

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

**FIRST NATION 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

**SUBMISSIONS OF THE
CANADIAN HUMAN RIGHTS COMMISSION**
(Re. the motion by the Assembly of First Nations
for approval of the Final Settlement Agreement on compensation)

September 9, 2022

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PRELIMINARY COMMENTS

1. At the outset, the Commission wishes to acknowledge the work that parties to the Tribunal and class action proceedings have done to further the goal of providing a culturally-appropriate and trauma-informed compensation process.
2. The Commission recognizes that the Final Settlement Agreement (FSA), if implemented, would distribute a large and historic settlement fund to broad classes of recipients, including many who would not benefit under this Tribunal's compensation orders. The Commission is aware that this motion could have

important consequences for First Nations children, families and communities across the country.

3. The Commission also wishes to stress its respect for the sovereignty of First Nations communities. It recognizes the FSA is the product of negotiations between Canada, individual First Nations rights holders, and the Assembly of First Nations (AFN), in its capacity as a national First Nations political governing body. Nothing in the Commission's submissions is in any way intended as a critique or comment on whether the FSA is a good resolution for its intended classes of beneficiaries.
4. Indeed, throughout this proceeding, the Commission has generally not taken positions on the questions of whether compensation should be awarded, and if so, to whom and in what amounts. Instead, the proceedings with respect to those matters were led by the First Nations Child and Family Caring Society of Canada and the AFN, as the First Nations organizations having ties to the First Nations children, family and communities harmed by Canada's discriminatory practices. Instead, the Commission limited its past participation on compensation to general submissions on the powers of this Tribunal, and related administrative law matters.
5. The Commission aims to take the same approach on this motion. Our submissions generally focus on administrative law principles, and their relationship to the relief the AFN now seeks. We hope this Tribunal will find this to be a useful response to its request for the Commission's views regarding such matters.

OVERVIEW

6. In its motion materials, the AFN asks this Tribunal to find that by implementing the FSA, Canada will fully satisfy its obligations under the compensation orders. If this Tribunal considers this question and decides implementation will not fully satisfy the compensation orders, the AFN asks this Tribunal to vary the compensation orders to conform to the provisions of the FSA.
7. With respect to the first request for relief, the Commission's position is that this Tribunal has jurisdiction to consider whether implementation of the FSA will satisfy

its compensation orders. In light of its retention of jurisdiction, and the dialogic remedial approach taken to date, this Tribunal has authority to consider whether a proposed set of measures would satisfy the terms of its orders.

8. The Commission's position is that the compensation orders provide specific entitlements to compensation that are not reflected in the FSA. As a result, the FSA does not comply with this Tribunal's orders.
9. If this Tribunal agrees, it will need to consider the AFN's alternate request to vary those orders.
10. The Commission's position is that this Tribunal lacks the jurisdiction to substantively vary its compensation orders as requested.
11. This Tribunal has retained jurisdiction to make additional orders as needed, in order to ensure the remedies granted are implemented effectively. This Tribunal has properly exercised its retained jurisdiction in this case, where needed to clarify, supplement, or amend its prior rulings.
12. Where this Tribunal exercises this power, it does not change the substance of its prior remedial ruling. That would be contrary to the doctrine of *functus officio* (duty fulfilled), even as applied flexibly in an administrative proceeding. Instead, past exercises of this Tribunal's retained jurisdiction have been designed to ensure the substance of its prior remedial orders was respected.
13. Taking these administrative law principles into account, this Tribunal's retained jurisdiction does not extend to amending the substance of prior rulings that confer entitlements to receive compensation. This is particularly true when the rulings have been the subject of Federal Court orders upholding their reasonableness, and an appeal is pending.
14. If this Tribunal finds it does have jurisdiction to consider the request to vary, the Commission takes no position on whether the compensation orders should be amended to conform to the FSA.

