Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 8
Date: March 24, 2022
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Context

[1] This ruling concerns a March 4, 2022, consent order request made by the parties to these proceedings to expand Jordan's Principle services orders to youth from 18 to 25 years of age and for the application of the FNCFS program to youth ages 18 to 25 that age out of care. This consent order also provides for increased funding for prevention services for children, youth and families. This consent order request addresses a specific timeline for the implementation of the above and to set March 31, 2022 as the end date for eligibility for compensation for the victims of the discrimination found by the Tribunal. Finally, the parties made a number of other consent order requests. This will be further detailed below.

[2] In 2016, the Tribunal released its *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the FNCFS Program but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was the FNCFS Program creating incentives to remove First Nations from their homes, families and communities. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief so as to allow immediate change followed by adjustments and finally, sustainable long-term relief informed by data collection, new studies and best practices as identified by First Nations experts, the specific needs of First Nations

communities and of First Nations Agencies, the National Advisory Committee on child and family services reform and the parties.

[3] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20 the Tribunal stated that:

> [89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the Convention on the Rights of the Child and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in *all government services* affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] Furthermore, recently, the Quebec Court of Appeal in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, recognized the Tribunal's concern that funding only formed part of the Preamble and did not create an obligation for sustainable funding under *An Act Respecting First Nations, Inuit and Metis children, youth and families*, SC 2019, c 24 (see paras. 271-272, 274). The Court at para. 562 states: "Ainsi, une nouvelle

approche s'impose, ayant pour piliers la collaboration fédérale-provinciale et la prise en compte des peuples autochtones en tant qu'acteurs politiques et producteurs de droit. Cette approche doit prévaloir tant pour ce qui est des initiatives législatives que de leur mise en œuvre, y compris leur financement" (emphasis ours).

[6] The Panel is pleased with this helpful finding that will guide governments in the future. Moreover, as part of this motion, in her affidavit dated March 4, 2022, Dr. Cindy Blackstock asserts that:

> 25. [she] is concerned that First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families* may not benefit from the Tribunal orders, including this consent order. Canada has taken the position, and has repeatedly advised her, that it does not have obligations under the Tribunal's orders to First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families*. Dr. Blackstock affirms the Agreement in Principle reached on December 31, 2021(AIP), also excludes such First Nations. However, the AIP does state that these First Nations will not receive less funding than they would have received under the Reformed CFS Funding Approach for the services in question.

[7] Dr. Blackstock adds that:

> 25. … Respecting the right of First Nations to be self-determining, I believe that First Nations ought to have the right to make a free, prior and informed choice about which funding approaches, policies and practices, including those arising from the Tribunal proceedings, ought to apply.

[8] The Tribunal agrees and is satisfied the AIP ensures First Nations affirming their jurisdiction under *An Act Respecting First Nations, Métis and Inuit children, youth and families* will not receive less funding than they would have received under the reformed First Nations Child and Family Services [FNCFS] Funding Approach for the services in question.

[9] This is significant to ensure that First Nations do not have to face the unacceptable choice between adequate and sustainable funding under the reformed FNCFS Program or the exercise of their inherent right to self-government to develop and offer their own child and family services with the uncertainty of adequate sustainable funding especially upon the date of renewal of the agreements between the First Nation and Canada.

[10] The Panel agrees with Ms. Stephanie Wellman from the Assembly of First Nations (AFN) that the focus of this case is not on the *Act Respecting First Nations, Métis and Inuit children, youth and families* and that "[i]t is not for Canada, the AFN, this Tribunal or any other party to these proceedings to speak to the manner in which self-determining peoples opt to exercise their jurisdiction." (March 7, 2022 Affidavit, para. 80).

[11] This Tribunal's case is also about children and families who are also rights holders and deserve to have their human rights respected. The Tribunal's role is to eliminate the discrimination found and prevent the same or similar practices to reoccur.

[12] The Tribunal cannot force First Nations that are not part of these proceedings to do anything. However, the Tribunal has jurisdiction over Canada as per the *Canadian Human Rights Act*, RSC 1985 c H-6 [*CHRA*] to ensure that discriminatory practices adversely impacting First Nations children and families are eliminated and do not resurface in a new form in the long-term.

[13] The Tribunal made findings in the *Merit Decision* where Canada had concluded a funding agreement with the Attawapiskat First Nation:

> [122] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:
>
> > the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].
> >
> > (emphasis added).

[14] When the Tribunal expressed its concerns about sustainable and adequate funding not being guaranteed under the *Act Respecting First Nations, Métis and Inuit children, youth and families,* it did so with the above in mind and not in any way to hinder First Nations' inherent rights that this Panel has recognized on multiple occasions.

[15] The Tribunal's focus is on Canada not repeating its past discriminatory practices or creating new ones that would harm First Nations children, families and Nations.

[16] Finally on this point, the Tribunal is pleased to hear that the AFN sought, and achieved, recognition within the AIP that such First Nations exercising their jurisdiction would receive no less than the funding provided under the eventual reformed FNCFS Program. In her March 4, 2022, affidavit Dr. Valerie Gideon, Associate Deputy Minister of ISC, asserts that:

> 15. [t]he Agreement-in-Principle notes that First Nations that have chosen to avail themselves of the framework offered by *An Act respecting First Nations, Inuit and Métis children, youth and families* … to facilitate the exercise of their jurisdiction will "not receive less funding than they would have received under the reformed FNCFS Funding Approach for the services for which they have assumed jurisdiction." ISC [Indigenous Service Canada] will ensure that enhancements to the FNCFS Program, including those sought through this motion, are made available to those First Nations retroactive to April 1, 2022.

[17] Dr. Valerie Gideon further affirms that:

> 16. … ISC and the Assembly of First Nations will discuss how to adjust the [*Act respecting First Nations, Inuit and Métis children, youth and families'*] interim funding framework to reflect these enhancements. By April 1, ISC will also have reached out to the two Indigenous Governing Bodies who have signed or are on the cusp of signing coordination and fiscal relationship agreements. It will propose to discuss the enhancements available to those two entities. Regardless of the time required to have those discussions, ISC will make retroactive to April 1, 2022, any adjustments to the Indigenous Governing Bodies' agreements.

[18] This is extremely positive news and with the understanding that this commitment is reflective of what will also be included in the Final Settlement agreement for long-term reform addresses the Tribunal's concerns on this point.

II. Requested orders on consent

[19] In particular, this consent motion is for the following orders, as agreed to by the parties on December 31, 2021:

1. Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.

2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence- informed way agreed to by the Parties.

3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.

4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):

    a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;

    b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");

c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and

d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle, including but not limited to identifying and addressing formal equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").

5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

6. a. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada. b. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence- informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.

7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4:

[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at $2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the $2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services. These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

   [42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at $2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents.

[20] The wording for the seventh proposed order was modified in response to questions raised by the Panel. The Panel believed that given the procedural history in this case, the requested order should be clarified, to avoid future disagreements between the parties on the interpretation of the order. In particular, on March 11, 2022, the Tribunal wrote to the parties seeking clarification. The Panel's main question related to the $2,500 funding per person resident on reserve and in the Yukon for prevention services in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements.

[21] The Panel requested clarity in the case where reform is delayed and the prevention funds that are carried over have all been used. The Panel believed this eventuality should be reflected in the terms of the requested order to ensure that First Nations communities and First Nations agencies would have sufficient prevention funds while reform is completed.

[22] In response to the Panel's questions, the Parties agreed to add the following wording to the requested order:

> Canada shall fund the $2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will

require more time due to exceptional circumstances that will be further defined with the parties.

[23] The Panel considered this amended wording proposed by the Parties in its analysis.

III. Grounds for the motion and Tribunal findings

A. Grounds for the motion

[24] The Caring Society, the AFN and Canada made joint submissions on the grounds for this motion and filed separate affidavits along with untested evidence in support of this motion. The Chiefs of Ontario (COO), the Nishnawbe Aski Nation (NAN), the Commission and Amnesty International filed separate letters with the Tribunal indicating their consent to the motion. The Tribunal has considered all the materials and submissions filed by the parties. In the interest of conciseness, only some will be reproduced below:

> 11. As part of the Actuals Decision [2018 CHRT 4], the Tribunal ordered Canada, in consultation with the Parties, to undertake a cost analysis of the real needs of FNCFS Agencies, including small agencies, and to guide a data collection process (paragraphs 408, 418 and 421). The Caring Society and the AFN requested that the Institute of Fiscal Studies and Democracy (the "IFSD") take on the research outlined by the Tribunal, with the AFN acting as the project contract holder. The National Advisory Committee on First Nations Child and Family Services (the "NAC") provided directional and strategic support.
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> 12. In April 2018, the IFSD began its work on the following: (a) developing reliable data collection, analysis, and reporting methodology for analyzing the needs of FNCFS Agencies, in alignment with the Tribunal's rulings; (b) providing technical expertise to analyze agency needs, providing strategic advice on how best to monitor and respond to actual agency needs from fiscal and governance perspectives; and (c) analyzing the needs assessment completed by FNCFS Agencies and communities.
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> 13. On December 15, 2018, the IFSD released its first report, *Enabling First Nations Children to Thrive* (the "IFSD Phase One Report"). The IFSD Phase One Report defined and outlined the existing funding gaps in the FNCFS Program and the ongoing hardships facing First Nations children, youth, and their families: gaps in funding for prevention, poverty, information technology, and capital were identified as key components to the ongoing disparity.

14. Following the release of the IFSD Phase One Report, the Caring Society and the AFN asked the IFSD to define a funding approach and performance measurement framework for First Nations child and family services, with funding support from Indigenous Services Canada. The purpose of this second phase was to present a funding structure; a means of developing evidence to understand the well-being of children, families, and communities; and a range of scenarios to cost the proposed approach. Canada agreed to fund this second phase on May 13, 2019.

15. On July 31, 2020, IFSD released its second report, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being (the "IFSD Phase Two Report"). Based on 2019/2020 fiscal data, the IFSD Phase Two Report proposes a performance framework called "Measuring to Thrive" and a needs-based block funding approach based on indicators of well-being, bottom-up budgeting complemented by need and performance components, as well as control exercised by First Nations in the development and delivery of child well-being services.

16. The IFSD Phase Two Report outlines a funding approach designed as a block transferred budget with components addressing gaps in need, including prevention, poverty, geography, information technology and capital, with other supplements for the shift to a result-focused approach that addresses the real needs of First Nations children, youth, families, and First Nations. Among the various components costed by the IFSD, the funding approach recommends that prevention be funded (at the upper end) at $2500 per capita, based on community population, automatically adjusted based on inflation and population.

17. On July 22, 2021, the IFSD submitted its response to the AFN's request for proposal for *Research for the Modeling of a Wellbeing Focused Approach for First Nations Child and Family Services Through Performance Budgeting* ("IFSD Phase Three"). IFSD Phase Three is focused on modeling the funding approach outlined in the IFSD Phase Two Report in order to build capacity and an enhanced bottom-up planning framework for FNCFS Agencies and First Nations, while building confidence among stakeholders. Canada agreed to fund the entire proposal on December 31, 2021.

