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VIA EMAIL

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

RE: ***FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL V ATTORNEY GENERAL OF CANADA* – T#1340/7008**
OUR MATTER ID: 5204-002

We write pursuant to the Panel's September 21, 2022 and October 12, 2022 directions and in response to the September 28, 2022 submissions of the Assembly of First Nations, Attorney General of Canada, Chiefs of Ontario and Nishnawbe Aski Nation.

The Final Settlement Agreement's departure from the Tribunal's findings and orders regarding children removed from their homes, families and communities

Canada and the AFN submit to the Tribunal that they always understood that the Tribunal's compensation orders were limited to children who were placed outside of their homes, families and communities during a child welfare intervention, in placements funded by Indigenous Services Canada.[1] However, this is inconsistent with the clear wording of the Tribunal's orders, the manner in which the Compensation Framework was developed, the Compensation Framework wording approved by the Tribunal, and the way in which the parties contested and defended the Tribunal's orders before the Federal Court. It is also not consistent with the broad scope of the class action certification order, which was only narrowed upon conclusion of the Final Settlement Agreement.[2]

[1] AFN's September 28, 2022 submissions at pp 6-9; Canada's September 28, 2022 submissions at p 1.
[2] *Moushoom et al v Canada (Attorney General)*, 2021 FC 1225 at para 2(h); Janice Ciavaglia's October 6, 2022 response to Caring Society Question #1.

The Tribunal's orders regarding discrimination within the FNCFS Program were cast in broad terms:

> **2019 CHRT 39 at para 245:** Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community between **January 1, 2006** (date following the last Wen:de report as explained above) until the earliest of the following options occurs: the Panel informed by the parties and the 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 […]
>
> **2019 CHRT 39 at para 249:** Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community from **January 1, 2006** until the earliest of the following options occurs: the Panel informed by the parties and the 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 […]

The AFN and Canada effectively seek to make the following amendment to the Tribunal's orders:

> **2019 CHRT 39 at para 245:** Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community to an ISC-funded placement between **January 1, 2006** (date following the last Wen:de report as explained above) until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities to ISC funded placements as a result of the discrimination found in this case has ceased […]
>
> **2019 CHRT 39 at para 249:** Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community to an ISC funded placement from **January 1, 2006** until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities, to ISC funded placements, as a result of the discrimination found in this case has ceased […]

The Tribunal did not restrict compensation to ISC funded placements. This is because the focus of the orders has always been on the particular worst case scenario that First Nations children, their families, and the Nations of which they form part, face when they are removed from <u>both</u> their family and their community. As the Panel succinctly stated in 2022 CHRT 8 at para 145 "[t]he 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."[3] Indeed, in the Tribunal's January 26, 2016 decision on the merits, the concept of removal of a child from their home was canvassed without reference to whether the expenses associated with the out-of-home placement were funded by the federal government:

> Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child "in care". The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.[4]

AFN references paragraph 149 of 2019 CHRT 39 to support its statement that "Non-ISC Placements with a family friend or trusted person arguably reflects the principle of substantive equality."[5] However, this misses the very clear point the Tribunal made in that paragraph, that such children "should have been placed in kinship care with a family member or within a trustworthy family within the community [emphasis added]."[6] Separation from the child's community and Nation is only mitigated as a "worst case scenario" of discrimination when that removal lies to the home of a family member.

Ultimately, the Tribunal's compensation orders focused on the harm to dignity arising from a child being placed outside of their home, family, and community due to Canada's discriminatory conduct. The Panel 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 [emphasis added]".[7] The orders are about why the child had to leave their home, family, and community and not where they went once they did so (i.e., whether ISC funded the placement or not). To the child, the question of how their placement was funded is immaterial to the harm they suffered by being removed from their home, family and community.

The Caring Society agrees with AFN that the Compensation Framework provides a clarifying versus prescriptive perspective. Indeed, the Compensation Framework's definition of "necessary/unnecessary removal" sets out the various means by which First Nations children were removed from their homes, families, and communities. The Tribunal's criteria identifying removals outside of the First Nations child's family and community as the worst-case scenario

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[3] 2022 CHRT 8 at para 145.
[4] 2016 CHRT 2 at para
[5] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 8.
[6] 2019 CHRT 39 at para 149.
[7] 2022 CHRT 8 at para 147.

