

Cross Examination Questions for Janice Ciavaglia,
pursuant to her affidavit of July 22, 2022 on behalf of the
First Nations Child and Family Caring Society

Interpretation:

“**AFN**” means the Assembly of First Nations

“**Caring Society**” means the First Nations Child and Family Caring Society

“**Compensation Entitlement Order**” means *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, 2019 CHRT 39

“**Compensation Framework Order**” means *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, 2021 CHRT 7

“**Consolidated Class Action**” has the same meaning as set out in paragraph 14 of the Affidavit of Janice Ciavaglia, dated July 22, 2022

“**Estates Order**” means *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, 2020 CHRT 7

“**FNCFS Program**” means the First Nations Child and Family Services Program

“**FSA**” means the Final Settlement Agreement, dated June 30, 2022 found at Exhibit “F” to the Affidavit of Janice Ciavaglia, dated July 22, 2022

“**ISC**” means Indigenous Services Canada

“**Tribunal**” means the Canadian Human Rights Tribunal

“**Your Affidavit**” means the Affidavit of Janice Ciavaglia, dated July 22, 2022

Questions:

Background

1. How long have you served as AFN's Chief Executive Officer?
2. What, if any, positions did you hold at AFN prior to coming into your role as Chief Executive Officer?
3. As an affiant to the motion before the Tribunal, are you representing the class in the Consolidated Class Action or the AFN as a co-complainant in the ongoing human rights complaint before the Tribunal?
4. What steps, if any, has AFN taken to ensure equitable representation of eligible victims under the Compensation Entitlement Order and the Compensation

Framework Order and the class members impacted by the Consolidated Class Action?

5. Do you have any direct engagement in AFN's Social Development Sector and its work on the FNCFS Program and Jordan's Principle?
6. Did you personally actively participate in the negotiation of the Agreement-in-Principle and the FSA in relation to compensation?
7. At paragraph 3 of Your Affidavit, you note that AFN advocates on behalf of 634 First Nations in Canada. How many First Nations in Canada does AFN not represent?
8. Of those First Nations who are not represented by the AFN, what if anything did AFN do to secure their input and support in relation to the FSA?
9. At paragraph 12 of Your Affidavit, you state that AFN became concerned that "it would be sidelined in discussions related to long-term reform and compensation should negotiations occur only in the context of the Moushoom Class Action". Why was there concern of being "sidelined" when the Tribunal directed at paragraph 269 of the Compensation Entitlement Order that Canada enter into discussions with the Caring Society and the AFN on a compensation process?
10. At paragraph 12 of Your Affidavit you attach as Exhibit "A" a draft copy of the Executive Motion authorizing AFN to commence its own class action. Why was the motion brought to the AFN Executive Committee and not to the Chiefs-in-Assembly given the AFN's concern that it was being "sidelined"?
11. The motion reads in part, "the AFN shall uphold the integrity of the compensation order issued by the [Tribunal] in the class action process and incorporate those individuals from 1991 to 2006 into the base amount of \$40,000 for compensation". Has the base amount of \$40,000 been guaranteed in the FSA for all eligible victims under the Compensation Entitlement Order and Compensation Framework Order?
12. Was the motion found at Exhibit "A" passed unanimously? If not, can you please provide a breakdown of how the members of the Executive Committee voted and whether anyone abstained?
13. The motion found at Exhibit "A" is marked as "Draft Record of Decisions". Is this the final copy of the motion? If not, please provide the final version of the motion.
14. Did the AFN seek a resolution from the Chiefs-in-Assembly specifically approving the commencement of the class action? If not, why not?
15. Did the AFN seek a resolution from the Chiefs-in-Assembly to approve the FSA? If not, why not?

16. At paragraphs 22 to 25 of Your Affidavit, you set out a brief chronology of the Tribunal's orders in relation to compensation. To your knowledge, is there a cap on the total amount of compensation that Canada is required to pay to the victims of its discrimination pursuant to the Tribunal's Compensation Entitlement Order and Compensation Framework Order?