PART I - FACTS

A. Procedural history

15. Between 2019 and 2021, this Tribunal issued a series of compensation rulings in these proceedings.¹ The Federal Court upheld the reasonableness of these rulings.²
16. On December 31, 2021, Canada, the AFN, and representative plaintiffs in two related class action proceedings announced they had reached an agreement in principle to settle the compensation aspects of these proceedings.³
17. In May 2022, Canada advised this Tribunal and parties that Canada, the AFN, and class action counsel were close to finalizing the agreement on compensation. At that time, Canada also inquired about this Tribunal's availability to hold a hearing to approve the final agreement.⁴
18. In June 2022, the AFN notified this Tribunal and parties that the AFN and Canada intended to bring a joint motion following the finalization of the compensation agreement for this Tribunal's consideration of the final agreement.⁵

¹ [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*](#), 2019 CHRT 39; [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*](#), 2020 CHRT 7; [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*](#), 2020 CHRT 15; [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*](#), 2021 CHRT 6; [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*](#), 2021 CHRT 7.

² [*Canada \(Attorney General\) v First Nations Child and Family Caring Society of Canada*](#), 2021 FC 969.

³ AFN's motion submissions at para 44.

⁴ Correspondence from Paul Vickery, Counsel for the Respondent, dated May 20, 2022.

⁵ Letter from Stuart Wuttke, Counsel for AFN to CHRT Registry dated June 1, 2022.

19. The FSA was signed on June 30, 2022.⁶
20. The Commission was not involved in the negotiations leading to the FSA. The Commission first saw a copy of the FSA in early July 2022.
21. On July 22, 2022, the AFN filed this motion.

B. AFN's motion

22. In its motion, the AFN seeks an order that the FSA fully satisfies its compensation orders or, alternatively, that this Tribunal amend its compensation orders to conform to the FSA.⁷
23. The AFN acknowledges that the FSA is not an implementation of this Tribunal's compensation orders.⁸ Instead, the motion describes the FSA as a complex negotiated resolution based on this Tribunal's orders.⁹
24. The AFN's submissions outline how the FSA departs from this Tribunal's orders.¹⁰ The AFN's submissions also identify areas where, in its view, the FSA expands on this Tribunal's orders.¹¹

PART II – ISSUES

25. This motion raises the following issues:
 - a. Does the FSA fulfill this Tribunal's compensation orders?
 - b. If not, can this Tribunal amend its compensation orders to conform to the FSA?
 - c. Is the motion premature?

⁶ Final Settlement Agreement, Exhibit F to the Affidavit of Janice Ciavaglia affirmed July 22, 2022.

⁷ The AFN's motion submissions summarize the terms of the FSA at paragraphs 49-79.

⁸ AFN's motion submissions at para 248.

⁹ AFN's motion submissions at para 248.

¹⁰ AFN's motion submissions at paras 178-218.

¹¹ AFN's motion submissions at paras 116-177.

PART III – ARGUMENT

26. As mentioned earlier, the Commission's focus will be on administrative law principles, including the legal framework and types of orders that this Tribunal could make on this motion.

Issue 1: The FSA does not fulfill this Tribunal's compensation orders

27. Based on the differences between the FSA and the compensation order identified by the AFN, the Commission's position is that the compensation orders provide specific entitlements to compensation that are not reflected in the FSA.¹² As a result, the terms of the FSA do not comply with the compensation orders.

28. The Commission's submissions focus on the alternative relief sought by the AFN, should this Tribunal decide that the FSA does not comply with the compensation orders. This raises the core issue of whether this Tribunal has jurisdiction to vary its final orders.

Issue 2: This Tribunal does not have jurisdiction to amend its compensation orders to conform to the FSA

A. This Tribunal's compensation orders are final and cannot be reopened or substantively varied

29. As will be explained further, the Commission's view is that the compensation decisions are final and subject to the principle of *functus officio*. These are not preliminary or interim orders.

30. *Functus officio* means that a decision-maker has fulfilled its statutory function.¹³

31. Finality is particularly important in the case at bar. The parties have been litigating this matter for a decade and a half. Finality is both necessary and overdue.

¹² AFN's motion submissions at paras 178-218.

¹³ Black's Law Dictionary, 9th ed (Thomson Reuters) sub verbo "functus".

32. In the case of the compensation orders, finality means redress and compensation for the discrimination experienced by a significant number of First Nations children and families. While the FSA may provide finality in one form, the question of finality before this Tribunal is a legal one: are the original compensation orders final?

