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September 28, 2022

By 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 (File No. T#1340/7008)

I write in response to the Tribunal's correspondence dated September 21, 2022. We are pleased to provide the Assembly of First Nations' ("**AFN**") answers to the three questions posed by the Panel in relation to the submissions made by the Parties during the motion on the proposed endorsement of the Compensation Final Settlement Agreement (the "**FSA**"). In its letter, the Panel has invited the Parties to provide submissions on the following questions:

1. In light of the above, is there a possibility that the Agreement was negotiated based on a premise that departed from the Tribunal's findings and orders namely, ISC funded placements of First Nations children?
2. In the affirmative, does this change the free, prior and informed consent of First Nations Chiefs in Assembly? If the answer to questions 1 and 2 is yes, what is the appropriate action?
3. At the end of the hearing last week, the AFN raised a number of points in reply including the importance of collective rights especially for Indigenous Peoples. I took those comments to heart. I now have had times to reflect upon counsel Wuttke's important comments. I am inviting the parties to provide submissions on how individuals rights ought to be balanced with collective rights in this context considering the *UNDRIP*, *UNDRIPA*, the *Convention On the Rights of the Child* and the *CHRA*.

The Tribunal directed the parties to consider the following passages from its prior orders in addressing these questions:

> 2022 CHRT 8 at paras. 141-151; 2021 CHRT 7 and the Compensation Framework sections 4.2 and 5.6, Notice plan, Taxonomy of compensation categories for First Nations children, youth and families" dated November 2019

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and authored by Marina Sistovaris, PhD, Professor Barbara Fallon, PhD, Marie Saint Girons, MSW and Meghan Sangster, Med, MSW of the Policy Bench: Fraser Mustard Institute for Human Development will assist in the identification of potential beneficiaries (the "Taxonomy"). The Taxonomy is found at Schedule "B". 2019 CHRT 39, at paras. 148-152; 165; 169, 171, 175-179, 181, 184-186; 188, 193, 196-198, 201-206, 208-210, 245-257. 2021 CHRT 7 at, paras. 5-34, 2021 CHRT 6, at para. 61, 91, 127-130, 133, 135.

Given that the AFN has not provided any evidence on this question, we are attaching the Affidavit of Janice Ciavaglia, affirmed on September 28, 2022.

1) Negotiations on the Settlement Agreement

a) Overall approach to Negotiations

The AFN addressed and considered whether children who were placed in non-ISC funded non-kinship placements (the "**Non-ISC Placements**") and kinship placements could or should be included within the scope of the compensation prior to and during the course of negotiations of the FSA. In considering these Non-ISC Placements, the AFN first considered who the children are at the heart of this discussion.

The FSA covers all First Nations children on-reserve or in the Yukon who entered the child welfare system. Indeed, the FSA takes a much broader approach than the Tribunal's compensation orders in this respect because it extends compensation to children and families who were placed within their own communities (in addition to expanding all of these groups to April 1, 1991).

The only children on-reserve or in the Yukon who may have been in the child welfare system but not ISC-funded are some of those placed with kin and some of those placed with kith in unpaid arrangements. The situation of these groups is as follows:

1. Children in kinship care are expressly excluded from the Tribunal's compensation orders: The Tribunal's compensation orders required that a child be placed outside their "homes, families, and communities" for compensation eligibility. Children placed in kinship care stayed with "extended families and communities …[and] have been comforted by safe persons that they knew",[1] which is supported by sound policy that the Tribunal has expressly supported. In its merits decision, the Tribunal cited the "guiding principle" for "culturally appropriate services" as being: "culturally appropriate services encourage activities such as kinship care options where a child is placed with an *extended family member* so that cultural identity and traditions may be maintained".[2] As submitted below, the passing reference in the Compensation Framework to "kinship care" was not addressed or specifically decided by the Tribunal and is contradicted by the Tribunal's orders.

