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October 21, 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 Reply to the Panel's correspondence dated September 21, 2022 and October 5, 2022, and the First Nations Child and Family Caring Society of Canada's (Caring Society) Response dated October 14, 2022.

The Assembly of First Nations ("AFN") reiterates that the Panel should recognize that the settlement contained within the Final Settlement Agreement ("FSA") is a monumental achievement that benefits hundreds of thousands of First Nations children and their families. The Panel must have jurisdiction to approve a negotiated settlement between the national representative body of First Nations and the Government of Canada, and must recognize that any settlement will necessarily be the product of compromise by all negotiating parties. Any compromises that were made by the AFN were carefully considered, negotiated and discussed; the AFN maintains that the compromises were appropriate in the circumstances, and were necessary to achieve a settlement that benefits First Nations across the country. The settlement is the product of negotiations on a principled basis, endorsed by First Nations leadership.

At the outset, the AFN would like to respond to an aspect of the Panel's correspondence dated October 5, 2022. Citing paragraph 27 of the Affidavit of Janice Ciavaglia, dated September 29, 2022, (the "Supplementary Affidavit") the Panel noted its understanding that "there is a discrepancy between the Affiant's response and the Caring Society's affiant's evidence that may speak to a credibility issue". The AFN submits that the referenced paragraph of the Supplementary Affidavit could, when read in isolation, lend itself to some measure of confusion. However, its nature was designed to be supplementary - meant to provide additional context and build upon the previous evidence rendered to the Panel by way of the Affidavit of Janice Ciavaglia dated July 22, 2022 (the "Motion Affidavit"). As noted within the Supplementary

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Affidavit at paragraph 26, the AFN's Affiant clearly referenced the Motion Affidavit in the context of discussing the AFN's engagement with First Nations leadership.

The Motion Affidavit notes at paragraph 44 that it was ultimately the AFN Executive Committee who was kept informed of the negotiations of the FSA, provided direction throughout the process, and finally, agreed to sign off on the FSA. Paragraph 46 of the Motion Affidavit expanded on the engagement with First Nations leadership and updates on the status of the FSA negotiations, specifically noting the 50 briefings to "the AFN Executive, AFN Regional Chiefs meetings and Chief's Assemblies". The AFN Executive was clearly referenced therein with respect to "First Nations leadership".

Finally, in speaking to the finalizing of the FSA, paragraph 50 of the Motion Affidavit specifically notes that the FSA was provided to the AFN Executive Committee and the Representative Plaintiffs for approval. It also describes that following the FSA's approval, the executed FSA was presented to the Chiefs-in-Assembly on July 6, 2022, at the AFN's Annual General Assembly (AGA). Paragraph 52 makes it clear that the FSA was executed on June 30, 2022, prior to the AGA.

The AFN Executive are "First Nations leadership", being comprised of Regional Chiefs duly elected by the First Nations in each region across Canada and the National Chief who is elected by all the First Nations across Canada. Under the AFN's Charter, the Executive Committee is empowered to make representations on behalf of First Nations consistent with their properly delegated mandates from the Chiefs-in-Assembly. The approval of the FSA was within their delegated purview and was done so on a fully informed basis in the best interest of affected First Nations children and families. Of note, no objection to the FSA was raised by the Chiefs-in-Assembly at the AGA which immediately followed the FSA's execution.

The AFN again highlights that while some confusion could arise solely based on the text of the Supplementary Affidavit, the AFN's evidence as a whole in this motion supports the AFN's Affiant's statement in relation to First Nations leadership being aware of the FSA's compromises. Accordingly, there is no credibility issue. Finally, while some regional organizations have expressed limited concerns with the FSA well after its execution and the motion before this Panel, it must be highlighted that their regional AFN representative had a voice during the course of the AFN Executive Committee's approval process. Further, such regional resolutions are not binding on the AFN – it is the AFN Chiefs-in-Assembly who provide national binding mandates for the AFN.

Compensation orders relating to removal from one's home, family and community

The AFN's reading of the Caring Society's submissions is that the issue of children in kinship care or in voluntary placements is of a different character and heightened concern than the other compromises the parties have highlighted as necessary during the course of the FSA negotiations. The AFN submits that this Panel has jurisdiction to accept all compromises made by the parties to the negotiations, provided any given compromise was made on a principled and rational basis. The AFN has provided the principled bases for all compromises, including, for the non-ISC funded children, the uncertainties associated with entitlement and difficulties in the

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design of a trauma informed, culturally sensitive claims compensation process. This is not a jurisdictional issue for the Panel to resolve, but rather an evaluation of the magnitude of the achievement balanced against the compromises that were necessary to achieve such settlement.

In its response, the Caring Society uses generalities surrounding "kinship care" without being specific as to who they argue is excluded and why, or addressing the distinction between kin and kith (*i.e.*, family and friends). A reasonable compensation process cannot be built on generalities and aspirations. The Panel is presented with an advanced, detailed, First Nations-led compensation scheme that has considered and grappled with the many practicalities of flowing timely compensation to victims without re-traumatizing them, while also protecting compensation funds against fraudulent claims by non-First Nations and non-victims.

The Caring Society continues to focus on removal of a child from their "home, family and community" under para 2019 CHRT 39 at 245 and 249 as the determinative factor in eligibility for compensation. However, the Caring Society fails to address why the delicate balance achieved in the FSA through the ISC-funding metric should be unravelled in favour of an undefined, impractical general approach that is countered by the expert evidence obtained after the Compensation Framework, as further detailed below.

The Caring Society further misconstrues the Panel's compensation orders by asserting that voluntary placements are covered under the said orders. While this Panel's orders do not expressly state that "ISC funded placements" are required for compensation, the orders do require that children must be removed under the federal FNCFS program. The Caring Society's characterization of the Panel's compensation orders on non-ISC funded placements could open the compensation scheme to all those children voluntarily placed under provincial legislation and/or through provincial processes. Voluntary placements made between parents and FNCFS agencies outside of the federal program and under provincial process is clearly outside the four corners of this complaint. However, where voluntary placements were made under the federal FNCFS program, such placements would have been funded by Canada and such children would be entitled to compensation under the FSA.

The Caring Society asserts that the Compensation Framework process to identify claimants is a better process than that of the FSA. In this regard, the Compensation Framework contemplates reaching out to professionals, service providers, provincial/territorial governments and child welfare agencies to comb through records and data to identify beneficiaries (sections 5.3-5.5; 5.6(c); and 5.7(a)). These provisions of the Compensation Framework were drafted prior to the Parties obtaining advice or information on the availability and usefulness of these records. Based on the work of Professor Trocmé and Professor Fallon, the AFN now knows that these records will be of little to no assistance in locating potential claimants, and will be very burdensome on all parties:

> The findings of our review of data availability related to First Nations child welfare involvement show that **there are significant gaps in the data available to document eligibility under the child welfare compensation categories.** Across systems we reviewed, basic information regarding identity of the child and dates of placement are typically

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> documented, as dates are tied to payments for placements. More detailed information regarding circumstances of placement, such as why a child was placed, if they were placed outside of their community, the primary caregiver at the time of placement, however, are less consistently available. **The availability and quality of information is greatly impacted by the decentralized nature of child welfare service provision in Canada. Data collected by agencies with whom we spoke are less available in earlier years because many agencies used paper files before transitioning to a computerized information system.** [emphasis added][1]

In other words, the "Compensation List" that the parties had theoretically envisioned at the time of drafting the Compensation Framework proved impractical, if not unworkable.

Moreover, it is not accurate to suggest that these experts support the Caring Society's opposition to the FSA. The Caring Society uses isolated quotes from Professor Trocmé and Professor Fallon's report regarding the evidentiary burden on claimants, creating the inaccurate impression that those experts' advice is against the FSA. On the contrary, the FSA achieves what these experts recommended.

In particular, Professor Trocmé provided direct assistance to Moushoom counsel during the negotiations on the kinship care issue. He was present in the room at in-person negotiation meetings that led to the FSA, and the Article 1.01 definitions on these points in the FSA benefitted from his input. The Caring Society's opposition to the FSA is not evidence-based or expert-based, nor should they suggest that it is.

Finally, the Caring Society's interpretation of Justice Favel's order on the "finer distinctions between the reasons for the removal" is not helpful. Justice Favel noted that the Panel had broad discretion to order compensation.[2] He also noted that reasonableness is measured through an acceptable spectrum.[3] After applying the reasonableness standard of review, Justice Favel determined that the Tribunal's decision fell within an acceptable range of outcome and should not be set aside. It does not stand for the propositions that the Caring Society asserts.

Free Prior and Informed Consent (FPIC)

As the Panel considers FPIC, the AFN respectfully submits that it is important that the Panel not lose sight of the tens of thousands of victims who stand to lose the most in a discussion that could block their long awaited compensation, but has little to no practical meaning for them insofar as this compensation is concerned. Victims want their compensation now regardless of esoteric debates raised by the Caring Society. Victims do not want endless litigation.

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[1] 2022 Report of Professor Trocmé and Professor Fallon Report at page 70, attached to the Affidavit of Janice Ciavaglia affirmed September 28, 2022.
[2] Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada (JR Decision), 2021 FC 969 at para 121 and 231.
[3] JR Decision 2021 FC 969, at para 259; also *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paras. 47-49; *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 at paras 86, 87, 99 and 100.