(leading to maximum compensation under the *CHRA*) continue to apply. Consistent with the Tribunal's orders, only "kinship and various custody agreement" placements falling outside of the child's family and community can give rise to compensation under the Tribunal's orders.

There are no express words in the Compensation Framework, negotiated by the parties (including the AFN and Canada) and approved by the Tribunal, indicating that compensation is limited to ISC-funded placements. The wording of section 4.2.1 is straightforward and remained unchanged since the first draft of the Compensation Framework was submitted on February 21, 2020, to when the final draft was submitted on December 23, 2020. Unlike the eligibility provisions related to Jordan's Principle, which involved months of negotiations and required a ruling from the Panel (2020 CHRT 15), there has been no controversy between the parties regarding FNCFS Program eligibility until now.

The wording in section 4.2.1 reflects the inclusive categories of placements set out in Dr. Fallon's December 2019 report, first provided to the Tribunal as Exhibit 12 to Dr. Blackstock's December 8, 2019 affidavit. Indeed, this is consistent with Canada's representation, on behalf of itself, the Caring Society, and the AFN, in its February 21, 2020 reporting letter submitting the Compensation Framework, that the Compensation Framework "builds on the extensive work done by the Caring Society in 2019, as described in the affidavit of Dr. Blackstock filed with the Tribunal on Dec. 8, 2019."[8]

Dr. Fallon's December 2019 report appears to have provided the foundation for Dr. Fallon's and Dr. Trocmé's February 2022 report, which is attached to Ms. Ciavaglia's July 22, 2022 affidavit. While the AFN states that it followed the expert advice contained in this report when it decided not to pursue compensation for children in non-ISC funded placements, this assertion is underinclusive in two regards. First, Dr. Fallon and Dr. Trocmé themselves note the focus in the Compensation Agreement-in-Principle on children being taken into out-of-home care as a point of departure from the child protection related CHRT orders.[9] Second, as Dr. Fallon and Dr. Trocmé recognized at the conclusion of their February 2022 report, "**[c]laimants are not responsible for missing and incomplete information about the discrimination that they suffered, and it is this fundamental acknowledgment that must guide the continued development of the compensation process** [emphasis in original]".[10] Dr. Fallon and Dr. Trocmé also noted that "**[r]espondents were clear that if inequities in data availability translate to a lack of compensation for children who are eligible based on their experiences, this would itself be a manifestation of the discrimination the CHRT and class actions are aiming to redress** [emphasis added]".[11] Rather than heed the expert report's findings, the AFN has chosen not to pursue compensation for these victims due to perceived difficulties in obtaining records related to the children's circumstances.

[8] February 21, 2020 letter from Robert Frater, Q.C. to the Tribunal.
[9] Affidavit of Janice Ciavaglia, affirmed July 22, 2022, Exhibit "J" at p 21.
[10] Affidavit of Janice Ciavaglia, affirmed July 22, 2022, Exhibit "J" at p 141.
[11] Affidavit of Janice Ciavaglia, affirmed July 22, 2022, Exhibit "J" at p 91.

The Compensation Framework itself also indicates a broad-based approach. Contrary to the class action Final Settlement Agreement, which privileges using ISC records to determine eligibility, the CHRT Compensation Framework contemplates ISC proactively reaching out to professionals, service providers and provincial/territorial governments to identify beneficiaries (sections 5.3-5.5) and specifically contemplates obtaining assistance from child and family service agencies across the country (section 5.6(c)) and from provincial and territorial governments (section 5.7(a)). The CHRT Compensation Framework further states that the work required for service providers to bring this information forward will be funded by Canada (sections 5.4 and 5.6(b)). The CHRT Compensation Framework stated that the result of the information gathering efforts by ISC, FNCFS Agencies and provincial/territorial governments would be a "Compensation List", being a list of individuals on which there was agreement regarding eligibility for compensation (section 8.3). Individuals not on the Compensation List would still be able to apply to have their claim considered (section 8.7).