The Final Settlement Agreement Process

17. At paragraph 25 of Your Affidavit, you note that Canada appealed the Federal Court's decision to uphold the Tribunal's various compensation orders. Does the FSA provide for Canada withdrawing its appeal? If not, what is your understanding of when Canada will withdraw its appeal?
18. At paragraph 31 of Your Affidavit, you note that "ISC communicated to the experts and plaintiffs' counsel that the data often came from third-party sources and was in some cases incomplete and, at times, inaccurate". When did you and/or the AFN first come aware of incomplete and inaccurate data?
19. At paragraph 32 of Your Affidavit, you note the number of "Removed Child Class Members from 1991 to March 2019". How many of these children falls within the Tribunal's Compensation Entitlement Order and Compensation Framework Order?
20. At paragraph 33 of Your Affidavit, you note that the Jordan's Principle Class estimates were based on "the fourth fiscal quarter of the 2019-2020 fiscal year (i.e. January 1, 2020 to March 31, 2020)". Why was this quarter used to estimate the Jordan's Principle Class instead of a more recent quarter?
21. Paragraph 35 of Your Affidavit states that "data from later in 2020 was significantly impacted by the COVID-19 pandemic, which gave way to an influx in requests for support." What analysis, if any, has been done to determine the percentage of this increase in Jordan's Principle requests following March 31, 2020 that is attributable to COVID-19?
22. Paragraph 46 of Your Affidavit states that "the AFN provided periodic reports with First Nations leadership across Canada". Were approvals also sought at these meetings or were they simply updates? Please provide any materials that were shared with First Nations leadership in relation to these updates.
23. At paragraph 48 of Your Affidavit, you append the "Children Back, Land Back" report from the Assembly of Seven Generation as Exhibit "E". Please advise which of the recommendations from this report were adopted under the Cy-pres fund.

The Final Settlement Agreement

24. Paragraph 54 of Your Affidavit states that Canada has agreed to pay \$20 billion in compensation under the FSA. On what evidence (if any) did the AFN rely to determine whether this amount would be sufficient to compensate the victims eligible under the Tribunal's Compensation Entitlement Order and the Compensation Framework Order?
25. At paragraph 54 of Your Affidavit, you note that "In drafting the Final Settlement Agreement, the AFN, [...] sought to uphold the spirit and intent of the Panel's Compensation Decision, the subsequent orders and the Compensation Framework while recognizing compensation would be fixed at \$20 billion". However, at paragraph 248, you state that "the AFN recognizes that the settlement is not an implementation of the Compensation Decision". Why did the AFN agree to deviate from the Compensation Entitlement Order and the Compensation Framework Order?
26. At paragraphs 57, 59 and 72 of Your Affidavit, you note that only certain members of the Removed Child Family Class and the Jordan's Principle Family Class are eligible to receive compensation under the FSA but will be eligible to access the Cy-pres fund. How was the \$50 million value of the fund calculated?
27. What is your estimate of the number of eligible individuals who may access the Cy-pres fund?
28. Please confirm that those individuals excluded from eligibility for direct compensation under the Removed Child Family Class and the Jordan's Principle Family Class will nonetheless release any potential claims against Canada unless they opt out of the FSA?
29. At paragraph 62 of Your Affidavit, you state that "the parties have taken a more limited approach to the compensation than what was ordered by the Panel, in some respects, and expanded other factors, while staying true to the spirit of the Compensation Decision and subsequent Orders". What is the impact of "a more limited approach" on victims who are currently eligible for compensation pursuant to the Compensation Entitlement Order and the Compensation Framework Order?
30. At paragraph 67 of Your Affidavit, you reference that the experts, Dr. Nico Trocmé and Peter Gorham will be engaged. Have they now been engaged and if not, when will that happen and how long is their work expected to take?

