change

121. This is a case of systemic discrimination and yet the Ontario FSA specifically states that Arbitral Tribunal and the Appeal Tribunal do not have jurisdiction to order systemic remedies that require an amendment to the agreement, or that require Canada to fund new components or increase funding for existing components.[194] Moreover, the adjudication of a SPFAR cannot result in systemic change – each Nation and each FNCFS Agency will only have the ability to help itself, even if its experiences are shared with others.[195]

122. Canada suggests that systemic change can come through enforceable recommendations made by the Ontario Reform Implementation Committee (the "**ORIC**") in relation to the Initial Program Assessment.[196] The Caring Society submits it is entirely unclear whether the Arbitral Tribunal could make an order impacting the Reformed FNCFS Program in its entirety. Paragraph 121 of the Ontario FSA gives some suggestion that an Initial Program Assessment recommendation could be enforced by the Arbitral Tribunal, but this power is buttressed by section 197(c), which provides that a Parties' Dispute does not include the power to enforce any recommendations from the ORIC that require an amendment to this Final Agreement – Initial Program Assessment recommendations come from the ORIC.[197]

123. Moreover, Canada is explicitly not required to implement recommendations from the Second Program Assessment.[198] There is no ability for either Claimants or Parties to seek recourse from the Arbitral Tribunal vis-à-vis the Second Program Assessment, leaving serious questions about systemic change beyond the term of the Ontario FSA.[199]

124. Any systemic change to the Reformed FNCFS Program will require an amendment to the Ontario FSA and will likely require a new component and/or increased funding for existing components. The Caring Society submits that the Ontario FSA's uncertainty on this

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[194] Ontario FSA, at para 211(a),(g) and (h).
[195] Ontario FSA, at para 211.
[196] Canada's Written Submissions, at para 90(e).
[197] Ontario FSA, at paras 121 and 197(c).
[198] Ontario FSA at para 163. See also XEX of D. Farthing-Nichol 12 Dec 2025 Part 1, Transcript Brief at Tab 6, at p 480, lines 3-8.
[199] Ontario FSA, at para 197. See also COO and NAN Written Submissions, at para 99.

point calls into question whether and to what extent the substantive equality rights of First Nations children can adequately be protected under the DRP.

(ii) The Arbitral Tribunal Lacks the Jurisdiction to Award Damages

125. The Arbitral Tribunal does not have the jurisdiction to award general damages, punitive damages or damages for discrimination.[200] This provision is not in keeping with the intent of the Tribunal's orders, the purpose of the *CHRA* and it is potentially counter-intuitive to the human rights regime.

126. Human rights damages are an essential tool to the recognition of human rights: "individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination." Furthermore, as this Panel has made clear, "damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada".[201]

127. Limiting damages in this way allows Canada to shield itself from compensation under the DRP process, even if the Arbitral Tribunal finds that Canada knowingly and willingly violated the rights of First Nations children. Indeed, the history of this proceeding and Canada's conduct before and during the adjudication of this Complaint ought to give the Tribunal pause about whether the rights of First Nations children can be fully vindicated under the DRP for generations to come.

(iii) The DRP Lacks Safeguards for First Nations and FNCFS Service Providers in the Second Funding Period

128. There is a serious question with conflicting answers regarding what happens if the amount required to approve a SPFAR requires Canada to spend funds outside of the $8.5 billion in the Second Funding period. The Caring Society submits, on a strict reading of the Ontario FSA, the Arbitral Tribunal can make no such order.[202] While the Ontario FSA provides specific instances when additional funding from Canada may be required during the Initial Funding Period,[203] no such allowance exists during the Second Funding Period.

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[200] Ontario FSA, at para 211 (b).
[201] 2019 CHRT 39, at paras 14-15. See also 2022 CHRT 41, at para 171 and 259.
[202] Ontario FSA, at paras 11-12 and 211.
[203] Ontario FSA, at paras 9-10.

129. COO and NAN state that the DRP supports an interpretation that the Arbitral Tribunal's jurisdiction extends to an ability to order funding above and beyond the $8.5 billion in the Second Funding Period. To make this point, they rely on a portion of the testimony of Mr. Farthing-Nichol, for which they acknowledge there is no transcript.[204] Interestingly, Canada makes no submission on this point in its written argument.