18. On April 2, 2019, the AFN proffered evidence regarding the many challenges youth in care face once they age out of care. On November 22, 2019, Youth in Care Canada released *Justice, Equity and Culture: the First-Ever YICC Gathering of First Nations Youth Advisors* (the "2019 Youth in Care Report"), which was tendered in evidence and referenced in 2020 CHRT 7 paras. 30-32. In December 2021, Youth in Care Canada released *Children Back, Land Back: A Follow-Up Report for First Nations Youth in Care Advisors* (the "2021 Youth in Care Report"). The evidence, including evidence put forward during the hearing on the merits, underscores the need for young people to be involved in matters affecting them on an ongoing basis as well

as services and supports to assist youth in care and former youth in care as they transition to adulthood.

ISC's inclusion of post-majority care in the FNCFS Program

19. Prior to March 2020, First Nations children were no longer eligible for services pursuant to the FNCFS Program when they reached the age of majority in their province or territory of residence.

20. On March 27, 2020, following discussions at the Consultation Committee on Child Welfare ("CCCW"), Canada announced that, as an exceptional measure in response to the COVID-19 pandemic, it would temporarily keep supports in place for First Nations young adults ageing out of care after reaching the age of majority to avoid discharging them from care during the pandemic.

21. In Budget 2021, Canada announced that it would continue to fund post-majority supports under the FNCFS Program for First Nations young adults for up to two years beyond the point the individual is no longer eligible for child and family services, either because they have reached the age of majority, or are no longer eligible for extended care services as per the provincial or Yukon legislation. The Tribunal has found that many of these young people were removed as children unnecessarily due to Canada's discrimination as found by the Tribunal.

22. The evidence filed in support of this motion (some of which is already before the Tribunal) indicates that First Nations youth ageing out of care who do not have access to post-majority supports may have higher needs owing to the multi-generational trauma of residential schools and hardships arising from Canada's discrimination found by the Tribunal. Youth in care and former youth in care are a marginalized group with unique needs that require specific supports.

Canada's Commitments to Immediate Measures that Redress the Ongoing Discrimination

23. Canada acknowledges that it has the onus to redress the discrimination identified by the Tribunal and prevent its recurrence. This consent order is the first step on the path to the long-term measures ordered by the Tribunal.

24. Starting in November 2021, the Parties engaged in settlement discussions regarding the long-term reform of the FNCFS Program and Jordan's Principle. The Parties were assisted by the Honourable Murray Sinclair.

25. On December 31, 2021, the Parties announced that they had reached an Agreement-in-Principle on long-term reform. As part of that Agreement-in-Principle, the Parties committed to reforming the FNCFS Program by March 31, 2023, as well as improving compliance with and reforming Jordan's

Principle. Also, in the Agreement-in-Principle, the parties have agreed that the Reformed CFS Funding Approach will accommodate First Nations and FNCFS service providers experiencing exceptional circumstances, to be defined in the Final Settlement Agreement, which may require a longer transition to the Reformed CFS.

26. In addition, the terms of the consent order sought in this consent motion (see paras 1-9 under “orders sought”) were annexed to the Agreement-in-Principle. Following the execution of the Agreement-in-Principle, the Caring Society, the AFN, and Canada agreed to seek this order as soon as possible.

27. While the research and community consultation are not at a sufficient stage for complete reform of the FNCFS Program to be implemented, the funding of prevention at $2,500 per capita will provide families with supports they need and deserve to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. Prevention funding at $2,500 per capita will also provide First Nations and FNCFS Agencies with greater resources “up front” (as opposed to through the application-based actuals process) and will provide greater funding to First Nations without FNCFS Agencies (currently receiving $947 per capita, subject to inflation adjustments, pursuant to 2021 CHRT 12).

28. With respect to Jordan’s Principle, the evidence demonstrates that for some high needs First Nations youth and young adults who reach the age of majority, the loss of access to Jordan’s Principle is detrimental to them and their families. Canada has agreed to assess the resources required to aid families and/or young adults in identifying supports for needed services for these recipients. Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan’s Principle long-term reform.

29. Canada acknowledges that Indigenous Services Canada (“ISC”) requires transformation in order to address the “old mindset” repeatedly identified by the Tribunal, which contributed to the discrimination under the FNCFS Program and Jordan’s Principle. In response to 2016 CHRT 16 at para 29, 2018 CHRT 4 at para 154, 2019 CHRT 7 at para 63, 2020 CHRT 15 at para 84, and 2021 CHRT 41 at para 341, Canada has agreed to consult with the Parties and continue the implementation of mandatory cultural competency training and performance commitments for employees within ISC, to complete work begun through the CCCW. In addition, Canada has agreed to work with the Parties to establish an expert advisory committee within sixty (60) days of the order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada has further agreed to take reasonable measures to begin implementing the work plan.

30. Finally, the Parties acknowledge that some questions remain unanswered regarding the best path forward for long-term reform. This is particularly the case with respect to modeling the IFSD Phase Two Report, assessing the real needs of First Nations without FNCFS Agencies, formulating a better long-term approach to Jordan's Principle and reforming ISC to prevent the discrimination from recurring. Canada has agreed to provide funding and data to enable IFSD to conduct the following research to assist the Parties in developing long-term solutions to address the findings of the Tribunal:

a. IFSD Phase Three;
b. the Non-Agency First Nations Needs Assessment;
c. the Jordan's Principle Data Assessment; and
d. the Jordan's Principle Needs Assessment.

31. To ensure that the work undertaken by the IFSD can be completed in a timely manner, Canada is agreeing to fulfill all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

Based on Canada's Commitments, the End Date for Compensation Under the FNCFS Program is Justified

32. Based on Canada's consent to the orders outlined herein, the Parties are of the view that the factual basis on which the Compensation Entitlement Decision was made will significantly change as of April 1, 2022, due to increased amounts of prevention funding being made available to communities.

33. In addition, the provision of post-majority supports to young people ageing out of care or young adults who were in care duly considers the multi-generational trauma flowing from Canada's discrimination and enables a more holistic child welfare approach. Young people in care and young adults from care have long advocated for post-majority supports and this action responds to their advocacy.

34. As a result, the Parties request that the Tribunal set March 31, 2022, as the end date for eligibility for compensation under the Compensation Entitlement Decision for the particular victims impacted by the discrimination in the FNCFS Program identified by the Tribunal in 2016 CHRT 2 and subsequent decisions.

35. This amendment to the Compensation Entitlement Decision will resolve one of the issues before the Federal Court of Appeal in Canada's appeal from the Federal Court's decision upholding the Compensation Entitlement Decision.

36. Should the Parties to the Federal Court class proceedings in Federal Court File Nos. T-402-19 and T-1751-21 reach a settlement agreement, Canada

> and the Assembly of First Nations will make submissions to the Tribunal regarding the impact of that settlement agreement with respect to the Tribunal's Compensation Entitlement Decision and Compensation Payment Decision and any relief requested from the Tribunal in that regard.
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> 37. The Parties further rely on:
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> (a) subsection 91(24) of the *Constitution Act, 1867*;
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> (b) Section 53(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;
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> (c) Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's *Rules of Procedure (Proceedings prior to July 11, 2021*;
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> (d) the Tribunal's implied jurisdiction to control its own processes; and
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> (e) such further and other grounds as counsel may advise.

B. Tribunal findings

[25] Some of the evidence such as the affidavits and some attachments were untested, nevertheless the Tribunal may accept such evidence given section 50(3)(c) of the *CHRA*:

> subject to subsections (4) and (5), authorizes the Tribunal to receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law.

[26] However, while the evidence can be accepted under this section, the probative value will be appreciated by the Panel in weighing the evidence.

[27] Furthermore, some of the evidence was already tested at the hearing on the merits or in subsequent proceedings.

[28] The Panel has weighed the evidence considering the above.

[29] Upon consideration, the Panel agrees with the parties' order requests and will address them now in turn.

(i) Performance Informed Budgeting

> Order request #1. Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.

[30] The AFN insisted that discussions on compensation also include a separate track on long-term reform. The Panel believes this was instrumental and necessary. Moreover, it is in line with the Panel's approach to remedies in this case and the Panel's goal to remain seized of this case until sustainable long-term reform orders on consent or otherwise have been made that will eliminate the systemic racial discrimination found and prevent it from reoccurring.

[31] The AFN submits that Canada advised it was open to negotiations on both compensation and long-term reform.

[32] While the Panel has considered all the materials, it finds Dr. Cindy Blackstock's affidavit reliable given her expert knowledge of the matters at hand. Moreover, upon examination of the evidence attached to the affidavit, the Panel finds the affirmed declaration to be consistent with the referenced evidence. Dr. Blackstock provides a concise and very useful outline of this order request indicating that:

> 16. As part of this consent motion, Canada has agreed to reform the FNCFS Program to reflect a performance-informed budgeting approach, with consideration of the well-being outcome indicators defined in the IFSD Measuring to Thrive framework. A Tribunal order requiring Canada to adopt a performance-informed budgeting approach consistent with the Measuring to Thrive framework will provide a foundation for the further development of a durable and equitable long term funding approach for the FNCFS Program that addresses ongoing discrimination and prevents its recurrence. The Measuring to Thrive framework provides the foundation for the further development of the Reformed Funding Approach pursuant to the IFSD Phase Three Research proposal. The Reformed Funding Approach must be based on evidence informed principles including the following:
>
> > a. Funding will be provided by Canada based on evidence informed well-being indicators for First Nations children, youth, and families, as opposed to being driven by bureaucratic markers for funding;

> b. The well-being indicators will facilitate reliable data collection at a community,
> regional and national level to inform best practices and improve federal child welfare policies and legislation over time;
>
> c. Funding will be based on a bottom-up budgeting approach driven by the *actual needs* of children, families and communities, reflecting the guidance and direction provided by the Tribunal to date; and
>
> d. Funding will address the structural drivers of the over-representation as well as culturally based child welfare services.

[33] Dr. Blackstock further affirms that:

> 17. The Measuring to Thrive framework is a results-based tool to plan, monitor, and assess the performance of policies and programs, against the goal of thriving First Nations children, families and First Nations. It is vital that the factors driving the over-representation of First Nations children in care (such as poverty, poor housing, substance misuse and domestic violence) be measured and addressed to ensure success and erase the discriminatory funding practices of Canada.
>
> 18. Implementation of the performance-based budgeting framework in the Measuring to Thrive approach consistent with the IFSD recommendations, will center funding levels and structures on the needs of children, youth and families. This will mark a departure from the non evidence informed bureaucratic approach that was a hallmark of Canada's discriminatory conduct and funding formulas, policies, procedures and agreements under the FNCFS Program.

[34] The Panel finds this approach in line with its findings and previous orders such as a "cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision" order. In other words, those injunction-like powers to cease and desist aim to compel Canada to stop the systemic discrimination found by the Tribunal following the evidence-based findings in the *Merit Decision* and subsequent rulings as a road map with indicators of what constitutes the systemic discrimination found. Further, reform is an important component of the Tribunal's orders. As the Panel previously stated, "By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First

Nations children and families living on reserve" (see *Merit Decision* at paras. 463, underlining changed). Consequently, the National Program, funding formulas and agreements need a full-scale reform not just support pillars (band-aid, unsustainable short-term solutions) put in place.

[35] Further, the Panel believes that the consent order requests are in line with its findings:

> AANDC's [now ISC] reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.
>
> (see *Merit Decision* at para 465, emphasis added).