Removed Child Class

31. At paragraph 56 of Your Affidavit, you state the proposed FSA's definition of "Removed Child Class" includes "all First Nations individuals who, at any time during the period between April 1, 1991 and March 31, 2022, while they were under the Age of Majority, were removed from their home by child welfare authorities or voluntarily placed into care, and whose placement was funded by ISC." Please

confirm whether the Compensation Entitlement Order or the Compensation Framework Order require a child's placement to be funded by ISC to eligible for compensation?

32. What happens to the eligibility of children who were removed pursuant to Canada's discriminatory FNCFS Program but were not in an ISC-funded placement (e.g. unfunded placement in part of the parent's or child's social network off-reserve)?
33. Why did the AFN agree to only compensate removed children who were placed in ISC funded placements?
34. What evidence can you point to that demonstrates that a child will suffer less harm if they are in a non-ISC funded placement?
35. What is your estimate of the number of children who meet the eligibility criteria under section 4.2.1 of the Compensation Framework but who will not be eligible for direct compensation under the FSA?
36. What will AFN's messaging be to those removed children who are eligible under the Tribunal's Compensation Entitlement Order and Compensation Framework Order but are not eligible for direct compensation under the FSA?
37. Please confirm whether all Removed Child Class members (as defined in the FSA) are guaranteed to received at least \$40,000.
38. At paragraph 70 of Your Affidavit, you attach a copy of a letter from Peter Gorham, dated February 7, 2022 as Exhibit "H". Please pinpoint Mr. Gorham's references to the joint report "Estimated Class Size – First Nations Children in Care 1991 to 2019" dated 18 January 2021 in his letter of February 7, 2022.
39. Please advise whether Mr. Gorham consulted with Dr. Trocmé in advance of providing this letter to Mr. Kugler.
40. What happens if the \$7.25 billion budget set out at Article 6.03(5) of the FSA is exceeded due to the number of claimants? Does each child still receive the \$40,000?
41. Will all children defined under 4.2.5 and 4.2.5.1 of the Compensation Framework be eligible for direct compensation under the FSA? If not, please explain the differences in detail.
42. Will First Nations children with a meaningful connection to the First Nations community (as set out in 4.2.5.1 of the Compensation Framework) be eligible for direct compensation under the FSA? If not, please explain the differences in detail.

Caregiving Parents and Caregiving Grandparents

43. At paragraph 77 of Your Affidavit, you set out that a Caregiving Parent or Caregiving Grandparent who has committed abuse is not eligible for compensation. Does this mean that a Caregiving Parent or Caregiving Grandparent will not be eligible for compensation until the removed child has reached the age of majority?
44. Why did the AFN decide to have the child fill out an application form in relation to abuse they may have sustained when it could have requested that every Caregiving Parent or Caregiving Grandparent could have filled out a statutory declaration?
45. At paragraph 79 of Your Affidavit, you set out the “customized eligibility” for Caregiving Parent or Caregiving Grandparent. Why are adoptive parents in a different category from biological parents?
46. At paragraph 81 of Your Affidavit, you state that “the current cap [of \$20 billion] would have made it difficult or impracticable to mirror the Panel’s compensation order on the family class, which has the potential to oversubscribe the total compensation amount.” The Compensation Entitlement Order and the Compensation Framework Order make clear that each parent or caregiving grandparent is entitled to \$40,000. Can you elaborate on how the cap would make it “difficult or impracticable to mirror the Panel’s compensation order” in this regard?
47. Given your statement that it would be difficult or impracticable to mirror the Panel’s compensation order, who will be impacted by the FSA in this regard in comparison to the Panel’s compensation orders?
48. What happens if the \$5.75 billion budget set out at Article 6.04(5) of the FSA is exceeded due to the number of claimants? Will these claimants still receive \$40,000?
49. What happens if the \$2 billion budget set out at Article 6.06(17) of the FSA is exceeded due to the number of claimants? Will these claimants still receive \$40,000?