[1] 2019 CHRT 39 para 149
[2] 2016 CHRT 2 at para 424 [emphasis added]

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2. Children placed with kith (such as trusted friends or acquaintances living outside the child's home, family, and community) are not addressed in the Tribunal's compensation orders: These are the only individuals who could potentially be argued to be included in the Tribunal's compensation orders but not captured by the ISC-funding requirement. [3] As such, the submissions that follow focus squarely on this group. As stated below, the Tribunal's orders do not decide whether this particular group is entitled to compensation. Given that the Tribunal has not expressly decided this issue and in light of the multi-faceted nature of such arrangements across the country, we believe that such individuals are not captured by the Tribunal's compensation orders. We do, as elaborated on below, acknowledge that ambiguity may exist in this regard.

We did not disregard the arguments that such individuals may be included in the Tribunal's orders or should be included in the FSA. All plaintiffs engaged in intensive negotiations hoping to capture every First Nations child who suffered discrimination, and we were able to capture such children far beyond what the Tribunal could order in its statutory context.

In the course of negotiations, the AFN considered whether the Non-ISC Placements and kinship placements could be included within the scope of compensation under the FSA on the basis of the Panel's compensation orders, including the Compensation Framework. This issue was discussed between the AFN and Moushoom counsel and ultimately, we decided that these children would not be included within the scope of compensation under the FSA.

The AFN has highlighted that certain departures from the Tribunal's orders and the compensation framework were reasonably necessary in order to settle the class action and expand compensation to thousands of additional beneficiaries under the terms of the FSA. The need for compromise was evident before entering into negotiations, while other compromises surfaced during the course of the negotiations. Compromises were made with respect to the estates, the inclusion of adoptive and stepparents, creating a process for Jordan's Principle and the opt-out period, all in a principled manner which emphasized benefits for children and the need for a workable, culturally-sensitive and trauma-informed claims process.[4] When a compromise was required to be made, the AFN applied a child first approach, negotiated intensively with the other parties, and took decisions that it viewed as in the best interests of the class and its First Nations members.

The AFN had no misunderstanding of the Panel's orders on Non-ISC Placements and kinship placements, having considered the issue from the outset, both in the context of the compensation framework negotiations, and ultimately, the class action settlement negotiations.[5] The AFN recognized that significant difficulties existed in including Non-ISC Placements and kinship placements into the compensation scheme. Notably, non-ISC funded arrangements encompass various types of care arrangements, including various unique care arrangements in First Nations families which can include close friends, which provincial and agency records would not be able

[3] Amongst this group, any child who at any stage between April 1, 1991 and March 31, 2022 entered the child welfare system outside this discrete group is already captured by the FSA.
[4] Affidavit of Janice Ciavaglia affirmed September 28, 2022, at para. 5 ["Ciavaglia Affidavit"].
[5] Ciavaglia Affidavit at para. 5.

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to distinguish.[6] The AFN was also aware that there would be issues in identifying the members of this group, and that information regarding a child's placement would be difficult to obtain, or in some cases, not exist. Additionally, if provincial and agency related data exist, they are subject to significant provincial inconsistencies and variability which would undermine any effective manner in which to establish eligibility for compensation for these individuals.[7]

The AFN sought to include as many people as possible in the compensation scheme. In developing a workable and sound compensation process, certain departures from the Panel's orders were required. The FSA was negotiated with an understanding of which children were included in the Panel's orders and those that were not, and which to the best of the parties' ability, reflected the entitlements established within this Panel's Compensation Decision and related compensation orders. Any departures do not represent misapprehension, but rather decisions that were made to compromise during the course of negotiation.

The Tribunal should take into account the rationales underlying the use of ISC funding as a metric in the FSA.

The children staying with kith identified above—who are the only group not included in ISC-data but who could potentially be covered by the Tribunal's compensation orders—do not share the same characteristics as the estimated 116,000 children already covered by the ISC funding metric. Extreme variability exists across this group: some parents may have left their child with a friend informally for personal reasons without any involvement of child welfare authorities; others may have left their child with a neighbour or family friend or extended family; in some instances, a parent may have faced compulsion from an agency to leave their child with a trusted acquaintance instead of formal foster care; in some cases there may be voluntary written agreements and in many cases not. In most, if not all, such cases, the child would have benefitted from staying with a trusted family friend or acquaintance (rather than foster care) because such trusted family friends or acquaintances would be the "safe persons that they knew", chosen by their parents, which the Tribunal encouraged over foster care with strangers.[8]

Further, the taxonomy experts who investigated the provincial data concluded that no reliable or uniform source of information exists within the provinces and agencies.[9]

Lessons learned teach us the following: the claims process should be user-friendly, culturally sensitive, and trauma-informed. These qualities are not abstract or aspirational. The FSA delivers these qualities.