[36] In 2018 CHRT 4 at para. 236 the Tribunal ordered that its immediate to mid-term orders will remain in effect:

> Until such time as one of the options below occur:
>
> 1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.
>
> 2. Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling.
>
> 3. Reform is completed in accordance with best practices recommended by the experts including the NAC and the parties and interested parties, and Eligibility of reimbursements from prevention/least disruptive measures, building repairs, intake

> and investigations and legal fees services are no longer based on discriminatory funding formulas or programs.
>
> 4. Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel.
>
> (emphasis added)

[37] The Panel believes that subparagraph 4 applies in these consent order requests. Moreover, the Panel believes that some of the consent order requests, including request # 1, are intended to comply in the near future with subparagraph 3 above.

[38] Furthermore, in 2018 CHRT 4 at para. 415:

> The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

[39] Moreover, Dr. Valerie Gideon asserts in her March 4, 2022, affidavit that:

> 7. ISC has agreed to fund the AFN to contract IFSD to undertake Phase Three of its research, *Implementing a well-being focused approach to First Nations child and family services through performance budgeting*. That research will model the reformed FNCFS funding approach with First Nations and service providers. ISC and the parties will consider Phase Three's findings and recommendations in the transition to the new funding approach (recommendations on such topics as the FNCFS Program's performance indicators and the activities of the national First Nations-led Secretariat function).

[40] For the reasons explained above, the Panel agrees to make such order and, as will be explained below, the Panel has the power to make such an order.

(ii) Fund Actual Cost Post-Majority Care

> Order request # 2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March

> 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence- informed way agreed to by the Parties.

[41] Dr. Blackstock in her affidavit and evidence correctly characterizes the Tribunal's previous decisions and the evidence in the record.

[42] Dr. Blackstock affirms that:

> 31. [a]lthough the Tribunal did not directly address or consider post majority services in the *Merits Decision* or in the rulings that followed, evidence was tendered during the hearing on the merits on some of the tragic circumstances facing First Nation youth leaving care at the age of majority. Excerpts of the following evidence from the hearing on the merits are attached as Exhibit "E" to [her] affidavit:
>
> a. Commission's Book of Documents, Tab 3: National Policy Review at p. 56;
>
> b. Commission's Book of Documents, Tab 5: Wen: De We are Coming to the Light of Day at pp. 195 and 200;
>
> c. Commission's Book of Documents, Tab 389: Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair at p. 44;
>
> d. My February 25, 2013, examination-in-chief at pp. 146-147; and
>
> e. Betty Kennedy's September 4, 2013, examination-in-chief at pp. 14.

[43] The Panel agrees with the Caring Society that:

> 32. [i]t is important to recognize that, given the long history of this case, all First Nations young adults currently aged 18-25 who were placed in care under the FNCFS Program experienced the harms arising from Canada's discrimination. Canada, therefore, has a positive moral obligation to provide supports to these young people to mitigate some of the harms its willful and reckless discrimination caused. The Panel also agrees the evidence listed by Dr. Blackstock above address leaving care at the age of majority and support the need for the requested order.
>
> The Caring Society believes strongly in centering and empowering the voices of youth in care. Therefore, on September 2019, the Caring Society entered

> into an agreement with Youth in Care Canada ("YICC") to organize a national consultation with First Nations youth in care or formerly in care regarding the Compensation Process. In November 2019, YICC released *Justice, Equity and Culture: the First-Ever YICC Gathering of First Nations Youth Advisors*, which is attached as Exhibit "11" to [Dr. Blackstock's] December 8, 2019, affidavit filed with the Tribunal. This report makes important recommendations regarding the Compensation Process and recommendations regarding child welfare system reforms, including the need for post-majority supports for youth transitioning out of care.
>
> In November 2021, the Caring Society entered into an agreement with the Assembly of Seven Generations (A7G) to provide an advisory report regarding reform of the FNCFS Program, among other things. In January 2022, A7G released *Children Back, Land Back: A Follow-Up Report of First Nations Youth In Care Advisors*. This report also included key recommendations regarding the need for supports for First Nations young adults transitioning out of care. A copy of this report is attached to [Dr. Blackstock's] affidavit dated March 4, 2022, as Exhibit "F".

[44] The Panel has considered the evidence provided through Dr. Blackstock's affidavit alongside all the evidence in the record.

[45] The Panel considered and accepted the YICC's 2019 recommendations as part of the compensation process orders (see 2020 CHRT 7 at paras. 31-34).

[46] The Panel finds the YICC reports and recommendations to be reliable given the methodology employed to arrive to their findings. Furthermore, the reports and recommendations are also highly relevant given the YICC's direct knowledge and experience of the impacts of being in care and aging out of care.

[47] The findings in YICC's report *CHILDREN BACK, LAND BACK: A Follow-Up Report of First Nations Youth In Care Advisors* discuss how the underfunding impacted their childhood and adolescence as well as long-term impacts. These impacts included the following but are not limited to:

- Removal from birth, biological or blood family
- Lack of support for birth, biological or blood family – money instead flows to foster families. In this vein, there are minimal supports to be able to cover the cost of living.

> • Lack of resources for child and family services as well as related services which have a major impact on child and family well-being, for example health clinics, therapy, and rehab centers on reserve.
>
> • Youth believe underfunding caused them to be shifted from temporary to permanent wards of the state and even resulted in being adopted to non-Indigenous families.
>
> • Attending services and placements not culturally safe therefore resulting in experiences of microaggressions and racism.
>
> • Struggling with addiction and mental health with no proper supports.
>
> • Experiencing homelessness and poverty especially after aging out of care.
>
> • Increased vulnerability of experiencing human trafficking.
>
> • Increased interaction with the criminal justice system (for the youth in care as well as their families).
>
> • Lack of supports to succeed in school, resulting in high school dropouts and undiagnosed learning disabilities.

[48] The YICC report #2 made important recommendations and stated that "while we cannot turn back time to undo the harm and abuse that Indigenous youth and children have experienced in child welfare, we can use the lessons of hindsight and the generations of reports, recommendations and solutions to prevent harm and abuse from happening to another generation of Indigenous youth and children" (p. 28).

[49] Another important recommendation is that:

> Canada and its provinces/territories must acknowledge and be honest about the violence they have caused to Indigenous youth and children and their families through their policies and legislation. This acknowledgement of past and ongoing violence must be followed up with actions and systemic changes.
>
> Within this acknowledgement, Indigenous rights as well as distinctions-based rights, treaty rights, and inherent rights must be recognized. Indigenous peoples must be involved in every aspect of these systems that impact them alongside evaluation of these systems to ensure ideologies are remedies. Furthermore, First Nations must be supported to move to self government with culturally based and equitable funding if they want to go that path.
>
> (p. 28, emphasis omitted).

[50] The YICC report also mentions at p. 30 that:

> It is an understatement to say that the relationship between Indigenous youth, children, families and communities and Canada is tense and strained. Trust has been broken. Those that have been impacted by child welfare want to see justice and accountability. Canada cannot be trusted to make the best decisions for Indigenous youth and children and Canada's promise to do better cannot be trusted. Until trust can be rebuilt, there must be a mechanism in place that can hold Canada accountable. This mechanism must be led and designed by Indigenous youth as mentioned in *Accountability in Our Lifetime: A Call to Honour the Rights of Indigenous Children and Youth*.

[51] Some of the recommendations are directed to youth aging out of care:

> Presently, supports to "age out" of child welfare vary by province and territory. The First Nations Child and Family Services program ends care at age 18, though there is an ongoing moratorium on "aging out" of care due to the COVID-19 pandemic. The Federal 2021 Budget promised to "permanently ensure that First Nations youth who reach the age of majority receive the supports that they need, for up to two additional years, to successfully transition to independence." It is essential to listen to and incorporate feedback from the youth who will be impacted by this policy change. The decision to formally transition into adulthood must also be made in consultation with the youth leaving care – including based on their own readiness level. Supports must be provided to help youth transition into adulthood.
>
> (p. 37)

[52] The Panel accepts the YICC's recommendations and finds that many findings in report #2 to be corroborating the evidence provided by the parties in these proceedings that led to the Tribunal's previous findings. This speaks to the probative value of the report #2. Finally on this point, the Panel wants to emphasize the YICC's voices have also been heard by this Tribunal. The Panel values the YICC's viewpoint informed by direct experience.

[53] Moreover, research has been completed by Dr. Mary Ellen Turpel-Lafond. Dr. Turpel-Lafond's report, "On Their Own: Examining the Needs of B.C. Youth as They Leave Government Care", dated April 2014, explored the issue of the termination of services for youth involved with the child and family services system in British Columbia when they reach the age of 19. This report noted that despite improvements to the supports available to transition young people out of care and into independence, there remains much to be done to assist them to become full, contributing members of society. This report is filed as an exhibit to the affidavit of Dr. Mary Ellen Turpel-Lafond on April 2, 2019.

[54] The report, “Paige’s Story: Abuse, Indifference and a Young Life Discarded”, filed as an exhibit to the affidavit of Dr. Mary Ellen Turpel-Lafond on April 2, 2019, provides an analysis of ongoing issues faced by Indigenous youth involved with the child and family services system. The report documents the life of an Indigenous girl from British Columbia, who never received the nurturing or protection she deserved. The Representative has taken the unusual step of using Paige’s actual name in this report, because it is important to acknowledge that this is the story of a real girl, a real person – a person who deserved much better from the society in which she briefly lived. Paige was in and out of the child and family services system, being moved some 50 plus times between the ages of 14 to 16. There were serious issues with respect to Paige’s required protection, but various parties who had interactions with Paige failed to report her circumstances to the authorities. This resulted in Paige aging out of care at age 19 without a transition plan or adequate supports, which culminated in Paige’s death from an overdose shortly after her 19th birthday. The outcome was predictable and should have been prevented. The report made several recommendations regarding the “professional indifference” demonstrated by those who are supposed to care for children that contributed to Paige’s death, and to put in place safeguards for all children in care, with particular attention paid to Indigenous children, to provide and enhance transition supports as they age out of care.

[55] Further, the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, is attached to Stephanie Wellman’s affidavit dated March 7, 2022, as Exhibit “H”. This Report outlines the need for support for youth aging out of care. For example, Call for Justice 12.11 outlines further programming recommendations for youth "aging-out" of care. These recommendations include “a complete network of support from childhood into adulthood based on capacity and needs,” as well as “opportunities for education, housing, and related supports. This includes the provision for free post-secondary education for all children in care in Canada.”

[56] The Panel finds there is sufficient probative, relevant and reliable evidence in this case to make the requested order.

[57] The Panel agrees with the consent order request and finds this could bring positive change to youth aging out of care especially given the higher risks to experience,

homelessness, poverty and human trafficking and other risks as identified in YICC's report #2 and referred to above.