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The FSA represents the most thoroughly First Nations-engaged and First Nations-led group settlement in this country's history. The FSA negotiation, and extensive First Nations engagement and participation is a model that should be celebrated as an example to be followed in the future. Despite such extensive engagement and participation, it must be noted that First Nations' unanimous approval is not required or realistic, being unattainable in a case of this breadth. Requiring unanimity would not only serve to block compensation to victims across Canada who have long awaited their compensation, it would also hold First Nations to a higher standard than any other group in Canada in resolving systemic discrimination.

The Caring Society asserts that AFN is subject to FPIC. This position misconstrues the nature of FPIC. Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) requires the "state" to "seek to obtain the FPIC prior to taking legislative or administrative measures" that will impact Indigenous peoples. The FSA before this Panel deals with compensation. It is not about land issues, nor is it in relation to legislative measures or regulations. As a result, the AFN submits that FPIC does not apply to the realm of adjudicative decisions, or settlements such as this case. Otherwise, given the plurality of perspectives and opinions amongst First Nations across Canada, First Nations could never reach settlements in any "representative" case.

Furthermore, the Caring Society overstates the law and context as it applies to FPIC in Canada. The absolute standard of prior "consent" is only required in forced relocation or storage of hazardous materials under UNDRIP. Furthermore, the reports and sources the Caring Society cites on Article 19 and FPIC are not on point. The Expert Mechanism on the Rights of Indigenous Peoples report ("EMRIP Report") relied on by the Caring Society clearly notes that FPIC is tied to the right of indigenous peoples' control over their land and resources.[4] Secondly the EMRIP Report notes that consent is required in five instances: legislative and administrative measures; projects affecting lands and resources; relocation of Indigenous Peoples from their lands; taking cultural artifacts or intellectual property; and the storage of hazardous materials on Indigenous lands.[5]

Article 10 relating to the removal of Indigenous people speak to the removal of the whole group from their ancestral lands. It does not apply to the removal of certain individuals pursuant to child protection measures or incarceration of Indigenous Peoples. Likewise, the references in the Burrow's and Carmen articles the Caring Society relies upon speak to legislative actions of the federal and provincial governments and land and resource matters. They do not address compensation agreements in the present context. In short, none of the references the Caring Society relies on stands for the proposition that the AFN in negotiating and approving the FSA is subject to FPIC.

Furthermore, compensation considered under the FSA is a benefit provided to individuals. This compensation does not affect any Aboriginal or Treaty rights, nor does it have any impacts to First Nations lands or the environment. In fact, it has no application or impacts to the collective rights of any First Nation. FPIC does not apply to the payment of compensation in this matter.

[4] U.N. Human Rights Council, A/HRC/39/62, "Free prior and informed consent: a human rights-based approach" (EMRIP Report) at paras 11, 14, 19.
[5] EMRIP Report at para 31.

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Even if it did, the proper review by the Panel would have to be based on current law relating to the duty to consult, which is based on a spectrum. Where there is little impact to the collective Aboriginal or Treaty rights of First Nations (as in this case), only the provision of notice would be required.[6]

FPIC is a fundamental international human rights principle for which the AFN has advocated for decades. The Caring Society's attempt to turn this principle against the AFN should be rejected by this Panel. FPIC applies to states, governments and resource extraction companies. Finally, the AFN notes that the Caring Society is applying a double standard. The Caring Society suggests that AFN has an obligation to meet the FPIC burden. However, the Caring Society is unwilling to subject itself to FPIC, as it has not produced a single First Nations' resolution where First Nations' leadership authorized the Caring Society to oppose the FSA, jeopardizing the compensation of victims through a First Nations-led settlement. The AFN notes that the Caring Society is an organization that represents child welfare agencies and is not accountable or answerable to any rights holders.

The AFN urges this Panel to reject the Caring Society's misguided submissions on FPIC.

Collective vs individual rights

Once again, as the Panel considers this issue, the AFN respectfully asks that the Panel not lose sight of survivors who are waiting for their compensation. Victims will either receive their long-awaited compensation in the coming months through the First Nations-led, trauma-informed holistic process embodied in the FSA, or they will be condemned to more litigation and uncertainty.

However, given that the matter is raised and the Caring Society urges this Panel to consider the issue of collective versus individual rights in its ruling, the AFN makes the following reply submissions. The Caring Society approaches this issue though the narrow lens of human rights discourse and presents a limited view of the collective rights of First Nations. To this effect, the Caring Society asserts that "individual and collective rights are not mutually exclusive in nature."