The FSA can deliver a user-friendly, culturally sensitive, and trauma-informed claims process in part because it taps into ISC data on survivors, which proportionately reduces the burden on the survivors claiming compensation in accordance with lessons learned.

[6] Ciavaglia Affidavit at para. 16.
[7] Ciavaglia Affidavit at para. 6
[8] 2019 CHRT 39 para 149
[9] Ciavaglia Affidavit at para 9.

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First Nations across the country have advised the AFN that they prefer a simplified, trauma-informed approach that does not place the burden on the claimants where possible. The Caring Society's criticism of this metric—well-intentioned as it may be—threatens to deprive the claims process of a most valuable tool that enables a trauma-informed approach to the payment of compensation.

Removing the pre-requisite of ISC-funding potentially opens the floodgates to claimants who were not envisaged by the Tribunal's orders or the claims made in the class action. There is a potential that this could severely undermine the compensatory process. The use of the ISC data is an essential safeguard that enables a simplified, non-traumatizing claims process. Opening compensation to the non-ISC funded kith cohort would bring unknown and unverifiable uncertainties into the claims process and potentially require much more invasive screening processes, which the AFN worked hard to avoid based on past experience.

b) Practical Considerations to the non-inclusion of Non-ISC Placements in the FSA

There were a number of practical and policy reasons as to why the AFN ultimately concluded that Non-ISC Placements would not be included in the FSA. The factors below, considered in light of the need to create a workable, culturally sensitive and trauma-informed compensation process, informed the AFN's decision to not include non-ISC funded kinship placements within the scope of the FSA. These factors include:

(a) There is a lack of provincial, territorial and agency records available to quantify the number of individuals who may have been placed in non-ISC funded, kinship placements, which meant there was significant uncertainty regarding the number of individuals who could be entitled to compensation;

(b) Provinces and communities across Canada are inconsistent with respect to their documentation of voluntary placement arrangements. The variability and deficiency of provincial territorial and agency data meant there would be significant uncertainty in establishing the entitlement for compensation for these individuals, even if records or other relevant data was available;

(c) There would be serious issues regarding the ability to create an accessible, culturally-sensitive and trauma-informed claims process for these individuals, even if they were able to be identified, as a result of the issues relating to the availability of records and data, as noted above;

(d) Many of the children placed into alternative and voluntary placement arrangements may still be entitled to benefits under the FSA as they may also have been subjected to a Jordan's Principle claim or subsequent ISC-funded removal and/or placement;

(e) Equally problematic is that provincial legislation for kinship placement is not uniform. A number of provinces include family friends into the definition of kinship care; and

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(f) First Nations do not draw categorical differences between kith (familiar friends, neighbours) and kin.[10] The placement of children into other non-ISC funded arrangements would include children who did not suffer breaches of substantive equality as they were placed with close friends who would have maintained the connection to their community in the same way that would have occurred with a kin-placement, potentially resulting in confusion and tension between these individuals and those placed with family who would be ineligible for compensation under the Tribunal's Compensation Orders and the FSA.