B. Finality – general legal principles

33. Finality is a foundational principle of justice. This legal principle is based on the need of the parties and the public for finality to govern their affairs in reliance on the decision. Further, tribunals need to control their workloads and manage resources to hear and decide new cases efficiently.¹⁴

34. Whether a tribunal has discretion to vary its orders depends on whether its statutory mandate has been fulfilled in the circumstances of a case, also known as being *functus*. Administrative tribunals must apply the *functus* doctrine flexibly.¹⁵

35. The power to reconsider, whether implicit or implied in public interest litigation, must be construed liberally.¹⁶ As quasi-constitutional remedial legislation aimed at redressing discrimination, the *Canadian Human Rights Act (CHRA)* must be interpreted in a broad and liberal manner.¹⁷ Any implied authority in the *CHRA* to reconsider a decision must thus be interpreted liberally.

¹⁴ Sara Blake, *Administrative Law in Canada*, 7th ed. (Markham: LexisNexis Canada, 2022), ch 4: Decision-Making Powers, at 4.04.

¹⁵ [Canada \(Attorney General\) v Canadian Human Rights Tribunal](#), 2013 FC 921, at para 43 [Berberi]; [Chandler v Alberta Association of Architects](#), 1989 CanLII 41 (SCC), [1989] 2 SCR 848 at p 862.

¹⁶ Robert W. Macaulay, James L.H. Spargue, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Thomson Reuters Canada Limited, 2022) ch 35: Authority of an Agency to Rehear or Reconsider Decisions at 35:6.

¹⁷ [Canada \(Canadian Human Rights Commission\) v Canada \(Attorney General\)](#), 2011 SCC 53 (CanLII), [2011] 3 SCR 471 at paras 33, 62 and 64; [Canadian Human Rights Act](#), RSC 1985, c H-6.

36. Another consideration in assessing whether a tribunal has the power to vary its orders is the availability of avenues of appeal or review.¹⁸ Statutory rights of review or appeal may limit a tribunal's implicit power to reconsider.
37. As a general rule, a tribunal cannot reconsider its orders if its statutory mandate has been fulfilled. New evidence is not an exception to the *functus* doctrine.¹⁹ Neither is a change in circumstances.²⁰ In addition, consent cannot confer jurisdiction on its own to reconsider or vary a decision.²¹
38. There are limited circumstances that may warrant an exception to the general rule of *functus*.²² These are where: a) the enabling statute authorizes the tribunal to make the change (including whether the authority is implicit in the statutory scheme); b) the tribunal made an error in its decision or; c) the tribunal made an error in expressing its manifest intent.²³

¹⁸ Robert W. Macaulay, James L.H. Spargue, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Thomson Reuters Canada Limited, 2022) ch 35: Implied By the Wording of Other Provisions or Overall at 35.19.

¹⁹ Robert W. Macaulay, James L.H. Spargue, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Thomson Reuters Canada Limited, 2022) ch 35: Implied By the Wording of Other Provisions or Overall at 35.19.

²⁰ Sara Blake, *Administrative Law in Canada*, 7th ed (Markham: LexisNexis Canada, 2022), ch 4: Decision-Making Powers, at 4.04.

²¹ Robert W. Macaulay, James L.H. Spargue, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Thomson Reuters Canada Limited, 2022) ch 35: Authority of an Agency to Rehear or Reconsider Decisions at 35:5. See also: [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2021 CHRT 7 at para 34; [Walden et al. v Attorney General of Canada](#), 2016 CHRT 19 at para 22; [Payiappily v Rogers Cantel Inc.](#), 2000 CanLII 15339 (FCA); [Lake Babine Nation v Williams](#), 2012 FC 1085 at para 46.

²² [Chandler v Alberta Association of Architects](#), 1989 CanLII 41 (SCC), [1989] 2 SCR 848; [Hughes v Transport Canada](#), 2021 CHRT 34 at paras 41-42.

²³ [Chandler v Alberta Association of Architects](#), 1989 CanLII 41 (SCC), [1989] 2 SCR 848 at p 862.