[58] Moreover, the MMIWG, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* vol. 1a, made similar findings:

> The National Inquiry heard about instances of human trafficking from First Nations, Inuit, and Métis witnesses, who often spoke about their experiences within the context of their history within child welfare, or the need to find medical care not available in home communities
>
> (p. 565)
>
> For Indigenous girls and 2SLGBTQQIA youth, the dangers associated with moving from one place to another or with being displaced from a safe community are significantly heightened. However, given the extensive violence and abuse experienced by many youth in care, leaving a foster home or other living accommodation may be the only option that seems to exist in order to escape violence.
>
> … Erin Pavan, the manager of STRIVE Youth in Care Transition Program, poignantly described the lack of security that exists for Indigenous girls, youth, and 2SLGBTQQIA people in these contexts: "So, aging out of care is really like a euphemism for the abrupt termination of all … services. Like, this 'aging out,' I don't even like this term, I think it's too gentle for what the experience is; it's like being pushed off a cliff, right?"
>
> For many of the family and friends who shared their truths, the failure to address the realities of abuse and violence experienced by children and youth within child welfare forces many youth, in their attempts to escape violence, to enter into more dangerous situations, which usually begin with running away. Even for those youth who do remain in care, aging out of care and the lack of support are akin to – as Erin puts it – pushing them off a cliff. In both cases, poverty, housing, barriers to education, and unique vulnerabilities to drugs, trafficking, and other forms of interpersonal violence collectively remove safety. As we heard from many families, recognizing what happens at the edge of this cliff and how basic economic and social security is undermined here is key to understanding the violence that leads to the disappearance and death of Indigenous women and girls.
>
> …
>
> Understandably, the challenges of daily survival mean that, for many youth in foster care or those who have aged out of foster care, completing high school,

pursuing post-secondary education, or finding employment become impossible. Erin Pavan put things into perspective.

> They're not graduating high school; I think that by age 19, like 32% of youth aging out of care will have a high school diploma, compared to 84% for the general population. And, so they're not finishing school.
>
> They're also less likely to have a job. They're going to make less money. A lot of them are relying on income assistance right off the bat, 40% will go right onto income assistance.
>
> The income assistance rate just finally got raised in BC, but for Vancouver it is not even near enough money to live off of. You can't even pay rent with it, never mind buy food. So they're going into extreme poverty right off the bat, with no high school diploma, not enough supportive people in their lives. Obviously, by definition, anyone who's been through care is going to have trauma. So they've got trauma; they're more likely to have issues with their mental health, with substance use, more likely to be involved with the criminal justice system, become young parents. They're more likely to die young. Of the 1,000 youth who age out of care in BC every year, three to four will be dead before they turn 25.
>
> So I think you can really see the connection, right, between the missing and murdered young women and the care system.

(pp. 555-557, footnotes omitted).

[59] The Panel thanks the parties for this important advancement and their dedicated efforts. The Panel is honored to make such an order that may have far reaching positive effects for youth aging out of care.

[60] Finally on this point, the Panel finds it has the power to make such an order. As successfully demonstrated by the parties, the evidence in this case supports the order. The Tribunal's powers to make the order are further explained below.

(iii) High Needs Jordan's Principle Recipients past the Age of Majority

> Order request # 3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority

> (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.

[61] Stephanie Wellman, Director of Social Development with the Assembly of First Nations (AFN), employed with the AFN since May 2015, provided an affidavit affirmed on March 7, 2022. Prior to this Ms. Wellman worked in the AFN Health Sector and transferred sectors in March 2018 to the AFN Social Development Sector. In the Social Development Sector, she worked on Jordan's Principle until 2019.

[62] The Panel finds her affidavit and evidence very helpful given her relevant experience and expertise and the important details provided in her affidavit and evidence. Moreover, the Panel finds the evidence filed to support her affidavit does corroborate her declaration.

[63] She affirms that:

> 16. On December 31, 2021, the Parties executed an AIP on long-term reform and a separate AIP on compensation. On January 4, 2022, the Parties publicly announced that they reached these agreements. As part of the AIP on long-term reform, and upon execution of a Final Settlement Agreement by November 30, 2022, the Parties committed to reforming the FNCFS Program by March 31, 2023 and improving Canada's compliance with and reforming Jordan's Principle.

[64] As Ms. Wellman stated in her affidavit:

> 20. The AFN has been mandated and called on by First Nations leadership, parents and caregivers, Jordan's Principle Service Coordinators (Navigators) and others with intimate knowledge of the impact of Jordan's Principle to advocate for supports for youth with disabilities beyond the age of majority. The advocacy of the AFN has been fundamental in supporting and calling on Canada to address said issues, which is an immediate measure requested in this Motion.
>
> 21. The AFN Chiefs-in-Assembly have called for the need to improve how Jordan's Principle is delivered, with a goal of ensuring that First Nations are not limited by the current program authorities. This was a component of AFN Resolution 27/2018, *Support for the long-term implementation of Jordan's Principle*, attached to [her] affidavit as "Exhibit A".

22. The AFN has participated in and organized several gatherings concerning Jordan's Principle. During these sessions, the AFN heard the need to be supporting youth beyond the age of majority, as disabilities do not simply end when a child turns 18.

23. At the Jordan's Principle Service Coordinators Gathering in November 2019, presenter Lyndia Jones, from the Independent First Nations (Ontario), provided a recommendation for on-reserve disability services for First Nations children "aging out" of Jordan's Principle eligibility, attached to [Ms. Wellman's] affidavit as "Exhibit B".

24. Further, at the Jordan's Principle Summit in September 2018, the challenges of youth aging out of Jordan's Principle eligibility were noted, referencing the need for adult-focused disabilities programs on-reserve, and support for caregivers. The report from the Jordan's Principle Summit is attached to [Ms. Wellman's] affidavit as "Exhibit C".

25. The AFN led national engagement on federal accessibility legislation and noted the potential implications for First Nations persons with disabilities.

…

> The most prominent shortcomings of Jordan's Principle are the stringent eligibility criteria and the child only policy, providing no greater access to services or protection from jurisdiction wrangling for [First Nations persons with disabilities] over 18 years of age" (Appendix B, p. 7).

[65] The Panel finds this is supported by other evidence found at pages 7-8 of Appendix B to the AFN led Engagement on Federal Accessibility Legislation dated March 2017). Further, in Appendix A, at p. 18:

> Jordan's Principle could be expanded in contemplation of accessibility legislation to apply to any First Nations person, regardless of age, with any type of disability or disabilities caught in a jurisdictional dispute where those services are available off-reserve.

[66] Ms. Wellman's affidavit continues:

26. [She states that] a number of reports have supported the AFN's advocacy efforts and First Nations concerning the issue of post-majority care for high needs individuals. In terms of regional reports, the Keewaywin Engagement Manitoba First Nations Jordan's Principle Implementation Report, from Manitoba in 2017 call for supports beyond the age of 18, attached to my affidavit as "Exhibit E", states:

> Youth with special needs that are aging out of care require support past 18 years of age and the same services and supports they received while under the age of 18 must continue into their adult lives. Providing life skills programming and access to independent living units will empower our young adults aging out of care to move toward independence.

…

> 31. In the final report of the Public Inquiry Commission on relations between *Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, known as the Viens Commission report, is attached to [Ms. Wellman's] affidavit as "Exhibit G". This report recommended that the provincial government "initiate discussions with the federal government to extend the Jordan's Principle to adults".

…

> 34. In 2021, three human rights complaints were filed against Canada for its failure to support First Nations adults with disabilities in Manitoba. The complaints highlight that Jordan's Principle has effected important changes for children and youth with disabilities. However, there remains a critical gap when youth reach the age of majority, who are then left without the services and supports that they were receiving. These complaints also bring forward concerns about connection to culture for young adults and other adults with disabilities who are forced to leave their communities to access supports, due to the lack of disability supports and services on-reserve.

[67] Dr. Blackstock affirms in her March 4, 2022, affidavit that:

> 36. The Caring Society provides some assistance to First Nations children, families and First Nations community navigators to ensure ISC's approach and provision of Jordan's Principle is consistent with the Tribunal's decisions. In this role, we have encountered many First Nations youth who are receiving significant supports, services, and products via Jordan's Principle. Some of these individuals are high needs youth who are having their day-to-day needs managed and met by services funded under Jordan's Principle. ISC ceases providing Jordan's Principle services, products and supports when youth reach the provincial age of majority meaning that high needs adolescents will almost certainly experience gaps in supports, services and products detrimental to their health and overall well-being.

[68] The consent order sought will enable Canada to assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority.

[69] After considering all the evidence including the above, the Panel agrees with the requested order. The Panel finds the evidence filed as part of this motion supports a finding that First Nations with high needs and with disabilities given the eligibility cut-off when reaching the age of majority stop receiving services under Jordan's Principle and experience barriers and gaps in services.

[70] Of note, the First Nations and First Nations Persons with Disabilities Engagement on Federal Accessibility Legislation report dated March 2017, at Appendix B, page 8, mentions that:

> Due to the fact that there is no clear governmental department that should be responsible for providing services to First Nations Persons With Disabilities, it is necessary that the government develop a cross-departmental coordinated effort […] to ensure a comprehensive provision of services.

[71] The requested order will allow to obtain evidence-based information to ensure First Nations persons with disabilities and high needs reaching the age of majority have their specific needs met. This is consistent with applying a substantive equality lens to services and programs.

[72] It is also in the interest of the good administration of justice and human rights to address this now rather than to wait for the three complaints to proceed.

[73] Finally on this point, the Panel finds it has the power to make such an order. As successfully demonstrated by the parties, the evidence in this case supports the order. The Tribunal's powers to make the order are further explained below.

(iv) Fund Needs Assessment and Long Term Funding Research

> Order request # 4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):
>
> a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;
>
> b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they

relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");

c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and

d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle, including but not limited to identifying and addressing formal equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").

[74] In her March 4, 2022, affidavit, Dr. Blackstock affirms that:

39. The Caring Society recognizes that further funding approach research and work is required to achieve meaningful long-term reform to satisfy the Tribunal's direction in the *Merits Decision*. Under the FNCFS Program, further research is necessary to model the Measuring to Thrive framework as outlined in the IFSD Phase Three Proposal. …

40. The results of the IFSD Phase Three work will assist the Parties in finalizing a long-term reform funding approach for the FNCFS Program (the "Phase Three Recommendations"). Canada's agreement to fund this work as of December 31, 2021, pursuant to this consent motion is an important step to reforming the FNCFS Program on a final basis. …

41. Research to inform evidence-based long-term reform recommendations for Jordan's Principle will be critical to ensuring that Jordan's Principle is equitable, sustainable, accessible and that Canada is held accountable for the full and proper implementation of the Tribunal's orders. The Caring Society strongly believes such research must inform a longer-term funding approach for Jordan's Principle that embeds the Measuring to Thrive framework indicators for children, families, and communities to promote more holistic and seamless funding. We also see value in underpinning Jordan's Principle with the Spirit Bear Plan, given the large number of Jordan's Principle requests that relate to formal equality.

[75] Further:

42. IFSD has agreed to take on this Jordan's Principle research and, pursuant to this consent motion, Canada has agreed to fund it.

[76] The Panel agrees with the Caring Society and finds this is in line with the Panel's approach, findings and orders to eliminate systemic discrimination and prevent the same or similar discriminatory practices to emerge. Moreover, recently filed evidence in support of this motion substantiates Dr. Blackstock's assertions. The Panel finds this order is necessary to achieve evidence-based meaningful and sustainable long-term reform informed by the real needs of children, youth and families. This is consistent with the Panel's orders to provide services according to the First Nations children's real needs.

