Tribunal File No: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 and NISHNAWBE ASKI NATION

Interested Parties

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I. OVERVIEW

1. The Assembly of First Nations ("AFN"), with the support of the Respondent Attorney General of Canada ("Canada") and the representative Plaintiffs in two consolidated class actions before the Federal Court of Canada ("Federal Court"), bearing File Nos. T-402-19 and T-1751-21 (collectively, the "Class Action"), is seeking a declaration from the Canadian Human Rights Tribunal ("Tribunal") that the terms of a Final Settlement Agreement on compensation for the class members in the Class Action ("FSA")[1] satisfies the Tribunal's Compensation Decision and related compensation orders[2], which are currently under appeal to the Federal Court of Appeal. Moreover, the AFN requests that the declaration sought be contingent on the approval of the FSA by the Federal Court following a settlement approval hearing currently scheduled for September 19 to 23, 2022.

2. Following the filing of the class actions described below, Canada sought to engage with the parties to both the within tribunal proceedings bearing File No. T1340/7008 ("Tribunal Proceedings") and the Class Action in an effort to negotiate a global settlement concerning the compensation payable to survivors of Canada's discrimination. Parallel negotiations were undertaken with respect to the issue of the long-term reform of the First Nations Child and Family Services Program ("FNCFS Program") and Jordan's Principle to ensure that the discrimination identified by the Tribunal in the Merits Decision would end.

3. The AFN, the representative Plaintiffs in the Class Action and Canada concluded the FSA on the issue of compensation for individuals following extensive and difficult negotiations that took place over more than two years. The FSA provides $20 billion in compensation payable to the survivors of Canada's discrimination. The FSA is intended to address both the Compensation Decision and related Compensation Orders ordered by the Tribunal, and the relief sought in the Class Action in the fairest and least traumatic

[1] First Nations Child and Family Services Jordan's Principle, Trout Class Settlement Agreement dated June 30, 2022 ["FSA"], Affidavit of Janice Ciavaglia affirmed July 22, 2022 ["Ciavaglia Affidavit"], Exhibit "F".
[2] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 39 ("Compensation Decision"), 2020 CHRT 7; 2020 CHRT 15; 2020 CHRT 20; 2020 CHRT 36; 2021 CHRT 6; and 2021 CHRT 7, all hereinafter collectively referenced as the Compensation Orders.

manner. The global resolution reached by the parties remains contingent on a declaration from the Tribunal that the terms of the FSA satisfy the Compensation Decision and related Compensation Orders, in addition to approval by the Federal Court seized of the Class Action.

4. The AFN, with the support of Canada and Moushoom class counsel, takes the position that the FSA satisfies the terms of the Compensation Decision and the related Compensation Orders reflected in the other decisions and rulings of the Tribunal over the past several years. Alternatively, the AFN asks the Tribunal to amend its Compensation Decision and related Compensation Orders to reflect the terms of the FSA. The result of doing so will remediate the complaint, advance reconciliation between First Nations and Canada and fulfil the goals set out in the *Canadian Human Rights Act.*[3]

II. FACTS

a) History of First Nations Child Welfare discrimination and Jordan's Principle

5. Since 1998, the AFN has engaged with Canada to address significant deficiencies and inequities inherent in the funding from then Department of Indian Affairs and Northern Development for the FNCFS Program, and the adverse impacts on the First Nations children and families involved with the FNCFS Program.[4] These deficiencies and inequities were the subject of various reports and reviews, such as the National Policy Review and Wen:de reports, which the AFN helped to create and support. [5]

6. As noted in the Wen:de report summary of findings: "the disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation." The Wen:de reports further noted the impact of jurisdictional

[3] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ["*CHRA*"].
[4] Ciavaglia Affidavit at para. 4.
[5] Ciavaglia Affidavit at para. 8.

disputes on First Nations children, particularly those with complex and unique needs.[6]

7. As a result of Canada's failure to address the inequities inherent within its provision of child and family services via the FNCFS Program, despite the repeated reports and calls for action, the AFN and the Caring Society ultimately decided to pursue recourse before the Tribunal.[7]

b) The Tribunal Proceedings

8. In 2007, the the First Nations Child and Family Caring Society of Canada ("Caring Society"), and the AFN filed a complaint ("Complaint") alleging that Canada had engaged in a discriminatory practice contrary to section 5 of the *CHRA*. Specifically, the Complaint alleged that Canada was discriminating against First Nations children and families living on reserve and in the Yukon[8] in the provision of child and family services, on the basis of race and/or national or ethnic origin, by denying equal child and family services and/or differentiating adversely in the provision of child and family services and Jordan's Principle.

9. In the Tribunal Proceedings, the AFN was the only party who squarely advanced a claim for individual compensation, submitting a remedial request to the Tribunal on August 29, 2014, for an order addressing the "appropriate individual compensation (pain and suffering as well as wilful acts of discrimination) for children, parents and siblings impacted by the discriminatory child welfare practices between 2006 and the date of the Tribunal's Order in this matter".[9]

10. On January 26, 2016, the Tribunal substantiated the Complaint in its seminal Merits Decision. The Tribunal held that Canada was discriminating against First Nations children and families living on-reserve and in the Yukon through its FNCFS Program and other related provincial/territorial agreements, by denying and/or differentiating adversely in

[6] Ciavaglia Affidavit at para. 8.
[7] Ciavaglia Affidavit at para. 9.
[8] *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2016 CHRT 2 ["Merits Decision"]at paras 456-467.
[9] Merits Decision at para. 487.

the provision of child and family services in violation of subsections 5(a) and 5(b) of the *CHRA.*[10]

11. In substantiating the Complaint, the Tribunal ordered Canada to cease its discriminatory practices and to reform the FNCFS Program and the *Canada-Ontario 1965 Indian Welfare Agreement* to address the findings of the Tribunal. Canada was also ordered to cease applying its narrow definition and to fully implement the full meaning and scope of Jordan's principle.[11]

12. The AFN and Caring Society sought an order for compensation, diverging on the issue of individual compensation versus the establishment of a trust.[12] However, the Tribunal reserved its decision on compensation, opting to address the most pressing discrimination issues first through interim measures, and leaving the compensation issue to be dealt with at a future date after determining a process to allow the parties to put forward evidence and legal submissions.[13]

13. The Tribunal invited the parties to respond to questions it put forward in relation to compensation and file additional submissions on the matter.[14] An initial hearing was held April 25 to 26, 2019.

14. In the subsequent Compensation Decision, the Tribunal found that the removal of children from their communities and families was traumatic, causing great pain and suffering. The Tribunal further highlighted how First Nations children were denied essential services and how these delays and denials caused harm to the children and their families. In response to the finding of discrimination, the Tribunal exercised its considerable statutory discretion[15] and broad remedial powers[16] to fashion a remedy for

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[10] *CHRA*, ss. 5(a) and 5(b); Merits Decision, paras. 456-467.
[11] Merits Decision at para. 481.
[12] Merits Decision at paras. 486-487.
[13] Merits Decision at para. 490; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada)*, 2018 CHRT 4 at para. 444.
[14] Compensation Decision at para. 12.
[15] *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para. 296.
[16] *Canada (AG) v. Mowat*, 2009 FCA 309 at para. 25.

the survivors of Canada's discrimination, including an order for payment of compensation to survivors for the pain and suffering they experienced as a result of the discriminatory practice, and in relation to Canada's willful and reckless behaviour, pursuant to s. 53(2)(e) and 53(3) of the *CHRA*.[17]

15. The Tribunal ultimately awarded $20,000, the maximum amount for pain and suffering under the *CHRA* to each First Nations child removed from their homes, families and community since 2006, and to each of their caregiving parents/grandparents; and $20,000 to those who experienced a delay, denial or gap in the delivery of an essential service. The Tribunal awarded an additional $20,000 in compensation for Canada's willful and reckless behaviour on the basis that Canada knew that its policies were harming children and nevertheless put its financial interest over the best interests of First Nations children.[18]

16. Of particular significance for the present application, the Tribunal was clear in the Compensation Decision that the parties to the proceedings could return to the Tribunal for clarification. The Tribunal stated that it welcomed any comments, suggestions and requests for clarification from any party regarding moving forward with the compensation process, or the wording or the content of the orders.[19] In addition, the Tribunal retained jurisdiction until the issue of the process for compensation was resolved by consent order or otherwise.[20]

17. With respect to the compensation process, the Tribunal wished to foster a continued dialogic approach wherein the parties would inform the process and thereafter seek approval from the Tribunal further to its retained jurisdiction. To facilitate this, the Tribunal directed Canada to enter into discussions with the Caring Society and the AFN, as well as consult with the Interested Parties to the Tribunal Proceedings and the Canadian Human Rights Commission ("Commission"), on a compensation process. The Tribunal was

[17] Compensation Decision.
[18] Compensation Decision at paras. 245-257.
[19] Compensation Decision at para. 270.
[20] Compensation Decision at para. 277.

not making a final determination as to process, but instead encouraged the parties to discuss possible options and return to the Tribunal with propositions, which would then be considered by the Tribunal for the purpose of making a final determination.[21]

18. Following the Compensation Decision and as directed by the Tribunal, the parties engaged in discussions concerning the development of a compensation framework that would align with the Compensation Decision. A draft compensation framework was presented to the Tribunal by the AFN, Caring Society and Canada on February 21, 2020, and the parties continued to work on a compensation framework throughout 2020. The parties sought a variety of clarifying orders from the Tribunal in the interim.

19. The following Tribunal decisions were ultimately issued, which had the effect of modifying or impacting the Compensation Decision:

a) April 16, 2020 – This decision clarified certain elements of the Compensation Order, including the age at which beneficiaries would gain access to compensation; whether it would apply to children already in care at the material date; and the payment of compensation to estates of deceased individuals;[22]

b) May 28, 2020 – This decision clarified certain material terms in the Compensation Decision, including Service Gap, Essential Service and Unreasonable Delay;[23]

c) July 17, 2020 – This decision addressed the definition of a First Nations child for the purposes of Jordan's Principle, which had the effect of broadening the eligibility for compensation under the Compensation Decision,[24] as modified by the Tribunal by way of a Consent Order on November 25,

[21] Compensation Decision at para. 269.
[22] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 7.
[23] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 15.
[24] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 20 ["Eligibility Decision"].

2020.[25]

d) February 11, 2021 – This decision addressed the establishment of a Trust for the benefit of the beneficiaries who do not have the capacity to manage their own financial affairs;[26] and

e) February 12, 2021 – The Tribunal approved the "Framework for the Payment of Compensation under 2019 CHRT 39" ("Framework Decision").[27]

20. Notably, the Tribunal was clear in the Framework Decision that it was retaining jurisdiction on all of its Compensation Orders, including the Framework Decision itself, and that it would revisit its retention of jurisdiction as it saw fit in light of the ongoing evolution of the case or once individual claims for compensation were completed.[28]

c) The Judicial Review

21. In October 2019, following the release of the Compensation Decision, Canada filed an application for judicial review ("Judicial Review") of both that decision, and the Tribunal's supplementary Eligibility Decision, which clarified eligibility for Jordan's Principle and had the effect of expanding the entitlement to compensation further to the Compensation Decision.[29] Specifically, Canada sought an order to set aside the Tribunal's decision and to dismiss the claim for monetary compensation.

22. In the Judicial Review, Canada acknowledged the finding of systemic discrimination and did not oppose the general proposition that a tribunal could award compensation to First Nations children affected by a discriminatory funding model in appropriate circumstances. However, Canada contended that awarding compensation to individuals

[25] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 36.
[26] *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2021 CHRT 6.
[27] *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada*, 2021 CHRT 7 ["Framework Decision"].
[28] Framework Decision at para. 41.
[29] Eligibility Decision, as modified by 2020 CHRT 36.

was inconsistent with the nature of the Complaint, the evidence, past jurisprudence and the *CHRA*. Canada argued that a reasonable exercise of remedial jurisdiction must be consistent with the nature of the Complaint, the evidence, and the statutory framework.[30] Canada opposed claims for individual compensation on the basis that the Tribunal lacked jurisdiction to grant such orders in cases concerning systemic discrimination.

23. As respondents in the Judicial Review, the AFN and Caring Society submitted that: (i) the Compensation Decision should be upheld; (ii) Canada should pay compensation for every child affected by the FNCFS Program that was taken into out-of-home care and to children affected by Canada's narrow interpretation of Jordan's Principle; and (iii) that such compensation should be paid to First Nations children and their parents or grandparents. Further, the AFN and Caring Society submitted that the compensation payable should be retroactive to 2006 and until such time as the Tribunal deemed Canada compliant with the Merits Decision.[31] The other respondents in the Judicial Review, being the Commission, and Chiefs of Ontario ("COO"), Nishnawbe Aski Nation ("NAN") and Amnesty International as Interested Parties to the Tribunal Proceedings, echoed the position of the AFN and the Caring Society.

24. The Federal Court upheld the Compensation Decision, finding that it was reasonable given the broad discretion provided under the *CHRA* to fashion appropriate remedies to fit the circumstances.[32] In reaching its conclusion, the Federal Court noted that the Tribunal had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (resulting from the removal of First Nations children from their homes, and the delay, denial or unavailability of essential services for which there was a confirmed need); and Canada's knowledge of that harm.

25. The Federal Court accepted the Tribunal's broad remedial power and affirmed that the broad, remedial discretion provided by the *CHRA* must be considered in light of the

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[30] *Attorney General of Canada v. First Nations Child and Family Caring Society et al.*, 2021 FC 969 at para. 85 ["JR Decision"].
[31] JR Decision at para. 91.
[32] JR Decision at para. 231.

context. In this case, the context involved a vulnerable segment of society, First Nations children and their families, impacted by funding decisions within a complex jurisdictional scheme. The Court recognized that First Nations occupy a unique position within Canada's constitutional legal structure. Further, the Court noted that First Nations people are amongst the most disadvantaged and marginalized members of Canadian society. The Federal Court stated that the Tribunal was aware of this and reasonably attempted to remedy the discrimination while being attentive to the very different positions of the parties.[33]

26. In short, the Federal Court found that Canada had not succeeded in establishing that the Compensation Decision was unreasonable. Further, the Court noted that the Tribunal utilized the dialogic approach, and reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases.[34] The Federal Court held that the Tribunal ensured that the nexus of the Complaint, as discussed in the Merits Decision, was addressed throughout the remedial phases and it was all conducted in accordance with the broad authority the Tribunal has under the *CHRA*.[35]

27. First Nations children and families were the subject matter of the Complaint from the outset and Canada always knew that the respondents were seeking compensation for the survivors. The Federal Court held that if Canada wanted to challenge these aspects of the Complaint, it should have done so earlier, such that it could not collaterally attack the Merits Decision or other decisions in the Tribunal Proceedings.[36]

28. The Federal Court concluded its reasons with the following statement urging the parties to focus on good faith discussions to try to achieve a fair and just settlement:

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[33] JR Decision at para. 121, citing *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras. 332, 334.
[34] JR Decision at para. 302.
[35] JR Decision at para. 302.
[36] JR Decision at para. 231.

> Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those negotiations.[37]

d) The Class Action

29. On March 4, 2019, the representative plaintiffs, Xavier Moushoom, Jeremy Meawasige by his Litigation Guardian, Jonavon Joseph Meawasige, and Jonavon Joseph Meawasige (collectively, the "Moushoom Plaintiffs"), commenced a proposed class action in the Federal Court under Court File Number T-402-19, seeking compensation from Canada for its discrimination dating back to 1991 ("Moushoom Class Action").[38]

30. On January 28, 2020, the AFN and the representative plaintiffs Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson, filed a similar proposed class action in the Federal Court under Court File Number T-141-20, also dating back to 1991 ("AFN Class Action").[39] In the Spring of 2020, the plaintiff groups in the Moushoom Class Action and the AFN Class Action combined their efforts in an attempt to obtain a resolution in the best interests of the class.[40]

31. Canada's initially refused to consent to certification of the class action on behalf of class members alleging Canada's discrimination in its provision of services and products prior to its recognition of Jordan's Principle in December 2007. Accordingly, on July 7, 2021, the Moushoom Class Action and the AFN Class Action were consolidated ("Consolidated Action") and, on July 16, 2021, the AFN and Zacheus Joseph Trout filed a proposed class action in the Federal Court ("Trout Action") representing the Jordan's

[37] JR Decision at para. 300.
[38] Ciavaglia Affidavit at para. 10.
[39] Ciavaglia Affidavit at para. 13.
[40] Ciavaglia Affidavit at para. 14, Exhibit "B".

Principle claimants from April 1, 1991 to December 12, 2007 as plaintiffs.[41]

32. The causes of action within the context of these class actions drew from the Compensation Decision, being rooted in Canada's discriminatory funding of the FNCFS Program and its narrow application of Jordan's Principle, seeking compensation for an expanded timeline for those survivors who suffered comparable discrimination to that identified within the Compensation Decision from 1991 onwards, being the date that Directive 20-1 established the discriminatory FNCFS Program.[42] The Class Action contemplated six unique classes of individuals for whom compensation was sought:

a) **Removed Child Class:** The Removed Child Class are First Nations individuals who were removed from their homes between 1991 and 2022 as minors while they or one of their parents were ordinarily resident on reserve.

b) **Removed Child Family Class:** The Removed Child Family Class is defined as parents, grandparents or siblings of the members of the Removed Child Class. Only the caregiving (biological, step and adoptive) parents or the caregiving (biological and adoptive) grandparents in this class are entitled to direct compensation.

c) **Jordan's Principle Class:** The Jordan's Principle Class is comprised of all First Nations minors living anywhere in Canada who between 2007 and 2017 had a confirmed need for an essential service and faced a denial, delay or service gap with respect to that needed essential service.

d) **Trout Child Class:** The Trout Child Class is comprised of all First Nations minors living anywhere in Canada who between 1991 and 2007 had a confirmed need for an essential service and faced a denial, delay or service gap with respect to that needed essential service.

[41] Ciavaglia Affidavit at para. 15.
[42] Ciavaglia Affidavit at para. 12.

This class is named after the two children of the plaintiff, Zacheus Joseph Trout of Cross Lake First Nation. Sanaye and Jacob Trout both had Batten disease, a rare genetic neurological disorder that normally begins in early childhood. Jacob and Sanaye suffered from a lack of adequate services until the end of their short lives. Both passed away by the age of 10. The FSA extends compensation to individuals such as Sanaye and Jacob, and other First Nations children who suffered discrimination regarding essential services prior to 2007.

e) **Jordan's Principle and Trout Family Class:** The Jordan's Principle and Trout Family Class is defined as parents, grandparents or siblings of the members of the Jordan's Principle Class and Trout Child Class. Only certain caregiving (biological, step and adoptive) parents or caregiving (biological and adoptive) grandparents of the members of the Jordan's Principle Class and Trout Child Class who suffered higher impact within this class are eligible for direct compensation under the FSA.[43]

33. Canada consented to the certification of the Consolidated Action and ultimately to the certification of the Trout Class Action. On November 26, 2021, and February 11, 2022, the Federal Court granted certification of the Consolidated Action and the Trout Action, respectively.[44]

34. Certification of the Class Action by consent removed an important procedural hurdle that is often the subject of time, effort and expense on the part of all parties, accelerating the negotiation process and allowing the parties to focus their efforts upon negotiating a fair and reasonable resolution for survivors.[45]

[43] FSA, Article 1.01; see also FSA Schedule "A" (Consolidated Action Certification Order) and Schedule "B" (Trout Action Certification Order).
[44] Ciavaglia Affidavit at paras. 15-16.
[45] Ciavaglia Affidavit at paras. 27–30.

e) Class Size Estimates

35. In order to further settlement discussions, the parties worked collaboratively to determine the sizes of the various classes included in the Class Action.

36. For the Removed Child Class, a joint report was prepared for the parties by Professor Nico Trocmé and actuary Peter Gorham ("Trocmé Gorham Report"). The Trocmé Gorham Report estimates that there were 106,200 Removed Child Class members from 1991 to March 2019. Dr. Trocmé and Mr. Gorham subsequently advised that this class size must be adjusted to approximately 115,000 to cover the period from March 2019 to March 2022. The estimated Removed Child Class Size was determined based on the data received from ISC and modelling which took into account gaps in the data.[46]

37. With respect to the Removed Child Family Class, the Parliamentary Budget Office estimated in its report entitled *Compensation for the Delay and Denial of Services to First Nations Children* that there are approximately 1.5 caregiving parents or grandparents per First Nations child.[47] However, simply multiplying 115,000 by 1.5 would overestimate the size of the Removed Child Family Class because such a calculation would assume that no two children had the same caregiving parents or caregiving grandparents. The number of members in this class is therefore likely to be less than that calculation, as discussed in greater depth below.

38. No direct information is available on the number of individuals who meet the definition of the Jordan's Principle Class or the Trout Class. The analysis undertaken by the parties was therefore based upon recent ISC data in relation to the number of Jordan's Principle services accessed, which was extrapolated to provide an estimation of historical numbers. The Jordan's Principle Class size estimate is derived from data that Canada shared with the AFN and Moushoom class counsel on the number of approved Jordan's Principle claims for a quarter of the 2019-2020 fiscal year which Canada suggested might

[46] Ciavaglia Affidavit at para. 31, Exhibit "D".
[47] Ciavaglia Affidavit, Exhibit "J", at pg. 7 ["PBO Report"].

provide some useful information for estimating a class size. This quarter was highlighted by Canada as providing the highest quality representative data in relation to the full implementation of Jordan's Principle as: (i) it was further enough along from the initial November 2, 2017 consent order and the commencement of full implementation/transition period; (ii) accounted for the broader definition which commenced in February of 2019 in relation to urgent cases; and, (iii) finally, reflected pre-pandemic numbers.[48] Extrapolating from this very limited data, the Jordan's Principle Class is estimated to be between 58,385 and 69,728 for the Jordan's Principle Class Period (December 12, 2007 to November 2, 2017). This number is necessarily speculative.[49]

39. There is no precise data available to determine the size of the Trout Class, as Jordan's Principle did not exist during this period of time. Accordingly, the Trout Class size estimate was predicated on the Jordan's Principle Class size by taking a round figure of 65,000, which is slightly above the average of the two extremes of the estimated Jordan's Principle Class Size, and multiplying it by the number of years that the Trout Class Period is greater than the Jordan's Principle Class Period (1.6). This results in an estimated Trout Class Size of 104,000.[50]

40. There are no estimates of the number of Jordan's Principle and Trout Family Class Members because this figure can only be determined once a sufficient number of claims has been received.[51]

f) The Settlement Negotiations and Consultation

41. The negotiations among the parties to the Class Action were lengthy, extensive and complex, unfolding for well over a year prior to execution of the AIP, with an additional six months to craft a comprehensive settlement agreement consistent with the objective of designing a trauma-informed, culturally safe claims process through which to deliver

[48] Ciavaglia Affidavit at paras. 33-36.
[49] Ciavaglia Affidavit at para. 36-39.
[50] Ciavaglia Affidavit at para. 38.
[51] Ciavaglia Affidavit at para. 34.

compensation to survivors of Canada's discrimination.[52]

42. Beginning in November of 2020, the parties to the Consolidated Action engaged in mediation in accordance with the Federal Court Guidelines for Aboriginal Law Proceedings with the Honourable Leonard Mandamin as mediator. The negotiations covered compensation for certain classes in the Consolidated Action and long-term reform aspects of the Tribunal's decisions and orders. The Caring Society was a participant in both aspects of this mediation.[53]

43. On or about November 1, 2021, the parties entered into negotiations outside of the Federal Court mediation process. The parties, by agreement, appointed the Honourable Murray Sinclair to act as chair of the negotiations. The objective of these intensive negotiations was to reach a comprehensive settlement for all classes in the Class Action and to resolve outstanding issues related to compensation in the Tribunal Proceedings.[54] While the compensation discussions were primarily a tripartite negotiation among the AFN, Canada and Moushoom Class Counsel, compensation proposals relating to the various classes of survivors were also presented to the Caring Society, with an opportunity for consultation and discussion. Numerous meetings occurred among various parties to the Class Action and the Tribunal Proceedings in furtherance of the objective of reaching a global resolution.[55]

44. On December 31, 2021, the parties to the Class Action concluded an Agreement-in-Principle ("AIP") which set out the principal terms of settlement and formed the basis of the FSA.[56]

45. The AIP established key commitments by the parties which would form the basis of an eventual Final Settlement Agreement, including: (i) establishing a $20 billion settlement amount in consideration of a the release of Canada of all claims contemplated

[52] Ciavaglia Affidavit at para. 43.
[53] Ciavaglia Affidavit at para. 26.
[54] Affidavit of Valerie Gideon sworn July X, 2022 ["Gideon Affidavit"] at para. 5.
[55] Ciavaglia Affidavit at para. 26.
[56] Ciavaglia Affidavit at para. 40.

by the Class Action and Tribunal Proceedings; (ii) the non-reversion of settlement funds to Canada; (iii) the acknowledgment of the uncertainties surrounding the size of the Class; (iv) the design of the distribution protocol resting with the plaintiffs; (v) the opt-out period; (vi) satisfaction of the Compensation Decision and related Compensation Orders; (vii) treatment of taxes and social benefits and supports; (viii) notice; (ix) legal fees; (x) request for a public apology.[57]

46. The parties pursued extensive settlement negotiations from January to June of 2022, in an effort to agree upon and draft the FSA. Throughout the negotiations and preparation of the FSA, the parties were able to fully develop and voice their positions and there was vigorous debate. The parties raised and canvassed many issues and sought insight from outside experts as needed. This lengthy process ultimately led to approval of the FSA by all parties to the Class Action.[58]

47. In addition, the AFN engaged in extensive consultation throughout the negotiation process by providing ongoing updates on the status of the negotiations and the substance of the settlement across all of its regions. AFN internal and external legal counsel, along with key AFN team members, presented the draft FSA and received feedback and comment on the compensation amount and structure. The regions generally expressed support for the FSA and the importance of distributing compensation to individuals as soon as possible.[59]

g) Objectives of the Plaintiffs

48. The following objectives informed the AFN and Moushoom class counsel's decision-making throughout the settlement negotiations and the drafting of the FSA: [60]

a) maintain and increase awards under the Compensation Decision to the

[57] Ciavaglia Affidavit at para. 43; AIP as previously filed with the Tribunal.
[58] Gideon Affidavit at para. 9; Ciavaglia Affidavit at para. 57.
[59] Ciavaglia Affidavit at paras. 46-47, Exhibit "D".
[60] Ciavaglia Affidavit at para. 43.

greatest extent possible;

b) ensure proportionality of compensation (based on objective factors serving as proxies for harm), such that those who suffered greater harm are awarded greater compensation;

c) where compromises must be made between groups of survivors, they are to favour the children who suffered as a result of Canada's discrimination;

d) the process should be trauma-informed and culturally sensitive;

e) survivors of Canada's discrimination should not be subjected to interviews or cross-examination in order to advance a claim;

f) the claims process should be as easy and accessible as possible and survivors should not be required to hire lawyers or retain any other type of professional to submit a claim;

g) provide ample support to survivors throughout the claims process; and

h) the entire settlement amount funds should go to survivors, without deduction for fees payable to counsel or other third parties who are involved in the implementation of the FSA.

h) Summary of the Terms of Settlement

49. The provisions of the FSA are substantive, complex and nuanced, but in an effort to provide a general overview agreement, key elements of the FSA have been summarized below:

i. Settlement Priorities

50. The FSA expressly reflects within its preamble the parties desire to: (i) ensure that the Claims Process is administered in an expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed manner; (ii) safeguard the best interests of the

survivors who are minors and Persons under a Disability; (iii) minimize the administrative burden on survivors; (iv) ensure culturally informed and trauma-informed mental health and cultural support services, as well as navigational assistance are available to survivors; and (v) provide for some Class Members, or subsets of Class Members to receive direct compensation, while ensuring that those who not receive direct benefits may receive indirect benefits.[61]

ii. The Settlement Funds

51. The FSA ultimately reflects the overarching agreement that Canada will pay $20 billion to settle the claims of the Class in accordance with the terms of the FSA, which is to be paid into a Trust Fund by Canada within 30 days from the last day on which a Class Member may appeal or seek leave to appeal the Settlement Approval Order, or the last date where any appeals of the Settlement Approval Order has been determined.[62]

iii. FSA Classes

52. As described above, the settlement reflected in the FSA comprises all six classes included in the definition of the "Class". The simplified definitions of each are as follows:[63]

a) **Removed Child Class:** First Nations individuals who:

i. while under the age of majority, and

ii. while they, or at least one of their caregivers were ordinarily resident on reserve or living in the Yukon;

iii. were removed from their home by child welfare authorities or voluntarily placed into care between April 1, 1991 and March 31, 2022; and

iv. whose placement was funded by ISC.

[61] FSA preamble T(ii)-(iii) and U.
[62] FSA, art. 1.01 Definitions, "Settlement Funds" and "Implementation Date", art. 4.01(2).
[63] FSA, art. 1.

b) **Removed Child Family Class:** all brothers, sisters, mothers, fathers, grandmothers and grandfathers of a member of the Removed Child Class at the time of removal.

c) **Jordan's Principle Class:** First Nations individuals who, between December 12, 2007 and November 2, 2017, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on ground including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

d) **Jordan's Principle Family Class:** all brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Jordan's Principle Class at the time of the delay, denial or service gap.

e) **Trout Child Class:** First Nations individuals who, between April 1, 1991 and December 11, 2007, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on ground including a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

f) **Trout Family Class:** all brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Trout Child Class at the time of the delay, denial or service gap.[64]

53. Under the FSA, "First Nations" includes: (i) individuals who are registered pursuant to the *Indian Act*; (ii) individuals who were entitled to be registered under 6(1) or 6(2) of the *Indian Act* as read as of February 11, 2022; (iii) individuals who met Band Membership requirements under s. 10-12 of the *Indian Act* by February 11, 2022, and were included on

[64] FSA art. 1.01 Definitions: "Removed Child Class", "Removed Child Family Class", "Jordan's Principle Class", "Jordan's Principle Family Class", "Trout Child Class" and "Trout Family Class".

the Band List, and with respect to Jordan's Principle, who suffered a delay, denial, or service Gap between January 26, 2016 and November 2, 2017; and (iv) with respect to only the Jordan's Principle Class alone, those recognized as citizens or members of their First Nations by February 11, 2022 and who suffered a delay, denial or service gap.[65]

iv. Compensation Budget

54. Based on the estimates considered during the settlement during the negotiation process, the $20 billion in settlement funds was ultimately budgeted amongst the Classes. The budget includes the following: $7.25 billion to the Removed Child Class, $5.75 billion to the Removed Child Family Class, $3 billion to the Jordan's Principle Class, $2 billion to the Trout Child Class, and finally, $2 billion to the Jordan's Principle and Trout Family Class.[66]

v. Entitlement and Quantum of Compensation

55. The criteria for entitlement to compensation is set out in the FSA, as are the principles for determining the amount of compensation each individual will receive.[67] The general mechanism contemplated by the FSA is the payment of a base compensation amount and the possibility of enhanced payment for those individuals who were most impacted by Canada's discriminatory conduct. The FSA contemplates that some members of the various family classes may not receive direct compensation but will benefit from the Cy-près Fund. Entitlement to compensation is described in more detail below.[68]

vi. Administrator

56. On the recommendation of the parties, an Administrator will be appointed by the court who will be responsible for administering the Claims Process.[69]

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[65] FSA art. 1.01 Definitions "First Nations"; Note: this is a simplified paraphrasing of a complex provision of the FSA.
[66] FSA, art. 6.05(3), 6.04(5), 6.06(9), 6.06(10).
[67] FSA, art. 6.
[68] FSA Preamble "U"; art. 6.04(1)-(2), 6.06(16), 1.01 "Jordan's Principle Family Class"; "Removed Child Family Class"; "Trout Family Class".
[69] FSA, art. 3.01

57. The duties of the Administrator include: (i) developing and implementing systems, forms, guidelines and procedures for the processing of claims and addressing appeals; (ii) developing procedures for the payment of compensation; (iii) receiving settlement funds from the Trust; (iv) ensuring appropriate staffing; (v) ensuring First Nations participation and a trauma-informed approach; (vi) accounting for its activities; (vii) addressing request of claimants; (viii) and regular reporting.[70]

58. In carrying out its duties, Administrator is governed by various principles, including ensuring that the Claims Process is cost-effective, user-friendly, culturally sensitive, trauma-informed, and non-traumatizing to Class Members. The Administrator must ensure quality assurance processes are documented, comply with service standards established by the party and comply with such other duties or responsibilities as directed by the Court.[71]

vii. Claims Process/Distribution Protocol

59. The FSA contemplates a claims process that minimizes the administrative burden on survivors and recognizes the importance of cultural safety, and health and wellness supports.[72] The FSA outlines both the principles and process relating to the distribution of compensation, which will inform the development of the final distribution protocol.[73]

60. The claims process and distribution protocol will be developed with input from the selected Administrator and the parties to ensure that it is aligned with the principles in the FSA. The FSA contemplates that the AFN and Moushoom class counsel may seek input from the Caring Society, as well as from experts and First Nations stakeholders in the design and implementation of the distribution protocol. The FSA contemplates the completion of the distribution protocol by December 20, 2022.[74]

[70] FSA, art. 3.02(1)
[71] FSA art. 3.01(2).
[72] FSA art. 5.01(3), 6.01(1)-(3), 6.02(1)-(3), art. 8.
[73] FSA art. 5, art. 6.
[74] FSA art. 5.01(2).

viii. Notice Plan/Opt-Out

61. The parties to the FSA have developed and will implement a comprehensive and robust notice plan to inform potential class members that they may be entitled to compensation under the FSA.[75] The notices are subject to court approval and a motion with respect to the first stage of the notices was approved by the Federal Court on June 24, 2022.[76] Survivors will have the opportunity to opt-out of the settlement and will be provided with notice of their rights to same.[77]

ix. Claims Period

62. For individuals who have obtained the age of majority, the FSA permits claims to be filed up to three years following the notice of approval of the FSA.[78] This lengthy period is intended to maximize the number of eligible survivors who will claim compensation.

63. The FSA is also responsive to the fact that many of the survivors are still children, most notably a significant percentage of the Removed Child Class and Jordan's Principle Class members. Therefore, the claims period for these individuals is linked to when an individual attains the age of majority, rather than a fixed date following the approval of the settlement.[79] Under the FSA, the claims period will remain open for individuals to claim for three years following the date that they attain the age of majority. This permits an individual to make a claim when they are ready. In exceptional circumstances, the FSA does provide flexibility for a claim to be filed and paid prior to an individual reaching the age of majority.[80] Further, the claims deadline may be extended in instances where an individual was unable to claim due to extenuating personal circumstances.[81]

[75] FSA, art. 10.02
[76] FSA, art. 3.04(1).
[77] FSA, art. 11.
[78] FSA, art. 1, "Claims Deadline".
[79] FSA, art. 1, "Claims Deadline".
[80] FSA, art. 6.07.01
[81] FSA, art. 1 "Claims Deadline" (c).

x. Cy-Près Fund

64. The FSA establishes a mechanism for those who do not receive direct compensation to benefit from the terms of the FSA by way of the establishment of a Cy-près fund of $50 million ("Cy-près Fund"). The First Nations-led Cy-près Fund will be endowed with $50 million.[82]

65. The Cy-près Fund will be designed with the assistance of experts and has the objective of providing culturally-sensitive and trauma-informed supports to survivors, which may include:

a) Family and community unification, reunification, connection and reconnection for youth in care and formerly in care;

b) Facilitating access to cultural programs, activities and supports;

c) Facilitating access to transitional supports such as safe and accessible housing, life skills and independent living, financial literacy, continuing education, health and wellness supports for youth in care and formerly in care who are either not eligible for post-majority care or are not covered elsewhere; and

d) Facilitating access to navigational supports for Jordan's Principle class members and families who are not eligible to receive post-majority services or are not covered elsewhere.[83]

66. A national First Nations Youth In/From Care Network may also be established which could include national and regional networks for sharing best practices and updates, engaging in advocacy, and providing recommendations on policy.[84]

[82] FSA, art. 7; Ciavaglia Affidavit at para. 114.
[83] FSA art. 7.01(5)(a).
[84] FSA art. 7.01(5(b).

xi. No Encroachment

67. To ensure that the entirety of the $20 billion settlement funds are directed toward compensation for survivors, Canada has agreed to pay, over and above the settlement funds, the costs of notice to the class, class counsel fees, health and wellness supports, and administration and implementation costs.[85] There will be no encroachment of the settlement funds for any other purpose save and except for the compensation for survivors.

xii. Taxability and Social Benefits

68. Canada has further committed to make best efforts to ensure that compensation received will not impact any social benefits or assistance that class members would otherwise receive from Canada or from a province or territory.[86] Additionally, Canada has committed to making best efforts to ensure that compensation paid through the claims process will not be considered income for tax purposes[87]

xiii. Investment of Settlement Funds

69. Given the length of time over which the settlement will be administered, a substantial amount of the $20 billion will be invested in accordance with the guidance of an Investment Committee (comprised of an independent investment professional and individuals with relevant board experience regarding the management of funds) and actuaries.[88] It is intended that throughout the lifetime of the claims process, the settlement funds will have accrued significant gains. The entirety of the interest and income gained upon the principal invested will be directed to survivors.[89]

xiv. Oversight of Settlement Administration

70. The Administrator will provide ongoing reporting with respect to the

[85] FSA, art. 3.04.
[86] FSA, art.9.03(1).
[87] FSA, art. 9.03(2).
[88] FSA, art. 12.04.
[89] FSA, art. 6.10.

implementation of the FSA and on any systemic issues relating to the implementation or the claims process with a review to addressing such issues.[90] A First Nations-led Settlement Implementation Committee ("**SIC**") and, ultimately, the Court will have ongoing oversight with respect to the implementation of the FSA.[91]

71. The SIC will consist of both members of the First Nations community and class counsel. The SIC will oversee the claims administration process and address systemic issues that may arise. This oversight role is crucial to the successful implementation of the parties' shared intention: a claims process that is trauma-informed, expeditious and culturally appropriate.[92]

72. The parties intend that the SIC will facilitate an appropriate level of flexibility in the claims process and be able to respond to systemic issues. The SIC is empowered to engage experts in trauma, community relations and health and social services to provide advice on the implementation of the settlement, if required.[93] The SIC will also be responsible for bringing motions or protocols before the Court to adjust the claims process, as needed, in response to issues that may be identified.[94] The SIC will be in place throughout the claims period, which will last approximately 20 years following the approval of the FSA.

xv. Settlement Supports

73. The FSA is explicit in its provision of substantive supports for Class Members participating in the Claims Process, all of which is to be funded by Canada. This includes mental health, cultural supports, trained navigators who will promote communications and provide referrals to health services. These mental health and cultural supports will be funded based on the evolving needs of the Class, which will all be adapted to include innovative, First Nations-led mental health and wellness initiatives.[95] At all times, a phone line will be made available to provide a culturally-safe, youth specific support line that

[90] FSA, art. 3.02.
[91] FSA, art. 12.
[92] FSA, arts. 3.02(3) and 5(3).
[93] FSA, art. 12.03(1)(j).
[94] FSA, arts. 12.03(f) and 12.03(3).
[95] FSA art. 8(1) and (4).

would provide counselling services for youth and young adult class members and to refer same to post-majority care services when appropriate.[96]

74. In an effort to ensure that the full breadth of necessary supports would be included in Canada's funding obligation, in February of 2022 a taskforce comprised of participants from the AFN, AFN class counsel, Moushoom class counsel, and Canada along with relevant experts, was formed to draft a framework for supports available to claimants.[97] These efforts eventually culminated in Schedule "C" to the FSA, being the "Framework for Supports for Claimants Throughout the Claims Process" ("Supports Framework").[98]

75. The Support Schedule outlines the holistic wellness supports that will be made available to claimants. These supports are significant in scope, and generally include: (i) service coordination and care teams approach for supports to claimants; (ii) the bolstering of the existing network of health and cultural supports; (iii) the provision of access to mental counselling to all Class Members; and (iv) support enhancement for either the Hope for Wellness Help Line or the establishment of a new dedicated phone line.[99]

76. With respect to the service coordination and care teams approach, this will include coordinated, seamless access to service and supports wherever possible, addressing administrative, financial literacy and health and culture supports depending on Class Members needs, to be provided in a culturally appropriate and trauma informed manner.[100]

xvi. Estates

77. The FSA provides that only the deceased members of the Removed Child, Jordan's Principle and Trout Child classes will be entitled to compensation.[101] However, the FSA

[96] FSA art. 8(3).
[97] Ciavaglia Affidavit at para. 121.
[98] FSA Schedule "C".
[99] FSA, Schedule "C", "Components".
[100] FSA, Schedule "C", Component 1: Service Coordination and Care teams approach for supports to claimants.
[101] FSA, art. 13.02.

does provide for compensation to members of the family classes where a complete application for compensation was submitted prior to the individual's death.[102]

78. The FSA provides for the submission and treatment of claims both in circumstances where an Estate Executor or Estate Administrator has been appointed and where no such individual is in place.[103] In addition, provision is made for the assistance of ISC in the administration of the estates of eligible deceased class members and payment to personal representatives of class members who are, or become, Persons Under a Disability.[104]

xvii. Public Apology

79. The FSA further contemplates Canada proposing to the Office of the Prime Minister that the Prime Minister make a public apology for the discriminatory conduct at the heart of the matter, and for the past and ongoing harm it has caused.[105]

i) Future work required as part of settlement implementation

80. The FSA is the culmination of approximately 18 months of collaboration and intensive negotiation among the parties, which built on the previous work of the Tribunal and the parties to the Tribunal Proceedings.[106] There are certain aspects of the compensation mechanisms that will be determined following the Federal Court's approval of the FSA and further refinement to the process throughout the claims process, as overseen by the SIC, and ultimately subject to the Court's approval.

81. The outstanding items to be determined include:

a) Finalization of the Jordan's Principle assessment methodology, on which the plaintiffs are actively in conversations with a First Nations-led Circle of

[102] FSA, art. 13.02.
[103] FSA, arts. 13.03-13.04.
[104] FSA, arts. 13.01 & 13.04(3)-(4).
[105] FSA art. 23.
[106] Ciavaglia Affidavit at paras. 26-30, 54.

Experts[107];

b) Approval of the notice of settlement approval hearing to the class, which was obtained on June 24, 2022 by the Federal Court. The notices are being finalized by the parties and will be posted on the compensation website for survivors to receive information. The notice plan is to be approved by the Federal Court on August 8, 2022.[108]

c) Aggregation and assembly of ISC data regarding the Removed Child Family Class., Canada has committed to providing as much of the data as possible to the parties prior to the settlement approval hearing in Federal Court;[109]

d) Approval of the FSA by the Federal Court. The approval hearing is scheduled to commence September 19, 2022;[110]

e) Appointment of an Administrator, in respect of which a Request for Proposals has been disseminated;[111] and

f) Design of the notices to the class, which will be led by First Nations, class counsel, and developed in collaboration with the chosen Administrator. [112]

III. ISSUE

82. The issue to be determined by the Tribunal is whether the terms of the FSA satisfies the Compensation Decision and related Compensation Orders which are intended to provide compensation to the survivors of Canada's discrimination for the pain and suffering they experienced as a result of Canada's discriminatory practices, in addition to the willful and reckless nature of the discriminatory practices.

[107] FSA art. 1.01, "Essential Service", art. 6.06(3)-(4), Ciavaglia Affidavit at para. 94.
[108] Ciavaglia Affidavit at para. 109.
[109] Gideon Affidavit at para. 13.
[110] Ciavaglia Affidavit at para. 109.
[111] Ciavaglia Affidavit at para. 111., FSA art. 3.01
[112] FSA, art. 10.02

IV. SUBMISSIONS

a) Recommendation of the Parties and Counsel to the Class Action

83. The AFN's position is that this settlement satisfies the Tribunal's Compensation Decision and related orders. The AFN views this settlement, reflected in the FSA, as the best possible resolution to both the complex and lengthy proceedings before the Tribunal related to compensation for survivors and to the Class Action. In addition to finally providing resolution of all outstanding legal proceedings and ensuring timely delivery of compensation, approval of the FSA will significantly expand the number of survivors who would otherwise not be entitled to compensation and allows those who suffered the greatest harm to be compensated commensurately.

84. The scope and amount involved in this settlement cannot be overstated. The $20 billion settlement amount far outstrips any class action settlement known in Canada in any context. It is more than six times the amount of compensation that was delivered under IRSS.[113] The scope of the settlement is also impressive, as the compensation will be delivered to hundreds of thousands of survivors of Canada's discrimination. The individual amounts of compensation will have life-changing impacts for many of our most vulnerable and marginalized First Nations members. As the national First Nations political governing body, the AFN is best positioned to understand the impact that this compensation will have for individuals and First Nations communities across Canada.

85. The AFN views a class action administration, with the culturally-appropriate protective measures set out in the FSA, as the most effective and feasible mechanism for delivering compensation to survivors. The AFN has negotiated the specific cultural supports set out in the FSA in order to maximize the benefit and minimize the harms associated with receipt of compensation for survivors.

86. It is of significant importance that this settlement will deliver meaningful

[113] Ciavaglia Affidavit at para. 53.

compensation to individuals in the near term. The AFN has led the push for compensation for survivors at the Tribunal since day one and has experienced firsthand the drawn-out litigation that has long delayed the delivery of compensation into the hands of the survivors, many of whom have continued to suffer as litigation grinds on. The FSA expedites the payment of compensation, while honouring the substantial and significant work of the Tribunal and the parties to the Tribunal Proceedings on behalf of survivors.

87. The AFN puts forward these submissions on this motion with the full support of the AFN, Moushoom Class Action and Canada.

b) Jurisdiction of the Tribunal to Endorse the Settlement Agreement

i. The Tribunal's retained jurisdiction

88. The Tribunal's remedial jurisdiction lies in subsection 53(2) of the Act, which establishes broad remedies available to the Tribunal.[114] This broad and purposive remedial jurisdiction ultimately formed the basis for the Tribunal's Compensation Decision.[115]

89. As noted by the Federal Court, the Tribunal is afforded "broad" and "extensive" statutory jurisdiction to fashion appropriate remedies.[116] The quasi-constitutional nature of the *CHRA* as human rights legislation demands that it be interpreted in a broad and purposive manner, including with respect to the application of its remedial provisions.[117] This is required because, as noted by the Supreme Court of Canada:

> Human rights legislation is amongst the most pre-eminent category of legislation.... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed....[118]

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[114] *Taylor v. Canada (AG)*, 184 D.L.R. (4th) 706, 2000 CanLII 17120 (FCA) at para. 70.
[115] Compensation Decision.
[116] JR Decision at para. 126.
[117] *Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 S.C.R 566 at para. 18.
[118] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339.

90. The Tribunal has crafted its remedies in these proceedings in the context of this broad remedial authority,[119] including through retaining jurisdiction over its subsequent rulings in relation to the Compensation Decision and related Compensation Orders. As noted within the Compensation Decision:

> The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.[120] [emphasis added.]

91. And as further elaborated upon within the more recent Framework Decision:

> The Panel retains jurisdiction on all its Compensation orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.[121] [emphasis added]

92. Various tribunals have previously adopted a comparably large and liberal approach where they remained seized of a matter after an award of broad public interest remedies until the order in question and any subsequent implementation orders were carried out.[122] As noted in the JR Decision, this includes examples where the Tribunal was seized of a matter for a period of over 10 years to ensure discrimination ended and to facilitate settlement discussions.[123]

93. The Federal Court upheld this retention of jurisdiction on the Judicial Review[124] and has also previously endorsed such an approach, finding that the Tribunal has jurisdiction to reconsider and change a remedial order[125] and "has broad discretion to return to a

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[119] JR Decision at para. 130.
[120] Compensation Decision at para. 277
[121] Framework Decision at para. 41.
[122] *Hughes v. Elections Canada*, 2010 CHRT 4; *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20 at paras. 15 & 23; *Public Service Alliance of Canada v. Canada (Treasury Board)*, 32 CHRR 349, 1998 CanLII 3998 (CHRT) at para. 507.
[123] JR Decision at para. 133, citing *McKinnon v Ontario (Ministry of Correctional Services) (No.3)*, 32 CHRR 1, 1998 CanLII 29849 (ON HRT).
[124] JR Decision. at para. 302.
[125] *Canada (Attorney General) v. Grover*, 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC).

matter…".[126]

94. The Tribunal itself has extensively considered the scope of its broad and remedial powers, having found that said powers and its retained jurisdiction provided it with the ability to both endorse the payment of compensation into trust as contemplated within its Compensation Decision,[127] and thereafter the endorsement of the Compensation Framework itself.[128]

ii. The Tribunal's dialogic approach and the need for "flexibility and innovation" in the context of human rights remedies

95. The Federal Court was clear in the JR Decision that remaining seized of this matter allowed the Tribunal to foster dialogue between the parties, effectively promoting a "dialogic approach", which ultimately contributes to the goal of reconciliation between Indigenous people and the Crown.[129] The Federal Court specifically stated that the dialogic approach "allowed the Tribunal to set parameters on … its remedial jurisdiction."[130] The Tribunal's facilitation of the dialogic approach is emphasized within the Compensation Decision wherein the Tribunal confirmed that its orders would find application once the compensation process had been agreed to by the parties or ordered by the Tribunal.[131]

96. The dialogic approach directed Canada to engage in discussions with the AFN and the Caring Society, as well as consult with the Interested Parties to the Tribunal Proceedings and the Commission, on a compensation process. The Panel clearly stated that it was not making a final determination on the process, but instead was allowing the parties to discuss and return with proposals, which it would then consider before making a final determination on the compensation process.[132]

97. The Tribunal also invited the parties to reach out to it for clarification or with any

[126] *Canada (Attorney General) v. Moore*, [1998] 4 FC 585, 1998 CanLII 9085 (FC) at para. 49 ["*Moore*"].
[127] 2021 CHRT 6 at paras. 51-80.
[128] Framework Decision at paras. 34-38.
[129] JR Decision at paras. 135-136.
[130] JR Decision at para. 136.
[131] Compensation Decision at para. 244.
[132] Compensation Decision at para. 269.

suggestions in relation to the compensation process. This invitation gave the parties flexibility into engage in the dialogic development of the compensation process, which the Panel viewed as necessary for its broad remedial orders on compensation to be given due effect:

> As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. … [133]

98. The Federal Court took no exception to the Tribunal's retention of jurisdiction and the dialogic process within the JR Decision, noting that the retention of jurisdiction by the Tribunal had precedent,[134] and ultimately finding that retention of jurisdiction and dialogic process were both reasonably within the broad remedial power of the Tribunal:[135]

> I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the *CHRA*.

99. The Federal Court was clear that this approach was supported by the law as it was simply an expression of the fact that effective remedies in the context of human rights legislation require "innovation and flexibility on the part of the Tribunal" and the *CHRA* is structured to facilitate this flexibility. Importantly, this approach allowed the parties to "address key issues on how to address the discrimination".[136]

100. It is clear that the Tribunal's continued dialogic approach has been endorsed by the Court, as has the fact that the *CHRA* is structured in a manner which allows the Tribunal to

[133] Compensation Decision at para. 270.
[134] JR Decision at para. 132.
[135] JR Decision at para. 302.
[136] JR Decision at para. 138.

be both innovative and flexible in its consideration of human rights remedies.

iii. The Tribunal has the jurisdiction to consider the FSA as satisfying its Compensation Orders

101. The AFN submits that the Tribunal's retained jurisdiction over compensation, which is mirrored in each relevant Compensation Order, in conjunction with the Federal Court's endorsement of same and the dialogic approach, as well as the need for "flexibility and innovation" by the Tribunal in exercising its remedial jurisdiction, ultimately support the Tribunal jurisdiction to consider the FSA as satisfying its Compensation Decision and related Compensation Orders.

102. As noted, the Tribunal has explicitly reserved the jurisdiction to revisit the Compensation Order and related Compensation Orders to ensure their effective implementation, and duly considered the evolution of the matter before it.[137] This approach was endorsed by the Federal Court in the context of the Judicial Review, recognizing that the Tribunal ultimately has broad discretion to return to a matter.[138] Further to this endorsement, the Tribunal's own analysis with respect to the scope of its broad remedial powers and powers and ability to return and evaluate the Compensation Framework are relevant and are equally applicable in the context of the Tribunal's consideration of the FSA.[139]

103. The AFN further submits that the Tribunal's ongoing retention of jurisdiction over the issue of compensation and the evolution of the matter, the Tribunal's broad remedial powers in this context, and its provision for the parties to the Tribunal proceedings to make suggestions and seek clarity as needed, provide sufficient authority for the AFN and Canada to present the FSA to the Tribunal for its consideration. The FSA represents a clear evolution of the case before the Tribunal and is a product of the dialogic process that is heavily informed and influenced by the representative First Nations party thereto.

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[137] Compensation Decision at para. 277; Framework Decision at para. 41.
[138] JR Decision at para. 302.
[139] Framework Decision at paras. 34-38.

104. The FSA is the product of extensive negotiations between the AFN and Canada, who are both parties to the Tribunal Proceedings and signatories to the FSA. This is a continuation of the dialogic approach directed and emphasized by the Tribunal. The parties to the Class Action negotiated for over 18 months to reach an appropriate settlement for the Class and develop an effective implementation scheme, as reflected in the FSA. The Caring Society was involved in the mediation before Justice Mandamin, and consulted with during the course of the negotiations giving rise to the FSA. The AFN and its class counsel, along with Moushoom class counsel, provided multiple opportunities for commentary and feedback. Responses were given to these parties' questions during negotiations and on the terms of FSA prior to the completion of the negotiations. Where practicable within the Class Action framework, these questions and points raised have been incorporated into the FSA.[140]

105. Ultimately, the Tribunal's consideration of the FSA is grounded in the fact that effective remedies in the context of human rights legislation require innovation and flexibility on the part of the Tribunal, which is facilitated by the nature of the *CHRA*.[141] As consistently noted and relied upon by the Tribunal during the Tribunal proceedings in relation to its broad and remedial powers;[142]

> In short, I have no doubt that if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.[143]

c) The Tribunal has discretion in the manner in which it evaluates the contents of the FSA as satisfying its own Compensation Decisions and Compensation Orders.

106. It is clear through the Tribunal's ongoing retention of jurisdiction, the inherent flexibility in the exercise of its remedial powers, and the dialogic approach undertaken

[140] Ciavaglia Affidavit at paras. 27, , 41, 51.
[141] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 ["Robichaud"] at para. 13.
[142] Framework Decision at para. 75.
[143] *Robichaud* at para. 15.

among the parties involved in both the Tribunal Proceedings and the Class Action that the Tribunal has the jurisdiction to assess the FSA's ability to satisfy the Compensation Decision and related Compensation Orders.

107. Despite this, given the unique circumstances of this proceeding, there appears to be no direct precedent where the parties have negotiated a settlement agreement for compensation outside of the Tribunal processes that also satisfies a compensation order made by the Tribunal, although some parallels do exist with respect to the Tribunal's adoption of the Compensation Framework. There is also no precedent in Canadian history of such an historic settlement, providing for the payment of such substantial compensation to so many thousands of historically disadvantaged individuals. As such, there is no effective precedential "road map" for the evaluation of the FSA as satisfying the Tribunal's Compensation Decision and related Compensation Orders, or "guide" to how the Tribunal's jurisdiction can be given effect in this unique context.

108. What is clear, however, is that in evaluating the FSA, the remedial jurisdiction of the Tribunal affords it flexibility and broad statutory discretion.[144] The exercise of this broad remedial discretion is only constrained by the fact that it "must be exercised on a principled and reasonable basis",[145] and is limited by and subject to rules of procedural fairness, natural justice, and the regime of the *CHRA*.[146]

109. The AFN contends that in evaluating the FSA as satisfying its Compensation Decision and related Compensation Orders, the most appropriate pathway is an analysis of whether the FSA reasonably, and in a principled manner,[147] satisfies its Compensation Orders and the principles enumerated therein by Tribunal, effectively promoting the rights of the survivors and providing meaningful vindication for the violation of their rights and

[144] JR Decision at paras. 126, 138, 231. *Robichaud* at paras. 13, 15.
[145] *Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45 at para. 188 ["*Beattie*"], citing *Hughes v. Elections Canada*, 2010 CHRT 4 at para.50.
[146] CHRA s. 48.9(1). This section provides that proceedings before the Tribunal be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
[147] Compensation Decision at para. 98, *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37.

freedoms, which are key *CHRA* compensation principles.[148]

110. Additional substantive factors which should be considered by the Tribunal with respect to its analysis of the FSA include that the FSA: (i) meets the Tribunal and CHRA's objectives in relation to compensation; (ii) accords with international human rights principles, including those adopted domestically; (iii) is a continuation of the dialogic process; and (iv) is the product of reconciliation, with the negotiations and FSA being First Nations-led.

111. These factors are respectively premised on:

a) the fact that the Tribunal must consider effective remedies through the lens of the *CHRA*;[149]

b) it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principles,[150] including the express consideration of the UN Declaration[151] required domestically with the passage of the UNDRIPA[152];

c) the Federal Court has endorsed the Tribunal's dialogic approach[153]; and

d) reconciliation between First Nations and the Crown is the fundamental objective of the modern law of Aboriginal and treaty rights[154], with Courts consistently noting how negotiation fosters reconciliation[155] including the Federal Court calling on the parties' to consider moving forward in the spirit

[148] Compensation Decision at para. 94, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62.
[149] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62.
[150] *R. v. Hape*, [2007] 2 SCR 292 at para. 53.
[151] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ["*UN Declaration*"];
[152] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14. ["UNDRIPA"]
[153] JR Decision at para. 302.
[154] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para. 1 ["*Mikisew 2005*"].
[155] JR Decision at paras. 297-301; *R. v. Desautel*, 2021 SCC 17 at paras. 87-89;

of reconciliation in the JR Decision.[156]

112. The AFN contends that other salient factors and principles to assist the Tribunal's analysis can also be drawn from Federal Court jurisprudence, in particular, Federal Court approval hearings for class actions focused on compensating First Nations individuals for historical discrimination by Canada, and these can be considered aligned with a "broad and purposive"[157] reading of the remedial powers under the *CHRA*.

113. Similar to the Tribunal's broad, contextual remedial jurisdiction must be exercised on a "principled and reasonable basis",[158] the Federal Court test in evaluating proposed terms of settlement is a contextual analysis of whether the settlement is fair and reasonable and in the best interest of the class as a whole.[159] The AFN submits that some factors the Federal Court considers in making this determination that could be salient for the Tribunal in its analysis include: (i) the settlement terms and conditions; (ii) the likelihood of success or recovery with continued litigation; (iii) the future expense and likely duration of contested litigation; (iv) the dynamics of, and positions taken during the negotiations; and (v) the risks of not unconditionally approving the settlement; and (vi) position of the representative plaintiffs.[160]

114. The AFN submits that these can be distilled to the following additional factors for the Tribunal's purposes: (i) litigation risk and considerations should the Tribunal not endorse the FSA; and (ii) participation of the Representative Plaintiffs.

115. In the sections below, the AFN outlines how the FSA reasonably and in a principled manner addresses the compensation of the survivors of Canada's discriminatory conduct in accordance with the objectives of the *CHRA* as it predominantly aligns with and/or expands upon the Compensation Decision and related Compensation Orders and provides

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[156] JR Decision at para 297-301.
[157] JR Decision. at para. 128.
[158] *Beattie* 45 at para. 188.
[159] *Tk'emlúps te Secwépemc First Nation v. Canada*, 2021 FC 988, citing *Merlo v Canada*, 2017 FC 533 at para. 16 ["*Tk'emlúps*"].
[160] *Tk'emlúps* at para. 38.

meaningful vindication for the violation of the human rights and freedoms of the survivors contemplated therein, consistent with the factors and principles enumerated above.

d) The FSA aligns with and builds upon the Compensation Orders, advancing CHRA principles of Compensation

116. In approving the Compensation Framework, the Tribunal stated:

> [36] … the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc.[161]

117. The parties, assisted by the knowledge and experience of the AFN's and Canada's representatives involved with the development of the Compensation Framework, took a similar approach in drafting the FSA. Throughout the process, efforts were made to incorporate, and where possible expand on, the terms of the Compensation Orders in alignment with CHRA principles. The parties were predominantly successful in their efforts, as reflected in the terms of settlement discussed herein.

i. Settlement Quantum

118. The actual quantum of compensation contemplated within the FSA is fair, reasonable and principled, as it meets and arguably exceeds the objectives of the Compensation Decision and related Compensation Orders. The $20 billion in total compensation is significant, meaningful and will have substantial impacts on the lives of the survivors of Canada's discriminatory conduct. The amounts that will be provided to individuals, as addressed more in-depth below, are clearly not symbolic. While, as noted by the Tribunal, no amount of compensation will right the wrongs that these individuals

[161] Framework Decision at para. 36.

have endured,[162] the compensation under this settlement could be life-changing for many individuals who have been marginalized and harmed by a discriminatory system.

119. It is significant that the $20 billion in compensation contemplated within the FSA is over six times the amount of total compensation distributed to claimants under the IRSS, which remains to this day the largest class action settlement in Canadian history.[163] While the $20 billion amount is fixed, to the best of the parties' knowledge, this amount is more than sufficient to compensate the Class which includes individuals covered by the Tribunal's Compensation Orders, and for many children exceeds this compensation.

120. The AFN submits that the significant quantum of compensation importantly reflects meaningful vindication for the violation of the rights and freedoms of the survivors of Canada's discrimination, including those at the heart of the Compensation Decision and related Compensation Orders.

ii. Compensation Mechanism

121. In terms of the compensation mechanism, the FSA reflects a reasonable and principled approach, derived from lessons learned in the context of previous First Nations related settlements and is consistent with the Compensation Decision and related Compensation Orders. During negotiations, the parties were cognizant of the need to adopt an approach which would minimize re-traumatization and would also reflect core concepts such as access to justice, efficiency and expeditiousness. It also focuses on the need to avoid individual case-by-case assessments wherever possible.

122. The parties sought to adopt an approach which was similar to the common experience payment provided for in the context of the IRSS, as endorsed by the Tribunal,[164] which minimized evidentiary requirements, focusing instead on the shared discriminatory experience of the survivors. The AFN's view is that this is a culturally competent and trauma-informed compensation process that is in the best interest of the First Nations

[162] Compensation Decision at para. 13.
[163] Ciavaglia Affidavit at para. 53.
[164] Compensation Decision at paras. 259-260.

children and families at the heart of the Compensation Decision. This amounts to an "effective remedy", a core human rights principle.[165]

123. This approach is reflected in the FSA. For all classes, there is a presumption in favour of qualification for compensation, a low burden of proof to establish entitlement, and minimal evidentiary requirements.[166] While achieving proportionality amongst claimants in the same class requires some information upon which to base the distinctions, the FSA reflects a minimally invasive approach to proportionality. The primary mechanism for this is to rely upon objective factors that require minimal verification wherever possible. The assessment process is the opposite approach from the independent assessment process associated with IRSS, which has been criticized for the re-victimization of survivor claimants.[167]

iii. Compensation for the Removed Child Class

124. The Compensation Decision granted removed children the maximum indemnity allowable under the *CHRA*: $20,000 in compensatory damages, and $20,000 in punitive damages.[168] The FSA provides that all of the Removed Child Class, which includes those individuals who were eligible as removed children under the Compensation Order, will receive, at a minimum, the same amount ordered by the Tribunal, i.e., $40,000[169], reflecting alignment with the Compensation Decision and related Compensation Orders.

125. The FSA also significantly expands both the number of removed children eligible to receive compensation and the amounts they may receive.

126. The first way in which eligibility is expanded is through the class period. In the Compensation Decision, the Tribunal was bound by its "ordinary practice" of awarding remedies for no more than one year prior to the filing of the human rights complaint, such

[165] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1 at 3-4.
[166] FSA, arts. 5.01(3) & 5.01(4)-(5).
[167] *Tk'emlúps* at para. 49.
[168] Compensation Decision at paras. 249, 253-254.
[169] FSA art. 6.03(2)

that the cut-off point at which a child must have been in care to be eligible for compensation was January 1, 2006.[170] The Class Action was not bound by the same limitation. As a result, the parties to the Class Action were able to begin the class period on the date at which the discriminatory funding system was implemented by Canada: at the inception of Directive 20-1. Consequently, the FSA moves the starting date of eligibility 15 years earlier to April 1, 1991.[171] This is significant, as children removed from their families and homes prior to 2006 were also victims of a similar discriminatory system that is the object of the Compensation Decision, such that they too are entitled to justice.[172]

127. The Trocmé Gorham Report estimates that an additional 56,600 removed children are eligible for compensation as a result of the expanded class period.[173] A corollary is that more family members who were caregiving parents or grandparents for these children will also be compensated, as a result of this expanded class period.

128. The second expansion relates to the whether a child was placed outside of their community. The Compensation Decision awarded compensation to children who were "placed outside their homes, families and communities."[174] The FSA does not limit compensation to individuals who were "placed outside their homes, families and communities". Rather, if a child was placed outside their home, but placed within the community and that placement was funded by Indigenous Services Canada ("ISC"), the child and their eligible family members will qualify for compensation under the FSA. In this respect, the FSA recognizes the trauma and harm suffered by children and caregivers due to their separation, even in situations where the child remains within the same community.[175]

129. Beyond expanding eligibility, the linking of placements to ISC funding serves at least two principled purposes. First, it links the harm that was caused by Canada to the

[170] *Canada (A.G.) v. Walden*, 2010 FC 490 at para. 167.
[171] FSA art. 1.01, Definitions "Removed Child Class", FSA preamble A-B.
[172] FSA, Schedule "A" and Schedule "B".
[173] Ciavaglia Affidavit, Exhibit "C", at p. 28
[174] Compensation Decision at para. 245.
[175] FSA, art. 1.01 Definitions "Out-of-home Placement", "Removed Child Class", art. 6.03.

incentivization of placements because Canada's discriminatory funding model prioritized removals over preventive measures[176]. Second, it facilitates the identification of children who were removed through the data received from ISC, a FSA priority with respect to the Removed Child Class[177], and lessens the need to consult provincial and agency records.

130. The third expansion is the amount of compensation that a removed child will receive. Based on the Trocmé Gorham Report, approximately 115,000 individuals are part of the Removed Child Class going back to 1991.[178] Paying $40,000 to 115,000 individuals requires a sum of $4.6 billion. The FSA allocates a budget of $7.25 billion to compensate these class members.[179] This budget ensures a minimum of $40,000 per approved removed child class member and sets aside an additional $2.65 billion for enhancement payments in order to increase compensation over and above $40,000 to children who suffered exceptional harms, as determined by objective factors considered as proxies for such harm.[180]

131. The enhancement payments address the Tribunal's observation that other means are available to obtain compensation beyond the statutory limitations of the *CHRA*, and that $40,000, which was the highest amount the Tribunal could order, was insufficient to compensate for the "egregious harm" that the class suffered.[181]

132. The factors used to enhance the payments made to Removed Child Class Members are listed at article 6.03(3) of the FSA and include the following:

a) the age at which the Removed Child Class Member was removed for the first time;

b) the total number of years that a Removed Child Class Member spent in care;

c) the age of a Removed Child Class Member at the time they exited the child

[176] *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4.
[177] FSA art. 6.02(3)
[178] Ciavaglia Affidavit at para. 30, Exhibit "C".
[179] FSA art. 6.03(5).
[180] FSA art. 6.02(2), 6.03(3)
[181] Compensation Decision at para. 182.

welfare system;

d) whether a Removed Child Class Member was removed to receive an essential service relating to a confirmed need;

e) whether the Removed Child Class Member was removed from a northern or remote community; and

f) the number of spells in care for a Removed Child Class Member and/or, if it can be determined, the number of out-of-home placements applicable to a Removed Child Class Member who spent more than one year in care.

133. The plaintiffs' experts have identified each of these factors as a reasonable objective proxy for the level of harm that the class member suffered.[182]

134. The relative weight to each factor and the amounts of additional compensation assigned will be further developed in consultation with experts.[183] As such, it cannot be determined at this point, and it is not specified in the FSA, how much of an enhancement payment a class member would receive applying one or multiple enhancement factors. Determining the amount of each enhancement factor is also dependent on the number of class members eligible to receive enhancement payments and thus the amount of compensation remaining in the $7.25 billion budget, which is unknown at this point.

135. While the FSA does not address these two unknowns – the weight given to an enhancement factor and the number of eligible class members – class counsel has been actively engaged on developing the methodology for determining same and has considered that they be addressed in the following fashion:[184]

a) First, the relative weight of each enhancement factor will be assigned a percentage of the $2.65 billion set aside for enhancement factors (e.g., 20% time-in-care, 10% age of removal, etc.); and

b) Second, once it is possible to know or forecast the number of class members

[182] Ciavaglia Affidavit at para 66-67.
[183] FSA art. 6.03(4).
[184] Ciavaglia Affidavit at paras. 67-70.

who are eligible to receive that enhancement factor, then a dollar figure may be assigned to it.

136. The time-in-care factor may be used as an example to illustrate how this process may work. The experts may, for example, determine that 20% of the $2.65 billion should be set aside for the time-in-care enhancement factor, given its importance as a proxy for harm relative to the other factors. If greater harm results from a longer time in care, the enhancement factor may be scaled to reflect this fact. The enhancement payments could be allotted according to the following categories or levels: 1 up to 3 years in care will benefit from the first enhancement level; 3 up to 6 years in care will benefit from the second enhancement level, which shall be double the first enhancement level; more than 6 years in care will benefit from the third enhancement level, which shall be triple the first enhancement level. Using these figures would result in the following approximate breakdown for this enhancement factor:

***Table** 1: Time-in-care enhancement example*

Time in care	**Number of individuals**	**Amount of increase per claimant**
1 up to 3 years	26638	$ 6,000.00
3 up to 6 years	11695	$ 12,000.00
6 years or more	12778	$ 18,000.00
Total		$ 530,169,491.53
Percentage of 2.65 billion set aside for enhancement payments		20%

137. The same design process could occur for each enhancement factor as the information regarding the number of survivors who qualify for a specific enhancement factor is obtained. As approximately half of Removed Child Class members will already have attained the age of majority by the time the settlement receives Federal Court approval, this information is expected to be determinable during the initial claims period of three years. The initial claims during this period should permit actuarial analysis for the purpose of recommending to the SIC the amounts for each enhancement factor.[185]

138. While these specific amounts are not set out in the FSA, the FSA does set out the

[185] Ciavaglia Affidavit at para. 70, Exhibit "H".

budgeted amount for the Removed Child Class. Not all survivors will be eligible for an enhancement payment, but survivors who are eligible for the highest levels of compensation could receive more than triple the amount awarded by the Tribunal if this system for the weighting of the Enhancement Factors is adopted by the Plaintiffs, with the assistance of experts.[186]

139. The enhancement factors permit proportionality based upon individual impacts above the $40,000 threshold[187], while minimizing the risk of causing trauma to claimants. The information used to apply enhancement factors will be obtained, where possible, from ISC data.[188] This method relieves class members of the burdens of testifying, being subjected to interviews, and obtaining documentation on their own.[189] If there is a gap in the ISC data, it may be supplemented by information provided by the class member.[190]

140. The AFN contends that these new entitlements and factors align with the stated objectives of the compensation process as noted by the Tribunal[191], *CHRA* principles in relation to recognizing and vindicating breaches of victims of rights discrimination and equates to reasoned and principled expansion of the Compensation Orders.

iv. Compensation for the Removed Child Family Class

141. The compensation available for the Removed Child Family Class begins with the same objective as that for the Removed Child Class: ensuring a minimum payment of $40,000 to eligible class members.[192] In line with the expansion of compensation to removed children back to 1991 and the advent of Directive 20-1, compensation has comparably been expanded for caregiving parents and grandparents of these children[193],

[186] FSA art. 6.03(4).
[187] FSA art. 6.02(2).
[188] FSA art. 6.02.(3)
[189] FSA art. 6.01(1)-(2).
[190] FSA art. 6.02(3)
[191] Framework Decision at para. 36.
[192] FSA art. 6.04(8)
[193] FSA art. 1.01 Definitions, “Removed Child Family Class”, “Removed Child Class”, art. 6.04(1), (8)

well beyond the timeline contemplated by the Tribunal Compensation Orders.[194]

142. According to the class size estimates that the Plaintiffs have received, the FSA accomplishes this goal. As previously stated, the Parliamentary Budget Officer estimated within its *PBO Report* that there are 1.5 caregiving parents or grandparents per First Nations child. Multiplying this figure by the estimated size of the Removed Child Class (115,000) results in an estimate of 172,500 caregiving parents or grandparents. This likely overestimates the true number of caregiving parents or grandparents as some of these parents will have had multiple children removed from the home. The FSA sets aside $5.75 billion to compensate family class members[195], which is sufficient to provide $40,000 in compensation to 143,750 caregiving parents and grandparents. For comparison, the budgeted compensation available to the caregiving parents and grandparents is 1.9 times the global compensation distributed under the IRSS.[196]

143. The Tribunal ordered that compensation was limited to biological parents and, if one or more grandparents cared for the child at the time of removal rather than the parent, then that biological grandparent would be eligible to receive compensation.[197]

144. The FSA expands the category of eligible caregivers to adoptive parents, stepparents and adoptive grandparents. However, in the event of multiple claims from biological parents, adoptive parents, and grandparents, the FSA awards compensation according to a list of priorities: biological parents come first, then adoptive and stepparents, then biological and adoptive grandparents. In the case of the latter two, groups, they may share the base compensation. The various possible compensation scenarios are presented in the form of an interpretive aid attached as Schedule “F” to the FSA.

[194]Compensation Decision at paras. 248, 254.
[195] FSA art. 6.04(5).
[196] Ciavaglia Affidavit at paras. 54, 78.
[197] 2020 CHRT 15.

v. The establishment of the Trout Child Class and the Trout Family Class

145. Another notable way in which the FSA sought to build and expand upon the Tribunal's Compensation Decision and related Compensation Orders was by way of the inclusion of the Trout Child and Family Classes. As previously noted, the Trout Child Class is comprised of all First Nations minors living anywhere in Canada who between 1991 and 2007 had a confirmed need for an essential service and faced a denial, delay or service gap with respect to that needed essential service. [198]

146. The FSA extends compensation to these First Nations children who suffered discrimination regarding essential services prior to 2007. The FSA contemplates a minimum amount of $20,000 in compensation for those most impacted as a result of the denial, delay or service gap of a needed essential service, and up to $20,000 for those who have not suffered an objectively higher level of impact as a result of same.[199] $2 billion dollars has been budgeted to compensate the Trout Child Class.[200]

147. The FSA also extends compensation to the caregiving parents/grandparents of a Trout Child Class member, providing that the caregiving parents/grandparents of those Trout Child Class members who experienced the highest levels of impact may be entitled to some level of direct compensation, while those who children did not meet this threshold would not received direct compensation, but still be entitled to access indirect benefits by way of the Cy-près Fund.[201] The Trout Family Class will share in the budget also allocated to the Jordan's Principle Family Class of $2 billion dollars.[202]

148. The AFN contends that the inclusion of the Trout Child and Family Classes is significant as these children and their families were subjected to similar discrimination to those contemplated who were denied experienced a delay, denial or service gap in the receipt of an essential service under Jordan's Principle.[203] Their inclusion aligns with the

[198] FSA art. 1.01 "Trout Child Class".
[199] FSA art. 6.06(12), (14).
[200] FSA art. 6.06(10).
[201] FSA art. 6.06(16).
[202] FSA art. 6.06(17).
[203] FSA, Exhibits "A" and "B".

CRHA's principles as it ultimately affords these survivors with the potential for redress in relation to Canada's historic harms, an opportunity that may not have otherwise been available given that it occurred prior to any legal recognition. The remedies available to the Tribunal "attempt to make victims whole and prevent the recurrence of the same or similar discriminatory practices."[204] As such, the AFN submits that expansion to include these classes should be viewed by the Tribunal as a reasonable and principled expansion of the Compensation Decision and related Compensation Orders.

vi. Cy-près Fund

149. As noted hereinabove, the FSA establishes a Cy-près Fund which will be endowed with $50 million.[205]

150. The Cy-près Fund's primary purpose is to benefit Class Members who do not receive direct payment under the terms of the FSA. This includes all siblings of the Removed Child Class and the Jordan's Principle Class. The Cy-près Fund is another means by which the FSA seeks to expand on the Compensation Decision and related Compensation Orders, recognizing that the discrimination at the heart of the Compensation Orders was felt by all the immediate family members of the removed children and those who experienced a delay, denial or service gap in the context of Jordan's Principle.

151. As noted, the Cy-près Fund will be designed with the assistance of experts and has the objective of providing culturally-sensitive and trauma-informed supports to survivors. This is a reasoned and principled expansion of the Compensation Orders which both aligns with the stated objectives of the compensation process as noted by the Tribunal,[206] and *CHRA* principles in relation to recognizing and vindicating breaches of victims of discrimination rights. The benefits contemplated with the establishment of the Cy-près Fund are in primarily in addition to direct compensation, and not in lieu thereof, which the

[204] Compensation Decision at para. 13.
[205] FSA, art. 7.01.
[206] Framework Decision at para. 36.

Tribunal specifically wished to avoid.[207]

vii. Minimizing Trauma

152. The Tribunal was clear in its Compensation Orders that a compensation process should be culturally safe and appropriate and take into consideration the vulnerability of survivors.[208]

153. The implementation of previous class action settlements has resulted in First Nations' experiencing many negative impacts on their well-being. A fundamental lesson learned is that in class action proceedings addressing historical wrongs to First Nations, the process must be designed to avoid re-traumatization. In particular, the experiences of survivors in the Independent Assessment Process under the IRSS, has resulted in significant criticism for the re-victimization of survivors in the claims process.[209]

154. Consistent with the Compensation Orders, the FSA establishes principles to govern the claims process intended to minimize trauma to survivors. As noted by the Federal Court, if compensation is done in a manner that minimizes re-traumatization, it may also help to bring closure to a painful past, the value of which cannot be underestimated.[210] The AFN would submit that the FSA's efforts at minimizing of trauma is a critically important consideration in evaluating the FSA's satisfaction of the Compensation Decision, as it is in the best interest of First Nations children and families who are at the heart of the Tribunal Proceedings.

155. The parties to the Class Action have meaningfully considered and incorporated the principle of minimizing trauma into the FSA. This shared intention and core principle is clearly reflected in the language of the FSA which states throughout that the claims process is to be administered in a culturally sensitive and a trauma-informed manner.[211]

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[207] Compensation Decision at para. 260.
[208] Framework Decision at para. 36.
[209] *Tk'emlúps*, citing *Fontaine v Canada (Attorney General)*, 2018 ONSC 103 at para. 202.
[210] *Tk'emlups* at para. 63.
[211] FSA, preamble at T(ii).

156. For example, the FSA notes that the Administrator in considering its duties must do so in a trauma-informed manner[212] while the principles governing claims administration also explicitly provide for the Claims Process to be trauma-informed and non-traumatizing to survivors.[213] In support of this approach, it mandates that the Administrator, in administering the Claims Process, should presume that Claimants are acting honestly and in good faith with respect to any claim and draw all reasonable inferences in favour of survivors.[214]

157. Additional provisions addressing the minimization of re-traumatization within the FSA include:

a) The general principles governing compensation provides that the Plaintiffs will design a "Claims Process with the goal of minimizing the risk of causing trauma to Class Members".[215] This includes a guarantee that none of the children classes contemplated within the FSA will be required to submit to an interview, examination or other form of viva voce evidence taking.[216]

b) The principles governing the Removed Child Class, and their respective Caregiving Parents or Caregiving Grandparents, as well the Jordan's Principle Class and Trout Child Class, are each explicit that it is a requirement that each approach to compensation be trauma-informed and culturally sensitive.[217]

c) The provisions regarding the Cy-près Fund explicitly provide that its objective is the provision of culturally sensitive and trauma-informed supports to members of the Class who would be ineligible for direct compensation.[218]

158. With respect to the Removed Child Class, eligibility for compensation and related

[212] FSA, art. 3.02(1)(e).
[213] FSA, art. 5.01(3).
[214] FSA, arts. 5.01(4)-(5).
[215] FSA, art. 6.01(1).
[216] FSA, art. 6.01(2).
[217] FSA, arts. 6.02(1) & 6.05(2).
[218] FSA, arts. 7.01(2) & (5).

enhancement factors will be based upon objective criteria and data primarily from ISC wherever possible in an effort to minimize the potential trauma of having to provide supporting documentation in support of a claim for same.[219] The claims process for the Jordan's Principle Class and Trout Class will also be conducted in such a way as to reduce any associated trauma while ensuring appropriate supports are in place for Claimants who require the same.

159. As previously described, the FSA contemplates the provision of substantive supports for Class Members participating in the claims process, all funded by Canada. This includes mental health, cultural supports and trained navigators who will promote communications and provide referrals to health services and assistance with the claims process. These supports will be funded based on the evolving needs of the Class and adapted as needed to include innovative, First Nations-led mental health and wellness initiatives.[220] At all times, a phone line will be made available to provide a culturally-safe, youth specific support line that would provide counselling services for youth and young adult class members and to refer same to post-majority care services when appropriate.[221] Appropriate use of the supports funding may be adjusted during the claims period in order to minimize impacts to claimants.

160. The Supports Framework outlines the holistic wellness supports that will be made available as part of the claims process. These supports generally include: (i) service coordination and care teams approach for supports to claimants; (ii) the bolstering of the existing network of health and cultural supports; (iii) the provision of access to mental counselling to all class members; and (iv) support enhancement for either the Hope for Wellness Help Line or the establishment of a new dedicated phone line.[222]

161. Under a service coordination and care teams approach, supports will include coordinated, seamless access to service and supports wherever possible and

[219] FSA, art. 6.02(3).
[220] FSA, arts. 8(1) & (4).
[221] FSA, art. 8(3).
[222] FSA, Schedule C, "Components".

administrative, financial literacy and health and culture supports responsive to Class Members needs. This will be provided in a culturally appropriate and trauma-informed manner.[223]

162. The AFN submits that the parties' efforts reflected in the FSA aimed at minimizing trauma, including the ample supports contemplated therein, both align and build upon the efforts contemplated within the Compensation Orders and are an important consideration for the Tribunal in assessing whether the FSA satisfies its Compensation Decision and Compensation Orders.

viii. Supports

163. Building upon the FSA's efforts at minimizing trauma, the AFN submits that its efforts in the provision of significant supports to survivors both aligns with and expands upon the efforts contemplated with the Compensation Orders.

164. Throughout the settlement negotiations, the AFN advocated for robust supports to be available to claimants during the claims process and they have been included and detailed in the FSA and the Supports Framework. The Supports Framework was the result of focused dialogue among representatives of the parties and outside experts, and seeks to leverage and build on existing networks of service providers and First Nations organizations.

165. Given that survivors who are now children will be able to claim compensation once they have attained the age of majority, Canada will be funding these supports for approximately 21 years. Further, the Supports Framework expressly recognizes the generational nature of the settlement such that supports are flexible and adaptable to accommodate different timelines and needs. As a result, a child who was removed from their home as of March of 2022, the end of the eligibility period,[224] will receive an

[223] FSA, Schedule C, "Component 1: Service Coordination and Care teams approach for supports to claimants".
[224] *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 at para. 172(9).

equivalent support to a child who is eligible to claim immediately upon settlement approval. These supports will continue from the point that a survivor seeks information on the application process and will continue throughout the compensation process.

166. The continuing supports under the FSA include ensuring Navigators are available to claimants to assist, in a culturally appropriate manner, with filling out and submitting claims form, obtaining supporting document and, if required, assistance with the appeals process.[225] The Supports Framework also considers, enhancement of the Hope for Wellness Help Line, access to mental health counselling, bolstering the existing network of health and cultural supports, and case management for individuals.

167. Such extensive supports are not readily available within the context of litigation. It is the FSA that allows for this important feature.

168. Outside of the Supports Framework,[226] Canada has agreed to provide funding to the AFN for the next five years to implement specific First Nations-led supports for claimants.

169. Relatedly, the Cy-près Fund will provide further supports and benefits to children and families. As previously noted, the Cy-près Fund is endowed with $50 million for the express purpose of providing benefits to Class Member who do not receive direct compensation under the FSA. The objectives of the Cy-Près Fund include providing culturally sensitive and trauma-informed supports to the Class, including grant-based supports to facilitate access to culture-based, community-based and healing-based programs, services; access to transition and navigational supports for those aging out of care, scholarships; programs associated with family reunification; access to holistic wellness supports; and facilitating access to cultural programs and activities.[227]

170. The AFN submits that the significant scope of supports contemplated under the

[225] FSA, art. 3.02 (j).
[226] FSA, Schedule "C".
[227] FSA, arts. 7.01(1)-(5).

FSA are reasonable and principled and accord with the best interest of the First Nations children and families at the heart of the Compensation Decision and related Compensation Orders, and further, aligns with or exceeds the supports contemplated therein[228].

ix. Notice to the class

171. The parties' intention is that every survivor who is eligible to receive compensation in accordance with the FSA will submit a claim and receive compensation. In alignment with the Compensation Orders, the FSA contemplates a fulsome notice plan that will seek to ensure that all potential claimants contemplated within the scope of the FSA will be made aware of the nature of the terms of settlement and be supported throughout the claims process.[229] Where individuals have registered for updates, they will be able to receive notice of their possible entitlement to compensation through various channels and when they become eligible to claim compensation.

172. The parties to the FSA have developed and will implement this comprehensive and robust notice plan to inform potential class members that they may be entitled to compensation under the FSA.[230] The notices are subject to court approval and a motion with respect to the first stage of the notices was approved by the Federal Court on June 24, 2022. Canada will pay the reasonable costs of the notice plan.[231]

x. Opt-out period

173. In alignment with the Compensation Orders[232], the parties have agreed to an opt-out period of six months, following the publication of the notice of certification. The notice and opt-out forms were recently approved by the Federal Court on June 24, 2022.[233] Thus, any individual who wishes to not be bound by the settlement or eligible for compensation

[228] Compensation Framework, s. 6; FSA, s. 3.04(e), Article 8 and Schedule "C" Framework of Supports for Claimants in Compensation Process"; Framework Decision at para. 24.
[229] Compensation Framework, s. 5.1-5.2; FSA, art. 10.02; Framework Decision at para. 23.
[230] Compensation Framework, s. 5.1-5.2; FSA, s. 10.02; Framework Decision at para. 23.
[231] FSA, s. 3.04(1).
[232] Compensation Decision at para. 266; Compensation Framework, s. 3.2-3.3;
[233] Ciavaglia Affidavit at para. 109.

under the FSA may pursue their personal path to compensation.[234] However, assuming that the Tribunal declares that the settlement satisfies its compensation order, such an individual would not be able to claim under that order.

174. The AFN would note however that it views this settlement as in the best interests of the class. Further to the parties' intention that every eligible survivor will receive compensation, the AFN does not believe it is in the best interests of class members to opt-out of the settlement.

xi. General FSA provisions in alignment with the Compensation Orders

175. Several other provisions of the FSA align with the Tribunal's Compensation Decision and related Compensation Orders. The following provisions are substantially reflected in both the FSA and the Compensation Decision and related Compensation Orders:

a) An administrator will be appointed by the Court to administer the claims process who will act in accordance with the principles governing the claims, in particular that the claims process be cost-effective, user friendly, culturally sensitive, trauma-informed and non-traumatizing to claimants.[235]

b) The parties will develop a distribution protocol as part of the claims process to govern the administration of claims and distribution of the compensation. [236] The FSA contemplates that the AFN and Moushoom class counsel may seek input from the Caring Society, as well as from experts and First Nations stakeholders in the design and implementation of the distribution protocol. A distribution protocol is scheduled for Court approval in December 2022.

c) Canada will fund the provision of trauma-informed, culturally safe, and accessible health and cultural supports to class members as they navigate

[234]FSA, art. 11
[235] Compensation Framework, ss. 2.2-2.4; FSA, s.3.01(2); Framework Decision at para. 20.
[236] Compensation Framework, s.2.5; FSA, s. 5.01; Framework Decision at para. 21.

the compensation process.[237]

d) Compensation paid through the claims process is not intended to be considered income for tax purposes.[238]

e) Canada has committed to make best efforts to ensure that compensation received will not impact any social benefits or assistance that class members would otherwise receive from Canada or from a province or territory.[239]

f) Survivors will have three years from age of majority, or three years from the commencement of the claims process if they are adults, to submit a claim for compensation. The claims deadline will provide sufficient time for survivors to submit a claim, with the possibility for additional extensions based on individual circumstances of the survivor.[240]

g) Survivors who are denied compensation will have a right of appeal to an independent third-party.[241]

h) Prior to issuing payment to an Approved Removed Child or Jordan's Principle Class Member, the Administrator will contact the approved Class Member to inquire whether they wish to have some or all of their compensation directed to an investment vehicle.[242] Further supports are contemplated as part of the transitional services offered under the Cy-près Fund.

[237] Compensation Framework, s. 6; FSA, s. 3.04(e), Article 8 and Schedule "C" "Framework of Supports for Claimants in Compensation Process"; Framework Decision at para. 24.
[238] Compensation Framework, s.10.9; FSA, s. 9.03(2),
[239] Compensation Framework, s. 5.7(c); FSA, s.9.03(1)
[240] Compensation Framework, s. 7; FSA, art. 1.01 and s. 3.02(1)(n); Framework Decision at para. 25.
[241] Compensation Framework, s. 9.6; FSA, s.3.03 and 5.02(6)-(9); Framework Decision at para. 27.
[242] FSA, s. 6.11(b) and 7.01(3) [see Compensation Framework, ss. 10.7-10.8].

i) Compensation paid to a survivor cannot be assigned.[243]

j) Compensation paid to a survivor can take into account the time value of money, i.e. growth for the period of time the survivor was a minor until their attainment of the age of majority and the payment of compensation.[244]

k) The claims administrator will provide ongoing reporting with respect to the implementation of the FSA and on any systemic issues relating to the implementation or the claims process so that such issues can be addressed.[245] The First Nations-led Settlement Implementation Committee and the Court will have oversight on the implementation of the FSA.

176. The AFN submits that the foregoing FSA provisions meet or exceed the compensation contemplated by the Tribunal in its Compensation Decision and related Compensation Orders, and supports the endorsement by the Tribunal further to the CHRA principles of compensation as it is both a reasoned and principled approach which provides meaningful vindication for the violation of the survivors rights and freedoms.

177. Further, these provisions reflects core principles of the Compensation Orders as they establish a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case, including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, all key elements of a compensation process as previously contemplated by the Tribunal.[246]

[243] Compensation Framework, s. 11.1; FSA, s. 18.04; Framework Decision at para. 29.
[244] FSA art. 6.12; Compensation Decision at para. 271-276.
[245] Compensation Framework, s. 12.3; FSA, s.3.02.; Framework Decision at para. 30.
[246] Framework Decision at para. 36.

e) The FSA seeks alignment with the Compensation Orders, but where necessary, deviates to provide certainty and clarity, in alignment with *CHRA* compensation principles

178. As noted, the parties to the FSA negotiations were at all times guided by and attempted to build upon the Compensation Decision and related compensation orders.

179. As the Compensation Framework and process outlined were developed under very different circumstances and in effect designed to contextualize the Compensation Decision, it was incumbent on the parties to the FSA to attempt to implement, expand on, or, where necessary, clarify aspects of the Compensation Decision and related compensation orders. This required the parties to take into account various considerations in addition to those relevant to the Compensation Decision and Compensation Framework. These considerations include: (i) the substantial, but fixed amount of compensation available; (ii) the inherent complexities associated with the compensation of the Jordan's Principle Class as compounded by the lack of data available with respect to same; (iii) the expansion of compensation eligibility back to 1991 for the Removed Child Class and Removed Child Family Class; and (iv) the addition of the Trout Class.

180. In light of these challenges, the parties agreed that where compromise was required, they would prioritize compensation to children who have suffered substantial impacts as a result of the discrimination at issue further to the negotiation principles previously summarized herein, which the AFN would contend is a reasonable and principled concession that aligns with CHRA compensation principles. Each compromise deemed necessary was considered in light of the spirit and intent of the Compensation Decision, with the objective of ensuring that the compensation provisions of the FSA continue to reflect the importance of the Compensation Decision and related compensation orders and *CHRA* principles. In particular, the parties to the FSA negotiations ensured that any deviations were reasonable and principled, and that the survivors at issue would be provided with meaningful vindication for the violation of their rights and freedoms.

181. While negotiating the FSA, the parties were cognizant of the Tribunal's acknowledgment that the amount awarded to the survivors "can never be considered as proportional to the pain suffered" and that despite their best efforts, no amount of compensation will ever recover what the survivors lost or address the suffering endured as a result of racism, colonial practices and discrimination.[247] Just as the Tribunal noted that its award of compensation within the Compensation Decision recognized to the best of its ability that the case of discrimination was one of the worst possible cases warranting the maximum awards, the FSA reflects the parties' attempt to craft the most fair and effective settlement that satisfies the Compensation Decision and compensation related orders, while recognizing the inherent limitations of a negotiated resolution and a fixed global settlement amount.[248]

i. The Removed Child Family Class

182. There are two points where the Removed Child Family Class may deviate from the Compensation Framework. First, caregiving parents and grandparents will receive additional compensation up to $60,000,[249] rather than multiples of $40,000 in compensation in the event that multiple children were removed as contemplated by the Tribunal.[250] Second, if there is an unexpectedly higher number of eligible caregiving parents and grandparents, the compensation amount may be adjusted to ensure there is not an insufficiency of compensation available.[251]

183. The additional compensation ensures that there is recognition of additional impacts of multiple removals and ensures a measure of proportionality in the compensation method. The primary reason to limit total compensation for a single caregiving parent or grandparent to $60,000 is to account for the potential of insufficiency of the settlement funds in the face of an unexpectedly large number of claimants in this class. It would not have been possible to commit to compensating caregiving parents and

[247] Compensation Decision at para. 13.
[248] Compensation Decision at para. 13.
[249] FSA art. 6.04(9)
[250] Compensation Decision at para. 248.
[251] FSA art. 6.04(11)

grandparents multiples of $40,000 per child who was removed and still ensure that enough remained to compensate the other classes. This limitation is simply the reality of fixed, albeit historically large, compensation.

184. Similarly, if there are more caregiving parents and grandparents who are eligible for compensation than within the class size estimate, there is potential for the FSA to depart somewhat from the Compensation Decision.[252] This is unknown to the parties at this time, but is necessary to ensure equitable compensation for each impacted caregiving parent or grandparent.

185. It is important to note, however, that should some level of deviation be required in light of the circumstances provided hereinabove, the FSA continues to contemplate indirect compensation via the Cy-près Fund, access to which would be available to each member of the Removed Child Family Class who do not receive direct compensation, ensuring that the discrimination that they suffered is meaningfully recognized and vindicated.

186. The AFN submits that this is a reasoned and principled approach, which accounts for the previously addressed circumstances which were not before the Tribunal when it was contemplating the Compensation Decision and related Compensation Orders, and thus is in alignment with the *CHRA* principles regarding compensation.

ii. Jordan's Principle Class Compensation

a. *The Tribunal's approach*

187. In the Compensation Decision, a gap, delay or denial of an essential service grounds the right to compensation.[253] The Tribunal's subsequent orders and its approval of the Compensation Framework[254] further clarified the concept of a "confirmed need" for an essential service, in the sense that the need for an essential service must be confirmed by

[252] FSA art. 6.04(11)
[253] Compensation Decision at para. 231.
[254] Framework Decision.

a professional with relevant expertise in order to demonstrate an entitlement to compensation.[255]

188. In determining the content of each of these concepts, the Tribunal provided some guidelines favouring a reasonable and objective approach:

a) In order to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential". The definition of "essential" for compensation purposes remained to be finalized by the parties;[256]

b) The list of supports, products and services that Canada has provided since 2017 in compliance with Jordan's Principle is instructive in informing the definition of service gaps,[257] bearing in mind that the Tribunal agreed "with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable";[258]

c) Some measure of reasonableness should be applied to the determination of the gaps amongst the currently provided supports, products and services under Jordan's Principle that should be compensable.[259] In other words, not every service being provided now under Jordan's Principle constitutes a service gap for the purpose of compensation for past discrimination;

d) A confirmed need is a service recommended by a professional with relevant expertise to determine that the service is essential to meet the child's needs. The Tribunal's goal in setting this criterion was to "bring objectivity

[255] 2020 CHRT 15 at para. 106.
[256] 2020 CHRT 15. at para. 151.
[257] 2020 CHRT 15. at para. 150.
[258] 2020 CHRT 15. at para. 148.
[259] 2020 CHRT 15.

and efficiency to the compensation process as beneficiaries can indicate the service that was recommended but not obtained";[260] and

e) The compensation process should have some flexibility in determining "confirmed needs" by recognizing the systemic barriers encountered by many First Nations peoples in accessing services and that the absence of proof of assessment, referral or recommendation should not automatically disentitle a claimant. This flexibility should also be reflected in the parameters of the compensation process.[261]

189. The work of determining the detailed criteria and distribution process in the Compensation Framework was not finalized. The implementation and distribution guide envisioned under s. 2.5 of the Compensation Framework was not agreed on. The FSA provides many of the details or foresees processes to finalize them as part of a global resolution, in alignment with the Compensation Decision and related Compensation Orders to the greatest extent possible.

b. *FSA Compensation Process for Jordan's Principle*

190. The FSA and the claims process described therein which is to be developed by the parties generally follow the principles established by the Tribunal and set criteria that are amenable to objective implementation. The goal in the FSA is to ensure that those children who suffered discrimination and were objectively impacted are compensated consistent with the Tribunal's reasoning that the compensation process should be objective[262] and efficient[263], and the definition of essential services must be reasonable.[264] The process primarily focuses on a confirmed need for an essential service that was the subject of a delay, denial or, service gap within the bounds of reasonableness.[265]

[260] 2020 CHRT 15. at para. 117.
[261] 2020 CHRT 15 at para. 117. .
[262] 2020 CHRT 15 at para 45.
[263] Compensation Decision at para. 258.
[264] 2020 CHRT 15 paras. 148-151.
[265] FSA art. 1.01 Definitions "Jordan's Principle Class Member", art. 6.06(11)

191. The FSA dedicates a budget of $3 billion to the Jordan's Principle Class.[266] The larger budget estimated for the Jordan's Principle Class despite the smaller projected size of that class accounts for the intention to ensure—to the extent possible in a class of unknown size—payment of $40,000 to those Jordan's Principle survivors who would have benefitted from a $40,000 payment under the Tribunal's Compensation Order.

