**Tribunal File No: 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 and Northern Affairs Canada)**

Respondent

– and –

**CHIEFS OF ONTARIO and NISHNAWBE ASKI NATION and AMNESTY INTERNATIONAL CANADA and TAYKWA TAGAMOU NATION and CHIPPEWAS OF GEORGINA ISLAND FIRST NATION**

Interested Parties

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# JOINT WRITTEN REPLY SUBMISSIONS OF THE MOVING PARTIES, CHIEFS OF ONTARIO AND NISHNAWBE ASKI NATION

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## PART I – OVERVIEW

1. This reply addresses the submissions of the First Nations Child and Family Caring Society of Canada (the "Caring Society") and Taykwa Tagamou Nation ("TTN") and Chippewas of Georgina Island First Nation ("GIFN") (collectively, "TTN/GIFN") opposing the approval of the *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario* (the Ontario Final Agreement or the "OFA"). Chiefs of Ontario ("COO") and Nishnawbe Aski Nation ("NAN") submit that the objections advanced do not disclose any legal, evidentiary, or principled basis for the Canadian Human Rights Tribunal (the "Tribunal") to withhold approval of a negotiated long-term reform agreement that addresses the discrimination identified in these proceedings and prevents its recurrence.

2. The Caring Society and TTN/GIFN ask the Tribunal to evaluate the OFA through speculation rather than evidence, to demand proof of guaranteed future outcomes rather than a meaningful and effective remedial framework, and to discount the policy choices made by First Nations' representative institutions in Ontario. In doing so, the Caring Society and TTN/GIFN advance stereotypical assumptions about what First Nations will do, can do, or should be permitted to do. This is neither the correct legal question not the appropriate evidentiary approach. This line of reasoning should be rejected by the Tribunal, which must consciously overcome the assumption – rooted in colonial child welfare systems – that First Nations are less capable than others of determining what is best for their children.

3. Properly understood, approval of the OFA does not undermine the Tribunal's final cease-and-desist order or erode the permanence of its findings. The Tribunal's

injunction-like order requiring Canada to end systemic discrimination remains intact. What the OFA does – consistent with the dialogic approach endorsed by the Tribunal – is replace interim and mid-term measures with a comprehensive, evidence-informed framework for sustainable long-term reform, including funding, governance, oversight, and mechanisms for review and adjustment.

4. The record also does not support the claim that funding under the OFA is inadequate or that it will recreate discriminatory outcomes. Assertions to that effect rest on mischaracterizations of the funding framework, reliance on findings and orders about the *Memorandum of Agreement Respecting Welfare Programs for Indians* (the "1965 Agreement") beyond the context in which those findings were made, and the elevation of opinion and concern over evidence. Where uncertainties exist, the OFA embeds structured processes – like the Dispute Resolution and Service Provider Funding Adjustment Request processes – to identify and address gaps over time, without entrenching perpetual litigation or Tribunal oversight.

5. Finally, the Caring Society's and TTN/GIFN's framing of self-determination as a weakness of the OFA is legally and conceptually flawed. The meaningful exercise of First Nations' right to self determination is an essential component of effective long-term reform, not an obstacle to it. The OFA reflects choices made by First Nations in Ontario through their own decision-making institutions, following extensive engagement. Self-determination does not require unanimity, and rejection of the OFA would frustrate the rights of the many First Nations who have

chosen this path, while offering no workable or timely alternative capable of bringing these proceedings to a conclusion.

## PART II – SUBMISSIONS

### A. The OFA Should Be Evaluated Based on Evidence and Reasoning, Rather Than Assumptions or Unfair Evidentiary Demands

*The Tribunal must reject conclusions founded on stereotypical assumptions rather than evidence*

6. At various points, the submissions of the Caring Society and TTN/GIFN assert what First Nations can do, will do, or should do – assertions that are not supported by evidence and instead are grounded in stereotypical assumptions.

7. The stereotypes that underlie many of the submissions of the Caring Society and TTN/GIFN suggest that First Nations are unable, unwilling, or unlikely to make appropriate decisions that promote the best interests and human rights of their children. Their submissions further rest on stereotypical assumptions that First Nations are fiscally irresponsible, lack the necessary expertise or experience to make good decisions, or are unaware of the legal regimes governing child and family services. On that basis, they invite the Tribunal to conclude that the OFA gives rise to discriminatory consequences.

8. COO and NAN submit the Tribunal should be guided by the Supreme Court of Canada's caution in *R v S (RD)* against reasoning that rests on stereotypes rather than evidence, emphasizing that reliance on inappropriate stereotypes is incompatible with impartial adjudication and undermines a fair and just determination of the case.[1]

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[1] *R v S (RD)*, [1997] 3 SCR 484 at para 29.

9. The stereotypical assumptions surface repeatedly as underlying premises of the Caring Society's submissions (which TTN/GIFN "agree with and adopt" [2]) and TTN/GIFN's submissions, including in the following ways:

a. Both the Caring Society and TTN/GIFN advance the premise that First Nations cannot independently develop or deliver effective prevention services due to lack of experience or readiness, asserting or implying that prevention will not be delivered unless it is designed or administered by First Nation Child and Family Services ("FNCFS") Agencies.[3]

   Building on the assertion that First Nations lack the capacity or readiness to deliver prevention services, TTN/GIFN further assert that, if granted full discretion over prevention funding, First Nations will retain the funds for themselves out of self-interest, and that this will lead to reduced availability of prevention services, increased child removals, and the re-creation of discriminatory outcomes.[4]

b. The Caring Society suggests that the decision made by Chiefs in Ontario to ratify the OFA was made without proper regard to the rights and best interests of children in their own communities, implying First Nations leadership are ignorant of or ignoring the human rights of their children.[5]

c. The Caring Society minimizes the role of First Nations themselves in addressing the overrepresentation of First Nations children in the child welfare system.[6]

d. TTN/GIFN assert that COO's advisory table (which included NAN representatives) was composed mostly of individuals lacking relevant expertise, stating that "the majority of the people at [COO's] advisory table ha[d] little experience or knowledge of protection service delivery and funding,"[7]

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[2] Responding Factum of the Interested Parties, Taykwa Tagamou Nation and Chippewas of Georgina Island First Nation, filed 2 February 2026 at para 8 [TTN/GIFN Responding Factum].
[3] Responding Factum of the First Nations Child and Family Caring Society of Canada, filed 2 February 2026 at paras 105-107 [Caring Society Responding Factum]; TTN/GIFN Responding Factum at paras 78-80.
[4] TTN/GIFN Responding Factum at paras 78-79, 81, 83-84.
[5] Caring Society Responding Factum at paras 72-77.
[6] Caring Society Responding Factum at paras 96-97.
[7] TTN/GIFN Responding Factum at para 69. Paragraphs 69 and 100 of TTN/GIFN 's Responding Factum rely on Hearing Exhibit 12, Affidavit Brief of the Interested Parties, Affidavit of Shannon Crate, affirmed 2 October 2025 at Exhibit A, which is a letter authored by Amber Crowe, Executive Director of Dnaagdawenmag Binnoojiiyag Child and Family Services. The Moving Parties challenged the admission of this exhibit on the same grounds as the ANCFSAO briefing note in their Motion to Strike Evidence filed 31 October 2025. For the reasons set out in the section addressing the ANCFSAO briefing note below, COO and NAN submit that Ms. Crowe's letter should also be given no weight.

inviting the Tribunal to draw negative conclusions about the competence and qualifications of COO's and NAN's technicians.

e. The Caring Society frames the protection of First Nations children as requiring continued external oversight by the Tribunal rather than governance and decision-making by First Nations themselves.[8]

10. Taken together, these speculative, stereotype-based assertions invite the conclusion that entities other than First Nation governments are better placed to make decisions about the funding, design, and delivery of services for First Nations children. Although the Caring Society does not expressly say who should supplant First Nations in this decision-making role, the necessary implication of its submissions – adopted by TTN/GIFN – is that this authority should rest with the Caring Society and FNCFS Agencies.