The greatest practical impediment to the provision of compensation for kinship care and alternative placement arrangements include the deficiency of, existence, or access to these records. The question is not about finding these children, but about having a workable First Nations-led claim process for all children, which the FSA provides. Unfortunately, most of these placements were made under provincial processes. As a result, a claims process which contemplated these arrangements would require claimants to access their records with child welfare agencies or the provinces. As noted in the Trocme report, the regional records are rife with errors. Many records did not correctly provide for the right birthdate or did not include a birthdate at all.[11] Many records did not provide for an exit date the child left care or did not provide any information of years subsequent to the child's removal.[12] Any records a claimant would obtain from the provinces or agencies would unfortunately not be very useful to the claims process. The AFN's view was that it would likely be exceedingly difficult to determine or verify that a Non-ISC Placement or kinship placement occurred without placing a significant burden upon victims.[13]

c) The Panels' orders

We have conducted a review of the passages cited by the Panel in its letter of September 21, 2022, as well as the compensation orders. As noted in the AFN's oral argument, it is the AFN's view that Non-ISC Placement and kinship placement were not included within the Panel's compensation orders. We would qualify that by noting that there is ambiguity within the compensation orders on this point. The following explanation reflects the AFN's understanding going into negotiations on both compensation and long-term reform and the issues the AFN had to address in determining whether Non-ISC Placements and kinship care would be included in the FSA. Thus, the AFN's negotiation of the FSA was not premised on a departure from the Tribunal's orders.

This Panel has noted that there are two types of removals: (a) those children who did not need to be removed from their home and (b) those who were required to be removed due to physical, sexual or psychological abuse.[14] Those children who did not need to be removed did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities.[15] There is no doubt that these children are entitled to receive compensation under the Panel's orders.

[10] Ciavaglia Affidavit at para. 6.
[11] Trocme Report at p. 14.
[12] Trocme Report at p. 14.
[13] Ciavaglia Affidavit at para. 13, 16-17.
[14] 2019 CHRT 39, at paras. 14, 139.
[15] 2019 CHRT 39, 245

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While the Panel accepted that children were placed into care for a number of reasons, even those outside of Canada's control, the Panel opined that Canada should still be held liable for the suffering of First Nations children due to the lack of prevention services.[16] The AFN accepts this ruling.

However, we note that compensation is not only tied to the removal of a child without further inquiry. Implementing a single criterion would represent a significant departure from a proper reading of the Panel's numerous compensation orders. If removal of a child was the sole determinative factor, then all children, including those who were placed in homes in their communities would be entitled to compensation. Removals that occurred off-reserve are not included in the compensation orders.[17]

Presently, children who were removed, but placed in their community are clearly not entitled to compensation under the Panel's orders, despite being subjected to the same discrimination as other children from their Nation. The Tribunal was clear that compensation was contingent on meeting all three criteria: removal from one's (i) home, (ii) family, and (iii) community. Importantly, the Tribunal clarified that the harm underlying eligibility for compensation is a severance from one's culture, language and Nation.[18]

With respect to kinship placements, the Panel makes little reference to kinship care arrangements within the context of its compensation orders.[19] An important point this Panel makes is that where a child is placed with a member of their extended family the principles of substantive equality would be satisfied.[20] The placement of a child with a member of their extended family (aunts, uncles, cousins, older siblings, or other family members and kin) is reflective of traditional or customary placements.

This interpretation is also consistent with the Tribunal's order that compensation is tied to being removed from one's culture, language and Nation:

> [249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's Decision 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and communities.[21]

[16] 2019 CHRT 39 at para 177.
[17] 2021 CHRT 7, at para 12.
[18] 2019 CHRT 30, at paras 184 and 188; 2019 CHRT 39, at para 193; 2021 CHRT 7, at para 5; and 022 CHRT 8, at para 146.
[19] 2016 CHRT 2 at paras 117, 424; 2019 CHRT 39 at para 149.
[20] 2019 CHRT 39, at para 149. This Panel stated that where a child is not placed within their community, a member of an extended family, or someone trustworthy they knew, a breach of substantive equality would have occurred.
[21] 2019 CHRT 39 at para. 249.

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This is further supported by the Tribunal's comment that "First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities".[22]

The AFN would submit that the compensation orders and Compensation Framework are inconsistent with respect to kinship placements. Under the compensation orders, a child or family member would not be entitled to compensation where they are placed in state care under a normal apprehension, where such child was placed with a family member. However, the compensation framework provides an exception where a child is placed in kinship care under a voluntary arrangement. This would elevate voluntary arrangements as a preferred class to be compensated. Meanwhile, a meaningful majority of children placed with family members would not receive any compensation whatsoever. This is a contradiction that the AFN has trouble reconciling.

This Panel carefully assessed the evidence before it and opted to carve out eligibility factors that address harm from being removed from one's culture, language, community and nationhood. It is for this very reason that children who were placed in their community or with an extended member of their family are generally not entitled to compensation under this Panel's compensation orders. However, kinship care seems to be an exception to this rule, creating preferred status to a few while denying benefits to the majority.

With respect to Non-ISC Placements, the AFN notes that only place within the compensation orders or Compensation Framework that has been advanced as capturing same is found within the reference to "various custody agreements" referenced in the Compensation Framework at section 4.2.1. The AFN would note that the ambiguity therein is the basis for its position that Non-ISC Placements are not part of the compensation orders. Further, the AFN would submit that children subject to Non-ISC Placements would also be subject to the criteria of having been removed from their home, family, community, language, culture and Nations to be eligible for compensation. These are fundamental pre-conditions for eligibility pursuant to the Tribunal's compensation orders.

Further, such Non-ISC Placements with a family friend or trusted person arguably reflects the principle of substantive equality. As noted by the Panel:

> [149] … However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. **This is a good example of violation of substantive equality**.[23] [emphasis added]

These Non-ISC Placements may have maintained the opportunity for connection and attachment to the child's home, family, community, language, culture and Nation. The ambiguity reflected within these types of placements is that there are two classes or removed children who suffered

[22] 2019 CHRT 39, at para 149
[23] 2019 CHRT 39, at para 149.

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from the lack of prevention: (i) non-ISC funded children who are not required to have a split from their culture, language and nation; and (ii) all other removed children who are required to have a sever with their language, culture and Nations, in order to qualify for compensation. This would result in preferential treatment of these Non-ISC Placements over all other removed children.

The AFN does not submit that this was the case for all children, but creates ambiguity vis-à-vis removed children who were completely severed from their homes, families, community, and thus lost connection to their culture, language and Nation. The AFN and the other parties struggled to reconcile these two groups' entitlement to compensation under the FSA. It is the AFN's view that the approach to compensation in the FSA is justifiable. The criteria for compensation apply equally among all classes of removed children: severance from one's home, family, community, Nation, language, and culture.

The Compensation Framework is clarifying, not prescriptive

As noted above, the Non-ISC Placements are arguably only potentially captured by virtue of section 4.2.1. of the Compensation Framework:

> 4.2.1. "Necessary/Unnecessary Removal" includes: a) children removed from their families and placed in alternative care pursuant to provincial/territorial child and family services legislation, including, but not limited to, kinship and various custody agreements entered into between authorized child and family services officials and the parent(s) or caregiving grandparent(s); b) children removed due to substantiated maltreatment and substantiated risks for maltreatment; and c) children removed prior to January 1, 2006, but who were in care as of that date.[24]

The AFN recognizes that the inclusion of kinship care and alternative custody agreements is not fully consistent with this Panel's orders, as set out above. Further, the Compensation Framework is not a determinative or prescriptive document, but is instead a guidance document with the capacity to evolve or be amended.[25] Critically, the Compensation Framework is subordinate to the Panel's orders, including its further orders, and any inconsistency or discrepancy will be resolved in favor of this Panel's orders.[26]

> 1.2. The Framework is intended to be consistent with the Tribunal's Compensation Entitlement Order. Where there are discrepancies between this Framework and the Compensation Entitlement Order, or such further orders

[24] Compensation Framework, Article 4.2.1.
[25] Compensation Framework, Article 13.1 "The Framework is intended to provide general guidance to facilitate the Compensation Process. As noted above, the Parties will continue to work on tools that may provide more precision to guide the implementation of the Framework. Processes can and should be amended where the Parties agree amendment is necessary. Such amendments do not require the approval of the Tribunal. Where the Parties disagree on the necessity for amendment, or the wording of any amendment, the Tribunal shall determine the issue on motion from the party requesting the amendment."
[26] Compensation Framework at Article 1.2; 2021 CHRT 6 at para 111; and 2021 CHRT 7 at paragraph 16.