130. Pursuant to the first stage of the process reflected in the Tribunal's January 27, 2026, Direction, the Caring Society advises that it disagrees with COO and NAN's recitation of the evidence on this point. Mr. Farthing-Nichol made clear that paragraph 9 of the Ontario FSA provides limited circumstances as to when Canada will be required to spend funds beyond the $3.9 billion allocated to the Initial Funding Period;[205] this evidence is not in dispute. However, the audio that is available for this portion of Mr. Farthing-Nichol's evidence reveals that when asked whether Canada would be required to expend additional funds beyond the total amount of $8.5 billion in the event of a successful SPFAR in the Second Funding Period, Mr. Farthing-Nichol initially answered that Canada would not.[206] Mr. Farthing-Nichol stated that:

> the obligation that is in paragraph 9 with respect to the initial funding period is not in the Ontario Final Agreement with respect to the second funding period, although it could well be a recommendation of the Ontario Reform Implementation Committee in the program assessment.[207]

131. Mr. Farthing-Nichol, subsequently appeared to revisit his initial answer, stating that based on paragraph 199(d) of the Ontario FSA, he "thinks" that Canada would be obligated to fund a SPFAR, if ordered by the Arbitral Tribunal, even if the result required Canada to spend beyond the $8.5 billion.[208]

132. The Caring Society's view is that Mr. Farthing-Nichol's interpretation is contradicted by the text of the OFA. Requiring Canada to spend funds beyond the $8.5 billion would require an amendment to the Ontario FSA: paragraph 5 states that "Canada shall provide funding in the total amount of $8.5 billion for the Reformed FNCFS Program in Ontario for

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[204] COO and NAN Written Submissions, at para 46, citing Cross-Examination of Duncan Farthing-Nichol, 12 Dec 2025 Part 2, at 1:01:00-1:02:38 (no transcript).
[205] Ontario FSA, at para 9. XEX of D. Farthing-Nichol 11 Dec 2025 Part 2, Transcript Brief at Tab 5, at p 294, lines 10-20.
[206] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2 at 1:01:28-1:02:46 (no transcript).
[207] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2 at 1:01:28-1:02:46 (no transcript)
[208] XEX of D. Farthing-Nichol 12 Dec 2025 Part 2 at 1:03:05-1:04:00 (no transcript).

a period of nine fiscal years commencing April 1, 2025, and ending March 31, 2034, and for the housing commitment set out in PART IX – HOUSING FUNDING." Paragraph 5 does not provide a condition or caveat on the ultimate number required to be spent by Canada. As noted above, the Arbitral Tribunal has no jurisdiction to order an amendment.[209]

133. At best, the intersecting provisions related to the jurisdiction of the DPR, Canada's obligations thereunder and the ability to make enforceable orders are vague, unclear and at times conflicting. The Caring Society is of the view that before the Ontario FSA could be approved it requires significant amendment to clearly set out if and when Canada could be ordered to spend additional funds in the Second Funding Period if those funds are necessary to support the substantive equality rights of First Nations children.

3. The Failure to Protect Generations to Come

134. Long-term reform cannot be interim or short-term in nature if First Nations children are to be safeguarded from the devastating effects of Canada's discriminatory conduct and the Complaint is to be resolved on a final basis. The Tribunal has made clear that First Nations children are entitled to live free from discrimination now and into the future:

> [237] The ultimate objective is to achieve sustainable long-term reform informed by the many studies, expert committees, First Nations, the parties, etc. **for generations to come.** The Tribunal has always hoped for a settlement on long-term reform by way of consent order requests, if possible, similar to the compensation settlement agreement for both Jordan's Principle and the FNCFS Program. **However, if this is not possible, the Tribunal can make systemic long-term orders informed by the parties to eliminate the systemic discrimination found**. This is not optimal without the expert input of the parties including the First Nations Chiefs' knowledge and decisions expressed in the Chiefs-in-Assembly resolutions. [Emphasis added][210]

135. The Ontario FSA provides no assurances that First Nations children in Ontario who need child and family services will receive equitable access to these services beyond the term of the agreement, if at all. The term of the Ontario FSA is only nine years. Moreover, the term will only start to run once the Tribunal approves the agreement and, irrespective of when it is approved, will expire March 31, 2034.[211] Such an approach denies First Nations children

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[209] Ontario FSA, at para 211. See also para 316.
[210] 2025 CHRT 6, at para 237.
[211] Ontario FSA, at para 73.

intergenerational protections they are entitled to pursuant to the *CHRA* and the Tribunal's injunctive orders.[212]

136. First Nations children for generations to come cannot rely on a promise of an acknowledgement that Canada may need to do something in the future.

D. Approval Without Conditions Closes the Door to the Ontario FSA

137. The Tribunal has made clear that while long term reform can be resolved by agreement, remedies must be consistent with its approach and must ensure that First Nations' children's needs are accounted for in a way that eradicates discrimination and prevents its recurrence.[213]

138. The Caring Society submits that there are important and positive provisions within the Ontario FSA that should be amplified and built on, including the guiding principles, the commitment to prevention services, and the attempt to provide predictable and stable funding. However, there are significant and detrimental structural deficiencies that, if left unaddressed, will fail to eradicate the discrimination and prevent its recurrence. By demanding that the Tribunal vacate its orders and by presenting the agreement as an all or nothing deal, First Nations children are left standing on a jurisdictional cliff with no safeguards or protections.