11. This chain of reasoning is especially dangerous because it mirrors the historical justifications used to impose settler child welfare on First Nations communities in the first place: namely, the assumption that someone else is better positioned to make decisions about First Nations children's well-being than the governments of the communities they come from. This paternalistic reasoning echoes the historical disadvantage the Tribunal cautioned against perpetuating in the Merit Decision.[9] This line of reasoning should be rejected by the Tribunal.[10]

12. These submissions also contradict the Tribunal's finding in the Merit Decision that:

> The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the

[8] Caring Society Responding Factum at paras 7, 71.
[9] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at paras 402-403 [*Merit Decision*].
[10] *Brown v Canada (Attorney General)*, 2017 ONSC 251 at paras 42-52.

> eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.[11]

13. In any event, to the extent that the Tribunal is inclined to consider the conclusions urged by TTN/GIFN, COO and NAN submit that TTN/GIFN's factual assertions and submissions must be understood as relating only to their own First Nations. They cannot properly be accepted as facts about, or submissions on behalf of, other First Nations for whom TTN/GIFN have neither mandate nor standing to speak.

*The Caring Society and TTN/GIFN import the wrong standard for assessing the OFA*

14. The Caring Society and TTN/GIFN both oppose approval of the OFA on the basis that, in their submissions, COO, NAN, and Canada (the "Moving Parties") have not met their evidentiary burden.[12] Relying on the Moving Parties' acknowledgment that the OFA's effectiveness will only be clear after implementation,[13] TTN/GIFN further argue that the Tribunal cannot be satisfied at this stage that the OFA will eliminate the systemic discrimination found in these proceedings or prevent its recurrence.[14]

15. The Caring Society's and TTN/GIFN's submissions incorrectly conflate the inevitable uncertainty inherent in any prospective remedial agreement with a legal deficiency, and in so doing improperly impose a standard that exceeds even the

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[11] *Merit Decision* at para 426.
[12] Caring Society Responding Factum at para 77; TTN/GIFN Responding Factum at para 3.
[13] Joint Factum of Chiefs of Ontario and Nishnawbe Aski Nation, filed 16 January 2026 at para 7 [Joint COO/NAN Factum].
[14] TTN/GIFN Responding Factum at paras 23-24.

civil burden of proof. This reflects a fundamental misunderstanding of the exercise the Tribunal is engaged in at this stage of these proceedings.

16. The applicable standard is not proof of guaranteed future success. Rather, the Tribunal's exercise in the remedial phase is "less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified."[15]

17. Consistent with this approach, where the Tribunal determines that it lacks the necessary information to satisfy itself that a proposed remedy is meaningful and effective, it "may request additional information and submissions from the parties if required. The process is focused on gathering the necessary information to craft effective orders."[16]

18. COO and NAN rely on their written submissions which provide evidence and information sufficient to permit the Tribunal to assess whether the OFA and the *Trilateral Agreement in Respect of Reforming the 1965 Agreement* (the "Trilateral Agreement") constitute a meaningful remedial response to the discrimination identified.[17]

19. Finally, COO and NAN submit that imposing a requirement of "proof" of a future outcome would undermine the possibility of resolving this complaint by any means,

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[15] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 at para 28; *Chopra v Canada (Attorney General)*, 2007 FCA 268 at para 42.
[16] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 41 at para 21.
[17] Joint COO/NAN Factum at paras 207-243, which directly respond to parameter 4 from *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 80 at para 113(4).

whether through the OFA, the Caring Society and the Assembly of First Nations' or Canada's plans for long-term reform of the FNCFS Program, or Tribunal-imposed orders. Such a requirement is impossible to meet and is inconsistent with the manner in which remedies must be evaluated.

## B. The OFA and the Trilateral Agreement Do Not "Eviscerate" the Tribunal's Orders or Undermine Finality

*The Tribunal's orders for Canada to cease the discriminatory practices will endure*

20. The OFA and the Trilateral Agreement do not "eviscerate" the Tribunal's orders, as the Caring Society argues.[18] This motion asks the Tribunal to find that the OFA and the Trilateral Agreement satisfy the Tribunal's order in 2016 CHRT 2 (the "Merit Decision") to cease the discrimination, and to supersede the Tribunal's orders for immediate- and mid-term relief with the long-term reform remedies contained in the OFA and the Trilateral Agreement.

21. For clarity, COO and NAN endorse the Tribunal's view of its orders as set out in 2025 CHRT 80:

> The Dialogic approach does not supplant a final "cease the discriminatory practice" order grounded in the evidence and the CHRA; rather, it operates as a mechanism for implementing such an order. The cease order in this matter, addressing systemic racial discrimination, is firmly grounded in the extensive evidentiary record underlying the Merit Decision and is issued pursuant to the Tribunal's authority under the *CHRA*. Its purpose is to provide immediate and enduring protection to the victims of such discrimination and to ensure that the same or similar practices do not recur.
>
> The Tribunal affirms that this order has never been negotiable and was not issued on an interim basis. The "cease the discriminatory practices" order in 2016 CHRT 2 is final and binding. It is not subject to variation under the Dialogic approach, nor to derogation or abrogation by any future decision in these proceedings, or to amendment through any

[18] Caring Society Responding Factum at para 5.

> agreement between the parties. The cease order determines what the authors of the discrimination must do—stop—while the Dialogic approach addresses how compliance is to be achieved, and the orders implemented. There may be multiple effective methods for remedying discrimination, and flexibility is permitted in selecting among them, provided that the discrimination is fully and effectively addressed. What remains non-negotiable is the requirement to end systemic discrimination permanently.
>
> The dialogic approach is helpful in the phased remedy portion of this case; however, it cannot be elevated above final orders or be a means to stagnate long-term reform.[19]

22. If the Tribunal considers the terms of the order sought by the Moving Parties to be unclear on which components of the Tribunal's orders will endure beyond the approval of the OFA, the Tribunal has the jurisdiction to make its own order clarifying this.

*The Tribunal has jurisdiction to order that the reforms contained within the OFA and the Trilateral Agreement supersede its immediate- and mid-term relief orders*

23. The Caring Society argues that the Tribunal does not have jurisdiction to vacate its orders.[20] The Caring Society's reliance on the following jurisprudence to support this position is flawed:[21]

    a. In *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 the Supreme Court of Canada held that, as a general rule, once an administrative 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".[22] The appeal to *Chandler* is misguided here as the Moving Parties are not asking the Tribunal to overturn its previous findings or final orders or revisit the Merit Decision's finding that discrimination occurred.
    b. *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 is about whether the CHRT has jurisdiction to award costs.[23] It

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[19] 2025 CHRT 80 at paras 66-69.
[20] Caring Society Responding Factum at paras 54-63.
[21] Caring Society Responding Factum at paras 56-58.
[22] *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at p 861.
[23] Caring Society Responding Factum at para 56; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 33, 62, 64.

does not help to elucidate the Tribunal's jurisdiction to make long-term reform orders on this motion.

c. The paragraphs of *Walden et al. v Attorney General of Canada*, 2016 CHRT 19 and *Lake Babine Nation v Williams,* 2012 FC 1085 relied on by the Caring Society deal with whether consent can confer jurisdiction on administrative decision-makers that is not based in their statutory mandate. This motion does not seek to confer jurisdiction on the Tribunal that it does not already have. The Caring Society's reliance on these cases seems to be an argument about *functus officio,* but *functus officio* is not a live issue on this motion because the Moving Parties are not seeking to replace the Tribunal's final injunction-like orders.