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from the Tribunal as may be applicable, those orders will prevail and remain binding. [27] [emphasis added]

2) In the affirmative, does this change the free, prior and informed consent of First Nations Chiefs in Assembly? If the answer to questions 1 and 2 is yes, what is the appropriate action?

The AFN did not misconstrue this Panel's orders. Instead, the AFN considered and deliberated the potential inclusion of Non-ISC Placements and kinship placements in the FSA. The AFN does not believe there is a need to question the scope and breadth of AFN's briefings and dialogue with First Nations governments and rights holders.

Further, the FSA does not amount to or contemplate a Crown imposed "legislative" or "administrative" measure which would give rise to the necessity to obtain their free, prior and informed consent ("**FPIC**"). Instead, the FSA is a private agreement between parties to a dispute associated with compensation for a grievance, even though one is a state actor. The AFN is not a "state" that is subject to FPIC, but a representative advocacy organization which find its authority in Charter derived delegations from the Chiefs-in-Assembly of matters of national concern to First Nations, including by way of its mandates and resolutions and those of the AFN Executive Committee.

However, as this Panel has invited the AFN to provide submissions on FPIC, the AFN offers the following:

1. Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."
2. There is no coherent or uniform practice in implementing Article 19 and all articles of the UN Declaration must be read together, and in light of Section 35 of the *Constitution Act, 1982*.
3. There is no universal definition of FPIC, and international treaties and jurisprudence have not resolved its meaning, nor have Canadian courts and tribunals. This proceeding is not the matter to definitively establish the requirements to obtain FPIC, as this will cause further delays. Superior courts are already seized with these issues in relation to other matters, see *In the Matter of the Reference to the Court of Appeal of Quebec in Relation with the Act Respecting First Nations, Inuit and Metis Children, youth and families*, SCC file 40061, 2022.
4. The obligation of FPIC rest solely on the state. In the Canadian context, the obligation rest solely on the federal and provincial/territorial governments, and by delegation municipal governments.
5. The development of Article 19 and the international record of negotiations was reflective of the following key points:

[27] Compensation Framework at Article 1.2.

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a. Indigenous Peoples should be engaged prior to the drafting of legislation that impacts them;
b. Free means without coercion or pressure (and note there is no coercion or pressure in relation to settlement here by Canada);
c. Informed means Indigenous Peoples should receive satisfactory information in relation to the revenant measure or project;
d. There is no consensus on the actual meaning of "consent" so there is no immediate determination or direction that it means:
    i. It is fluid and application to Canadian context must involve Indigenous rights holders and Indigenous representative governments.
    ii. There is no case on record in which Article 19 was applied to an adjudicative setting.
    iii. There is no case on record in which individual rights of First Nations were held up for settlement in an adjudicative setting due to Article 19
    iv. Band class of compensation was rejected in this matter and is not before the tribunal.

6. Article 19 is a general provision applicable to legislative and administrative functions. It is not on its face applicable to adjudicative matters such as tribunals or courts.

7. The explicit affirmation of FPIC, and the recognition of self-determination makes the Declaration's approach to participatory rights especially innovative. It was a major source of conflict during negotiations of the UN Declaration. It reflects the need to permit political space to work this out appropriately over time without overreach from tribunals or adjudicative bodies.[28]

8. FPIC is more than consult and engage. In regards to child and family services, Canada has obligations to engage and co-develop legislation, and those programs and services that are within federal mandates must be developed according to Article 19. The federal legislation on *An Act Respecting First Nations, Inuit and Metis children, youth and families* has been developed on that basis, has a 5-year statutory review, and is subject to ongoing improvement and examination, extending the participation and input of First Nations over time into this important topic.

9. With respect to long-term reform of the First Nations Child and Family Services Program, Canada is obligated to co-develop reforms with only those organizations that represent First Nations rights holders, and/or the rights holding First Nation governments. Canada has no obligation and should not co-develop reforms with any civil society or interest-based organizations.