The detailed process outlined in sections 5.3 to 5.8 to generate section 8.3's CHRT Compensation List, as well as the residual ability to apply for compensation included in section 8.7, would not have been required if compensation was limited to ISC-funded placements.[12] As the AFN has made clear in its submissions,[13] ISC-funded placements can be identified by ISC data alone, and do not require access to the wide array of sources identified in the CHRT Compensation Framework. This in and of itself is evidence of the Compensation Framework's broad approach to implementing the Tribunal's orders. This approach was agreed to by the Caring Society and the AFN, and by Canada subject to its objections in its judicial review.

Finally, the parties' approach to contesting and defending the compensation orders before the Federal Court does not reflect the limits that AFN now says were implicit in the CHRT's original orders. Justice Favel upheld the Tribunal's orders as reasonable after a five-day hearing, with the benefit of 311 pages of written submissions from the parties and access to the entire Tribunal record. With this context, Justice Favel provided the following summary of his view of the reasonableness of the Tribunal's decision:

> In my view, the Tribunal reasonably considered the various ways that underfunding of the FNCFS Program and Jordan's Principle led to the removal of children from families and communities for the complex and multi-faceted reasons that the Applicant pointed out. It was reasonable to make finer distinctions between the reasons for removal, but regardless of the reason, the affected children were

[12] Indeed, Ms. Ciavaglia's answer to the Caring Society's sixth question recognizes that the claims process needs to be more detailed where ISC's documents are not the only source of information. This more detailed model is the one selected in the Compensation Framework. The Caring Society notes that the Compensation Framework's model, involving pro-active work with records holders before claims are received, mitigates the re-traumatization concerns Ms. Ciavaglia raises in her response to Question #6.

[13] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at pp 4-5.

> removed and denied culturally appropriate services in their own communities [emphasis added].[14]

Justice Favel noted the broad position on compensation taken by the complainants and interested parties in the following terms: "[t]he Respondents' position has consistently been that they seek to remedy the harms arising from the removal of First Nations children from their families and their communities. They were not seeking individual tort-like loss suffered by each child or their families."[15] Justice Favel recognized the "unique context" of the harm in this case "was related to the removal of children from their families and the harm to the children's dignity as opposed to the individual tort-like harms that they suffered from the removal".[16] The AFN's retrospective attempt to distinguish between the experience of children in non-ISC funded placements outside of their families after the removal is inconsistent with the Tribunal's clear focus on the harm of the removal itself throughout this proceeding, which approach was upheld as reasonable by the Federal Court.

For the reasons set out above, the Caring Society urges the Tribunal to reject the AFN's after-the-fact reconstruction of the Tribunal's compensation orders.

Impact on the free, prior, and informed consent of First Nations Chiefs in Assembly

AFN's submissions confirm that their briefings to the AFN Executive, AFN Regional Chiefs meetings and Chief's Assemblies were based on Canada and AFN's faulty understanding of the scope of the Tribunal's compensation order. Despite the Caring Society having clearly voiced its concerns regarding the exclusion of non-ISC funded placements based on the Tribunal's orders more than two months before the Final Settlement Agreement was signed, there is no evidence that AFN or Canada shared the Caring Society's concerns with Chiefs as part of the AFN briefing process. There is also no evidence as to how the AFN has ensured that its obligation in Article 10.01(3) of the Final Settlement Agreement "to take all reasonable steps to publicly promote and defend the Agreement"[17] has not interfered with its obligation to represent the First Nations that have expressed concerns with the Final Settlement Agreement.

The Caring Society disagrees with AFN's position that Free Prior and Informed Consent is irrelevant in this situation. The idea that Free, Prior, and Informed Consent applies to questions relating to mineral rights, harvesting resources, and land, but not to children, is fundamentally flawed.

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[14] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2021 FC 969 at para 173.
[15] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2021 FC 969 at para 183.
[16] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2021 FC 969 at para 194.
[17] Affidavit of Janice Ciavaglia, affirmed July 22, 2022 at Exhibit "F", Article 10.01(3).

By way of settlement of a civil representative proceeding, Canada purports to contract out of binding legal orders made under the *Canadian Human Rights Act*, replacing them with a different compensatory scheme. Given the *Canadian Human Rights Act*'s *quasi*-constitutional status, this is unquestionably state action. Canada is attempting to fulfill its Free, Prior, and Informed Consent obligations by negotiating with AFN and providing the AFN, as a National Indigenous Organization, with the latitude to engage its membership. This choice does not absolve Canada, or the AFN, of human rights scrutiny related to the effectiveness of the method selected (i.e., whether First Nations have had the opportunity for Free, Prior, and Informed Consent). Nor does it relieve Canada of its obligation to consult First Nations. Indeed, both entities have committed themselves to live up to UNDRIP: Canada by way of its enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 and the AFN by way of the Chiefs in Assembly's ratification of UNDRIP in 2007 (Resolution no. 37/2007) and commitment "to the full implementation of [UNDRIP] within their own agreements, arrangements, laws and Nations".[18] Indeed, the Tribunal should take these endorsements as a recognition by both Canada and the AFN that UNDRIP is part of good governance, regardless of the government involved.

The Caring Society also does not agree with AFN that the meaning of Free, Prior, and Informed Consent is unresolved. To the contrary, there has been significant work done in this regard, including most notably the UN Expert Mechanism on the Rights of Indigenous Peoples' ("UNEMRIP") 2018 study, *Free, prior and informed consent: a human rights-based approach*. Indeed, detailed thinking on Free Prior and Informed Consent has been a feature of the academic literature in this area, for example in Andrea Carmen's 2010 book chapter "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", in *Realizing the UN Declaration on the Rights of Indigenous Peoples*.

Based on this work, the Caring Society disagrees with the AFN's statement that "Indigenous Peoples should receive satisfactory information in relation to the [relevant] measure or project".[19] To the contrary the UNEMRIP notes that information provided should be objective, accurate and clear,[20] while Ms. Carmen's text states that "all relevant information reflecting all views and positions must be available for consideration by Indigenous peoples concerned".[21]

The AFN's submission also fails to consider the importance of timeliness to Free, Prior, and Informed Consent. The UNEMRIP study noted that the "prior" component of Free, Prior, and Informed consent requires "[p]roviding the time necessary for indigenous peoples to absorb,

[18] Affidavit 7 of Doreen Navarro, affirmed October 11, 2022 at Exhibit "A".
[19] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 11.
[20] UN Expert Mechanism on the Rights of Indigenous Peoples (2018), *Free, prior and informed consent: a human rights-based approach* at para 22(a).
[21] Carmen, Andrea, "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", in Joffe, Paul, Jackie Hartley and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples* (2010) at pp 124-125.

understand and analyse information and to undertake their own decision-making processes".[22] Ms. Carmen's summary also states that "[t]he decision-making process must allow adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal under consideration".[23] The Caring Society submits that, on the face of the record, there are timeliness concerns in this case given the very quick pace at which the AFN and Canada have sought to move.

Concerns regarding whether a timely opportunity for Free, Prior, and Informed Consent has been provided are even more pronounced given the more than fifteen years that it has taken to achieve compensation for the infringement of individual victims' human rights. This is particularly the case given that the timelines are a function of Canada's budgetary cycle and the pace at which the class action parties seek to proceed with Federal Court settlement approval. While the Caring Society agrees that it is imperative that victims receive compensation as quickly as possible, the time required for proper consideration would have been a marginal change to the pace of proceedings. Moreover, it was always open to Canada to comply with the Tribunal's compensation orders, which Chiefs in Assembly had authorized the AFN to seek, and which had been upheld by the Federal Court, and issue payment to victims.

The Caring Society notes that the AFN has provided the Tribunal with limited evidence regarding its consultations generally, or on the matter of excluding non-ISC funded placements specifically. Aside from representations made by counsel during oral submissions in chief and reply at the September 15-16, 2022 hearing (which should be disregarded due to the prohibition on counsel giving evidence), details are limited to the cursory statements made at paragraphs 44-51 of Ms. Ciavaglia's July 22, 2022 affidavit, paragraphs 25-27 of Ms. Ciavaglia's September 28, 2022 affidavit and in Ms. Ciavaglia's October 6, 2022 written response to the Caring Society's ninth question. Other than a list of 48 meetings (23 of which were with the AFN Executive or other parties to this litigation),[24] no concrete information regarding the consultative process has been provided.

The information provided the Ms. Ciavaglia's post-hearing affidavit is also not responsive to the state of Chiefs' acceptance of the exclusion of non-ISC funded placements, as that affidavit addresses concerns expressed around the exclusion of provincial/territorial placements. However, the concern Ms. Ciavaglia notes as being related to those placements arises not from the lack of data regarding non-ISC funded placements, but rather from the fact that placements by the off-reserve provincial/territorial child welfare systems (as opposed to under the FNCFS Program) are outside the scope of the complaint, which addressed the FNCFS Program's operations on-reserve and Canada's failure to implement Jordan's Principle. AFN's commitment

[22] UN Expert Mechanism on the Rights of Indigenous Peoples (2018), *Free, prior and informed consent: a human rights-based approach* at para 21(a).

[23] Carmen, Andrea, "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", in *Realizing the UN Declaration on the Rights of Indigenous Peoples* (2010) at p 125.

[24] Affidavit of Janice Ciavaglia, affirmed July 22, 2022 at Exhibit "D".

to UNDRIP in its own agreements and arrangements requires clearer disclosure than this. Ms. Ciavaglia's response to the Caring Society's written questions also selectively quotes from the Union of BC Indian Chiefs' Resolution 2022-67, which in addition to referencing First Nations individual and collective rights (as Ms. Ciavaglia notes) states that the Tribunal's compensation orders are a minimum standard (which Ms. Ciavaglia fails to note).[25] Ms. Ciavaglia's response to the Caring Society's written questions also fails to note the BC Assembly of First Nations' resolution also endorsed the Tribunal's compensation orders as a minimum standard.[26]

The state of the AFN's consultations is important, as the AFN has repeatedly asserted that it represents First Nations rights holders on this motion and yet it has not produced any resolutions authorizing it to file the class action on behalf of First Nations, nor did it seek or receive any resolutions from the Chiefs in Assembly authorizing the Final Settlement Agreement. Indeed, AFN signed the Final Settlement Agreement less than a week before the Chiefs in Assembly were meeting in Vancouver for their Annual General Assembly from July 5-7, 2022. It is not enough for a representative organization to proclaim authority from rights holders. Consistent with Free, Prior, and Informed Consent, that authority must be sought and confirmed.

Submissions on how individual rights ought to be balanced with collective rights in this context, considering the *UN Declaration on the Rights of Indigenous Peoples*, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, the *Convention on the Rights of the Child* and the *Canadian Human Rights Act*

The AFN's oral submissions in reply and response to the Panel Chair's third question set up a false dichotomy between awarding damages to a group as a whole and addressing individual human rights violations. Individual and collective rights are not mutually exclusive in nature.[27]

Counsel for the AFN previously set out a similar false dichotomy in its oral reply submissions, suggesting that if the Tribunal did not grant the AFN and Canada's requested motion, First Nations rights would be set back "another 100 years". The Caring Society fundamentally disagrees with this grandiose and unsupported statement. The Panel should not give any weight to this submission, as it strains credulity to say that the AFN would join with Canada to bring a motion that posed such serious risks to First Nations rights holders. Even if this proceeding could set back First Nations rights "another 100 years", surely such a dire outcome should increase the importance of ensuring that Canada does not contract out of its duty to consult. It is essential that rightsholders can exercise Free, Prior, and Informed Consent, particularly on matters involving their children.

[25] Affidavit 7 of Doreen Navarro at Exhibit "D".
[26] Affidavit 7 of Doreen Navarro at Exhibit "C".
[27] Naiomi Metallic, Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments, in Constitutional Forum constitutionnel, at p 15.

As noted above, there is no dichotomy between individual and collective rights. Individual human rights (include the right to effective remedies) and a collectivity's rights can and should co-exist.[28] Indeed, the AFN's decision to pursue the remedy of individual compensation and its rejection of the Caring Society's proposed collective remedy (i.e., compensation paid into a trust for the exclusive benefit of victims) highlights the fact that individual and collective rights can co-exist.

Given the interdependency of human rights, a process that ousts redress for subsets of individuals is not compliant with minimum human rights standards. Human rights are not fragmented categories. Instead, they must be understood as a larger interdependent whole, because the violation of one right puts other rights in jeopardy.[29] A disregard for existing entitlement to human rights compensation for First Nations children who were removed to non-ISC funded placements will inevitably have impacts on the collective.

Therefore, the Caring Society takes the position that, consistent with prior orders, this Tribunal can provide the necessary instructions to ensure that individual human rights are being respected, by confirming non-ISC funded placements were included in the Tribunal's compensation orders, while still bearing in mind the effect of individual violations on the collectivity. Providing guidance to Canada and AFN confirming that non-ISC funded placements were always included in the Tribunal's compensation orders would honour individual rights while giving the group purporting to speak for the collective an opportunity to respond. This would also provide the AFN and Canada with the opportunity to follow Dr. Fallon's and Dr. Trocmé's advice that "**[t]here will be limitations to reliance on written documentation to support compensation eligibility. Accordingly, other mechanisms should be considered, or eligible claimants will be left out of the process** [emphasis added]".[30] While such "other mechanisms" appear to have been developed for Jordan's Principle claimants (subject to a number of definitional concerns), First Nations children placed outside of their families and communities in "non-ISC funded placements" were not similarly considered.

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[28] See the United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 at preamble and article 1: "*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,"
"Article 1 Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law" [emphasis added].

[29] M. Celeste McKay and Craig Benjamin, A Vision for Fulfilling the Indivisible Rights of Indigenous Women, in Joffe, Paul, Jackie Hartley and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples* (2010) at p 160.

[30] Affidavit of Janice Ciavaglia, affirmed July 22, 2022 at Exhibit "J", p 137.

The very nature of human rights rests upon the protection of vulnerable groups. It addresses power dynamics, which arise both in the relationship of First Nations with outside groups (including, most importantly, the federal government) and within First Nations communities. It is this second aspect which bears careful consideration in this case. As the Chiefs in Assembly have affirmed by way of their 2007 resolution adopting UNDRIP, human rights must be ensured within Indigenous communities and organizations and redress must be available.[31] Human rights should "also be construed as recognizing the human rights of indigenous individuals in their relations with their own governments".[32]

Far from AFN's representation that First Nations governments and citizens "rarely" make use of the human rights system, complaints from First Nations claimants make up a significant proportion of matters brought to the Canadian Human Rights Commission.[33] Indeed, in addition to this matter, other complaints proceeding to the Tribunal have addressed policing for First Nations peoples, special education for First Nations children and adults with disabilities.[34] This is consistent with AFN's views expressed in 2011 in its report regarding readiness in relation to the repeal of s. 67 of the *CHRA*, in which it stated that it had "worked hard to encourage Canada to work directly with First Nations and to take the necessary steps to ensure equality rights are protected on reserve lands in a manner consistent with the international human rights system"[35] and noted that "First Nations are eager to improve and develop human rights and dispute resolution mechanisms within their communities and expect Canada to comply with all international human rights norms".[36]

The Tribunal's approach in this case is instructive. Individuals experienced widespread and deep levels of discrimination by Canada, which also had an impact on rights-holding collectives. In approaching remedies, the Tribunal broadened the consultation required of Canada beyond the Commission, to ensure that the voices of First Nations and those with significant expertise could be heard via representative organizations in order to inform immediate and long-term relief. The Tribunal has also created provisions in its orders for individual First Nations to negotiate more specific arrangements with Canada. Importantly, the Tribunal has created space for particular

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[31] Emily Snyder; Val Napoleon; John Borrows, Gender and Violence: Drawing on Indigenous Legal Resources, 48 U.B.C. L. Rev. 593, 654 (2015) [Emily Snyder, Gender and Violence], p 603.
[32] John Borrows 53 U.B.C. L. REV. 957 (2021), at p 961. See also p 960: "In addition to necessary state action, rights embedded within the Declaration will not be realized if lndigenous governments disregard or reject its provisions."
[33] Canadian Human Rights Commission, *2021 Annual Report to Parliament* at p 53.
[34] *Dominique v Canada*, Tribunal File No. T2251/0618; *Mississaugas of the New Credit First Nation v Canada*, Tribunal File No. T1810/4012; *Taylor v Canada*, Tribunal File Nos. T1991/7113 and T1990/7013.
[35] Affidavit 7 of Doreen Navarro, affirmed October 11, 2022 at Exhibit "B", p 39.
[36] Affidavit 7 of Doreen Navarro, affirmed October 11, 2022 at Exhibit "B", p 58.

First Nations interests to participate on discrete questions through its use of the "interested party" mechanism in the Tribunal's Rules.[37]

Children and youth are particularly vulnerable populations. This means they are also subject to the power relationships within the communities.[38] Being mindful of the enhanced vulnerability that children are subject to, article 22.1 of UNDRIP specifically addresses this group by ensuring their rights against violence and discrimination. Contrary to the AFN's argument[39], this is entirely consistent with self-government. Indeed, article 34 of UNDRIP clearly states that the promotion and development of Indigenous peoples' institutional structures should be "in accordance with international human rights standards." As a result, the endorsement of UNDRIP by the Chiefs in Assembly shows important First Nations support and acceptance of minimum human rights standards, both for individuals and the collective. No governance should be exercised without limitations. Governance by its very nature needs to be accountable to those governed, be it that emanating from the federal government, or from a self-governing First Nation. Self-government aims to improve the situation of First Nations citizens and, in this light, even inadvertent breaches of human rights ought to be avoided to safeguard self-government from entrenching oppression and discrimination.[40]

Ousting non-ISC funded placements, as proposed by the AFN and Canada, would mean a significant setback on this Tribunal's orders because it would undermine the confidence in the justice system as a whole, by failing to protect vulnerable persons. Revoking or reducing existing entitlements to human rights compensation, whether generally or for First Nations children in non-ISC funded placements, is inconsistent with the aims of reconciliation.

Effectively, the AFN and Canada are asking the Panel to change its orders to conform to and to validate the power dynamics that resulted in the Final Settlement Agreement. Indeed, Canada has chosen to impose a cap on class action compensation and a requirement that the Tribunal conform its orders to reflect the agreement reached in the class action, so that class members cannot opt out to seek compensation under the Tribunal's orders as an alternative to the Final Settlement Agreement. The AFN has determined that the most practical way of meeting these requirements is to exclude non-ISC funded children, the estates of parents, and to adopt a procedure that places the entitlements of victims of Canada's discrimination related to Jordan's Principle in an ambiguous state. This contradicts the very purpose of this Tribunal's jurisdiction,

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[37] 2016 CHRT 11 (re Nishnawbe Aski Nation); 2019 CHRT 11 (re Congress of Aboriginal Peoples); 2020 CHRT 31 (re Innu Nation); 2022 CHRT 26 (re Federation of Sovereign Indigenous Nations).

[38] Emily Snyder, Gender and Violence, p 605: "Indigenous law, like all other forms of law, is not neutral; rather, it is heavily influenced by dominant social norms." On how the relationships of dominance and power imbalance within first nations can also lead to human rights violations see Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) at p 399.

[39] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 13.