39. Case law provides that the following limited circumstances, which are considered a continuation of an original proceeding rather than a rehearing, are among those that may constitute an exception to the *functus* doctrine:
- a. the correction of clerical and arithmetic errors;
 - b. the correction of a factual material error;
 - c. the clarification of ambiguous orders;
 - d. the rehearing of a matter to cure harm caused by procedural deficiencies in a previous hearing;
 - e. the reopening of a matter where a decision was made in the absence of a person affected by the order who should have been notified but was not;
 - f. if a party was unable, through no fault of its own, to exercise its right to be heard;
 - g. reopening the investigation of a closed complaint without notifying the subject of the investigation.²⁴
40. None of these exceptional circumstances are present in the current motion.
41. While private, out-of-court arrangements between parties may demonstrate compliance with orders, they cannot supersede the authority of a final tribunal decision.

C. Finality principles specific to this Tribunal

42. The *CHRA* does not expressly address the issue of finality. However, section 57 explains that a Tribunal order to award compensation under section 53(2)(e) or

²⁴ Sara Blake, *Administrative Law in Canada*, 7th ed (Markham: LexisNexis Canada, 2022), ch 4: Decision-Making Powers, at 4.04.

section 53(3) may be made an order of the Federal Court for the purpose of enforcement.²⁵

43. While this Tribunal has broad remedial discretion, this authority is constrained by the *CHRA* framework and by the evidence presented.²⁶
44. The *CHRA* requires this Tribunal to balance flexibility and innovation in remedies with natural justice principles.²⁷
45. The dialogic approach does not mean this Tribunal can reconsider its orders in perpetuity. It is meant to facilitate the implementation of orders.²⁸ It is not intended to be used to negotiate out of binding legal obligations.

D. Cases where the CHRT has considered *functus*

46. The Federal Court determined that an exception to *functus* was justified to clarify a remedial order in *Attorney General of Canada v Canadian Human Rights Commission (Berberi)*.²⁹ In *Berberi*, this Tribunal issued a remedial order related to a job offer that was implied rather than explicit. The implied nature of the remedy made it ineffective. The Federal Court held that this was a unique situation that justified departing from the *functus* doctrine. It was not a situation of this Tribunal changing its remedial order. Rather, it was a clarification of the existing remedial order: it was clear from this Tribunal's reasoning that its remedial orders were premised on the implied job offer.

²⁵ *CHRA*, [section 57](#).

²⁶ [Hughes v Elections Canada](#), 2010 CHRT 4 at para 50.

²⁷ *CHRA*, [section 48.9\(1\)](#) and [section 53](#); [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2021 CHRT 12 at para 32.

²⁸ [Canada \(Attorney General\) v First Nations Child and Family Caring Society of Canada](#), 2021 FC 969 at para 162; see also Gwen Brodsky, Shelagh Day and Frances M Kelly, The Authority of Human Rights Tribunals to Grant Systemic Remedies, 2017 6-1 *Canadian Journal of Human Rights*, 2017 CanLIIDocs 45, <<https://canlii.ca/t/6w5>>.

²⁹ [Canada \(Attorney General\) v Canadian Human Rights Tribunal](#), 2013 FC 921.

47. The Federal Court also found this Tribunal was authorized to clarify a remedial order in *Canada (Attorney General) v. Grover*.³⁰ Contrary to paragraph 93 of the AFN's submissions, the Federal Court did not generally endorse this Tribunal's ability to reconsider and change a remedial order in that case.
48. This Tribunal retained jurisdiction for an open-ended period to hear further evidence, if required, related to a remedial order for a promotion. The Federal Court found that the circumstances warranted this Tribunal clarifying its remedial order for several reasons that represented an exception to the *functus* doctrine. The wording of the order was lacking in detail such that its implementation was ineffective.³¹ This Tribunal had also foreseen difficulties in implementing the order of promoting the complainant, such as the relevant workplace undergoing a restructuring.³² The Federal Court found this Tribunal was not *functus* and had appropriately exercised its retained jurisdiction by offering clarification to ensure the effective implementation of its remedies.
49. At other times, this Tribunal has determined it was *functus* and unable to reconsider an order. This was the case in *Hughes v. Transport Canada*.³³ In that case, this Tribunal ordered remedies and retained jurisdiction to oversee the implementation of its remedies for one year. After the one-year mark, this Tribunal was asked to reconsider an order. Distinguishing the circumstances from *Berberi*, this Tribunal determined it was being asked to change its order rather than clarify it to make it enforceable.³⁴ It found it was unable to do so because its retained jurisdiction had expired and the retained jurisdiction had been limited to overseeing

³⁰ [Canada \(Attorney General\) v Grover](#), 1994 CanLII 18487 (FC), 24 CHRR 390.