d. In the final paragraph of 2025 CHRT 6, the Tribunal contemplated ending its jurisdiction once long-term reform has been addressed with an agreement between the parties.[24] The Caring Society quotes a part of this same paragraph to support its claim that the Tribunal cannot revisit its orders.[25] But the paragraph in full demonstrates the Tribunal has always envisioned ending its jurisdiction when remedies are developed that will eliminate the discrimination and prevent its recurrence:

> […]**The Tribunal will revisit this retention of jurisdiction once long-term reform has been addressed with long-term Tribunal orders or the parties' agreement that clearly demonstrates the systemic racial discrimination will be eliminated in implementing the agreed measures and the same or similar systemic racial discriminatory practices will not reoccur.** This necessarily includes sufficient and sustainable resources for all First Nations in the long-term. The Tribunal's cease and desist the discriminatory practice order in the Merit decision is an injunction-like permanent order against Canada. The purpose of this order is to eliminate the mass removal of children from their respective Nations and to protect First Nations children, families, and Nations for generations to come. Finally, the Tribunal encourages the parties to negotiate as part of both long-term reform processes, creative, innovative, needs-based culturally appropriate solutions that reflect the different contexts and needs of the many diverse First Nations.[26]

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[24] *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 at para 602.
[25] Caring Society Responding Factum at para 55.
[26] 2025 CHRT 6 at para 602 (underline emphasis in original, bold emphasis added).

24. Since the Merit Decision, the Tribunal has adopted a flexible and creative phased remedial approach with immediate relief addressing the worst sting of discrimination while mid- and long-term relief are to be developed relying on research and negotiations, pursuant to the dialogic approach. The Caring Society's characterization of the Tribunal's authority to revisit its orders is unduly narrow and is unsupported by the Tribunal's jurisprudence. The proper understanding of the Tribunal's phased remedial approach and authority is set out in 2025 CHRT 80:

> However, as was also raised during the case management conference, numerous immediate and mid-term orders were intended to be superseded by sustainable long-term orders, with the assistance and input of the parties. The objective was to issue final long-term orders that would constitute an improvement upon the immediate orders, which had been made on the basis of the best evidence then available. The parties submitted that further studies and additional data collection were necessary to inform best practices in relation to long-term remedies.
>
> This Tribunal agreed and took a phased approach to the remedies in dividing them in categories: general orders in 2016 CHRT 2, immediate relief, mid-term relief, long-term relief, reform and compensation. This allowed the Tribunal to make immediate relief orders three months after the Merit Decision and in many subsequent decisions.
>
> This was to allow for change to occur immediately while studies and data collection would be completed. This was explained in previous rulings. This is how the dialogic approach was adopted by this Tribunal.[27]

25. The OFA is an example of the circumstances in which the Tribunal said it would cease its jurisdiction: a negotiated agreement between parties that addresses long-term reform. It is appropriate for the remedies in the OFA and the Trilateral Agreement to supersede the Tribunal's orders for immediate- and mid-term relief

[27] 2025 CHRT 80 at paras 72-74.

because these orders are not in the nature of long-term reform.[28] This approach is not an attempt to bypass the Tribunal's findings and orders made over the course of 10 years in the Merit Decision and the 36 subsequent published decisions issued throughout the remedial phase.[29]

*Ending Tribunal oversight is a valid non-discriminatory choice*

26. The OFA reflects the choice of First Nations in Ontario to get out of the "conflict driven, adversarial litigation process" and move toward a different kind of oversight, review, and governance model that is grounded in collaboration and co-operation.[30] The real risks of continual or endless litigation in this matter are set out starkly by the Tribunal:

> The dialogic approach was never intended to continually revisit previous orders or to confine the proceedings within an endless cycle of interim measures. Its purpose is to facilitate the transition from immediate and mid-term orders based on the best evidence then available, to long-term, sustainable, culturally appropriate, evidence-based, orders, whether by consent or determination of the Tribunal (based on the parties' evidence and submissions), designed to benefit future generations. Moreover, long-term orders must be informed by First Nations' perspectives and guided by First Nations-led solutions.
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> Furthermore, waiting months and years because some parties are not in agreement or do not want to negotiate anymore will not assist the Panel in determining the outstanding issues.

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[28] This approach is supported by the Tribunal's jurisprudence, e.g., 2025 CHRT 80 at para 72: "However, as was also raised during the case management conference, numerous immediate and mid-term orders were intended to be superseded by sustainable long-term orders, with the assistance and input of the parties. The objective was to issue final long-term orders that would constitute an improvement upon the immediate orders, which had been made on the basis of the best evidence then available."

[29] 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 11, 2016 CHRT 16, 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35, 2018 CHRT 4, 2018 CHRT 27, 2019 CHRT 1, 2019 CHRT 7, 2019 CHRT 11, 2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 17, 2020 CHRT 20, 2020 CHRT 24, 2020 CHRT 31, 2020 CHRT 36, 2021 CHRT 6, 2021 CHRT 7, 2021 CHRT 12, 2021 CHRT 41, 2022 CHRT 8, 2022 CHRT 26, 2022 CHRT 41, 2023 CHRT 44, 2024 CHRT 92, 2024 CHRT 95, 2024 CHRT 96, 2025 CHRT 6, 2025 CHRT 58, 2025 CHRT 80, 2025 CHRT 85, 2025 CHRT 86, 2025 CHRT 87.

[30] *Shot Both Sides v Canada*, 2024 SCC 12 at para 71 [*Shot Both Sides*]; Joint COO/NAN Factum at paras 198-199, 201-206.

> The Tribunal has authority to move things forward to find meaningful, effective, sustainable, culturally appropriate, needs- based, long-term solutions for generations to come, that incorporate the distinct needs of First Nations without hearing directly from each one of them.[31]

27. It was the Caring Society's choice to withdraw from the multi-party negotiations on long-term reform many years ago.[32] Having done so, it is not appropriate for the Caring Society to now insist that the Moving Parties continue with litigation as a means of resolution. Ending Tribunal oversight in the manner advanced under the OFA is a different policy choice than that reflected in the Caring Society's plan for long-term reform of the FNCFS Program, which entrenches Tribunal oversight for many years.[33] It is nonetheless a deliberate and valid policy choice.

28. COO's and NAN's factum explains why the dialogic approach is appropriate for long-term reform: because a negotiated resolution is most responsive to First Nations' aspirations and needs and reflective of all parties' realities and solemn commitments.[34] Negotiation "is a preferable way of reconciling state and Aboriginal interests".[35]

29. It is not the role of the Tribunal or of the Caring Society to seek to supplant COO's and NAN's policy choices, such as the choice to develop a culturally appropriate dispute resolution process versus continue with Tribunal oversight, where the evidence demonstrates that the policy choices in the OFA will end discrimination

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[31] 2025 CHRT 80 at paras 75-76.
[32] Caring Society Responding Factum at para 36.
[33] The Loving Justice Plan: First Nations Child and Family Services (Outside Ontario), filed jointly by the Assembly of First Nations and the Caring Society on 22 December 2025 at p 49-51.
[34] Joint COO/NAN Factum at paras 136-140.
[35] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14, cited by *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 88 and *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24; see also *R v Desautel*, 2021 SCC 17 at para 87, *Shot Both Sides* at para 71.

and prevent its recurrence. This would be a top-down colonial approach that does not look at the OFA holistically and fails to recognize First Nations' right to self-determination.[36] The cautions of this approach are explained by human rights scholar Kent Roach:

> Even if there is a willingness to recognize harms, there is the added danger that supra-national and national adjudicators may, even with the best of intentions, replicate colonial methods and impose what they perceive to be the best for Indigenous peoples.[37]

## C. The Caring Society and TTN/GIFN Fail to Establish that Funding Under the OFA is Inadequate

*The ANCFSAO briefing note is not expert evidence and should be given no weight on questions of funding adequacy under the OFA*

30. The Caring Society and TTN/GIFN cite the same text from a briefing note from the Association of Native Child and Family Services Agencies of Ontario ("ANCFSAO"), which appears as an exhibit to the affidavit of GIFN/TTN witness, Kristin Murray.[38] They rely on it to support the submission that funding to FNCFS Agencies under the OFA is inadequate because it is anchored to 2022-23 actual expenditures, and because FNCFS Agencies lack separate, guaranteed prevention funding including funding to deliver mandated mental health services.[39]

31. The Moving Parties previously objected to the ANCFSAO briefing note and brought a motion to strike it from the record, or, in the alternative, to have it given no

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[36] Kent Roach, "9.2.3.1. Inter-American Court of Human Rights" in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021) at p 475 [Roach].
[37] *Roach* "9.1 Introduction" at p 455.
[38] Hearing Exhibit 12, Affidavit Brief of the Interested Parties, Affidavit of Kristin Murray, affirmed 2 October 2025 at Exhibit B, p 71, cited by Caring Society Responding Factum at para 87 and TTN/GIFN Responding Factum at para 87.
[39] Caring Society Responding Factum at paras 87-88; TTN/GIFN Responding Factum at paras 83-84, 96.

weight.[40] On December 4, 2025, the Tribunal declined to strike the briefing note, without providing reasons.

32. COO and NAN submit that references to the ANCFSAO briefing note – and, by extension, the conclusions the Caring Society and TTN/GIFN purport to draw from it regarding the adequacy of funding under the OFA – should be given no weight.

33. The ANCFSAO briefing note is not expert evidence and does not itself provide an evidentiary foundation for the conclusions it asserts regarding the adequacy of funding under the OFA. It is lay opinion evidence, which is presumptively inadmissible.[41] It would be procedurally unfair and prejudice the Moving Parties for the Tribunal to rely on the briefing note for the truth of its contents as it advances opinion evidence without its authors having been qualified as expert witnesses, especially where the note touches upon issues central to the Tribunal's inquiry.[42] This concern is reinforced by TTN/GIFN 's position, adopted by the Caring Society,[43] that the briefing note be admitted to demonstrate "widespread concerns" with the OFA among child and family service providers",[44] which, contrary to their submissions, is a hearsay purpose, as it requires accepting the briefing note for the truth of its contents.[45]

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[40] Moving Parties' Joint Notice of Motion to Strike Evidence, filed 31 October 2025 at paras 3, 10; Factum of the Moving Parties in the Motion to Strike Evidence, filed 31 October 2025 at paras 3, 7, 10, 23-24 [Factum of the Moving Parties in the Motion to Strike Evidence].
[41] *R v DD,* 2000 SCC 43 at para 49.
[42] *Clegg v Air Canada*, 2019 CHRT 4 at paras 90-91; Factum of the Moving Parties in the Motion to Strike Evidence at paras 3, 7, 10, 23-24.
[43] Responding Factum of the First Nations Child and Family Caring Society of Canada in the Motion to Strike Evidence brought by the Moving Parties, filed 13 November 2025 at para 6.
[44] Responding Factum of the Interested Parties, Taykwa Tagamou Nation and Chippewas of Georgina Island First Nation in the Motion to Strike Evidence brought by the Moving Parties, filed 12 November 2025 at paras 6, 47 [Responding Factum of TTN/GIFN in the Motion to Strike Evidence].
[45] Reply Factum of the Moving Parties in the Motion to Strike Evidence, filed 21 November 2025 at paras 3, 17.

34. It is clear from their submissions that the Caring Society and TTN/GIFN intend to rely on the ANCFSAO note for the truth of its contents, yet they have not established why it was introduced through Ms. Murray and not through its authors. Even if Ms. Murray were cross-examined on the content of this note, she would have no basis for how the authors came to their conclusions.

35. While the Tribunal admitted the briefing note into the record, it would be an error to rely upon it for the truth of its contents or as proof that funding under the OFA is inadequate. At most, the note may be referenced for the limited, non-hearsay purpose of showing that Ms. Murray, as a lay witness, held these views.[46]

*The assertion that FNCFS Agency funding is unchanged since the Merit Decision is based on outdated evidence and a mischaracterization of the funding framework*

36. The Caring Society and TTN/GIFN submit that operations and maintenance funding for FNCFS Agencies is, in substance, unchanged under the OFA from the FNCFS Program funding regime considered in the Merit Decision.[47] That submission is fundamentally flawed for two reasons. First, the 2013 testimony of Theresa Stevens cannot be used to support the Caring Society's proposition that present-day FNCFS Agency funding is inadequate. More than a decade has passed since that testimony was given and the funding landscape and the remedial context have materially evolved.

37. Second, and in any event, operations and maintenance funding for FNCFS Agencies in Ontario is determined pursuant to the Government of Ontario's

[46] Responding Factum of TTN/GIFN in the Motion to Strike Evidence at paras 14, 32-33.
[47] Caring Society Responding Factum at paras 40-43; TTN/GIFN Responding Factum at paras 83-84.

provincial funding formula.[48] That formula has not been found by the Tribunal to be discriminatory.[49]

38. Arguments that the Government of Ontario's funding formula for FNCFS Agencies must change in order to proceed with long-term reform raise a distinct issue that is beyond the scope of this motion and the Tribunal's findings and jurisdiction in these proceedings. Raising such arguments at this stage improperly reframes the issues and tries to shift the goalposts of this motion.

39. The OFA reforms federal funding for FNCFS Agencies, which is the most the Tribunal can properly require, and does so in a manner that results in adequate funding.[50] The record contains no evidence to the contrary.

*The absence of dedicated funding for mental health services in the OFA does not undermine reform*

40. The Caring Society and TTN/GIFN submit that the OFA is deficient because it contains no dedicated funding for FNCFS Agencies to provide mental health services. They ground this criticism in the Tribunal's conclusion in the Merit Decision that Canada's failure to fund statutorily mandated mental health services in Ontario under the 1965 Agreement was discriminatory.[51]

41. COO and NAN do not dispute the Tribunal's finding in the Merit Decision nor that mental health services are a required and central component of a substantively equal child and family services system. That finding, however, was made in the specific context of deficiencies in the 1965 Agreement and the Tribunal's

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[48] Joint COO/NAN Factum at paras 56, 158.
[49] This submission should not be taken as COO's or NAN's acceptance or endorsement of the Government of Ontario's child and family services funding formula.
[50] Joint COO/NAN Factum at paras 158-162.
[51] Caring Society Responding Factum at paras 9, 41-50; TTN/GIFN Responding Factum at paras 132-133, 136-137.

corresponding order to reform that agreement. It does not follow that the absence of dedicated mental health funding in the OFA is a defect of the Reformed FNCFS Program in Ontario.

42. Further, while the OFA does not establish a standalone funding component for mental health services, such services continue to be available to First Nations children and youth through existing mechanisms, including those that will operate alongside and following the reform of the 1965 Agreement pursuant to the Trilateral Agreement.[52]

43. Mental health needs may be addressed using prevention funding under the OFA. Prevention services are defined broadly in the Reformed FNCFS Program in Ontario's Terms and Conditions and include services intended to support healthy child development and to promote mental and emotional well-being.[53] First Nations and FNCFS Agencies (subject to First Nations' allocation decisions) receive prevention funding under the OFA and may use this funding to support services that address mental health-related needs.

44. In addition, where an FNCFS Agency's baseline funding – comprised of amounts provided by the Government of Ontario and Indigenous Services Canada ("ISC") – is insufficient to meet statutorily required service obligations, including mental health-related services, the OFA provides access to additional funding through the Service Provider Funding Adjustment Request process.

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[52] Factum of the Attorney General of Canada, filed 19 January 2026 at paras 94-99 [Canada Factum].
[53] Hearing Exhibit 23, *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario*, dated 26 February 2025 at App. 8, A. 2 at p 156-157 [OFA].

45. The mental health needs of First Nations children and youth, both on- and off-reserve, have also been and continue to be addressed through multiple funding mechanisms, including Jordan's Principle. While the Caring Society submits that reliance on Jordan's Principle is not an appropriate long-term solution,[54] ongoing reform efforts (particularly those addressing processing delays and backlogs) may improve its effectiveness, and its availability in the interim ensures continued access to mental health services pending broader reforms.

46. The Caring Society and TTN/GIFN contend that these mechanisms do not provide sufficient assurance that mental health needs will be met in practice.[55] To the extent gaps remain, they reflect broader structural and systemic issues in the existing child and family services and mental health service frameworks, including but not limited to those associated with the 1965 Agreement, and cannot be fully addressed through the OFA alone.

*Using historical actuals to determine baseline and First Nation Representative Services funding represents a deliberate policy choice to ensure funding stability*

47. The Caring Society and TTN/GIFN submit that the OFA's use of historical actuals in calculating baseline funding and First Nation Representative Services funding improperly treats past expenditures as a reliable proxy for need.[56]

48. COO has acknowledged that some First Nations and FNCFS Agencies have had difficulty accessing actuals funding,[57] and concedes that historical actuals may not be a perfect proxy for need. However, the applicable standard for reform is not

[54] Caring Society Responding Factum at para 49.
[55] Caring Society Responding Factum at paras 49-50; TTN/GIFN Responding Factum at paras 136-137.
[56] Caring Society Responding Factum at paras 110-111; TTN/GIFN Responding Factum at paras 85-87.
[57] Joint COO/NAN Factum at para 143, citing Hearing Exhibit 2, Supplemental Affidavit of Grand Chief Joel Abram, affirmed 21 May 2025 at para 22.

perfection; the Tribunal has acknowledged that settlements inherently involve compromise and that effective remedies may be imperfect.[58]

49. The OFA deliberately opts for predictable and stable funding rather than continued reliance on actuals. In criticizing the actuals process as inaccessible to First Nations and FNCFS Agencies with constrained capacity and as suppressing and understating true need,[59] the Caring Society and TTN/GIFN advance submissions that also demonstrate why an actuals-based funding model cannot be sustained. Actuals cannot simultaneously be characterized as flawed and inaccessible to some service providers and be promoted as the funding approach that should continue to govern FNCFS Program funding indefinitely.

50. While the Caring Society implies that baseline and First Nation Representative Services funding should continue to be determined through historical actuals pending the completion of bottom-up, needs-assessments for each First Nation or FNCFS Agency,[60] this is not a genuine alternative, as conducting such assessments for all 133 First Nations and 13 FNCFS Agencies in Ontario would be resource-intensive and time-consuming, and would risk delaying reform indefinitely.

51. Instead, the OFA recognizes the risks inherent in relying on historical actuals as a proxy for need and mitigates those risks by providing funding even where actuals

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[58] 2025 CHRT 80 at para 113(9); *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41 at para 479, discussed and expanded upon in Joint COO/NAN Factum at para 146 and footnote 248.
[59] Caring Society Responding Factum at paras 110-111; TTN/GIFN Responding Factum at paras 85-101.
[60] Caring Society Responding Factum at paras 85-86. The Caring Society also proposes at paras 112-113 that capital and post-majority support services funding be based on individualized needs assessments rather than the OFA methodology, implying that actuals-based funding should continue in the interim. This proposed approach would perpetuate the very accessibility and capacity barriers the Caring Society and TTN/GIFN criticize, while delaying stable funding reform.

were not accessed, and incorporating mechanisms designed to monitor for inequities and respond where issues arise.[61]

*TTN/GIFN's remoteness arguments do not demonstrate that the OFA fails to adequately fund GIFN*

52. TTN/GIFN criticize the OFA's approach to remoteness – particularly Statistics Canada's Index of Remoteness and the OFA's 0.4 remoteness threshold – for excluding GIFN from remoteness adjustments despite being a ferry-connected First Nation.[62] COO and NAN rely on their previous submissions in response to this criticism, which explain how the Index of Remoteness and the 0.4 threshold are evidence-based and how the OFA expressly commits to further work to refine the Index of Remoteness to better capture the circumstances of ferry-connected First Nations.[63]

53. TTN/GIFN further assert that GIFN has no meaningful way to participate in work to improve the remoteness approach under the OFA.[64] This is incorrect. ISC has invited GIFN to participate in a research project concerning refinements to the Index of Remoteness.[65]

54. TTN/GIFN specifically criticize the OFA for failing to account for GIFN's "significant access challenges" as a ferry-connected First Nation and the resulting "higher costs of delivering child and family services." [66] This submission raises two distinct points:

    a. First, with respect to higher service-delivery costs, TTN/GIFN submit that the OFA inadequately responds to the increased costs associated with delivering

[61] Joint COO/NAN Factum at paras 187-192.
[62] TTN/GIFN Responding Factum at paras 110-131, especially paras 110, 115-118.
[63] Joint COO/NAN Factum at paras 232-235.
[64] TTN/GIFN Responding Factum at para 130.
[65] Canada Factum at para 65.
[66] TTN/GIFN Responding Factum at para 110.

services in GIFN's circumstances.[67] As COO and NAN have previously submitted, however, TTN/GIFN have adduced no evidence demonstrating that the funding provided under the OFA is inadequate to meet those costs.[68] The suggestion that the Moving Parties argue GIFN should not raise remoteness concerns because it will receive "substantial" funding is incorrect;[69] the point is that TTN/GIFN have failed to establish, on the evidentiary record, that GIFN's projected annual funding under the OFA is inadequate.

b. Second, with respect to access barriers, it is clear from TTN/GIFN's submissions that, in their view, only a fixed link to the mainland would adequately address GIFN's access challenges.[70] While COO and NAN accept there are genuine difficulties associated with GIFN being a ferry-dependent community without air access, the fact that nothing short of a bridge would suffice only underscores the disconnect between the relief sought and the design of the OFA. The construction of a permanent bridge for GIFN is not something the OFA can achieve,[71] nor is it an appropriate benchmark against which the adequacy of the OFA should be assessed by the Tribunal.