Jordan’s Principle

50. At paragraph 86 of Your Affidavit, you state that “settling on the eligibility criteria for Jordan’s Principle is further encumbered by its evolving definition”. Does the AFN have concerns regarding the definition of Jordan’s Principle and its terms as outlined by the Tribunal in 2020 CHRT 15, 2020 CHRT 20 and in the Compensation Framework Order?
51. If so, what are those concerns and are there certain eligible Jordan’s Principle victims under the Compensation Framework Order who the AFN is of the view ought not to receive compensation?

52. In paragraph 87 of Your Affidavit, you state that mechanisms in the FSA ensure that “those who suffered greater harm will receive a minimum of \$40,000” in compensation and “those who suffered less harm will receive up to \$40,000” in compensation. On what reasoning found within any of the Tribunal’s orders to date did the AFN arrive at formulating an objective hierarchy of harm suffered by Jordan’s Principle claimants?
53. In the same paragraph, you state that compensation for Jordan’s Principle claimants is contingent on the degree of harm suffered. These degrees are separated into two categories under Article 6.06(4) of the FSA, which categorizes Essential Services into “Significant Hardship Essential Service” which, if approved, result in \$40,000 of compensation, and “Other Essential Services” which could result in less compensation. Article 6.06(11) of the FSA requires claimants to have suffered “the highest level of severity and duration of a disability, impairment, illness and similar condition based on objective factor”. What would happen if an individual falls within the 6.06(4) “Significant Hardship Essential Service” criteria, but they do not meet the 6.06(11) “comparatively suffered the highest level of severity” criteria?
54. Does the FSA guarantee a minimum amount of compensation for eligible Jordan’s Principle victims currently protected by the Compensation Entitlement Order and the Compensation Framework Order? If so, what is the guaranteed base payment for those victims?
55. For example, will claimants who fall under Article 6.06(13) of the FSA, (which explains when a claimant’s eligibility is determined based on “a Confirmed Need for Other Essential Services”) receive the \$40,000 amount that they were ordered to receive pursuant to the Compensation Entitlement Order and the Compensation Framework Order?
56. What is the estimated number of eligible Jordan’s Principle victims who may receive less than the ordered \$40,000 ordered by the Tribunal and upheld by the Federal Court?
57. In section 4.2.4 of the Compensation Framework approved by the Tribunal, “unreasonable delay” is defined to mean “where a request was not determined within 12 hours for an urgent case or 48 hours for other cases.” In Article 1.01 of the Final Settlement Agreement, “delay” means “where a member of the Jordan’s Principle Class or Trout Child Class requested an Essential Service and they received the requested Essential Service beyond the timeline specified in the Claims Process”. Please confirm that the AFN is asking the Tribunal to approve the FSA or amend its orders when the Claims Process is incomplete?
58. If the timeline specified in the Claims Process has been determined since you prepared Your Affidavit, please indicate whether the definition of “unreasonable delay” mirrors the order of the Tribunal. If it does not, please advise what the definition of “delay” is in the Claims Process.

59. Does the FSA contain any eligibility provisions on children in palliative care, as was specifically considered in 4.3 of the Compensation Framework? If not, why are children who were receiving palliative care not provided the same eligibility determination as has already been ordered by the Tribunal in Compensation Framework Order?
60. At paragraph 90 of Your Affidavit, you say that an “Approved Jordan’s Principle Class Member will receive a minimum of \$40,000 in compensation where they establish a confirmed need for an Essential Service and have established a confirmed need for another essential service and suffered higher levels of impact than other Jordan’s Principle Claimants” (emphasis added). Have the “objective factors” that you say will be used to measure such impact been developed? If so, what are they?
61. If they have not been developed, when will this work be complete?
62. Will this work be complete and made public prior to the expiry of the opt-out period?
63. What percentage of Jordan’s Principle claimants do you expect will meet this threshold? Please explain the evidentiary basis for this expectation.
64. In paragraph 94 of Your Affidavit, you refer to a “Circle of Experts”. Please identify these individuals and what methods they are using to develop “a recommended process to assess Jordan’s Principle claims”.
65. What happens if the \$3 billion budget set out at Article 6.06(9) is exceeded due to the number of claimants? Will these claimants still receive \$40,000?