³¹ [Canada \(Attorney General\) v Grover](#), 1994 CanLII 18487 (FC), 24 CHRR 390 at para 35.

³² [Canada \(Attorney General\) v Grover](#), 1994 CanLII 18487 (FC), 24 CHRR 390 at para 34.

³³ [Hughes v Transport Canada](#), 2021 CHRT 34.

³⁴ [Hughes v Transport Canada](#), 2021 CHRT 34 at para 50.

implementation. This Tribunal noted that where it is asked to change an order or implement a different remedy, it is likely *functus*.³⁵

E. This Tribunal’s retained jurisdiction over compensation orders applies to non-substantive matters

50. As previously mentioned, this Tribunal has retained jurisdiction to amend its compensation orders for purposes such as correcting clerical errors, clarifying, supplementing, or ensuring effective implementation.³⁶ This does not extend to substantive changes to existing orders.
51. This Tribunal has also indicated that it has jurisdiction to answer requests for clarification of its orders, especially if the parties disagree on their interpretation.³⁷
52. On other occasions, this Tribunal has made broader comments about its ability to reconsider past orders. For example, this Tribunal has stated that it “welcom[es] any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders”.³⁸

³⁵ [Canada \(Attorney General\) v Grover](#), 1994 CanLII 18487 (FC), 24 CHRR 390; [Hughes v Transport Canada](#), 2021 CHRT 34 at paras 59-63.

³⁶ [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2017 CHRT 35; [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2020 CHRT 7; [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2021 CHRT 41; [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2022 CHRT 8.

³⁷ For example see, [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2021 CHRT 41 at para 42; [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(for the Minister of Indian and Northern Affairs Canada\)](#), 2016 CHRT 10 at paras 15-16.

³⁸ [First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2020 CHRT 7 at para 52.

53. The Commission's position is that past findings or comments of this Tribunal in reasons, do not confer jurisdiction to re-open a final decision or vary the merits of the same.
54. Should this Tribunal interpret these findings or comments as leaving a narrow opening to vary the substance of the orders, the Commission's view is that this is limited to circumstances where parties are seeking to add or further specify categories of compensation beneficiaries but not to reduce or narrow beneficiaries.³⁹ This Tribunal has also said that any amendments of this nature should be agreed upon by the parties as being in the best interests of children, which suggests that changes should satisfy these two criteria.⁴⁰ Further, this Tribunal has consistently exercised its retained jurisdiction in accordance with the objectives of the *CHRA*.

F. Substantive variations of this Tribunal's orders may lead to new litigation or proceedings that disturb established legal principles

55. This Tribunal rendered final compensation orders. Canada sought to judicially review these orders as final – not interim or interlocutory – decisions. The Federal Court reviewed the decisions before it as final orders and upheld them. Canada sought to appeal this decision. The appeal is currently in abeyance.
56. To vary the merits of final orders of this Tribunal, a party should seek judicial review and if unsuccessful, pursue an appeal. If successful on judicial review or subsequent appeal, the matter would be returned to this Tribunal and the parties would be allowed to proceed with a new hearing and make submissions on the remedies sought and the terms of the final order. The Federal Court or Federal

³⁹ [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*, 2020 CHRT 7 at para. 51-52. See also, *Doucet-Boudreau v Nova Scotia \(Minister of Education\)*, 2003 SCC 62, \[2003\] 3 SCR 3 at para 81.](#)

⁴⁰ For example see, [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*, 2021 CHRT 41 at para 530.](#)

Court of Appeal may also return the matter to this Tribunal to determine a discrete issue.

57. Simultaneously seeking recourse through the judicial review or appellate processes while also returning to this Tribunal for the same outcome (i.e., to re-litigate or change the remedies ordered) creates a problematic precedent and challenges established principles and procedures of administrative law.⁴¹
58. Should this Tribunal substantively vary its compensation orders, there would be an impact on the pending appeal. Currently, the Federal Court of Appeal is seized with jurisdiction over this matter, specifically the appeal of the judicial review upholding this Tribunal's compensation orders. The Federal Court of Appeal would not have the correct record before it should this Tribunal substantively vary the original orders.
59. If this Tribunal has concurrent jurisdiction to review or change its final orders while they are under review or appeal, this may result in a waste of limited judicial resources. The Federal Court of Appeal would be able to exercise its jurisdiction to review the original compensation orders at the same time that this Tribunal would be changing the substance of those same orders. This may result in parallel proceedings until a decision is rendered in one forum.
60. There will also be an impact on the resources of this Tribunal. If this Tribunal has implicit jurisdiction to re-open the merits of its final decisions, this will open up the possibility of any party who is dissatisfied with the outcome of a final determination of a complaint or the remedies, returning to this Tribunal to re-litigate the matter and seek a different outcome.
61. A finding by the Federal Court of Appeal that the appeal is moot may still lead to additional litigation, detracting from finality. Any party wishing to challenge the amended orders would then be required bring a new judicial review application.

⁴¹ [Hughes v Transport Canada](#), 2021 CHRT 34 at paras 60-61.

Regardless of what the Federal Court of Appeal does, a party may still judicially review a Tribunal order that is substantively varied.

62. Retention of jurisdiction absent clear parameters will create a slippery slope for future parties or litigants before this Tribunal. If this Tribunal's retention of jurisdiction to see through the implementation or compliance with its orders is interpreted as leaving the door open to dissatisfied parties re-litigating the remedies ordered, this will erode the final, binding authority of an order of this Tribunal.
- G. If this Tribunal nonetheless decides it has discretion to vary its orders, it must exercise its discretion through the *CHRA* framework and a human rights lens**
63. If this Tribunal decides it can vary its orders, it should exercise its discretion by applying a human rights lens and respecting the legislative scheme of the *CHRA*.
64. This Tribunal's role under the *CHRA* is to provide appropriate redress to victims of the discriminatory practices it has identified. As a result, if this Tribunal considers the merits of a request to vary, its job will be to (i) examine the FSA, (ii) determine what compensation the FSA provides to persons this Tribunal found were subjected to discriminatory practices, and (iii) consider whether those remedies are appropriate in all the circumstances, based on human rights law principles.
65. The Commission acknowledges the AFN's submission that "the FSA will significantly expand the number of survivors who would otherwise not be entitled to compensation" by including classes of beneficiaries that go beyond the scope of the Tribunal inquiry.⁴² Equally, some people who are entitled to a remedy under this Tribunal's compensation orders will not receive one under the FSA. In taking these factors into account, this Tribunal must apply principles of fairness and access to justice.

⁴² AFN's motion submissions, at para 83.

66. While the impact of the FSA may be far-reaching and significant for many First Nations children and families, the focus under the *CHRA* must remain on what the FSA does or does not do for the victims identified in this Tribunal's prior orders.
67. The *CHRA* provides this Tribunal with a specialized framework and statutory mandate purposely designed to meet the unique needs of victims of discrimination. It is the proper framework to apply when considering how this Tribunal may exercise its discretion. It contemplates the adjudication and remediation of group complaints such as this. It is not necessary for this Tribunal to apply class action jurisprudence to decide whether to vary its orders to conform to the FSA.
68. This Tribunal has noted that it is not the right forum for class actions in light of its enabling statute, which does not import class action criteria into its process.⁴³ This Tribunal further notes that "[w]hile it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it."⁴⁴ This Tribunal also states that the quasi-constitutional nature of the *CHRA* supersedes any conflicting laws.
69. Class actions are judicial proceedings that are governed by separate objectives, legal principles, case law, and rules of procedure. All of this is distinguishable from the case at hand.
70. The Federal Court has made similar findings in the judicial review of this Tribunal's compensation orders.⁴⁵ The Court found that "the class action proceeding does not have a bearing on the issues at hand" and "that the option of a class action

⁴³ [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*, 2019 CHRT 39 at para 209.](#)

⁴⁴ [*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)*, 2019 CHRT 39 at para 209.](#)

⁴⁵ [*Canada \(Attorney General\) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at paras 177 and 179.](#)

does not negate the Compensation Orders.”⁴⁶ Further, the Court found that tort law principles do not apply and upheld this Tribunal’s decision to not order compensation for tort-like damages or personal harm as is required in a class action proceeding.⁴⁷

71. The FSA is designed to achieve multiple purposes. It is not entirely based on the *CHRA* framework, the proceedings before this Tribunal (including the evidentiary record), or human rights reasoning. The FSA is based in part, on class action legal principles.
72. Expanding or reducing the scope of the groups of complainants included in this Tribunal’s compensation orders to mirror the class action groups would require new evidence and a hearing on the merits of these issues. Further, the groups of complainants this Tribunal ordered to be paid compensation are protected from alteration by the principle of *functus*.