55. Accordingly, TTN/GIFN's remoteness arguments do not demonstrate that the OFA fails to adequately fund GIFN.

## D. The Dispute Resolution and Service Provider Funding Adjustment Request Processes are Meaningful Safeguards Offering Effective Remedies

*Limits on remedies under the OFA's Dispute Resolution Process are deliberate and do not undermine accountability*

56. In their submissions, the Caring Society and TTN/GIFN take issue with the scope of the jurisdiction of an Arbitral or Appeal Tribunal under the OFA's Dispute Resolution Process. They contend that restrictions on ordering systemic remedies

[67] TTN/GIFN Responding Factum at paras 120(c)-(d), 127.
[68] Joint COO/NAN Factum [Sealed Version] at para 238.
[69] TTN/GIFN Responding Factum at para 125.
[70] TTN/GIFN Responding Factum at paras 15-16.
[71] Joint COO/NAN Factum at paras 240-241.

that would require an amendment to the OFA, as well as restrictions on increasing funding, are deficiencies.[72]

57. Notwithstanding the Caring Society's dissatisfaction with the fact that certain remedies fall outside the jurisdiction of the Arbitral or Appeal Tribunals, this is a deliberate feature of the OFA. The Ontario Reform Implementation Committee and the Dispute Resolution Process are intended to operate together to promote cooperation, oversight, and responsive implementation of the Reformed FNCFS Program in Ontario, while preserving the integrity of the bargain the Moving Parties struck. This structure reflects the Moving Parties' intention to allow the OFA to function as the system change contemplated and to avoid subjecting the Reformed FNCFS Program in Ontario to perpetual litigation or permitting an adjudicator to fundamentally rewrite the OFA or impose new funding obligations beyond the agreed framework.

58. The Caring Society also concludes that the OFA provides no meaningful recourse where Canada declines to implement recommendations of the Ontario Reform Implementation Committee arising from the Initial Program Assessment.[73] Under the OFA's Dispute Resolution Process, a decision by Canada as to whether or how to implement a recommendation arising from the Initial Program Assessment is subject to review by an Arbitral or Appeal Tribunal on the same footing as judicial review. In such a dispute, the Arbitral or Appeal Tribunal may grant any remedy that would ordinarily be available on judicial review, including quashing Canada's

[72] Caring Society Responding Factum at paras 8, 120-124; TTN/GIFN Responding Factum at para 29.
[73] Caring Society Responding Factum at para 122.

decision and remitting the matter to Canada with reasons for redetermination, subject to the express limits set out in the OFA.[74]

59. Finally, the Caring Society and TTN/GIFN also take issue with the inability of an Arbitral or Appeal Tribunal to award general, punitive, or discrimination-related damages. They suggest that the absence of such damages within the OFA's Dispute Resolution Process effectively precludes access to human rights remedies.[75] It is incorrect to suggest that the absence of damages within the OFA's Dispute Resolution Process generally precludes access to human rights remedies. While the OFA limits the remedies available for Parties' Disputes,[76] it expressly preserves the ability of non-parties to pursue relief through other available forums. A First Nation or FNCFS Agency is not required to use the OFA's Claimant Dispute Process and may instead seek remedies before a court of competent jurisdiction or under the *Canadian Human Rights Act*.[77] The OFA thus provides a choice of forum, not an exclusion of remedies, and cannot be read as insulating Canada from human rights accountability.

*The question of Service Provider Funding Adjustment Request funding in the Second Funding Period turns on the OFA's text, not disputed testimony*

60. The Caring Society submits that the OFA is unclear as to whether Canada is required to fund Service Provider Funding Adjustment Requests during the Second Funding Period, including where funding is ordered through the Dispute Resolution

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[74] Joint COO/NAN Factum at para 98, which was adopted by Canada in Canada Factum at para 11.
[75] Caring Society Responding Factum at paras 125-127; TTN/GIFN Responding Factum at para 29.
[76] COO and NAN, as parties to the OFA, have limited the remedies available to them in respect of Parties' Disputes arising under the OFA, including the availability of damages. This limitation reflects a deliberate choice made by the parties to the OFA. It is also consistent with the fact that, in these proceedings, neither the complainants nor interested parties were entitled to claim damages for discrimination as part of the remedial phase.
[77] Joint COO/NAN Factum at para 102.

Process. In support of this position, it relies on portions of the testimony of ISC witness Duncan Farthing-Nichol, which it characterizes as demonstrating uncertainty or inconsistency regarding Canada's funding obligations beyond the OFA's $8.5 billion funding commitment.[78] The Caring Society's arguments on this point should be rejected.

61. COO's and NAN's summary of the OFA, which Canada adopts,[79] states the interpretation of the Moving Parties: while the OFA does not guarantee additional funding beyond the $4.6 billion Second Funding Period envelope, it expressly contemplates that further funding may be required to maintain long-term reform, including in respect of Service Provider Funding Adjustment Requests, and that Dispute Awards arising from Service Provider Funding Adjustment Requests are binding on Canada and must be funded, including in the Second Funding Period, even where this results in expenditures beyond the guaranteed amount.[80]

62. The testimony of Canada's witness is not determinative of the meaning of the OFA. The proper interpretation of the OFA is a matter for the Tribunal, based on the text of the OFA itself and the Moving Parties' clearly stated interpretation of funding for Service Provider Funding Adjustment Requests in the Second Funding Period.

## E. The Meaningful Exercise of First Nations' Right to Self-Determination is an Essential Component of Long-Term Reform

63. Contrary to the Caring Society's and TTN/GIFN's submissions,[81] COO and NAN do not assert that the OFA should be approved on the sole basis that it was ratified

[78] Caring Society Responding Factum at paras 120, 128-133.
[79] Canada Factum at para 11.
[80] Joint COO/NAN Factum at paras 44-46, 190.
[81] Caring Society Factum at paras 12, 72, 76-77; TTN/GIFN Factum at paras 8, 21.

by First Nations in Ontario. The Moving Parties have led extensive evidence and information about how the OFA will end the discrimination found by the Tribunal in on-reserve child and family services in Ontario and prevent its recurrence.

64. On this motion, COO and NAN submit that respect for First Nations' right to self-determination asks the Tribunal to value the policy choices in the OFA that were made by First Nations' own representative institutions, provided that the policy choices meet the legal standards of substantive equality, deterrence, and prevention of future discrimination. This proposition relies on the principle that remedial choice should be permitted, especially in cases of complex systemic reform, and is supported by the Tribunal's jurisprudence[82] and by the Supreme Court of Canada in *Eldridge*.[83] This proposition also relies on the right of First Nations governments to make informed policy choices in the best interests of their citizens; in sum, the right to self-determination.

65. First Nations' right to self-determination is a substantive and essential component of the legal framework the Tribunal should consider on this motion: it is more than just political will. For example, the Tribunal's finding that substantive equality requires culturally appropriate services and breaking cycles of outside control relies on First Nations' self-determination as a bedrock or necessary precondition.[84]

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[82] 2025 CHRT 80 at para 67.
[83] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 96.
[84] See para 255 of the Joint COO/NAN Factum. The requirement of First Nations' self-determination as a precondition to substantive equality also implicates the collective rights of First Nations and the individual rights of First Nations children to their culture and to live free from discrimination as protected under the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/2905 [UNDRIP] and *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

66. The realization of the rights of First Nations children to substantive equality in this case includes culturally appropriate services and breaking cycles of outside control and is thus inextricably intertwined with the rights of First Nations to have control over child and family services. The Tribunal has acknowledged an effective remedy must "reflect the best interests of the child through an Indigenous lens".[85] Applying an Indigenous lens to the best interests of the child recognizes that First Nations are best placed to ensure services are culturally appropriate and responsive to the specific needs of their children and their families.[86]

67. The Tribunal has directed that long-term reform must comply with the *United Nations Declaration on the Rights of Indigenous People* ("UNDRIP").[87] As explained in COO's and NAN's Joint Written Submissions, the OFA complies with the UNDRIP.[88] The Caring Society's insinuation that the OFA's respect for First Nations' right to self-determination is a weakness of the agreement is incompatible with the Tribunal's decisions.