139. Moreover, Canada has sought judicial review of 2025 CHRT 80, calling into question whether the Ontario FSA will have implications for the rest of the country. There is a serious concern based on the plain language of paragraph 3 that First Nations children's human rights will be impacted nationally.

140. As drafted, without amendment and without the protection of the Tribunal's existing orders, the Ontario FSA and Trilateral Agreement should not be approved.

PART IV - ORDER

141. The Caring Society respectfully submits that, given the "all or nothing" approach reflected in the motion, the relief sought in the Ontario Motion should be dismissed and the specific relief requested by TTN and GIFN should be granted.

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[212] Hearing Exhibit 12, Affidavit Brief of the Interested Parties at Affidavit of Chief Donna Big Canoe at paras 47-49.
[213] 2022 CHRT 8, at para 175. See also for example 2025 CHRT 80, at paras 61-62; 2025 CHRT 87, at para 3; 2025 CHRT 6, at paras 601-602; 2016 CHRT 2, at paras 474-484.

142. In the event the Tribunal is inclined to partially approve the Ontario FSA, such approval should be contingent on amendments being made to comply with the Tribunal's findings. Clear guidance should be provided to all parties indicating which provisions of the Ontario FSA comply with the Tribunal's findings and orders, which provisions do not, and any interpretive guidance required to resolve ambiguity that could impede the elimination of discrimination, and non-recurrence thereof. Canada should be afforded 90 days following the issuance of any such guidance to file a response addressing its plan to comply with such guidance. The Complaints, the Commission and the Interested Parties should also have the opportunity to provide responding submissions within that time period. The Tribunal should retain jurisdiction to assess compliance with its guidance and to issue any further remedial orders necessary to remedy the discrimination found and prevent its recurrence.

143. In the alternative, should the Tribunal be inclined to approve the Ontario FSA, the Caring Society submits that the Tribunal should affirm that its findings and orders requiring the end of discrimination and recurrence thereof are not vacated, superseded, suspended or rendered void by any such approval.

All of which is respectfully submitted, this 2nd day of February 2026.

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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*, S.C. 2019, c. 24
2	*Canadian Human Rights Act,* R.S.C., 1985, c. H-6
3	*Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1
CASE LAW	
4	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343
5	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009), Ottawa T-1753-08 (FC) (Proth).
6	*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, [2013] 4 FCR 545
7	*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53
8	*Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75
9	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969
10	*Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280
11	*Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848
12	*CNR v. Canada (Human Rights Commission)*, 1987 CanLII 109 (SCC)
13	*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62
14	*Entrop v. Imperial Oil Limited* (2000), 2000 CanLII 16800 (ON CA)
15	*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
16	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2013 CHRT 16
17	*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
18	*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

19	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 11
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)*, 2016 CHRT 16
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)*, 2018 CHRT 4
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)*, 2019 CHRT 1
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)*, 2019 CHRT 39
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)*, 2020 CHRT 7
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)*, 2020 CHRT 15
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),* 2020 CHRT 31
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)*, 2021 CHRT 6
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)*, 2021 CHRT 7
29	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12
30	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2021 CHRT 41

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)*, 2022 CHRT 8
32	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2022 CHRT 26
33	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41
34	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2023 CHRT 44
35	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2025 CHRT 80
36	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 87
37	*First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 6
38	*Hughes v. Elections Canada*, 2010 CHRT 4
39	*Kina Gbezhgomi Child and Family Services v. JM*, 2023 ONCJ 93
40	*Kina Gbezhgomi Child and Family Services v. MA,* ONCJ 414,
41	*Lake Babine Nation v. Williams,* 2012 FC 1085
42	*Mills v. The Queen*, 1986 CanLII 17 (SCC)
43	*Ontario English Catholic Teachers Association v. Ontario (Attorney General),* 2024 ONCA 101
44	*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3
45	*R v. 974649 Ontario Inc.*, 2001 SCC 81
46	*Turnbull v. Famous Players Inc.*, 2001 CanLII 26228 (ON HRT), [2001] OHRBID
47	*Walden et al. Attorney General of Canada*, 2016 CHRT 19
INTERNATIONAL LAW AND UN COMMENTARY	
48	*Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*, UN Permanent Forum on Indigenous Issues, 13th session, E/C.19/2014/3 (2013)
49	*United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess., UN Doc A/RES/61/295 (2007) GA Res. 61/295
SECONDARY SOURCES	

50	Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593
51	John Borrows, “Special Issue: British Columbia's Declaration on the Rights of Indigenous Peoples Act: Foreword” (2021) 53:4 UBC L REV 957
52	Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller)