

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS**

Complainants (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)**

Respondent (Responding Party)

- and -

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA
and NISHNAWBE ASKI NATION**

Interested Parties

**REPLY SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS
REGARDING THE COMPENSATION PROCESS**

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I. OVERVIEW

1. These reply submissions address the April 30th and May 1st, 2020 submissions of Nishnawbe Aski Nation (NAN) and the May 1, 2020 submissions of the Chiefs of Ontario (COO), filed in response to the Assembly of First Nations' (AFN), First Nations Child and Family Caring Society's (Caring Society) and Attorney General of Canada's (Canada) joint submission on the Draft Compensation Framework and the questions posed by the Panel in its letter dated April 22, 2020.
2. Part of the AFN's reply will be submitted in a joint AFN/Caring Society/Canada Reply filed by the Caring Society on May 5, 2020. Those joint submissions are to compliment these submissions of the AFN.
3. The AFN wishes to acknowledge the contributions COO and NAN have made in the development of the Draft Compensation Framework. The Complainants and the Respondent have carefully considered the recommendations of COO and NAN and have adopted a number of their proposals. As with all negotiations, not all of COO and NAN's proposals were accepted by the Parties for inclusion in the draft national compensation framework.

II. COMPENSATION FRAMEWORK

4. The AFN, Caring Society and Canada have been drafting a proposed Compensation Framework in compliance with this Panel's ruling.¹ The current text of the proposed Compensation Framework that the Complainants and the Respondent jointly submitted is not a final product. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the Compensation Framework will be revised to reflect any

¹ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (hereafter Compensation Entitlement Order) at para 269. <https://www.canlii.org/en/ca/chrt/doc/2019/2019chrt39/2019chrt39.pdf>

additional orders of the Panel. The Complainants and the Respondent will at that point provide a final copy to the Tribunal to be incorporated into a final order.

5. In addition, the Draft Compensation Framework is intended to be a national compensation plan that addresses certain aspects of Canada’s discriminatory conduct under the First Nations Child and Family Services (FNCFS) Program. The Compensation Framework will capture all individuals that the Panel has awarded compensation to. The application form and process to apply for compensation is intended to be seamless and as simple as possible for potential claimants, as envisioned by the Complainants and Respondent.
6. NAN’s proposal to insert both regional and sub-regional Ontario specific considerations at every stage of the compensation process² has the potential to complicate the national scope of the compensation program. NAN suggests that the Framework take into account regional specificities, including the setting of timelines, potential infrastructural needs of remote First Nations, the selection of second-level committee members, and the development of training and communication materials.³ This requirement would add between 11 – 30 regional components⁴ to the compensation framework, all of which the Central Compensation Administrator will have to be intimately familiar with. In addition, further complications could arise if an individual who originates from a region out west and now resides in Toronto demands to be provided with the cultural competence standards of their home region. The efforts to coordinate such benefits would be burdensome.
7. The AFN submits that regional considerations are adequately incorporated into the Draft Compensation Framework. Article 2.6 of the Draft Compensation Framework stipulates that the processes to facilitate payments to beneficiaries “will be as simple as possible and

² April 30, 2020 Written Submissions of NAN, at para 8

³ April 30, 2020 Written Submissions of NAN, at para 8

⁴ In Ontario alone First Nations are represented by COO, NAN, Grand Council Treaty 3, Union of Ontario Indians, and the Association of Iroquois & Allied Indians. Within the Anishinabek Nation, there is the Lake Huron Region, Northern Superior Region, Southeast Region, and Southwest Region. All of these organizations represent First Nation governments. In Manitoba, the Assembly of Manitoba Chiefs, Manitoba Keewatinowi Okimakanak (MKO) and Southern Chiefs Organization provide advocacy on behalf of First Nations. The Island Lake First Nations in Northern Manitoba split from MKO and now advocates on its own behalf. In most regions, there are a least two First Nations political/territorial organizations representing First Nations.

will include information that is easy to understand, having regard to the beneficiary's age and any disability or special/distinct needs of that individual" [emphasis added]. This is a guiding principle to the compensation process and will be applicable to every article of the framework. As such there is no need to capture regional specific text in every article of the Draft Compensation Framework.

8. Secondly, some of NAN's proposed amendments relating to developing specific compensation notices⁵ to reflect regionally specific interests are potentially problematic. The Draft Notice Plan and communication products are envisioned to be national in scope, uniform in messaging, and contain text approved by this Panel. If every region was free to develop their own specific notices, the compensation process will become susceptible to errors, misinformation, conflicting information, all of which may be detrimental to potential beneficiaries of compensation. Both the Complainants and Respondent seek to ensure that correct information is relayed across Canada and is made available to all potential beneficiaries.
9. With respect to COO's submissions on the Draft Compensation Framework, COO appears to take issue with the Complainants' and Respondent's emphasis on ensuring mental health supports are provided to children and youth.⁶ The Draft Compensation Framework does provide an obligation for Canada to provide mental health supports to all individuals, which will be provided through First Nations organizations that have expertise with various forms of trauma.⁷ COO is misinterpreting this section. The purpose of the second paragraph in article 6(c) is not to identify eligible beneficiaries, but rather to ensure children and youth receive mental health services that meet their unique needs.