The AFN submits that First Nations collective rights arise from the fact that they are Peoples under customary international law. The criteria defining what constitutes "a people" in customary international law are as follows. First, a group must be a social unit with a clear identity and characteristics of their own;[7] Second, the group must have a relationship with a territory.[8] Finally, the group must claim to be something more than simply an ethnic, linguistic or religious minority.[9]

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[6] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 43. "In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."
[7] Cristescu, A., *Report to the Subcommission on the Prevention of Discrimination and Protection of Minorities*, 31 U.N. ESCOR, 137 U.N. Doc. E/CN. 4/Sub. 2/404 (Vol. 1) (1981) at p. 41.
[8] United Nations, Study on Indigenous Populations, E/CN.4/Sub.2/1986/7/Add.4 at para 380
[9] *Cristescu*

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Current international law operates on two levels. On the first level, international law influences how the states of the world interact. Similar to domestic law, the second level of international law is concerned with the relationship between a state and persons within its territory.[10] International law with respect to the second level focuses on Human Rights abuses and the mistreatment of individuals.[11]

By solely focusing on the rights of First Nations through a human rights lens, the Caring Society demotes the status of First Nations as Peoples' to that of a minority population within the Canadian state. This proposition is untenable and dangerous. The AFN submits that the status of First Nations collective rights ought to be determined in other fora, where the full scope and context of the nature and source of First Nation rights can be weighed and determined. Much is at stake and the AFN urges this Panel to restrict its ruling on the issue before it – whether the FSA satisfies this Panel's compensation orders.

Furthermore, the AFN voiced concerns over the dangers of granting the relief requested by the Caring Society because they are seeking a binding order that solidifies the paramountcy of individual rights over collective rights. The danger in this approach is that the AFN, as a First Nations' "own representative institution" contemplated in Article 19 of UNDRIP, negotiated an agreement to resolve a dispute. Should individual rights trump such an agreement, the binding principle sought by the Caring Society as a precedent could also be applicable to other such agreements, including self-government agreements, resource agreements, etc. This could very well adversely impact First Nations' gains in the recognition of their inherent, Aboriginal and Treaty rights so hardly fought for over the last 30 years.

The AFN also rejects the Caring Society's assertion that "complaints from First Nations claimants make up a significant proportion of matters brought to the Canadian Human Rights Commission."[12] The data relied on by the Caring Society is in relation to an online survey by the Canadian Human Rights Commission. The fact that 18% of responses to the online survey were from First Nations individuals is not determinative or representative of the volume of claims filed by First Nations people. The AFN's statement relating to First Nations people not availing themselves of the human right process is accurate. The AFN notes that every day, hundreds of First Nations individuals are denied housing, employment, services, and medical care, and also face institutional racism and targeting by the police and other authorities, all based on their race. The AFN is well aware of their pain, suffering and attacks on their dignity as human being. The AFN wholeheartedly rebukes the Caring Society's dismissive and indifferent view of these individuals.

While in an ideal world, every child who was removed or had to depart from their home would receive compensation under the FSA, including if they went to stay with family or friends for a period, it is essential to remember the context of this motion. Justice Favel strongly encouraged the parties to negotiate a solution. The AFN took Justice Favel's admonition to heart. The AFN negotiated with the other parties for numerous months; the negotiations were intense and

[10] Lawery, Andree "Contemporary Efforts to Guarantee Indigenous Rights Under International Law" (1990) 23 *Vanderbilt Journal of Transitional Law*. p. 706.
[11] Macklem, Patrick "What is International Human Rights Law? Three Applications of a Distributive Account", 2007 52-3 *McGill Law Journal* 575, 2007 at p.579.
[12] Canadian Human Rights Commission, 2021 Annual Report to Parliament at p 53.

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difficult. The resulting unprecedented and monumental compensation amount of $20 billion will enable hundreds of thousands of our most vulnerable children and family members to receive timely justice. The Caring Society argues against the FSA on behalf of some estates. The AFN asks this Panel to have in mind the many children and parents who are alive now but some of whom will inevitably pass away without ever seeing compensation if this matter is reverted to years of more litigation at the Caring Society's behest.

The AFN submits that the expedient payment of compensation (greater in scope and breadth than what this Panel could provide) and the certainty of such payment associated with the FSA, is in the best interest of the First Nations victims of Canada's discrimination. To subject these victims to ongoing delays, and the outright risk to the payment of compensation more generally due to appellate intervention, would be an injustice.

This Panel has at every turn advanced the rights of the victims of Canada's discriminatory conduct, ensuring that its efforts respected First Nations self-determination. The AFN calls on the Panel to continue on this forward, positive and reconciliatory trajectory, embracing a First Nations-led and endorsed solution. Victims have come a long way with this Panel's help and they, being our First Nations children and families, should not be subjected to such a setback at this stage.

Respectfully,

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