[40] Emily Snyder, Gender and Violence, p 618.

which is to ensure that minorities have their human rights upheld. The decision on this motion should not overlook such power dynamics, which are present in every social context. The Tribunal's authority should not be used to validate the silencing of a vulnerable segment of this population.[41]

The *Convention on the Rights of the Child* (CORC) mandates that the best interest of the child should be the primary consideration of public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.[42] The *Act respecting First Nations, Inuit and Métis children, youth and families* confirms this priority in matters dealing with First Nations child and family services. Yet, the AFN's position is that, as a collectivity, the AFN has stronger rights than individuals who have been directly suffered human rights violations.[43] This is contrary to the CORC's provision that determines that both private and public actors must consider the best interest of the child, an obligation that UNDRIP accepts given Article 34's incorporation of international human rights standards, and expressly endorses given Article 22.1, as noted above.

Further, under the CORC, courts and administrative authorities should also consider the best interest of the child int their decision. Therefore, where there is any ambiguity in interpretation, or where there is a conflict between right holders, the guiding principle should be the child's best interest. Neither Canada nor the AFN have demonstrated how the Tribunal modifying its orders to exclude non-ISC funded placements is in the best interests of children. Their arguments rely solely on the collectivity's best interest, which cannot be considered separately in order to take precedence over the needs of First Nations children for individual redress for the wrongful removal of children from their homes, families, and communities. Accepting this argument contradicts this Tribunal's preceding orders.

Finally, the Caring Society encourages the Panel to reject the AFN's submission that the Caring Society is:

> seeking a binding precedential order that would ensure individual rights would trump any negotiated agreement that First Nations rights holders have developed. Such an order would amount to a structural injunction whereby individuals would be able to use the outcome in this case to thwart or challenge self-government agreements and other arrangements negotiated between First Nations and Canada in the future.[44]

To be clear, no "precedential order" eroding the rights of First Nations rights holders is possible in this fact scenario as AFN is not a rights holder, nor has it sought formal authority from rights holders respecting the Final Settlement Agreement. The argument above is also inconsistent with

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[41] Emily Snyder, Gender and Violence, p 637: "Power dynamics are present in all contexts, and some of our voices and perspectives might be heard over others".
[42] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at Article 3.
[43] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 14.
[44] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 13.

AFN's earlier position that the class action final settlement agreement "is a private agreement between parties to a dispute associated with compensation for a grievance".[45]

In any event, AFN's "structural injunction" argument mischaracterizes the Caring Society's position. The Caring Society agrees that First Nations can negotiate their own arrangements with the Crown. Indeed, the Caring Society has long been a strong proponent of self-determination (see, for instance, its long history promoting the Touchstones of Hope (2005) reconciliation model). The Caring Society's position is that subsequent settlements in different proceedings cannot detract from prior final orders providing meaningful remedies to uphold human rights. The sole reason that the present proceedings before the Tribunal pose any concern to the outcome of the class action settlement is Canada's choice to impose a term requiring the Tribunal orders to conform to the class action settlement. Were it not for that choice, co-existence of the relief contemplated in the class action settlement (for individuals who do not opt out of the class action) and those in the Tribunal's orders (for individuals who do opt out) would be possible.

The Caring Society recognizes the important work that AFN, COO and NAN have done in the proceedings before this Tribunal. However, the Caring Society has been unable to support the AFN and Canada's motion due to the adverse impacts on children, youth and adults. Taking away compensation from victims who have suffered so badly due to Canada's discrimination would add to the trauma and injustice they have experienced. The Tribunal is entitled to and, in the Caring Society's submission, ought to consider whether collective rights are being exercised by parties to the Final Settlement Agreement in a way that respects the free, prior and informed consent of First Nations rights holders (including those who have expressed concerns regarding the Final Settlement Agreement) and is cognizant and sensitive to the individual rights of the collective's members. Indeed, the AFN has recognized the importance of this principle in the past, both when it embraced the application of UNDRIP to First Nations own "agreements, arrangements, laws and Nations" and in its readiness report regarding the repeal of section 67 of the *CHRA*. This is an important contextual element through which the Tribunal must evaluate the settlement agreement reached in the Federal Court class actions, in order to ensure that individual victims are not deprived of their entitlement to effective human rights remedies.

Yours very truly,

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DPT/jk

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[45] AFN's September 28, 2022 submissions in response to the Panel Chair's questions at p 10.

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