III. DEFINITION OF ELIGIBLE CAREGIVERS

10. The AFN is deeply concerned about COO and NAN's request to expand the definition of "caregiver" to other individuals. Both COO and NAN's proposals would greatly complicate

⁵ Nan's April 30, 2020 Submissions as para 10

⁶ COO's May 1, 2020 submissions at para 6 and 7.

⁷ Draft Compensation Framework at article 6 (c).

the compensation process and give rise to competing claims of who was the rightful caregiver.

11. The AFN notes that this Panel's Compensation Order was modeled after the Indian Residential Schools Settlement Agreement's Common Experience Payment.⁸ The trigger that would entitle an individual to compensation is the apprehension of a child or the denial or delay of a service under Jordan's Principle. There would be no reason for a person to justify any individual harm, nor would it require an individual to provide evidence to justify why they are entitled to compensation. This Panel opted to adopt a similar approach to the Common Experience Payment in determining eligibility for compensation to victims to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped.⁹ A simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation.

12. Both COO's and NAN's recommendations would mark a significant departure from the Common Experience Payment model. Currently, one must demonstrate they or their child/grandchild was apprehended or impacted by the misapplication of Jordan's Principle. Upon verification they would be paid compensation. However, both COO and NAN suggest that the compensation process now include an adjudicative function whereby a parent or grandparent must participate in contested proceedings along with the child's uncles, aunts, cousins or other relatives. Under this proposed process, the parent/grandparent will have to prove: (1) they were the relevant caregiver; (2) they were financially responsible or paid more to support the child; (3) loved the child more than others; (4) maintained a parental role or bond; and (5) must obtain the child's written testimony that they believed their parents/grandparents were the primary caregiver; etc.

⁸ *Supra* Note 1, Compensation Entitlement Order, at paras 258-259.

⁹ *Ibid* at para 243.

13. The AFN submits that this proposed process is not in the best interests of the beneficiaries. This process will be traumatic for all involved, especially the child who might face pressure, coercion, bullying and stress in stating who stood in their life as the parental figure.
14. Much like COO and NAN, the AFN agrees that every child is very important to the extended family. It is often recognized in First Nations that “it takes a community to raise a child”. As such, every member of the child’s family, the Chief and Council, educators, health professionals and others all owe a sacred duty to the child. Children are the most precious resource of a First Nations community.
15. Building on the importance of family that both COO and NAN identify, the AFN acknowledges that other factors also play a significant role in how First Nation children are raised. For instance, this Panel has accepted evidence that housing shortages in First Nations communities exist. Typically, this results in more than two families living in a single housing unit. Often members of the same family would occupy such a residence. It therefore would not be unusual for a child to live with their parents, grandparents, uncle, aunts or older cousins. Strong family bonds are created in such a setting and a child may rely on more than one adult figure for things such as getting food to eat, seeking assistance in homework, etc. Despite the close kinship, the biological parents or grandparent of the child remain the most important figure in the child’s life, following which is the child’s siblings.
16. Secondly, this panel took notice of the widespread poverty many First Nations individuals suffer. Poverty related issues, systemic discrimination in the criminal justice system, and pursuit of economic opportunities can result in one or both parents leaving the community for a short period of time. During the brief period of a parent’s absence, a grandparent or other family member may care for the child.
17. Under COO and NAN’s proposal, any of these adults living in the same dwelling as the child, and those who temporarily are looking after a child while their parents are away working or temporarily incarcerated would be able to contest an application for compensation filed

by a parent. The AFN submits that the compensation plan has to be practical and very clear on who is eligible for compensation.