*The rights of individual First Nations children will not be violated by approving the OFA*

68. The Caring Society urges the Tribunal to find that the OFA creates a conflict between the individual rights of First Nations children and the collective rights of First Nations. This argument presents a false dichotomy between the individual and collective rights implicated in these proceedings because it fails to acknowledge that First Nations children live within First Nations families and

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[85] 2025 CHRT 80 at para 113(7).
[86] 2025 CHRT 80 at paras 113(3), (6)-(7).
[87] 2025 CHRT 80 at para 113(8); UNDRIP.
[88] Joint COO/NAN Factum at paras 244-257.

communities and that the reforms in the OFA are geared toward preserving the cultural continuity of First Nations children within their families and communities. The Supreme Court of Canada has affirmed that cultural continuity for Indigenous peoples is inextricably linked to keeping Indigenous children within their families and communities, as relationships within Indigenous families and communities are "absolutely indispensable and essential to their cultural survival".[89]

69. The OFA aims to preserve the cultural identity of First Nations children by empowering First Nations to design and deliver services in ways that reflect their own unique contexts, histories, and conceptions of the best interests of the child.[90]

70. The OFA also prioritizes prevention and First Nation Representative Services to maintain children's connections to family, community, language, and identity, which are fundamental to the well-being of First Nations children and essential to the cultural continuity of First Nations themselves.[91]

71. The OFA will not "extinguish"[92] or "override"[93] the rights of individual First Nations children, as the Caring Society suggests. The Caring Society's insinuation that the leadership of First Nations in Ontario use their political will as a blunt instrument to extinguish or override the rights of First Nations children – their own children, grandchildren, and citizens – is unsupported by the evidence.

72. Implicit in the Caring Society's allusions to how the OFA will harm individual First Nations children is the premise that the OFA must guarantee that each First

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[89] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 113.
[90] 2025 CHRT 80 at para 113(7).
[91] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 113.
[92] Caring Society Responding Factum at para 75.
[93] Caring Society Responding Factum at para 76.

Nations child will always receive substantively equal child and family services.[94] COO and NAN share this goal. Unfortunately, while the goal of the OFA is excellence in services, the level of certainty in service delivery suggested by the Caring Society cannot be achieved within the scope of reform that has been ordered by the Tribunal and cannot be guaranteed in any model of reform.[95]

73. Although no long-term reform model can guarantee a particular level of service on-the-ground in all cases, the OFA will create the conditions under which substantively equal services can be provided by, among other things:

a. accounting for the real costs of remoteness;[96]
b. greatly increasing funding for the child and family services system overall, including shifting the focus from protection to prevention;[97]
c. offering flexibility in how funds are spent;[98]
d. creating accessible pathways for dispute resolution and for service providers to identify funding gaps;[99] and,
e. shifting to First Nations-led governance[100] and creating systems for proactive review, monitoring, and course-correction.[101]

74. The fact that the reforms in the OFA cannot guarantee standards of service delivery in all cases does not mean that this is unimportant to COO and NAN. The data collection and reporting approach of the current FNCFS Program do not measure service delivery or outcomes from a First Nations' perspective. The OFA will change this through radically reshaping the performance measurement of the

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[94] Caring Society Responding Factum at paras 90, 135.
[95] This is part of the overall reality that no remedy is perfect, which has been affirmed by the Tribunal in 2022 CHRT 41 at para 479.
[96] Joint COO/NAN Factum at paras 76-80.
[97] Joint COO/NAN Factum at paras 141, 144, 163.
[98] See Joint COO/NAN Factum at para 81 for a description of the OFA's FNCFS Funding Mechanism.
[99] Joint COO/NAN Factum at para 82.
[100] Joint COO/NAN Factum at paras 83-88.
[101] Joint COO/NAN Factum at paras 201-206.

Reformed FNCFS Program in Ontario, including providing pathways to adjust to trends and immediate issues.

75. Performance measurement and data collection are a complex multi-faceted part of the OFA that works through the Program Assessments[102] and the work of the Systemic Review Committee,[103] the Ontario Reform Implementation Committee,[104] the Technical Advisory Committee,[105] the NAN-Canada Remoteness Quotient Table,[106] the Ontario Remoteness Secretariat,[107] and the Ontario FNCFS Data Secretariat,[108] and the annual reporting required by the Child and Community Well-Being Plan process.[109] One goal of these performance measurement and data collection processes is to understand (for the first time) the real child and family services needs of First Nations children and families and how to adjust services and funding to meet needs.

*Self-determination does not require unanimity*

76. TTN/GIFN oppose the OFA and assert that their right to self-determination demands that they not be subject to the OFA.[110]

77. COO's decision-making bodies seek to achieve consensus based on the informed choices of First Nations leadership.[111] That approach is reflected in the extensive

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[102] Joint COO/NAN Factum at para 90.
[103] Joint COO/NAN Factum at para 86.
[104] Joint COO/NAN Factum at paras 85-86.
[105] Joint COO/NAN Factum at para 86.
[106] Joint COO/NAN Factum at para 119.
[107] Joint COO/NAN Factum at para 119.
[108] Joint COO/NAN Factum at para 114.
[109] Joint COO/NAN Factum at paras 112, 117, 118.
[110] TTN/GIFN Responding Factum at para 140.
[111] For information on the role of consensus in COO's decision-making bodies, see Charter of Chiefs of Ontario, dated June 2022 at Article 8, Article 9.1, Article 20, Article [X] at p 21, Appendix B at ss 9-13, 23 and Appendix E at s 4, filed as Hearing Exhibit 16b, COO Charter Clean Version (amended 2025), update to Exhibit C of Hearing Exhibit 1a, Affidavit of Grand Chief Joel Abram, Vol 1, affirmed 6 March 2025.

regional engagement undertaken by COO on the OFA,[112] in which NAN participated, as well as in NAN's own separate and equally extensive engagement processes with its member First Nations.[113] Consensus to ratify the OFA was not reached amongst all 133 First Nations in Ontario.

78. Does the fact that the OFA was not ratified on consensus by all 133 First Nations in Ontario mean that its approval by the Tribunal would be improper? If the Tribunal decides that unanimous consent of every First Nation is the standard that must be met before it can proceed with ordering long-term reform of the FNCFS Program, it must say so expressly. COO and NAN note the following issues with this approach:

a. This standard would render collective reform difficult if not impossible to achieve.

b. The jurisprudence from the Tribunal does not support the conclusion that every First Nation must be heard before long-term reform can proceed, for example:

> The Tribunal values all expert viewpoints of First Nations. However, the Tribunal is not and cannot invite them directly into these proceedings without creating a paralysis of these proceedings that would negatively affect the very children that are at the heart of these proceedings.[114]
>
> The Tribunal has limited resources and is not mandated and does not have capacity to hear directly from every First Nation to make its orders. This is clearly expressed in considering the whole body of decisions rendered by this Tribunal in this case.[115]
>
> …[T]he Panel recognizes that the rights holders are First Nations people and First Nations communities and

[112] Joint COO/NAN Factum at paras 33-36, 38-40.
[113] Joint COO/NAN Factum at paras 33, 37-40.
[114] 2025 CHRT 80 at para 108.
[115] 2025 CHRT 80 at para 109.

> governments. While it is ideal to seek every Nations' perspective again, these proceedings are not a commission of inquiry, a truth and reconciliation commission or a forum for consultation. The Panel relies on the evidence, the parties in this case and the work that they do at the different committees such as the National Advisory Committee on Child Welfare (NAC), tables, forums and community consultations to inform its mid and long-term findings.[116]

c. The OFA and the Trilateral Agreement were widely supported by the Chiefs who participated in the assemblies at which they were ratified.[117] Tribunal rejection of the OFA would frustrate the self-determination of the First Nations who ratified the OFA.

d. An important component of First Nations' right of self-determination is the right to participate in, maintain, and develop First Nations' decision-making institutions. This is protected by Article 18 of the UNDRIP, which states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.[118]

First Nations in Ontario voluntarily elect to participate in COO and NAN and voluntarily agree to be governed by COO's and NAN's governance processes when participating in decision-making within COO and NAN. This includes the decision-making processes that seek consensus and rely upon democratic processes where necessary. COO and NAN represented First Nations' rights-holders in pursuit of the OFA on the basis of mandates obtained from the

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[116] *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 at para 42.
[117] Joint COO/NAN Factum at paras 2, 40.
[118] UNDRIP at Art 18.