192. The FSA takes into account several guiding principles, which the AFN would contend are reasonable and principled and in alignment with the CHRA's principles of compensation, and to the greatest extent possible, the Tribunal's Compensation Orders:

a) the claims process must be expeditious, cost-effective, user-friendly, culturally sensitive, and non-traumatizing to participants[267]; therefore, the claims process *cannot* be based on methods that require the following:

    i. individual trials of each claimant[268], which would result in a cumbersome, slow, and expensive process leading to subjective differences amongst claimants and arbitrary outcomes in some instances;

    ii. a claims process built upon showing causation between the delay, denial or service gap in each instance and any adverse harm on each claimant[269]; or

    iii. in-person interviews or examination of the claimants[270], which have been shown by the experience of past Indigenous settlements to cause re-traumatization of the survivors of discrimination; [271]

b) the claims process of the Jordan's Principle and the Trout Child classes will include a review by an individual with specific culturally appropriate health and

[266] FSA art. 6.06(9).
[267] FSA art. 5.01(3)
[268] FSA art. 6.05(2)(b)
[269] FSA art. 6.05(2)(b)
[270] FSA art. 6.01(2)
[271] *Tk'emlúps*, citing *Fontaine v Canada (Attorney General)*, 2018 ONSC 103 at para. 202.

social training on Jordan's Principle, essential services, confirmed needs, professionals, and supporting documentation, which are key terms defined in the FSA[272];

c) in the absence of reasonable grounds to the contrary, it is presumed that a claimant is acting honestly and in good faith, and all reasonable inferences are to be drawn in favour of claimants[273];

d) the FSA recognizes that class members' circumstances may require flexibility in the type of documentation necessary to support their claim for compensation due to challenges such as the child's age or developmental status at the time of the events, the disappearance of records over time, and systemic barriers to accessing professionals[274];

e) safeguards need to be in place to prevent the class members' settlement funds from being dissipated due to irregularities and fraud[275]; and

f) the mechanism in place for retroactive compensation for Jordan's Principle type equality rights has no effect on the present and future implementation of Jordan's Principle as a service delivery program within ISC or any provinces. Similarly, the determination of whether compensation is owed due to a past breach in this instance has no bearing on whether a specific service is now or in the future determined to be essential for a First Nations child.[276]

193. In order to ensure sufficiency of funds under the FSA to compensate the Jordan's Principle claimants who would have been entitled to $40,000 under the Tribunal's Compensation Order, the FSA creates two groups of claimants:

a) class members who are projected to receive a minimum of $40,000 (expected to be claimants who overlap with the Compensation Order); and

[272] FSA art. 5.01(8)
[273] FSA art. 5.01(4)
[274] FSA art. 5.01(7).
[275] FSA art. 18.04.
[276] FSA art. 9.03.

b) class members who will receive up to, but no more than, $40,000.[277]

194. This division responds to the significant uncertainties surrounding the potential size of this class. If the number of approved claimants for this class coincides with the estimate of 65,000 class members, all would be able to receive at least $40,000. If it is much higher, the two-group approach ensures that those who suffered more impact will receive at least $40,000, and the remaining funds in the budget will be shared pro rata (in equal shares) by the lesser impacted group.[278]

195. The number of successful claimants will be influenced by the stringency of the criteria set for compensation eligibility and proof requirements. These criteria were not established in the Tribunal process, and the parties were ordered to negotiate them.[279] Much of that negotiation has taken place in the context of the global resolution of the FSA.

196. The FSA adheres to the Tribunal's direction that exclusive focus on disability as a threshold question for Jordan's Principle is inappropriate.[280] In the event a two-group process is necessary, the impacts that will be assessed are not limited to the impacts of a child's disability, but focus upon the impact of the denied service upon the child.[281]

197. The process through which these two groups are determined under the FSA has three components: (1) a framework for essential services[282]; (2) a questionnaire[283]; and (3) the exceptional circumstances clause[284].

c. *Framework of Essential Services*

198. The FSA contemplates the adoption of a "framework of essential services" with

[277] FSA art. 6.06(11), (13). Notably, the same principles and tiers apply to Trout Child Class members but with the difference that the dividing compensation line is $20,000.
[278] FSA art. 6.06(13).
[279] Compensation Decision at para. 269; Compensation Framework at s. 2.5.
[280] 2020 CHRT 15 at para 140.
[281] FSA art.6.06(11)(b)
[282] FSA arts. 1.01 Definitions "Framework of Essential Services", "Essential Services",6.06(3)-(4).
[283] FSA art. 6.06(11)(b).
[284] FSA art. 6.07.

assistance from experts.[285] The intention of the framework is to streamline the compensation process and to facilitate the professional confirmation of the individual's need for an essential service (similar to the current ISC application process for Jordan's Principle).

199. The framework will enable claimants to identify whether they needed a service that is essential in their specific circumstances for compensation purposes. As indicated by the Tribunal,[286] the starting point is the list of services currently funded under the Jordan's Principle program at ISC. Consultation with experts on the form of the framework is ongoing. The FSA requires a finalized framework of essential services prior to Federal Court approval.[287]

200. The parties' mutual intention is to ensure that there is objectivity in the analysis, which may include a list of essential services that are presumptive of harm. The parties will avoid assessing each claim and service individually on a case-by-case basis in the claims process to determine if the service is essential, but instead will develop a framework approach with objective criteria to determine the nature of the service and whether it was essential to the child. This is an ongoing process with the experts.[288] Assessing each claim on an individualized basis, while appropriate for current and future service requests, would be difficult to implement for the purposes of a massive global compensation process: it would be slow, cumbersome, require an in-depth individual inquiry, insert high levels of subjectivity into the work of the Administrator, and potentially yield arbitrarily inconsistent outcomes.

d. Questionnaire

201. The second stage of the analysis seeks to ensure that if a child's circumstances indicate significant impact, the child can be properly placed in the first group to receive

[285] FSA arts. 1.01 Definitions "Framework of Essential Services", "Essential Services",6.06(3)-(4).
[286] 2020 CHRT 15. at para. 150.
[287] FSA art. 6.06(4).
[288] FSA art. 6.06(3)-(4).

$40,000 or more.

202. The specific mechanism and methodology of a questionnaire is the subject of Jordan's Principle expert consultations, which are First Nations-led and facilitated by the AFN. The AFN and Moushoom class counsel are actively consulting with these experts regarding a culturally-appropriate mechanism that will minimize the risk of re-traumatization.[289] The questionnaire will be piloted with a group of individuals to ensure it is achieving its desired outcomes and minimizing the burden upon survivors.[290]

203. Importantly, resorting to the responses received in a form of questionnaire will only be necessary in the event that there are greater than 65,000 Jordan's Principle claimants. This approach seeks to import flexibility into the analysis to be able to respond to the possibility of an unexpectedly large number of claimants, while ensuring that those who experienced greater impacts will receive at minimum $40,000 in compensation. The Court's ongoing supervision ensures that the decisions that need to be taken in the claims process are in accordance with the FSA and in the best interests of survivors.[291]

e. *Exceptional circumstances*

204. The FSA also reduces the risk of excluding a child who needed a service that may have been essential to that child but, exceptionally, is not included in the application of the framework of essential services.[292]

205. The category covers exceptional cases in which an otherwise non-essential service becomes essential due to the child's unique circumstances.[293]

206. If a child only needed a typically non-essential service but that service was essential to that child for a particular reason, they can provide confirmation of the need and also

[289] Ciavaglia Affidavit at para. 94.
[290] FSA art. 6.06(11)(b).
[291] FSA art. 6.06(11)(b).
[292] FSA art. 6.07
[293] FSA art. 6.07(1).

confirmation from the professional that the service was essential to the child and why.[294]

This category is intended as an exceptional category, covering unique fact-based scenarios where the service was requested but not received [295,] aligning with CHRA principles of ensuring that the survivors of discrimination are provided with an effective remedy and that the breach of their rights and freedoms are vindicated.

iii. Jordan's Principle Family Class

207. The FSA allocates a fixed budget of $2 billion to the families of Jordan's Principle and Trout Child classes. The same definitions of caregiving parents (biological, step and adoptive) and caregiving grandparents (biological and adoptive) apply to this class.

208. Amongst this group, however, only caregiving parents or caregiving grandparents of the Jordan's Principle and Trout Child class members who are determined to be in the "significant impact" category are expected to be eligible for compensation.

209. To the extent that there may exist individuals who might have qualified under the Tribunal's Compensation Order as caregiving parents or grandparents but may prove not to qualify for significant impact under the FSA, they would not receive direct compensation. This likely reality was the fundamental compromise in the context of the FSA negotiations, without which a settlement of this dispute was impossible. The unknown number of Jordan's Principle Class and Trout Child claimants and the unknown number of caregiving parents and grandparents required a compromise whereby only the parents of the most significantly impacted children may receive compensation.

210. Parents who do not receive direct compensation are expected to benefit indirectly from the Cy-près Fund established under the FSA as detailed above. The AFN contends that in light of the realities associated with a fixed amount of compensation, however substantive, that this concession is both reasonable and principled, and continues to align with *CHRA* principles with respect to compensation as it ensures that some level of

[294] FSA art. 6.07(1)(c).
[295] FSA art. 6.07(1)(d).

vindication continues to exist for these survivors of Canada's discrimination.

iv. Exclusion for abuse

211. In the Compensation Decision, the Tribunal recognized that there are circumstances in which a child was removed as a result of physical, sexual or psychological abuse suffered at the hands of their parent/caregivers. In such circumstances, the Tribunal noted the importance of children victims/survivors to feel vindicated and not witness financial compensation paid to their abusers.[296] The FSA maintains this by excluding from compensation caregiving parents and caregiving grandparents who committed abuse that resulted in the removal of their child.[297]

212. The FSA definition of abuse does not include neglect nor emotional maltreatment and thus does not capture psychological abuse as contemplated in the Compensation Decision. The AFN, through its consultation with First Nations informed the decision to limit the definition of "abuse" in the FSA to instances of sexual and serious physical abuse.[298] The parties' intention to design and implement a trauma-informed claims process required that the concept of abuse be defined in an identifiable and objective manner to reduce the child's exposure to traumatizing and subjective questions. The FSA avoids assessing the reason for a child's removal beyond serious instances of sexual or physical abuse.

213. A caregiving parent excluded may challenge this decision to the appeal mechanism, but this process will not involve the removed child. This minimizes the risk of re-traumatization, consistent with the principles outlined above.[299]

v. Compensation for Estates

214. As described extensively throughout these submissions, the parties to the FSA are seeking to achieve proportional compensation commensurate to harm suffered within a

[296] Compensation Decision at paras. 150 & 256.
[297] FSA, art. 1.0.1. Definitions "Abuse", art. 6.04(4).
[298] FSA, art. 1.0.1. Definitions "Abuse"
[299] FSA art. 5.02(6).

historically large, but fixed settlement amount. To achieve this, one area where the parties have taken a more limited approach to compensation than what was ordered by the Tribunal is with respect to the estates of deceased class members: only the deceased members of the Removed Child, Jordan's Principle and Trout Child classes are entitled to compensation.[300] However, the FSA does provide for compensation to members of the family classes where a complete application for compensation was submitted prior to the individual's death.[301]

215. As previously noted, in designing the settlement, one of the fundamental principles guiding the parties was that, where compromise is necessary, compensation for children must be given priority. The parties are mindful of the Panel's observation that "the discriminatory practices at stake involved the forced separation of families and communities, and could therefore have intergenerational impacts".[302] Although there are limits on which estates of class members will be eligible for compensation, safeguarding compensation for deceased members of the child classes allows compensation to still flow through to the heirs of those children who were the youngest victims of the discriminatory practices.

216. The FSA provides for the submission and treatment of claims both in circumstances where an Estate Executor or Estate Administrator has been appointed and where no such individual is in place.[303] In addition, provision is made for the assistance of ISC in the administration of the estates of eligible deceased class members and payment to personal representatives of class members who are, or become, Persons Under a Disability.[304]

vi. Release

217. While a release of Canada's liabilities was not contemplated within the context of the Compensation Decision or related Compensation Orders, premised on the Tribunal's

[300] FSA, art. 13.02.
[301] FSA, art. 13.02
[302] 2020 CHRT 7 at para. 140.
[303] FSA, arts. 13.03-13.04.
[304] FSA, arts. 13.01 & 13.04(3)-(4).

continued oversight of the process, the AFN would contend that its inclusion is aligned with CHRA compensation principles as the release granted under the FSA relates only to Canada's conduct, not to agencies, Provinces or individuals who may have contributed harm to a child's experience in the child welfare system.[305]

218. The FSA does not foreclose the possibility that individuals may seek compensation above the amount to which they are entitled under the FSA for personal harm that was suffered during, or as a result of their experiences in the child welfare system, facilitating the continued vindication for harms not specifically addressed within the context of the FSA.[306]

f) Additional Factors which support the Tribunal's endorsement of the FSA as satisfying the Compensation Decision and related Compensation Orders

i. International Human Rights

219. The AFN submits that the FSA is reflective of fundamental international human rights and associated requirements for the redress of violations of same, including of the norms enumerated within the *UN Declaration* which was recently adopted domestically by Canada with the passage of the *UNDRIPA*.[307]

220. Article 7 of the UN Declaration establishes that First Nations have the collective right to not be subjected to the forced removal of their children, while Article 8 affirms that First Nations also have the right not to be subjected to forced assimilation or destruction of their culture.

221. Importantly, Article 8(2) of the UN Declaration affirms an obligation on states to provide effective mechanisms for the prevention of, and redress for violations of these international norms, particularly for "any action which has the aim or effect of depriving [First Nations] of their integrity as a distinct peoples, or of their cultural values or ethnic

[305] FSA art. 9.01.
[306] FSA art. 9.01(2)-(3).
[307] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

identities", as well as "any form of forced population transfer which has the aim or effect of violating or undermining any of their rights".[308]

222. The *United Nations Covenant on the Rights of the Child*[309] further elaborates on fundamental human rights considerations in relation to children, placing an onus upon states to ensure that all the rights therein apply equally to each child within their respective jurisdiction, without discrimination of any kind, irrespective of race, and that the best interest of the child should be the prevailing consideration in all actions concerning children. It also provides that in states with persons of Indigenous origins, an Indigenous child "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture".[310]

223. There are many mechanisms to address violations of or conduct inconsistent with human rights norms. The Tribunal has offered effective redress to children and their families during a specific time period and has compelled Canada to honour its commitments to its human rights legislation. Reconciliatory measures, including a nation-to-nation dialogue between Canada and the AFN can also offer effective redress.

224. The pre-amble to the UN Declaration specifically states that "agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States". The AFN views the FSA as an important step in protecting First Nations' rights and denouncing conduct that violates First Nations' rights in Canada. The reconciliatory nature of this settlement, in recognizing and denouncing discriminatory conduct, supports the view that it is it in the best interest of First Nations children and families.

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[308] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15, Article 8(2)(a) and 8(2)(c) ["*UNDRIP*"].
[309] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 ["UN Convention"].
[310] UN Convention. Articles 2, 3 & 30.

ii. The FSA embodies the Constitutional Promise of Reconciliation as a First Nations led process

225. It is the AFN's view that this settlement furthers Canada's constitutional promise of reconciliation.[311] The spirit of reconciliation is palpable in the FSA's words and underlying intent. Canada has committed to recommend that the Prime Minister provide a public apology to the survivors for the discriminatory conduct underlying the claims and the ongoing harms endured.[312] The reconciliation of First Nations and their respect claims and interest with those of the Crown is effectively the fundamental objective of the modern law of Aboriginal and treaty rights.[313] While both were crucial to achieving compensation for survivors, the negotiations giving rise to the FSA were conducted in the spirit of reconciliation, whereas the Compensation Decision was unfortunately the result of extensive litigation. As noted by the Supreme Court of Canada, the benefits of negotiation include the fact that it provides certainty for both parties and that ultimately "true reconciliation is rarely, if ever, achieved in courtrooms".[314] The terms of the FSA are an expression of reconciliation, reflecting the fact that First Nations and Canada came together and reconciled their divergent interests in relation to compensation.