[77] In her March 7, 2022 affidavit, Ms. Wellman states that:

> 37. The work of the IFSD has been critical thus far in the matter associated with this motion and negotiations in understanding and formulating a well-being focused approach for FNCFS. The need for an evidence base and equitable funding regime for FNCFS has long been recognized by First Nations citizens and leaders, service providers, and academics and has led to a long history of research which preceded the IFSD reports. This was the goal of the Joint National Policy Review in 2000 and of the Wen:de Reports in 2005, which stated that "any new funding regime should be founded on evidence-based research and data – not speculation."

[78] The Panel arrives to the same conclusion in weighing previous evidence and recently filed evidence in the record.

[79] Furthermore, Ms. Wellman asserts in her March 7, 2022 affidavit that:

> 38. … research is vital to the success of FNCFS reform. Evidence-based decision-making in child and family services is essential to reduce risk factors through targeted interventions for First Nations children and families to achieve long-term goals and ensure that interventions achieve intended outcomes. The AFN has advocated for this research to be completed. The Parties to the FNCFS and Jordan's Principle negotiations with respect to the AIP agree that Canada shall fund research by the IFSD.

[80] She further adds that:

> 53. … [D]ue to bureaucracy and underfunding of other programs, parents, guardians and professionals must seek other ways for First Nations children's needs to be met and continue to turn to Jordan's Principle.

[81] Ms. Wellman affirms that:

57. … [C]hallenges have been noted at Jordan's Principle Operations Committee meetings, including on October 30, 2020 [excerpt from meeting record, full meeting record and presentation attached as "Exhibit O"]:

> The approved requests need to be situated within the context of the compliance rates and denials in order to give the broader context. …

…

59. For example, the 2020-21 deep dive analysis and summary of key findings (attached to [Stephanie Wellman's] affidavit as "Exhibit P") points to a high number of approved requests in the areas of education, medical transportation, respite, mental wellness and allied health, across individual and group requests. …

60. The 2020-21 deep dive analysis also indicates challenges with compliance with this Panel-ordered timelines: 65% for individual urgent requests; 63% for non-urgent individual requests; 35% for urgent group requests; and 73% for non-urgent group requests.

[82] Further, in Stephanie Wellman's affidavit dated March 7, 2022:

59. … The deep dive indicates that roughly half of the approved products and services under individual and group requests are within the normative standard (p. 2).

[83] Again, in Stephanie Wellman's same affidavit:

58. Further, the data that is reported on in the deep dive analysis does not give a full picture of where the gaps exist. While the analysis certainly points to where gaps may exist, there is a need for a comprehensive analysis of the data to understand the true scope and depth of the gaps. This work would assist to identify what is required to fill them.

…

61. A complete understanding of what is currently being covered by Jordan's Principle is required for true equality to exist for First Nations children. For instance, analysis on the services and supports being sought and their cost is critical to forecasting expenditures within Jordan's Principle and to supporting the identification of gaps in other programs and services to fill them. The work proposed by the IFSD Jordan's Principle Data Assessment and Jordan's Principle Needs Assessment will assess these critical gaps and measure what is needed to close them.

[84] The Panel entirely agrees and finds this is supported by the evidence.

[85] The parties have obviously and carefully thought this through and intentionally negotiated the required elements to be covered by further IFSD research to achieve evidence-based long-term reform for the benefit of First Nations children, youth and families. As successfully demonstrated by the parties, the evidence in this case supports the order.

[86] Therefore, the Panel finds it has the power to make such an order. The Tribunal's powers to make the order are further explained below.

(v) Timelines for Supporting Research Data Requests

> Order request #5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

[87] This request is ancillary to the request to fund the various IFSD research studies. It creates expectations for both the researches conducting the studies and Canada in supporting the research by providing relevant information. The Panel agrees with this wise operative request to ensure the IFSD work is efficient and has all the necessary data to conduct its research without experiencing long delays. As it will be explained below, the Panel has the authority to make such a consent order.

(vi) ISC Cultural Competency and Anti-Discrimination Plan

> Order request #6 a. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada.
>
> Order request #6 b. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.

[88] As set out in Dr. Blackstock's affidavit dated March 4, 2022:

> 48. The NAC has considered necessary reforms of ISC and reforms within the Government of Canada. In its *Interim Report of the National Advisory Committee on First Nations Child and Family Services Program Reform, January 2018* [see Exhibit I attached to Dr. Blackstock's affidavit], the NAC

makes several recommendations regarding internal reform, training, and education, including the following:

> a. A comprehensive 360 evaluation of ISC's FNCFS Program and Jordan's Principle must be completed to ensure it is fulfilling the Treasury Board Authorities and is compliant with the law and Canada's commitment to the Truth and Reconciliation Commission (TRC) Calls to Action. Such an evaluation should include consultation with First Nations leadership, FNCFS Agencies and experts such as provincial/territorial child advocates. The evaluation can inform the reformulation of ISC and Indigenous Crown Relations. This evaluation should be made public, and the evaluation team/group will be selected jointly by First Nations leadership and Canada. These evaluations should be done every 4 years to ensure ongoing compliance (see p. 17).
>
> b. Mandatory training for all Government of Canada officials interacting with First Nations children, youth and families on First Nations peoples and reconciliation (see p. 17).
>
> c. Linking performance measures and awards for all Government of Canada employees interacting with First Nations children, youth and families with compliance with the TRC Calls to Action and the *United Declaration on the Rights of Indigenous Peoples* ("UNDRIP") (see p. 18).

…

> 50. From the Caring Society's perspective, reform of ISC is critical to sustainable and equitable long-term reform. In addition to the recommendations made by the NAC, the Caring Society will continue to advocate for full ISC reform including: (a) ensuring that ISC staff have proper credentials in First Nations child and family services, children's health, education and social services; (b) implementing employee performance and incentive programs linked to ensuring non discrimination and alignment with human rights law, including but not limited to the United Nations Convention on the Rights to the Child (with attention to General Comment No. 11) and UNDRIP; and (c) adoption and implementation of the Spirit Bear Plan to address all inequities in federally funding public services. The Spirit Bear plan was introduced as an exhibit to the cross examination of Sony Perron (then Associate Deputy Minister at Indigenous Services Canada) on May 9, 2018, and a copy is attached to Dr. Blackstock's affidavit as Exhibit "J".

[89] The Panel accepts the above and finds this is consistent with the evidence and history in this case. For example, in the *Merit Decision*, the Panel wrote:

> [449] The *CRC*'s monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25).

[90] As set out in Ms. Wellman's affidavit of March 7, 2022:

> Moreover, the AFN Chiefs-in-Assembly unanimously supported the Spirit Bear Plan during the 2017 Special Chiefs Assembly through AFN Resolution 92/2017, Support the Spirit Bear Plan to End Inequities in all Federally Funded Public Services for First Nations Children, Youth and Families, attached to [Stephanie Wellman's affidavit dated March 7, 2022] as "Exhibit R".

[91] The Spirit Bear Plan is set out as Exhibit J to Dr. Blackstock's affidavit dated March 4, 2022 and as Exhibit Q to Stephanie Wellman's affidavit dated March 7, 2022:

> Spirit Bear calls on:
>
> > 1 CANADA to immediately comply with all rulings by the Canadian Human Rights Tribunal ordering it to immediately cease its discriminatory funding of First Nations child and family services. The orders further require Canada to fully and properly implement Jordan's Principle (www.jordansprinciple.ca). all federally funded public services provided to First Nations children, youth and families
> >
> > 2 PARLIAMENT to ask the Parliamentary Budget Officer to publicly cost out the shortfalls in all federally funded public services provided to First Nations children, youth and families (education, health, water, child welfare, etc.) and propose solutions to fix it.
> >
> > 3 GOVERNMENT to consult with First Nations to co-create a holistic Spirit Bear Plan to end all of the inequalities (with dates and confirmed investments) in a short period of time sensitive to children's best interests, development and distinct community needs.
> >
> > 4 GOVERNMENT DEPARTMENTS providing services to First Nations children and families to undergo a thorough and independent 360° evaluation to identify any ongoing discriminatory ideologies, policies or practices and address them. These evaluations must be publicly available.
> >
> > 5 ALL PUBLIC SERVANTS, including those at a senior level, to receive mandatory training to identify and address government

> ideology, policies and practices that fetter the implementation of the Truth and Reconciliation Commission's Calls to Action.

[92] The Panel notes that included in the MMIWG report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, filed in evidence in support of this motion, there is a specific call to justice concerning the Spirit Bear Plan:

> 12.13. We call upon all governments and child welfare agencies to fully implement the Spirit Bear Plan.

[93] Furthermore, Canada publicly accepted the MMIWG report and findings. Consequently, the Panel believes this should inform long-term reform.

[94] In her affidavit, Stephanie Wellman asserts that:

> 67. … First Nations have called for training to be given to senior officials at ISC and the Department of Crown-Indigenous Relations and Northern Affairs Canada. Such training may include ongoing evaluation to ensure officials understand the information and can translate it into practice effectively.
>
> 68. Training would be directed by an expert Advisory Committee and may include the development and implementation of a training program for all staff working with the FNCFS Program. While the scope and content of the training has yet to be developed, the AFN is of the view that such training may cover:
>
> - First Nations' cultures, worldviews, and histories;
> - Factors contributing to the over-representation of First Nations children in child and family services, including the intergenerational impacts of the Residential Schools;
> - The findings of the MMIWG2S inquiry, including how it impacts First Nations families;
> - Recent social movements like Idle No More or Families of Sisters In Spirit;
> - The history of the FNCFS Program, including the reviews and evaluations conducted from 2000 to 2011 and this Panel's findings.

[95] Moreover, Dr. Blackstock states that:

> 47. [she] recognizes that Canada has done some work on staff training. However, this is not sufficient to address the ongoing discrimination or prevent its recurrence. For example, Dr. Amy Bombay designed training for ISC staff on matters directly relating to the Merits Decision ranging from residential schools to child development. She conducted a pre- and post-test of ISC employees who took the training. Results indicate ISC staff showed a positive benefit from that training regarding historical understanding and matters peripheral to their duties. However, old mindset thinking patterns became more entrenched when the training included material about contemporary injustices. Consistent with the Tribunal's orders, the Caring Society will work to ensure that the final settlement agreement includes evidence informed long-term reform measures for child and family services and Jordan's Principle that include significant and structural changes within the Department to safeguard against a repetition or new manifestation of the discrimination experienced by First Nations children, youth, and families.

[96] Dr. Blackstock further asserts that:

> 46. [t]he immediate steps in the proposed consent order regarding reform at ISC are of great importance to the Caring Society. Canada has a long history of failing to take adequate steps to implement many measures to save children's lives and childhoods. This is reflected in the numerous non-compliance and procedural motions required to get Canada to act since the *Merits Decision*. This pattern of Canada knowing better but not doing better even when the arising harms are severe is emblematic of Canada's historic and contemporary conduct toward First Nations children, youth, and families. Up until now, there is little evidence that Canada has learned from its misconduct and made changes so that it does not recur. In my view, this pattern is clear in the findings made by the Tribunal in the *Merits Decision* and in the subsequent decisions related to non-compliance.