Chiefs-in-Assembly.[119] On this motion, the Tribunal should respect the right of First Nations in Ontario to make decisions within their own decision-making institutions and not supersede the decisions made for other processes of the Tribunal's design. This approach is urged by the Expert Mechanism on the Rights of Indigenous Peoples (a United Nations ("UN") body that provides expertise to the UN Human Rights Council):

> National human rights institutions, as independent bodies, should play an important role in bringing together representatives of Government and indigenous peoples, thus promoting indigenous peoples' participation in discussions and decisions on issues that concern them. National human rights institutions can also stress the need for all stakeholders to ensure indigenous representatives are involved in decision-making. Such institutions, through their own programmes, could also actively involve indigenous peoples in decision-making on related issues.[120]

79. Rather than seek perfection and delay long-term reform indefinitely, the OFA offers First Nations choice in how the Reformed FNCFS Program in Ontario is delivered in their communities. Furthermore, the OFA supports First Nations to chart their own course in child and family services outside of the OFA in two ways:

a. First, the OFA provides flexibility for dialogue between First Nations or subregional organizations and Canada about modifications to the Reformed FNCFS Program.[121]

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[119] Joint COO/NAN Factum at para 32.
[120] The UNDRIP does not define what the features of an "indigenous decision-making institution" are, but some guidance is found in UN Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: report of the Expert Mechanism on the Rights of Indigenous Peoples*, 18th Sess, UN Doc A/HRC/18/42 (2011) at para 39.
[121] OFA at para 47.

b. Second, the OFA provides that the Reformed FNCFS Program shall not apply to First Nations that exercise jurisdiction over child and family services under the Federal Act or another recognized jurisdictional process.[122] The OFA further guarantees that First Nations exercising jurisdiction will not receive less funding than they would under the Reformed FNCFS Program for the services covered by their jurisdictional agreement.[123]

*COO's and NAN's engagements processes were extensive*

80. TTN/GIFN allege that COO's and NAN's engagement processes were exclusionary, rushed, and insufficiently responsive to dissenting views, particularly those of FNCFS Agencies.[124] These allegations rest largely on the subjective perceptions, opinions, and personal experiences of TTN/GIFN's affiants. While those feelings are sincerely held and entitled to respect, they do not constitute objective proof that meaningful engagement did not occur. COO and NAN did not challenge these witnesses on their feelings about participation and consultation because feelings are not susceptible to cross-examination in the same way as facts. Where TTN/GIFN go further and rely on hearsay – asserting feelings of opposition or exclusion held by non-participating third parties[125] – that evidence should be given no weight.

81. When the record is assessed as a whole, it demonstrates extensive opportunities for engagement and participation through COO's and NAN's processes, including

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[122] OFA at para 106.
[123] OFA at para 106. In 2022 CHRT 8 at paras 16-18, the Tribunal confirmed that the inclusion of such a safety-net in a final settlement agreement would address its concerns on this point.
[124] TTN/GIFN Responding Factum at paras 56-75.
[125] TTN/GIFN Responding Factum at paras 65, 67, 74.

for First Nations and FNCFS Agencies, culminating in the nearly unanimous ratification of the OFA by Chiefs in Ontario.[126]

## F. The Caring Society's Proposal for Partial Approval and Retained Jurisdiction is Unworkable

82. The Caring Society submits that the motion to approve the OFA should be dismissed.[127] In the alternative, it asks that the Tribunal approve only those portions of the OFA it considers compliant with its findings and orders, provide detailed guidance identifying which provisions comply and which do not, require Canada to respond within 90 days with a plan to address that guidance, permit further submissions from the parties, and retain jurisdiction to assess compliance and issue further remedial orders as necessary.[128]

83. This proposal is unworkable. The OFA is a negotiated, multi-party agreement reached after extensive, years-long negotiations. Approving the OFA "in part" while requiring amendments would unravel the negotiated bargain and force renewed negotiations for which none of the Moving Parties has a mandate. Further, COO and NAN could not revise provisions of the OFA in response to Tribunal guidance without restarting its regional engagement and putting the result to ratification processes.

84. Compelling further negotiations would serve no practical purpose. History shows that negotiation processes involving the Caring Society have repeatedly failed to produce consensus, and there is no basis to conclude that directing the parties back to the negotiating table in relation to the OFA would yield a different result.

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[126] Joint COO/NAN Factum at paras 33-40.
[127] Caring Society Responding Factum at para 141.
[128] Caring Society Responding Factum at para 142.

85. If the Tribunal is not prepared to approve the OFA as presented, the appropriate course is for the Tribunal to ask for more information or to dismiss the motion with reasons, not to attempt to refashion the OFA through partial approval or impose conditions.

**PART III – CONCLUSION**

86. The Caring Society and TTN/GIFN ask the Tribunal to reject the OFA based on speculation, assumptions, and an approach to assessing remedies that is inconsistent with the Tribunal's jurisprudence. Their submissions do not establish that the OFA will perpetuate discrimination, undermine the Tribunal's orders, or deny meaningful remedies.

87. This is in stark contrast with the record, which demonstrates that the OFA constitutes the type of negotiated, evidence-informed, and forward-looking long-term reform repeatedly called for by the Tribunal. Approval of the OFA would preserve the Tribunal's permanent cease-and-desist order while replacing interim measures with a comprehensive framework for funding, governance, oversight, and course-correction, capable of eliminating discrimination and preventing its recurrence.

88. The Tribunal's task on this motion is not to demand certainty or unanimity, but to determine whether the proposed reform is meaningful and effective. The OFA meets that standard. Rejection of the OFA would frustrate the self-determination of the many First Nations who have chosen this path, prolong litigation, and delay urgently needed reform without offering a viable alternative.

89. For these reasons, COO and NAN respectfully submit that the Tribunal should approve the Ontario Final Agreement as presented.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2026.**

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## PART IV – LIST OF AUTHORITIES

| **CASE LAW** | |
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| 1. | *Brown v Canada (Attorney General)*, 2017 ONSC 251 |
| 2. | *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 |
| 3. | *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 |
| 4. | *Chopra v Canada (Attorney General)*, 2007 FCA 268 |
| 5. | *Clegg v Air Canada*, 2019 CHRT 4 |
| 6. | *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 |
| 7. | *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 |
| 8. | *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 |
| 9. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 |
| 10. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 41 |
| 11. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 8 |
| 12. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 26 |
| 13. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41 |
| 14. | *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 |
| 15. | *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 80 |
| 16. | *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 |
| 17. | *R v DD*, 2000 SCC 43 |
| 18. | *R v Desautel*, 2021 SCC 17 |
| 19. | *R v S (RD)*, [1997] 3 SCR 484 |
| 20. | *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 |
| 21. | *Shot Both Sides v Canada*, 2024 SCC 12 |
| **INTERNATIONAL LAW AND UN COMMENTARY** | |
| 22. | *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) |

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| 23. | UN Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: report of the Expert Mechanism on the Rights of Indigenous Peoples*, 18th Sess, UN Doc A/HRC/18/42 (2011) |
| 24. | *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** | |
| 25. | Kent Roach, "9.1 Introduction" in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021) |
| 26. | Kent Roach, "9.2.3.1 Inter-American Court of Human Rights" in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021) |