10. Articles 10 and 29 are more forceful about consent in specific contexts such as removal from territories (10) and hazardous materials (Article 29(2)). In these contexts, consent is absolutely required, but the context is different.

11. The juxtaposition of the various concepts of consent in UN Declaration give rise to the view that Article 19 is innovative and requires more than low participation and engagement in

[28] See Mauro Barelli, FPIC, in The UN Declaration on the Rights of Indigenous Peoples (Hohman & Weller, Oxford, 2018 at p, 248)

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legislative and administrative matters, and it should be able to develop in the proper political sphere.

The AFN reiterates that it is an advocacy organization that is comprised of First Nations governments, which include *Indian Act* bands, and Treaty First Nations (modern and historic). The AFN is not a mechanism for implementing or ascertaining FPIC. The AFN's mandates and authorities are set out in resolutions of Chiefs-in-Assembly and the AFN Executive Committee which direct the work of the organization. Importantly, the AFN is not a proxy for FPIC on legislative measures. The AFN was mandated to commence this action and a civil action and receives its mandates through its derived resolutions and deliberation, further to its Charter requirements.

The AFN does not set out what the scope and content of FPIC is, and this would be inappropriate, particularly when the AFN's advocacy in relation to individuals impacted by discrimination is based on the direction of Chiefs. Comparably, it is not for the Tribunal to question or determine the basis of AFN resolutions or approvals. This is inappropriate and potentially colonial in nature as it does not adequately give space for the AFN's political processes and runs contrary to the Panel's previous endorsement of the AFN as the representative complainant for First Nations victims at the heart of these proceedings. As noted in the Compensation Decision:

> [202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out.[29]

Ultimately, the Final Settlement Agreement before this Tribunal is the product of the AFN continuing to speak on behalf of First Nations children and families in accordance with its mandates and resolutions, the Final Settlement Agreement continuing to ensure that those who disagree with the AFN's approach can seek their own remedy by way of the provision of an opt-out. This Panel should not be focused on the principle of FPIC, which does not apply in the context of a negotiated settlement between Canada and a representative advocacy organization, and the inner-workings of the AFN's political processes, but instead on the fact that this was a First Nations-led process whose major proponents include the national representative body of First Nations in Canada who is a full party to these proceedings and each of the other interested parties' to this proceeding who represent rights-holding First Nations.

3) Balancing collective and individual rights

The question of individual rights versus collective rights is problematic under the *Canadian Human Rights Act* ("**CHRA**"). The CHRA and CHRT were created to protect and promote individual rights. This is precisely why many First Nations governments and individuals rarely avail themselves of the human rights regime.

[29] 2019 CHRT 39.

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The subject of collective rights for First Nations is complex. First Nations are more than a group of individuals, but are Peoples' who share a common heritage, history, culture, language, land base, and traditions, which leads to their members sharing a common identity. The UN Declaration, self-government agreements and the promise of reconciliation under s. 35 of the Constitution all support First Nations' right to self-determination. These rights will be defined by the First Nations themselves and should not be subject to intrusive questioning and oversight by Canadian courts and tribunals.

The AFN is of the view that this Panel should not weigh into the debate of collective rights of First Nations. We are of the view that it would be inappropriate for the Panel to attempt to classify or develop categories of Aboriginal and treaty rights or to distinguish collective versus individual rights. The issue before this Panel on the AFN's motion deals with individual compensation. Thus, it is not necessary for the Panel to make any ruling on collective versus individual rights. Rather, this Panel should confine its conclusions to determining whether the FSA should be endorsed as satisfying this Panel's orders.

The only reason why the AFN spoke to potential impacts to collective rights of First Nations is because the Caring Society and Commission are 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 could amount to a permanent structural injunction whereby individuals would be able use the outcome in this case as a precedent to thwart or challenge self-government agreements and other arrangements negotiated between First Nations and Canada in the future. This is problematic on many levels and interferes with the self-determination rights of Indigenous peoples.