[97] According to Stephanie Wellman:

> 66. [t]he AFN has heard from First Nations that the overall training should include a truth telling component on how Canada's past and contemporary actions impact First Nations children, youth, and families to identify and remediate colonial philosophies, practices and policies that persist today. Such training may include experiential learning relevant to the First Nations served by the officials, such as Elder's teachings, ceremonies, the *Touchstones of Hope*, and attendance at First Nations research seminars and Elder's gatherings to ensure ongoing professional development.

[98] The Panel accepts the above and finds this is consistent with the evidence, the Panel's findings and the history in this case. The Panel agrees with the AFN and insists that training should include a truth-telling component, all the items listed above and the Tribunal's

findings and orders. While the Panel acknowledges Canada's steps forward, the Panel has emphasized on multiple occasions the need for ISC to eliminate its old mindset, an important contributing factor that led to systemic discrimination.

[99] The Panel finds it has authority to make the requested order which is necessary and supported by the evidence in this case. The Tribunal's powers will be further detailed below.

[100] Moreover, Dr. Blackstock affirms in her March 4, 2022, affidavit that:

> 53. … [she hopes] that these incremental changes will result in significant structural reform within ISC and lead to the extinguishment of the "old mindset" of the Department that has resulted in devastating impacts on First Nations children, youth and families. Without these fundamental changes, there will be no lasting and durable reform.

[101] Dr. Gideon in her March 4, 2022, affidavit provides important details on this point. In sum, she affirms that:

> 32. ISC, the AFN and the Caring Society will discuss and agree to a list of candidates to join a new Expert Advisory Committee to support the design and implementation of an independent evaluation of ISC. …
>
> 33. ISC will initiate the process to put in place a contract for expert evaluators to support ISC, the parties and the Expert Advisory Committee in developing a framework for ISC's internal evaluation. This framework is still to be developed. Discussions to date have focused on innovative methodologies to identify systemic barriers that have led to the discrimination related to First Nations children and youth in ISC as identified by the Tribunal. Following the work of the Committee and discussion between the parties, recommendations will be developed based on the findings to identify actions required to redress and prevent the discrimination identified by the Tribunal from recurring.

[102] The Panel finds this order request is well in line with its previous findings and orders to redress and prevent the discrimination identified by the Tribunal from recurring. The Panel believes that this could lead to positive outcomes.

[103] Furthermore, in its *Merit Decision* and subsequent rulings, the Panel stressed the importance of ceasing the mass removal of First Nations children from their homes, families, communities and Nations now. The Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue. However, it was never the sole issue that led to findings of systemic

discrimination. Other structural and systemic changes ought to be made for the Panel to consider the systemic discrimination is eliminated in the long-term.

[104] This order request may be responsive to address those structural and systemic changes. Further, this order is supported by the evidence and previous findings in this case. Finally on this point, the Tribunal has the power to make such an order as it will be further explained below.

(vii) Amendment to 2018 CHRT 4

> Order request # 7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4
>
> > [421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at $2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the $2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services. These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

[105] The Tribunal will explain its findings and reasons for both prevention funding Order requests 7 and 8 under the order request 8 below.

(viii) Amendment to 2021 CHRT 12

> Order request # 8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

> [42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at $2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

[106] On March 7, 2022, Stephanie Wellman's provided a very helpful affidavit and evidence attached. Upon review of the evidence attached to the affidavit, the Panel finds the evidence to be consistent with the affirmed declaration. Stephanie Wellman indicates that:

> 70. First Nations have long advocated for adequate prevention funding for FNCFS. It has been well documented in reports, such as the *Wen:de We are Coming to the Light of Day*, Royal Commission on Aboriginal Peoples filed into the record as Exhibit HR-2, and the Joint National Policy Review (2000) filed into the record as Exhibit HR-1, that the current funding formula for the FNCFS Program inadequately invests in prevention.
>
> 71. Prevention within the FNCFS Program reform context must aim to ensure that children remain in their family and First Nation as a priority, with removal as a last resort. Prevention, including early intervention policies, must be adequately practiced and funded in each community.

[107] The Panel agrees and has considered the above-mentioned evidence and has made multiple findings in that regard, e.g. 2018 CHRT 4:

> [161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the [*Merit*] *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[108] Stephanie Wellman also affirms prevention "must be developed and mobilized to the standards that communities set and at the levels that communities decide" (March 7, 2022 Affidavit at para. 71).

[109] The Panel finds this is consistent with the spirit of its rulings requiring Canada to consider the unique and distinct needs of First Nations communities and to avoid a one-size fits-all top-down approach. In 2018 CHRT 4, the Panel wrote:

> [163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance (emphasis added).

[110] Stephanie Wellman adds that:

> 72. Canada must consider prevention and reform within the context of First Nations social determinants of health and wellbeing, including environment, education, gender, economic opportunities, community safety, housing and infrastructure, meaningful access to culture and land, access to justice, and individual and community self-determination, among others.
>
> 73. Prevention must address the structural and systemic reasons for First Nations' higher rates of involvement with child and family services. For example, housing, water, racism, infrastructure inadequacies, poverty, etc. All these impact child and family wellbeing, and prevention must therefore encompass the systemic drivers of First Nations' overrepresentation in child and family services. Systemic change must also recognize the colonization of First Nations as a fundamental underlying health, social and economic determinant.
>
> 74. Prevention must include evidence-based primary, secondary, and tertiary culturally based programming situated in a life-course continuum: from pre-natal development to birthing, childhood, adolescence, adulthood, as Elders, and through death and post-death.

[111] The Panel entirely agrees with the above. This corroborates the evidence in this case and is in line with the Panel's findings in the *Merit Decision* and in 2018 CHRT 4:

> [166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the [*Merit*] *Decision* at paras. 341-347), (emphasis added).

[112] As explained above and in previous rulings, the Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue.

[113] For example, in 2018 CHRT 4, a prevention/least disruptive measures focused ruling by this Tribunal, found (emphasis omitted):

[93] The fundamental core of Canada's systemic discrimination is that it fails to fund First Nation Child Welfare based on need, including addressing and redressing historical disadvantages. The Panel in its decision wrote that it's "...focus is whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and the communities" (…).

…

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

…

[150] Canada cannot justify paying enormous amounts of money for children in care when the cost is much higher than prevention programs to keep the child in the home. This is not an acceptable or sound fiscal or social policy. This is a decision made by Canada unilaterally and it is harming the children. (…), (see the *Decision* at paras. 262 and para. 297).

…

[180] The Panel reiterates that the best interest of the child is the primary concern in decisions that affect children. See, for instance, UNCRC, article 3 and article 2 which affirm that all children should be treated fairly and protected from discrimination. (see also the [*Merit*] *Decision* at paras.447-449). The Panel found that removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child. This is an important finding that was meant to inform reform and immediate relief (see the [*Merit*] *Decision* at paras 341-349).

…

[191] The United Nations CESCR recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 [*Merit*] *Decision*. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding observations on the sixth periodic report of Canada, March 4223, 2016, E/C.12/CAN/CO/6, paras.35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para. 33, Exhibit L).

[114] The Panel entirely agrees with this wise approach to prevention reform proposed by the parties in order to generate real and lasting systemic change. Moreover, the evidence filed supports this finding.

[115] As set out in Ms. Wellman's March 7, 2022 Affidavit:

> 76. The per capita costs are based on current prevention services and actual spending described in the case studies analyzed by the IFSD. For instance, the $2,500 per capita cost is based on a case study of K'wak'walat'si Child and Family Services (KCFS), which serves the 'Namgis First Nation and the village of Alert Bay on Cormorant Island off the coast of British Columbia. Since 2007, not a single child in 'Namgis First Nation has been placed in care. This success has been largely credited to the introduction of comprehensive prevention programming.

[116] This success story is referenced in Stephanie Wellman's affidavit and also included in the IFSD report #1, *Enabling Children to Thrive* filed in evidence. The report states that a case for prevention is clear from both FNCFS agency cases and from existing research. The unanimity from agencies and experts on the importance and need for a focus on prevention services and funding to match cannot be overemphasized (pp.93-94). This report is relevant and reliable especially given the methodology employed and the expert actors involved including the advisory role of the National Advisory Committee.

[117] Stephanie Wellman's affidavit continues:

> 77. These best practices in prevention are further modelled after Carrier Sekani Family Services (CSFS), a large prevention focused organization. The agency's life cycle model (from cradle to grave), informed by its own research, extends across health and social programs and services. From intensive family preservation to telehealth initiatives, CSFS has empowered its staff to innovate, try, fail, and succeed, in support of the people and communities they serve.
>
> 78. By providing a budget of $2,500 per capita for prevention, Canada would enable service providers and communities to deliver this best practice life cycle model of prevention.

[118] This is also consistent with previous findings by this Panel. In 2018 CHRT 4, the Panel said (emphasis omitted):

> [118] The orders are made in the best interests of children and are meant to reverse incentives to place children in care.
>
> [119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

[120] The best way to illustrate this is to reproduce Ms. Lang's answer to the AFN's question: AFN: So if every child in Ontario that's on First Nations was apprehended, INAC would pay costs for those apprehensions correct? (…) So my question is, it's kind of peculiar to me that the federal government has no qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me that just does not make sense. Now as a Program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions? Ms. Lang: for eligible expenditures, yes.

[121] This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings.

…

[148] Of particular note, *Wen:De Report Three* recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, *Wen:De Report Three* indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

> Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are overrepresented amongst children in care and Aboriginal children in care; they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreaux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.), (see 2018 CHRT 4 at. paras. 148-149 citing the *Merit Decision*).

…

> [160] This is the time to move forward and to take giants steps to reverse the incentives that bring children into care using the findings in the [*Merit*] *Decision*, previous reports, the parties' expertise and also everything gathered by Canada through its discussions since the [*Merit*] *Decision*.

[119] The 2018 CHRT 4 immediate relief orders on actuals were made in 2018 after the Caring Society and the AFN, urged the Panel to order them. The parties made compelling arguments and brought evidence to support it. The Panel indicated that the orders could be amended as the quality of information increased. The Panel recognized "that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases." (see 2018 CHRT 4 at para. 237). This is the case here. The evidence in the record demonstrates that there is a need to amend the previous prevention orders given that a number of issues arose as part of the implementation phase of the 2018 CHRT 4 orders.

[120] Moreover, the parties were able to establish that the process for reimbursement to actuals was causing hardships for First Nations and First Nations Agencies. Dr. Blackstock has affirmed that:

> 19. … While the funding at actuals approach has been effective in ensuring more prevention services are provided to children, youth, and families, ISC determining eligible prevention expenses has been problematic particularly given the lack of social work expertise within the department.

[121] Further, Dr. Blackstock also affirmed that "the "request-based" nature of the actuals process has also posed an obstacle for some FNCFS Agencies, who may lack capacity to make the request." (March 4, 2022 affidavit at para. 19). The Tribunal finds this was previously demonstrated in these proceedings (see for example, 2020 CHRT 24 at. paras 34-36).