Estates of Deceased Class Members

66. In paragraphs 105-107 of Your Affidavit, you discuss the “limited approach to compensation than what was ordered by this Panel [...] with respect to the estates of deceased class members.” In 2020 CHRT 7 at para 152 the Tribunal ordered Canada to pay \$40,000 in compensation to the estates of “all First Nations Children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the Compensation Decision Order”. Article 13.02 of the Final Settlement Agreement states that “The Estates of the Removed Child Family Class, the Jordan’s Principle Family Class or the Trout Family Class are not eligible for compensation, unless a complete Claim was submitted by the member of the Removed Child Family Class, the Jordan’s Principle Family Class or the Trout Family Class prior to death.” Please confirm that all parents or caregiving grandparents who have died after suffering discriminatory practices outlined in the Compensation order will not be given \$40,000, as per the Tribunal’s orders?
67. Please confirm whether this also means that the estates of all parents or caregiving grandparents who died after the Tribunal made the Compensation Entitlement Order will also not receive compensation under the FSA?

68. What guiding principle was used to determine that the estates of parents who have died before submitting a claim should be cut out of receiving compensation, notwithstanding the Tribunal's orders?
69. What is the estimate number of estates that will be excluded from the FSA?
70. Is it true that the estate of the mother of Jordan River Anderson, Virginia Ballantyne (of whom Jordan's Principle bears its name) will not be entitled to compensation under the FSA's proposed compensation regime?
71. Do you believe this exclusion reflects the "spirit and intent" of the Tribunal's various compensation orders? How does this accord with your statement at paragraph 5 of Your Affidavit, in reference to Jordan's family and the AFN's previous position submitted to the Tribunal at paragraphs 30-31 of its April 30, 2020 submissions?
72. Are you aware that the estate of Maurina Beadle will be excluded? How does this accord with AFN's position as set out in the last sentence of paragraph 5 of Your Affidavit?

Supportive Elements for Claimants

73. At paragraph 120 of Your Affidavit, you note health supports will be incorporated into the FSA and that these supports were the subject of negotiation of a specific taskforce. Who are the members of the specific taskforce and what are their related credentials in the area of health, children in care and Jordan's Principle?
74. At paragraph 121 of Your Affidavit, you note that "supports will be made available to claimants through the claims process". However, the youth in care recommendations made in *Justice, Equity and Culture: the First-ever YICC Gathering of First Nations Youth Advisors* (cited in Exhibit "E" – *Children Back, Land Back*) state that supports be provided before, during and after the claims process. What efforts, if any, are being taken to ensure the supports meet the specific needs of children and youth in care and formerly in care, as well as their parents and caregiving grandparents?
75. At paragraph 122 of Your Affidavit, you note that AFN will receive \$2.5 million over 5 years to "administer a help desk, employ liaisons to provide claimants with culturally safe assistance and information". How will these funds assist claimants who are still children?
76. What services or other supportive elements will be specifically provided by the AFN and how will they be tailored to the unique needs of children and youth?

Nature and Scope of the Motion

77. Have you reviewed Dr. Blackstock's letter addressed to Regional Chief Woodhouse, dated January 21, 2022?

78. When did you become aware of this letter?
79. Are you aware that she received no response from Regional Chief Woodhouse or any formal response from the AFN?
80. Does the AFN plan to respond to Dr. Blackstock's letter?
81. The Notice of Motion seeks, among other things, "variation of the Tribunal's Compensation Decision, Compensation Framework, and other compensation related orders, to conform to the proposed Final Settlement Agreement". What specific variations is the AFN requesting?
82. How do those variations line up with the principles set out by the Tribunal in the Compensation Entitlement Order and the Compensation Framework Order?
83. How do those variations take into consideration the best interests of the child?