226. Similarly, in the JR Decision, the Federal Court stated that negotiations are the preferred outcome for both First Nations people and Canada. As part of the reconciliation process, negotiation is encouraged, as it generates goodwill amongst First Nations and Canada.[315] The parties to the FSA negotiations took the Court's direction to heart and came together to further the work of the Tribunal regarding compensation. The parties ceased "sitting by the trail" and acted collaboratively in an effort to move forward in the spirit of reconciliation.[316]

227. Fundamental to the reconciliatory nature of the FSA and related negotiations, the

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[311] *R. v. Kapp*, [2008] 2 SCR 483 at para. 121.
[312] *UN Declaration*.
[313] *Mikisew 2005* at para. 1.
[314] *R. v. Desautel*, 2021 SCC 17 at para. 87.
[315] JR Decision at para. 300.
[316] JR Decision at para. 300-301.

process was at all times First Nations-led, ensuring that First Nations would continue to have a significant presence with respect to the oversight of the administration of compensation. Of note, the FSA provides for a significant First Nations presence with respect to the oversight and administration of the terms of settlement, providing that two of the five members panel of the SIC will be First Nations individuals, appointed by way of solicitations conducted by the AFN Executive Committee.[317] A third member will be legal counsel appointed by the AFN Executive Committee, ensuring consistent First Nations oversight of the compensation process in the best interest of the Class .[318]

228. Significantly, the AFN was the sole party who sought individual compensation before the Tribunal for the survivors of Canada's discrimination[319], further to the delegated authority provided to it by the First Nations-in-Assembly. It is on behalf of these rights holders that the AFN has engaged in the reconciliatory negotiations and accordingly, the FSA reflects a rights-holders perspective, those most inclined to safeguard the interest of the First Nations survivors who are ultimately entitled to compensation.

229. The Tribunal has always been cognizant of the value in providing an opportunity to negotiate the particulars of the compensation process, particularly in light of the inclusion of First Nations parties whose experience, knowledge and expertise and who have advanced arguments before the Tribunal about the approach that would best serve the interest of First Nations children with a culturally safe and appropriate lens.[320]

230. The AFN contends that the FSA continues to reflect First Nations experience, knowledge and expertise, and squarely reflects the best interest of First Nations rights-holders, further to efforts of the parties and interested First Nations parties during the Tribunal Proceedings. The AFN must highlight the fact that it is an originator of the Complaint and a full party to the Tribunal Proceedings, and for clarity, the only full party who is representative of First Nations rights-holders. It is the rights-holders who have

[317] FSA art. 12.01(5)-(6)
[318] FSA art. 12.01(10).
[319] Merits Decision at para. 487.
[320] Framework Decision at para 9.

ultimately endorsed the terms of the FSA by way of their duly elected representatives, and reconciliation would dictate that the Tribunal is ultimately under an onus to give significant and due consideration to the endorsement of the FSA as the embodiment of the First Nations perspective on compensation derived from nation-to-nation negotiations.

iii. The FSA reflects the dialogic approach

231. The FSA was ultimately the result of the dialogic approach, which was foundational in relation to the development of the Compensation Framework and informed the Tribunal's orders which sought to clarify aspects of the Compensation Decision. The Tribunal has always been clear that a compensation process would be defined by the parties and the necessary dialogue to complete said process was essential. This approach was endorsed by the Federal Court.[321]

232. The parties to the FSA negotiations have been engaged in discussions in relation to a global compensation settlement since 2020, which ultimately culminated in the FSA in 2022. The dialogue between the AFN, Canada and Moushoom class counsel, along with the involvement of the Caring Society and Representative Plaintiffs, has enriched the process and facilitated the development of a comprehensive FSA. At all times, the parties acknowledged and committed to an approach that was First Nations-led, with the AFN fully involved in all critical aspects of the FSA based on its lengthy involvement in the Tribunal Proceedings. Throughout, the parties to the FSA sought to ensure that the best interest of First Nations children and families remained the foremost consideration which they now jointly submit to the Tribunal has been achieved.

233. The fact that the negotiations took place primarily among the parties to the Class Action does not undermine the dialogic process. To the contrary, the First Nations-led dialogic approach engaged in by the parties to the FSA negotiations supports the fairness and reasonableness of the FSA. As noted, the AFN is the only full party to the Tribunal Proceedings who represents rights-holders, with its authority derived from the mandates

[321] JR Decision at paras. 135-136; Compensation Decision at para. 244.

of the First Nations-in-Assembly.[322] It is on this basis that the AFN has always advocated for a settlement that is in the best interest of the survivors who have the right to compensation pursuant to the Compensation Decision, and for those survivors who were not the subject of the Tribunal Proceedings but nevertheless suffered the same discrimination by Canada.

234. It is also of importance that the Caring Society, a central party to the Tribunal Proceedings, was kept informed and participated at various stages of the process: (i) as a party to the mediation with Justice Mandamin beginning in November 2020; (ii) as a participant in the intensive negotiations moderated by Justice Sinclair between November to December 2021 which resulted in the AIP; and (iii) was provided with the opportunity to comment and discuss issues during the negotiations leading to the FSA, including through the review of an earlier draft of the FSA.[323] This approach ensured the continuation of the dialogic approach with the parties to the Tribunal Proceedings, while respecting the fact that the Class Action was a distinct, though interrelated, legal process.

iv. Litigation Risk and Exposure should the FSA not be endorsed

235. The AFN submits that the potential risks associated with continued litigation surrounding the Tribunal's Compensation Decision and related Compensation orders supports the endorsement of the FSA given such litigation could ultimately jeopardize compensation for survivors.

236. The Tribunal must note that legal proceedings are fraught with uncertainty. Canada has filed a "protective appeal" to the Federal Court of Appeal of the JR Decision[324] and the AFN would expect that, should the matter continue through litigation it would most likely make its way to the Supreme Court of Canada. Ultimately, the AFN is of the view that the certainty of a settlement resolving the Class Action and compensation under the Tribunal Proceedings, combined with the monumental compensation amount, is preferable to the

[322] JR Decision at para. 160;
[323] Ciavaglia Affidavit at paras. 26, 27, and 51.
[324] Ciavaglia Affidavit at para. 85.

risks associated with continuing to defend the Compensation Decision at the Federal Court of Appeal or to proceed with litigating the Class Action through to a trial.

237. While Canada has consented to certification of the Class Action and has mandated its Ministers to focus upon the negotiation of a resolution, without an approved comprehensive settlement the plaintiffs thereto will be forced to continue litigation. Even if successful on the merits at trial, there is no guarantee that any damages awarded by the Court would exceed $20 billion. Members of the Trout Class and Trout Family Class are particularly vulnerable given that the Trout Class Action is based upon Canada's alleged discrimination *prior* to its recognition of Jordan's Principle in 2007. Similarly, members of the Removed Child Class and the Removed Child Family Class in the Class Action for the period from 1991 to 2005, are not included in the Tribunal Proceedings and therefore have no entitlement to any minimum amount of compensation. If tried on the merits, there is a real risk that these classes may see less compensation than what is currently contemplated by the FSA.

238. While the parties to the Tribunal Proceedings have made significant strides with the Compensation Framework, the key issues the parties have grappled with, most significantly the mechanism and administration for compensation, remain outstanding in the Tribunal Proceedings. These mechanisms have been the subject of intensive consideration, thought, collaboration and consultation with experts in the context of the FSA. The parties remain committed to addressing the details of the compensation mechanisms through the distribution protocol, in consultation with the Administrator and experts under the FSA.

239. While the AFN will always litigate on behalf of First Nations where necessary, the Tribunal must also turn its mind to the fact that the Tribunal processes took 12 years to culminate in the Compensation Decision, which was subject to an immediate judicial review by Canada. How much longer must the survivors of Canada's discrimination wait for fair, reasonable and principled redress, which the AFN would contend is embodied within the FSA?

240. The expeditious payment of compensation is one of the real benefits to resolving this matter as expeditiously as possible. The survivors of Canada's discrimination have been forced to wait for resolution of the issue of compensation for too long. The Tribunal's approval of the FSA as satisfying its Compensation Decision and related Compensation Orders will ensure that the settlement funds will be made available to the impacted individuals far sooner without continued judicial proceedings, ensuring that those most impacted will not be subjected to the uncertainty of protracted litigation. The Federal Court summed up a comparable situation in evaluating the terms of a settlement agreement in Tk'emlúps:

> … while acknowledging that no amount of money can right the wrongs or replace that which has been lost…. what is certain is that continuing with this litigation will require class members to re-live the trauma for many years to come, against the risk and the uncertainty of litigation. Bringing closure to this painful past has real value which cannot be underestimated.[325]

v. Participation of the Representative Plaintiffs in the negotiation of the Settlement

241. The Class Action includes representative plaintiffs for the Removed Child Class, Jordan's Principle class and their caregivers. For the Removed Child Class, the representative plaintiffs are Xavier Moushoom, Ashley Dawn Louise Bach and Karen Osachoff. For the Removed Child Family Class, the representative plaintiff is Melissa Walterson, Karen Osachoff's sister. For Jordan's Principle and the Jordan's Principle Family Class the representatives are Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson, and Jeremy Meawasige by his Litigation Guardian, Jonavon Joseph Meawasige, and Jonavon Joseph Meawasige. The representative plaintiff in the Trout Class Action is Zacheus Joesph Trout. All of these survivors have endured the effects of Canada's discrimination and therefore understand the need for effective compensation to be delivered to those who have shared similar experiences

[325] *Tk'emlúps* at para. 63.

242. The continued support of the representative plaintiffs in cannot be understated. They have been involved in the process from the outset. They were present for and asked for their views and input for all steps in the mediation and negotiation process leading up to and culminating in the FSA and provided their considered input throughout. This feedback is reflected in the final settlement.

243. The representative plaintiffs are motivated to settle this matter for the benefit of the entirety of the Class. The representative plaintiffs are mindful that this process must be fair and equitable but are also sensitive that this matter requires a resolution for survivors and desire for compensation to be available to all who are eligible as soon as possible.

244. While the representative plaintiffs understand that the claims process may be a traumatic process for survivors, they have provided input into the FSA with a view to minimizing the risk of re-traumatization.

245. As noted by the Federal Court in *Tk'emlúps*, the representative plaintiffs' support of a settlement can be a compelling factor when assessing a final settlement. Representative plaintiffs "[shoulder] the burden of moving these claims forward and have had to relive their own trauma" by recounting their experiences Just like the representative plaintiffs did in *Tk'emlúps*, the representative plaintiffs in the Class Action have acted for the benefit of all the Class Members, including the survivors at the heart of the Compensation Decision, who now, because of the terms of settlement, will not be required to do so.[326]

g) The FSA Satisfies the Tribunal's Order

246. This settlement will have a monumental impact for members of First Nations communities across the country. The AFN, along with the other parties to the Tribunal Proceedings and the Tribunal itself, as well as the representative Plaintiffs in the Class Action, have worked tirelessly to bring justice and recognition to the children who were impacted by Canada's discriminatory conduct. The AFN is proud to present this settlement

[326] *Tk'emlúps* at para. 61.

to the Tribunal in satisfaction of its Compensation Decision and related Compensation Orders.

247. The $20 billion settlement amount in the Class Action will effectively implement the Compensation Decision and will accelerate the process of delivering compensation to those individuals impacted by Canada's discrimination. It presents financial compensation and robust supports to survivors and it sets definitive timelines upon which this will be delivered. From the perspective of children who have been denied fundamental human rights due to Canada's discrimination, the compensation amounts will present financial opportunities that will aid them in reaching personal goals, achieving self-sufficiency, and reconnecting with communities from which they have been disconnected.

248. The AFN recognizes that the settlement is not an implementation of the Compensation Decision, but rather is a complex negotiated resolution built upon the Compensation Decision's foundations. The AFN has highlighted certain aspects of the settlement where compromises were made, primarily due to uncertainty in the number of claimants who will claim compensation. Whether these uncertainties result in inconsistencies with the Compensation Decision cannot be known until the FSA agreement is well advanced into the implementation phase. However, in these cases of uncertainty, the parties to the FSA have to the best of their abilities, protected and prioritized the interests of children impacted by Canada's discrimination, who are at the heart of the Compensation Decision and related Compensation Orders.

249. The compromises that were made do not detract from the monumental scope and amount in the FSA and its thorough methodology for protecting individuals who will receive compensation. Any settlement is the result of compromise and thorough analysis of risk:[327]

> All settlements are the product of compromise and a process of give and take and

[327] *Dabbs v Sun Life Assurance Company of Canada*, 1998 CanLII 14855 (ON SC), [1998] OJ No 2811 (Gen Div), at para 30, af'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A No. 371.

> settlements rarely give all the parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

250. The Tribunal must recognize that, in light of the size of the settlement, the high-level of engagement and participation of the parties in a dialogic process, the need to distribute compensation with alacrity and the risks associated with continual litigation of the Compensation Decision and related orders and the Class Action, the FSA is the best resolution for First Nations across Canada.

251. Ultimately, the settlement represented in the FSA is an expression of reconciliation between Canada and First Nations across the country, a negotiated collaboration that is in the best interests of First Nations. The settlement is built upon the foundation of the Tribunal's important work in protecting fundamental human rights and followed the Tribunal's guidance to achieving resolution:[328]

> [40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.
>
> [41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the Decision are very disconcerting, the opportunity to address those findings through positive change is now present. This is the season for change. The time is now.

[328] *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10 paras. 40-42.

> [42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term

252. For all of these reasons, the AFN urges the Tribunal to accept the FSA as satisfying its Compensation Decision and related Compensation Orders.

V. ORDER REQUESTED

253. The AFN is hereby seeking the following Declaration from the Tribunal:

a. that the FSA fully satisfies the terms of the Tribunal's Compensation Decision, the Compensation Framework, and other compensation related orders; or

b. alternatively, that the Tribunal amends the Compensation Decision, Compensation Framework, and other compensation related orders, to conform to the proposed FSA; and

c. in either event, that the Tribunal's endorsement of the FSA or variation of its Compensation Decision to conform to the terms thereof shall remain contingent on the Federal Court of Canada's approval of the terms of the FSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 22, 2022

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VI. LIST OF AUTHORITES

	PRIMARY SOURCES
	Legislation
1.	*Canadian Human Rights Act*, R.S.C., 1985 c. H-6
2.	*United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14
	Jurisprudence
3.	*Attorney General of Canada v. First Nations Child and Family Caring Society et al.*, 2021 FC 969
4.	*Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 SCR 566
5.	*Beattie and Bangloy v. Indigenous and Northern Affairs Canada*, 2019 CHRT 45
6.	*Canada (Attorney General) v. Grover*, 24 CHRR 390, 80 FTR 256, 1994 CanLII 18487 (FC).
7.	*Canada (Attorney General) v. Moore*, [1998] 4 FC 585, 1998 CanLII 9085 (FC)
8.	*Canada (AG) v. Mowat*, 2009 FCA 309
9.	*Canada (A.G.) v. Walden*, 2010 FC 490
10.	*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53
11.	*Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445
12.	*Chopra v. Canada (Attorney General)*, 2007 FCA 268
13.	*Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No 2811 (Gen Div)
14.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2016 CHRT 2
15.	*First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10
16.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada)* 2018 CHRT 4
17.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2019 CHRT 39
18.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 7
19.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 15
20.	*First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 20.
21.	*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 36
22.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 6
23.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 7
24.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2022 CHRT 8
25.	*Fontaine v Canada (Attorney General)*, 2018 ONSC 103

26.	*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20
27.	*Heydar v. Canada (Attorney General)*, 2019 FC 1477
28.	*Hughes v. Elections Canada*, 2010 CHRT 4
29.	*McKinnon v Ontario (Ministry of Correctional Services)*, 32 CHRR 1, 1998 CanLII 29849 (ON HRT)
30.	*Merlo v Canada*, 2017 FC 533
31.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388
32.	*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56
33.	*Public Service Alliance of Canada v. Canada (Treasury Board)*, 32 CHRR 349, 1998 CanLII 3998 (CHRT)
34.	*R. v. Desautel*, 2021 SCC 17
35.	*R. v. Hape*, [2007] 2 SCR 292
36.	*R. v. Kapp*, [2008] 2 SCR 483
37.	*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84
38.	*Taylor v. Canada (AG)*, 184 D.L.R. (4th) 706, 2000 CanLII 17120 (FCA)
39.	*Tk'emlúps te Secwépemc First Nation v. Canada*, 2021 FC 988
40.	*Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321
	International
41.	*United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15*
42.	*UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577*
	SECONDARY SOURCES
43.	*Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1*