[122] Moreover, recent relevant and reliable evidence contained in the IFSD report #2, Funding First Nations child and family services (FNCFS): A performance budget approach to well-being, July 31, 2020 found at p. 29 that:

> The significant 48% increase in FNCFS program spending in 2018–19 is attributed to the CHRT-mandated payments (the FNCFS program spending

> is projected to decrease by 9% in 2019–20) …. Case study analysis suggests that the CHRT payments have had immediate impacts on programming and operations. The supplementary investments, however, are one-time payments and not guaranteed beyond the next fiscal year. This reality puts progress on prevention programming and practices at risk.

[123] The above also supports the need for greater prevention funding as per the order requests including the eligibility for these funds to be carried forward by the First Nation and/or First Nations Child and Family Service providers(s).

[124] Furthermore, Dr. Blackstock affirms that "[g]reater "up-front" funding will allow FNCFS Agencies to focus their energies and resources on program development and delivery." (March 4, 2022 affidavit at para. 19).

[125] The Panel finds the evidence supports the need for a shift from the "request-based" nature of the actuals process where ISC determines eligible prevention expenses to a comprehensive community-level programming. The implementation of these orders will provide families with supports they need and in providing First Nations, FNCFS Agencies with greater resources "up front" to begin addressing the structural risk factors that contribute to the over-representation of First Nations children in care. This will also provide greater funding to First Nations without FNCFS Agencies.

[126] The IFSD report also supports this shift.

[127] The Panel agrees and is really pleased with these order requests. The parties' hard work will generate real change for First Nations children and youth. This responds to the Tribunal's 2018 call for giant steps towards a shift.

[128] As indicated in Stephanie Wellman's March 7, 2022 Affidavit:

> 75. The $2,500 per capita level of prevention funding is based on the case studies conducted by the IFSD in its Phase 1 report, which resulted in two fundamentally different approaches to prevention programming. This ranged from a First Nation with minimal prevention programming ($800) to comprehensive community-level programming targeted to the entire community, operating on a prevention basis ($2,500). The $2,500 per capita amount is to be considered the level necessary for agencies or communities to reasonably deliver best practices in prevention.

[129] As noted in IFSD report # 2, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* at p. 248:

> … In its Phase 1 study, [*Enabling First Nations Children To Thrive*], December 15, 2018, that costed the FNCFS system, IFSD estimated (based on actual models) that per capita expenditures for prevention should range from $800 to $2,500 across the entire community. At $800, programming is principally youth-focused and may not be CFS focused. At $2,500 per person, a full lifecycle approach to programming can be possible with linkages between health, social and development programming. …
>
> The First Nation's current per capita CFS expenditure estimates align to previous findings for communities unaligned to an FNCFS agency (ranging from $500 to $1,000 based on the population source). As the First Nation contemplates its next steps in CFS, it may wish to consider increasing its per capita budget to expand its resources for program and service delivery. IFSD estimated that the average cost of a child in care to be $63,000 per year. With opportunities for prevention program that have demonstrated positive results, there are various options for supporting the well-being of children, families and communities through wrap-around holistic services.

[130] As noted in IFSD report #1, *Enabling First Nations Children To Thrive* these costs would be on-going in nature and subject to changes in population and inflation. Per person spending on prevention should range from $800–$2,500 with total annual costs of $224M to $708M (p. 10).

[131] The report provides further details at pages 87-88:

> Prevention was the focus of experts and agencies, and consistently defined as the most significant funding gap that agencies are facing. The gap in prevention funding is a challenge and is connected to the system's current funding structure that incentivizes the placement of children in care.
>
> Shifting to a prevention-focused approach will require increased investment and a change in funding structure, such that agencies have the ability to allocate resources to meet community need. To cost-estimate an increase in prevention funding for FNCFS agencies, benchmarks of current prevention spending were identified and a range of per capita investments in prevention were defined: $800, $2,000 and $2,500.
>
> The per capita costs are based on current prevention services and actual spending described in case studies. The prevention cost estimates are premised on the assumption that prevention should target the entire population in the agency's catchment and not only the child population served.

[132] Moreover, as defined in 2021 CHRT 12, Non-Agency communities also form part of the Tribunal's previous orders. The Panel agrees that they should also benefit from the increased ongoing prevention funding as detailed in order request # 8. As explained above, this will greatly benefit their communities.

[133] The parties were successful in demonstrating the need for the requested orders # 7 as modified and 8. The Panel entirely agrees with the order requests # 7 & 8 and finds they are justified and supported by the evidence. Furthermore, the Tribunal has the authority to make those orders as it will be explained below.

(ix) Establish the End Date for Compensation

> Order request # 9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish March 31, 2022, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents.

[134] In her March 4, 2022, affidavit, Dr. Blackstock affirms that:

> 15. [o]n the strength of these immediate measures, which are to be implemented pursuant to the consent order requested on this motion starting on April 1, 2022, and assuming there is no disruption or reduction in current prevention service levels due to reductions in funding as a result of the implementation of these measures (which senior officials at ISC have assured me will not occur), I believe that the discrimination will be alleviated to a level whereby March 31, 2022, can be reasonably fixed as the end-date for FNCFS Program compensation eligibility pursuant to the Tribunal's compensation orders.

[135] Ms. Wellman affirms in her March 7, 2022, affidavit that:

> 17. It became apparent to the AFN that some commitments the Parties were considering for long-term reforms did not have to wait until April 2023 and could be implemented. At the AFN's request, the Parties agreed to seek the implementation of a number of immediate measures by way of a consent proceeding before this Panel that would be implemented in April 2022. Secondly, it was apparent that the Parties needed to address some outstanding items that were of concern to this Panel before compensation could be paid.
>
> …

> 19. [t]he Parties agreed to immediate measures to redress the ongoing discrimination found by this Panel throughout this proceeding, for amendment to this Panel's order regarding funding for prevention in 2018 CHRT 4, and for an end date for compensation, as contemplated within 2019 CHRT 39. These would form the terms of a consent order.

[136] Based on Canada's consent to the orders outlined herein, the Parties are of the view that the factual basis on which the *Compensation Decision* was made will significantly change as of April 1, 2022, due to increased amounts of prevention funding being made available to First Nations communities. Moreover, resolving the items at this time will address any existing barriers to the compensation process and will clear the way for the payment of compensation.

[137] Furthermore, Dr. Gideon affirms in her March 4, 2022, affidavit that:

> 51. [t]his order would set the end date for the period within which the removal of a child would give rise to a compensation claim as March 31, 2022. The justification for that end date rests on the seven measures described above to take effect on April 1, 2022.
>
> 52. The immediate measures identified in the order comprise very significant investments made in line with the parties' recommendations and evidence and are critical steps supporting the transition to full reform as outlined in the Agreement-in-Principle.

[138] The parties submit that given the evidence-based investments made and their emphasis on preventing children from entering care and supporting them once they leave care justify an end date for compensation of March 31, 2022.

[139] Furthermore, the Panel finds that the success stories discussed above where similar measures to the measures included in the consent orders in this ruling have been implemented and resulted in no child being taken into care. This is a very compelling argument in favour of the requested order.

[140] Moreover, for the particular victims of discrimination under the FNCFS Program, the Tribunal set the eligibility period as January 1, 2006 to a date ordered or agreed upon, as the discrimination under the FNCFS Program was ongoing. The Tribunal set the following parameters for an "end date" for compensation for the particular victims of the discrimination under the FNCFS Program: (a) the Tribunal, informed by the Parties and evidence, makes

a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; (b) the Parties agree on a settlement agreement for effective and meaningful long-term relief; or (c) the Tribunal ceases to retain jurisdiction and beforehand amends 2019 CHRT 39 [the *Compensation Decision*] (at paras. 245, 248, 249 and 254).

[141] The Panel does not make a finding as part of this ruling that all the systemic discrimination explained in the Tribunal's findings has ceased even if the orders in this ruling are giants steps forward in achieving the elimination of the systemic discrimination.

[142] In a recent ruling, the Tribunal reiterated some of its previous findings and wrote in 2021 CHRT 41:

> [56] Nevertheless, it may be less compelling for Cabinet and Treasury Board to approve authorities if there is a belief that other programs may be responsive to needs. However, to date while efforts are made to collect information, the information remains unclear on the elimination of the lack of coordination found that impacts service delivery. There is insufficient evidence about different programs offered to First Nations children and families on-reserve and how each really address the real needs of children and families. In other words, the Tribunal is unaware of the existence of a completed thorough analysis of all programs on-reserve, how they interrelate, intersect and ensure that there are no gaps in services to First Nations children. There is insufficient evidence to date to establish that the gaps in services to First Nations children and families on-reserve or ordinarily on reserve have all been addressed and accounted for by other programs when the FNCFS Program's authorities do not include items or place a funding cap. The Tribunal raises this point to illustrate that referring to other programs when a legitimate request is made for service delivery may not be sufficiently responsive to the Tribunal's orders as it will be explained below.
>
> …
>
> [58] … Canada was found liable and was ordered to cease the discrimination that is still ongoing until long term reform is implemented.
>
> …
>
> [63] Further, the Tribunal ordered a complete reform of the FNCFS Program to cease and desist from the discriminatory practice found in the decision including to move away from the lack of coordination of federal programs

> causing gaps, denials and delays in services to First Nations children and families.

[143] The evidence in this motion demonstrates there is still work to be done to address the findings above.

[144] However, the Panel agrees with the parties that the consent orders in this ruling will ensure the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case will cease given the implementation date of April 1, 2022.

[145] Since the beginning in the *Merit Decision* and onward, the Panel has focused its orders on adequate, needs-based, culturally appropriate services and sufficient funding informed by the evidence. The Panel has always emphasized the paramount need to stop removals of children from their homes, families and communities. When removals were necessary, the Panel stressed the importance of keeping the children in their communities and Nations.

[146] The Panel previously found that removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations.

[147] The Panel also previously found that the lack of prevention perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Merit Decision* and rulings. It incentivizes the removal of children rather than assisting communities to stay together.

[148] In 2019 CHRT 39 [*the Compensation Decision*] the Panel found:

> [163] …
>
> > Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the key drivers of

> neglect for First Nations children were poverty, poor housing, and substance misuse (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing improvement. The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently. The third factor, substance misuse, is within the personal domain for change but requires access to services. Overall, CIS- 98 results suggest that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children. …
>
> [164] … First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.
>
> (emphasis omitted).

[149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.

[150] The elimination of the mass removal of children is achievable when a real shift is made from reactive services that bring children into care to preventive services, especially when prevention services are developed and delivered by the First Nations children's respective First Nations communities. The evidence provided by the parties demonstrates that this shift will be made possible with the April 1, 2022 implementation of increased prevention funds provided to First Nations and First Nations child and family service providers across Canada.

[151] Finally, the consent orders discussed above are in line with the Panel's findings and orders. The Panel believes the full and timely implementation of those orders will significantly improve the lives of First Nations children, families and communities.

[152] As it will be explained in the next section, the Tribunal has the authority to make such an order.

IV. Legal Framework

[153] In considering the Tribunal's powers to make the requested orders, the Tribunal relies on the following:

> This Tribunal's January 26, 2016 order (2016 CHRT 2 [*Merit Decision*]) ordered Canada to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in that decision.
>
> This Tribunal's April 26, 2016 order (2016 CHRT 10) required Canada to immediately take measures to address the findings in its January 26, 2016 decision.
>
> This Tribunal's September 14, 2016 order (2016 CHRT 16) required Canada to update its policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision.
>
> This Tribunal's understanding in making its September 14, 2016 order (2016 CHRT 16) that reform of Canada's policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision would be achieved over the longer term, with certain interim measures being put in place until that time.
>
> The principles set out for immediate relief in the Tribunal's February 4, 2018 order (2018 CHRT 4).
>
> All other rulings made by this Panel in this case.