Both domestic[30] and international[31] human rights instruments and codes emphasize individual rights but lack discourse protecting the rights of distinct Nations. To counter this, the UN Declaration expressly recognizes collective rights of First Nations for protection from state action that could undermine an Indigenous group's ability to remain a culturally distinct people.

The individual rights of children are recognized in the Code, the Charter, and in the UN Declaration. The UN Declaration includes provisions to take special consideration of impacts on children, and has several provisions on individual rights:

a. Indigenous governments must recognize and support individual rights of children, and a focus on collective rights alone would mean these could be ignored or downplayed, which is not legally or politically accurate. Nor is it the position of AFN.
b. Children have a right to be safe, to be connected to their families and identity. The harm they experienced through removal by ISC and its policies, is the focus of compensation.

[30] The CHRA has no operative provisions addressing the collective rights of First Nations. The one provision Related Provisions in the Act speaks of balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.
[31] The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) contains no mention of group or collective rights. Also the *CHRA*

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In the alternative should this Panel intend on placing any emphasis on the distinction between collective and individual rights, the AFN submits that collective rights of Indigenous Peoples' are core and the individual rights only exist because of collective rights of Peoples'. The self-determination of Indigenous Peoples' cannot be undermined or halted by the dissent of one or a few of its citizens.

4) The Tribunal has encouraged the parties to negotiate a resolution

The AFN does not ask this Panel to make a determination in the context of collective versus individual rights. However, the fact that this is a historic First Nations-led FSA remains a factor of which this Panel should take note, as is the fact that it has been endorsed by each of the parties to these proceedings who represent First Nations rights-holders. This Panel recognized the AFN, COO and NAN's authority to speak to compensation on behalf of First Nations children, noting that the opt-out would preserve individual choices with respect to compensation, which has been preserved in the FSA.[32] The AFN is not asking the Panel to engage in an exercise of balancing the collective rights of First Nations against the individual rights of the victims. It cannot be forgotten that it was the Panel itself that charged the AFN with being the national representative voice of First Nations in the context of compensation, not on the basis of the self-determination of First Nations generally, but as a result of its role as the national representative organization for First Nations in Canada empowered by virtue of its resolutions and mandates.

The Tribunal's endorsement is a primary factor that guided the AFN in the negotiation of the FSA, as was the Tribunal's direction to seek a negotiated resolution of the matter in the interest of reconciliation. As noted by the Panel, the overall structure of the CHRA strongly encourages parties to resolve disputes through negotiation and the importance of negotiation is heightened in these proceedings, where complexity and addressing historic discrimination also requires scope for negotiation and resolution.[33] The FSA aligns with the Panel's objectives, setting "a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation".[34] If the Tribunal endorses the FSA, the AFN strongly believes that "for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country".[35]

The AFN continues to be of the view that the endorsement of the FSA is within the jurisdiction of this Panel. While variations were necessary and compelling, they were consistently done to ensure that the best interest of children prevailed, with particular emphasis on a trauma-informed claims process. The AFN urges this Panel to assess the entirety of the circumstances of this historic agreement and consider whether the denial of its endorsement over a minor and technical matter would work a greater injustice than its endorsement.[36] While negotiations always result in compromise, such compromises have been endorsed by First Nations leadership via the AFN's internal processes[37] and must be considered in light of the benefits achieved for tens of thousands of deserving First Nations children and families who will no longer be subjected to the inherent

[32] 2019 CHRT 39 at para. 201-202.
[33] 2021 CHRT 6 at para. 130.
[34] 2016 CHRT 10 at para. 40.
[35] 2016 CHRT 10 at para. 40.
[36] *Danyluk v. Ainsworth Technologies Inc*. [2001] 2 SCR 460 at para. 80.
[37] Ciavaglia Affidavit at para. 25.

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risk associated with the ongoing litigation of this Tribunal's compensation decision and the class action. Rather, compensation payments could conceivably start as early as the first quarter of 2023 pursuant to the FSA.

If Non-ISC Placements is the only concern of this Panel regarding its endorsement of the FSA, the AFN would reiterate its position within our oral submissions that this Panel may make suggestions or recommendations thereto.

Respectfully,

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