Issue 3: Is the AFN’s motion premature?

73. The Commission takes no position on this issue.

PART IV – ORDER SOUGHT

74. The Commission requests
 - a. a determination that the FSA does not comply with the compensation orders; and
 - b. that this motion be dismissed, should this Tribunal find it is without jurisdiction to vary the orders as requested.

⁴⁶ [*Canada \(Attorney General\) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969.](#)

⁴⁷ [*Canada \(Attorney General\) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at paras 177, 188, and 194.](#)

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 9, 2022

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PART V – LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, RSC 1985, c H-6, as amended, online: <https://laws.justice.gc.ca/eng/acts/H-6/>, sections 2, 48.9, 53 and 57

Caselaw

Canada (Attorney General) v Canadian Human Rights Tribunal, 2013 FC 921 (CanLII), <<https://canlii.ca/t/g0r9b>>

Canada (Attorney General) v First Nations Child and Family Caring Society of Canada, 2021 FC 969 (CanLII), <<https://canlii.ca/t/jjblh>>

Canada (Attorney General) v Grover, 1994 CanLII 18487 (FC), 24 CHRR 390, <<https://canlii.ca/t/g9vdx>>

Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53 (CanLII), [2011] 3 SCR 471, <<https://canlii.ca/t/fnl47>>

Chandler v Alberta Association of Architects, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, (1989) SCJ No 102, <<https://canlii.ca/t/1ft28>>

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3, <<https://canlii.ca/t/4nx4>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10 (CanLII), <<https://canlii.ca/t/gppjk>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35 (CanLII), <<https://canlii.ca/t/hrrkh>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39 (CanLII), <<https://canlii.ca/t/j3n9j>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 7 (CanLII), <<https://canlii.ca/t/jd0vb>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 15 (CanLII), <<https://canlii.ca/t/jd0v9>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 6 (CanLII), <<https://canlii.ca/t/jfb4g>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 7 (CanLII), <<https://canlii.ca/t/jfb4j>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 12 (CanLII), <<https://canlii.ca/t/jfb4i>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 41 (CanLII), <<https://canlii.ca/t/jpcp8>>

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2022 CHRT 8 (CanLII), <<https://canlii.ca/t/jpdl7>>

Hughes v Elections Canada, 2010 CHRT 4 (CanLII), <<https://canlii.ca/t/28c82>>

Hughes v Transport Canada, 2021 CHRT 34 (CanLII), <<https://canlii.ca/t/jp49j>>

Lake Babine Nation v Williams, 2012 FC 1085 (CanLII), <<https://canlii.ca/t/fsstv>>

Payiappily v Rogers Cantel Inc., 2000 CanLII 15339 (FCA), [2000] FCJ No 630 <<https://canlii.ca/t/4l3l>>

Walden et al. v Attorney General of Canada, 2016 CHRT 19 (CanLII), <<https://canlii.ca/t/gw43z>>

Secondary Material

Black's Law Dictionary 9th ed (Thomson Reuters) sub verbo "functus"

Sara Blake, *Administrative Law in Canada*, 7th ed (Markham: LexisNexis Canada, 2022), ch 4: Decision-Making Powers, at 4.04.

Robert W. Macaulay, James L.H. Spargue, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Thomson Reuters Canada Limited, 2022) ch 35: Authority of an Agency to Rehear or Reconsider Decisions at 35:2, 35:5, 35:6, 35:19, 35:20.

Gwen Brodsky, Shelagh Day and Frances M Kelly, The Authority of Human Rights Tribunals to Grant Systemic Remedies, 2017 6-1 *Canadian Journal of Human Rights*, 2017 CanLIIDocs 45, <<https://canlii.ca/t/6w5>>