[154] In light of the above and consistent with the Tribunal's detailed findings in the *Merit Decision* which included other related provincial/territorial agreements and other funding methods, all subsequent rulings and the Tribunal's approach to remedies and, pursuant to section 53(2) of the *CHRA*, the Panel finds it has statutory authority to make the consent orders requested by the AFN, the Caring Society and Canada and agreed to by the COO, the NAN, the Commission and Amnesty International as it will be further explained below.

[155] The Panel previously reviewed Canada's responsibility to remedy the discriminatory practice in this case in 2018 CHRT 4:

> [215] In its [*Merit*] *Decision* and rulings, the Panel found that Canada was responsible for funding to cover the costs of providing family and child welfare services to First Nations on reserves. It found that this responsibility included funding to cover the costs of providing services to First Nations children on reserves in need of care, in a manner that was culturally appropriate and substantively equal to the manner that the services were provided to non-First Nations children in Canada. It found that the basis upon which Canada was calculating and providing the funding was flawed in various respects, resulting in insufficient funding (i.e. underfunding) to provide the services in the manner hereinbefore described, and to meet the needs of First Nations children on reserve. It found that Canada was underfunding the services now being requested by the Moving Parties to be paid on an actual cost basis as immediate relief in this case. It found that Canada knew that it was underfunding the services and that the underfunding of prevention services, in particular, while Canada fully funded maintenance and apprehension expenses, created a perverse incentive to remove far too many First Nations children on reserve from their homes and families. It found that this underfunding of services was one of the discriminatory practices engaged in by Canada in this case, and that Canada needed to take immediate steps to eliminate this discriminatory underfunding and to fully reform the Program in the longer term.
>
> [216] Canada has accepted the Tribunal's [*Merit*] *Decision* and rulings that it is discriminating against First Nations children by underfunding the services and that both immediate steps and longer-term reform need to be undertaken to eliminate this discriminatory underfunding of services to First Nations children on reserve.
>
> [217] All of the parties agree that the Tribunal's remedial powers are to be interpreted broadly to give effect to the objectives of the *CHRA* in eliminating discrimination when there has been a determination by the Tribunal that discrimination has occurred and an order to cease has been made, in order to ensure that the discrimination does not continue.

[156] Furthermore, the Panel previously wrote in 2018 CHRT 4:

> [387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to

address discrimination now in the most meaningful way possible with the evidence available now.

[157] The Panel also wrote in 2016 CHRT 10 that:

> [15] … [C]onstructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility.
>
> [16] The Panel also said that aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[158] In the initial *Merit Decision*, the Panel indicated its approach once a complaint is substantiated:

> [468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).
>
> [469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[159] The Panel further addressed its remedial authority in 2018 CHRT 4:

> [31] The Panel provided an overview of the Tribunal's broad and flexible remedial authorities in 2016 CHRT 10 (paras. 10-19) which was not judicially reviewed.
>
> [32] Moreover, in making its orders the Tribunal is operating under its Statute that permits it to address past discriminatory practices, and prevent future ones from occurring. This is provided for in the *Act* under section 53 (2) (a): that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (...).
>
> (emphasis omitted).

[160] As noted in 2018 CHRT 4 at paragraph 40, "[t]he Tribunal made extensive findings in [the *Merit Decision*] and provided very detailed reasons as to how it arrived at its findings." As noted in the *Merit Decision*, [t]hose findings demonstrate that "AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves" (*Merit Decision* at para. 458). Moreover, [t]he Tribunal also found that "[t]he failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families" (2016 CHRT 2 at para. 458, emphasis added). Later, "[t]he Panel specifically mentioned that reform must address the findings in the [*Merit*] *Decision*. This case is about underfunding, policy, authorities and, the National Program that were found to be discriminatory" (see 2018 CHRT 4 at para. 40). The lengthy *Merit Decision* is authoritative in this case and the findings referred to above can be found in the *Merit Decision* and will not be repeated here. The Tribunal outlines the above to support that it has authority to issue this Consent Order since the subject matter of this Consent Order forms part of the evidence and findings in this case.

[161] Moreover, 2018 CHT 4 provides that:

> [34] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease-and-desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [Action Travail des Femmes]).

[162] Subsequently, the Panel noted in 2018 CHRT 4 that:

> [51] Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question.

[163] Furthermore, the Panel previously indicated in 2018 CHRT 4 that:

> [53] … it may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of Courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system.

[164] The Panel also said in 2018 CHRT 4 that:

> [50] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past.

[165] A similar approach to remedies was taken in the *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998], OHRBID, No 10, 1998 CanLII 29849 (ON HRT), 32 CHHR D/1 and [2002] OHRBID, No 22 decisions from the HRTO informed by the specific facts in the case and affirmed on appeal (see *Ontario v. McKinnon*, 2004 CanLII 47147 (ONCA)). The Tribunal relied on this case in 2018 CHRT 4 (see paras. 24 and 388). The Tribunal held that "[a]kin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here" (2018 CHRT 4 at para. 388). While the Panel said this in 2018, notably, next month will mark the

tenth year when the Federal Court quashed the former Chairperson's decision in this case and ordered a different Panel to adjudicate this case. This is when Sophie Marchildon, Edward P. Lustig and Réjean Bélanger were first seized of this matter.

[166] In a recent decision, *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839 the Ontario Divisional Court discussed the case at hand and commented on the monitoring and updating of funding policies, programs and formulas in systemic cases to ensure substantive equality:

> [189] The Tribunal's findings in this regard are reasonable. Indeed, they are consistent with the SCC's decision in Moore and the Canadian Human Rights Tribunal's decision in Caring Society, two cases concerning systemic discrimination in government funding policies. Moore and Caring Society make clear that governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH's position that it can wait before acting until midwives – a deeply sex-segregated profession that is highly susceptible to systemic gender discrimination in compensation – have proven that the MOH's conduct constitutes sex discrimination.
>
> (footnotes omitted).

[167] Recently, in a judicial review initiated by Canada in this case, the Federal Court in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, in dismissing all of Canada's arguments, made important comments on the Tribunal's approach to remedies in this case:

> [135] The fact that the Tribunal has remained seized of this matter has allowed the Tribunal to foster dialogue between the parties. The Commission states that the leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government respondents (Gwen Brodsky, Shelagh Day & Frances M Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies", (2017) 6:1 Can J of Human Rights 1). The Commission described this approach as bold considering the nature of the Complaint and the complexity of the proceedings.
>
> [136] The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access

information about Canada's efforts to bring itself in compliance with the decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.

[137] The Commission states that the dialogic approach was first adopted in this proceeding in 2016 and has been repeatedly affirmed since then. It submits that the application of the dialogic approach is relevant to the reasonableness considerations in that Canada has not sought judicial review of these prior rulings.

[138] I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [*Grover*] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal…" (2016 CHRT 10 at para 15). Furthermore, I agree that "the [*CHRA*] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

…

[162] I disagree with the Applicant's characterization of the decisions following the *Merit Decision* as an "open-ended series of proceedings." Rather, the subsequent proceedings reflect the Tribunal's management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implementing its order and to give full recognition of human rights. As well, significant portions of the proceedings following the *Merit Decision* were a result of motions to ensure Canada's compliance with the various Tribunal orders and rulings.

…

[281] As noted above, I have determined that the Tribunal did not change the nature of the Complaint in the remedial phase. The Tribunal, exercising extensive remedial jurisdiction under the quasi-constitutional *CHRA*, provided a detailed explanation of what had transpired previously and what would happen next in each ruling/decision (See e.g. 2016 CHRT 16 at para 161). In so doing, it was relying on a dialogic approach. Such an approach was necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination. Most importantly, the Tribunal was relying on established legal principles articulated in *Chopra v Canada (AG),* 2007 FCA 268 at para 37 and *Hughes* 2010 at para 50 (*Merit*

> *Decision* at paras 468, 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined.
>
> …
>
> [301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.
>
> [302] 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*.

[168] Moreover, the above follows the original approach to remedies taken by this Panel in its previous rulings.

[169] The Tribunal's powers to make the requested orders are grounded in section 53(2) of the *CHRA*; Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure (Proceedings prior to July 11, 2021); the Tribunal's implied jurisdiction to control its own processes and the approach in these proceedings described above.

V. Final remarks

[170] The Panel views this case as a catalyst for change to services provided to First Nations children, youth and families thanks to the tireless work of the parties, particularly the First Nations parties in this case who never gave up. The Panel honours their courage and determination. The Panel hopes that reform and real transformative change which will be the hallmarks of true justice will now be swift and future issues that may arise will be resolved expeditiously.

VI. Panel Chair's remarks

[171] As there is need for truth to achieve reconciliation there can be no true justice without truth. While the path forward paved by the parties' concerted efforts is certainly generating real hope, the path that led up to the need for this case was marked with systemic discrimination towards First Nations Peoples. Truth demands the unadulterated honesty to look at both paths to avoid repeating history. There is a real need to study the past to change minds and ways informed by the whole truth. The real goal is that minds and ways are changed to create a true shift giving birth to transformative justice and lasting change. This is a minimal requirement to honour the children and their families who were harmed and those who lost their lives.

VII. Orders

[172] Pursuant to section 53(2) of the *CHRA*, the Tribunal issues the following orders:

1. Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.

2. Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories ("post-majority care"). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program's funding formulas, policies, procedures and agreements in an evidence- informed way agreed to by the Parties.

3. Given Canada's commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan's Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.

4. Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):

    a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;

    b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");

    c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and

    d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle, including but not limited to identifying and addressing formal* equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").

    *** This order does not modify any substantive equality orders made by this Tribunal in this case.**

5. Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.

6. Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence- informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.

7. Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4

    [421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of **April 1, 2022**, fund prevention/least disruptive measures at $2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the $2500 on an ongoing basis adjusted annually based on inflation and population until the

reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services.
These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).

8. Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:

> [42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at $2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.

9. Pursuant to 2019 CHRT 39 at paragraphs 245, 248, 249 and 254, establish **March 31, 2022**, as the end date for compensation for removed First Nations children and their parents/caregiving grandparents.

[173] The above amendments to 2018 CHRT 4 and 2021 CHRT 12 are effective as of today's date and will be amended in the text of those decisions in due course.

[174] The above orders do not modify any other orders and rulings made by this Tribunal in these proceedings.

VIII. Retention of Jurisdiction

[175] Pending a complete and final agreement on long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above, the Panel retains jurisdiction on the Consent Orders contained in this ruling. The Panel will revisit its retention of jurisdiction once the parties have filed a final and complete agreement on long-term relief or as the Panel sees fit considering the upcoming evolution of this case.

[176] This does not affect the Panel's retention of jurisdiction on other issues and orders in this case. The Panel continues to retain jurisdiction on all its rulings and orders to ensure that they are effectively implemented and that systemic discrimination is eliminated.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
March 24, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: March 24, 2022

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

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