18. Both COO and NAN assert that guidelines can be developed by the parties to address these types of competing claims. However, determining what types of caregiving was provided and for the length of time associated therewith would require intrusive and in-depth investigation into potential beneficiary's history. It is clear that this form of compensation process would be ripe for abuse. There is the potential that people could be compensated whom the apprehended child may not even know or remember. In the circumstance of a child who was apprehended, this system raises the specter that individuals who cared for the child on and off for a few months could become entitled to compensation. In addition, situations may arise where a family member filed and obtained compensation prior to and without the knowledge of the parents/grandparents applying for compensation.
19. The AFN submits that both COO and NAN appear to focus on those individuals who were willing to assist in caregiving and/or contributing financially towards the care of a child as a determining element of compensation. The AFN submits that this may not be the best approach. The purpose of compensation is not meant to repay expenses or address the inconveniencing of family members. Rather, compensation is meant to compensate for the trauma of losing a family member who was apprehended as a result of Canada's discrimination.
20. When compensation is expanded to other caregivers, the compensation is no longer for the loss of a biological child/grandchild by apprehension or misapplication of Jordan's Principle. The nature and purpose of the compensation changes to that of compensating people for their time, expense and love for the child. The AFN submits that the purpose of the compensation awarded by the Panel is to compensate a biological parent/grandparent for the loss of their child to a system that targeted them because they were First Nations. The compensation scheme is meant to be objective, not subjective. To investigate the relationship between an adult and child removes the objective element and replaces it with an interrogatory process, which goes against AFN's strong position that children in care not

be subjected to the same traumatic process as Residential School survivors in the Independent Assessment Process.

21. Furthermore, COO asserts that caregivers beyond parents and grandparents aligns more closely with the family structures and practices experienced in many First Nations communities.¹⁰ However, COO references Canadian case law and legislation to suggest principles such as physical care, presentation of a parent-like relationship, financial contributions and intention to treat a child like their own should be determinative in this assessment.¹¹ Likewise, while NAN asserts First Nations laws, practices and traditions should be the guiding factors in determining who may be a potential caregiver,¹² NAN also seeks to avail to Canadian jurisprudence and legislation to compel the Central Administrator to make a subjective consideration on who is the most appropriate caregiver. This would import an adjudicative function into the compensation process that would likely require the creation of an industry that employs third party adjudicators and lawyers.
22. The AFN strongly disagrees with the suggestion that a child's perspective on who the appropriate caregiver is should be taken into account.¹³ NAN does not propose a method on how the child's perspective will be recorded. The only viable mechanism to adduce this information would be to question current or former children in care or Jordan's Principle candidates about which caregiver/parents they loved more, or who is more deserving of compensation. This approach would be traumatic as it effectively puts the relationship between a child and their family members on trial, which would certainly stress and potentially harm the emotional bonds between a child and their family members.
23. Finally, the AFN does not support COO's proposal on how to address Ontario's *Child, Youth and Family Services Act, 2017* ("CYFSA") and under-identification. The Ontario CYFSA was enacted in 2017. It replaced the former *Ontario Child and Family Services Act*, (CFSA) which was in place in Ontario from 1990-2017. The 1990 CFSA does not include an interpretation

¹⁰ Written submissions of COO, dated May 1, 2020 at para 32(b).

¹¹ *Ibid*, at para 30.

¹² Written submissions of NAN dated May 1, 2020 at para 10.

¹³ *Ibid*, at paras 22 and 23.

section which outlines the definition of “child in need of protection”. Therefore, COO’s concerns would only capture children and youth beneficiaries from 2017 to 2020 and will not apply to the majority of beneficiaries in Ontario, much less the rest of Canada. The original taxonomy suggested by the Complainants and the Respondent would apply in almost all circumstances and cover those children impacted by the CYSFA.

IV. REQUEST TO EXPAND DEFINITION OF CAREGIVER

24. In its April 22, 2020 letter to the Parties, this Panel ask for views on concerns expressed by Canada. The Panel is sought “meaningful contributions” that “stems from the Panel’s views on the role of the interested Parties.”
25. Throughout this complaint, the AFN has appreciated the roles, contributions and views of COO and NAN as the Interested Parties. As stated above, children are very important to First Nations communities. It is clear from both COO’s and NAN’s submissions that they are participating in this proceeding with the best interests of First Nations children in mind.
26. It is on this basis that AFN has and continues to provide both COO and NAN wide breadth in its submissions and contributions. The request to expand the definition of a “caregiver” was introduced by the Interested Parties. The AFN submits that interested parties would not normally be permitted to enlarge the issues in a case, raise new issues, or claim relief the applicant has not sought. Typically, interested parties are obligated to take these issues “as is”¹⁴ and are not permitted to transform them or add to them.¹⁵

¹⁴ *Reference re Goods and Services Tax (Canada)*, [1992] 2 SCR 445 at 487 (Intervenor status is not granted to allow the intervenor to raise an entirely new set of issues which are not addressed by the principal parties) <https://www.canlii.org/en/ca/scc/doc/1992/1992canlii69/1992canlii69.pdf> and *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at p. 463 (an intervenor is not entitled to widen or add to the points in issue). <https://www.canlii.org/en/ca/scc/doc/1993/1993canlii158/1993canlii158.pdf>

¹⁵ *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at para. 19. <https://www.canlii.org/en/ca/fca/doc/2015/2015fca34/2015fca34.pdf>

V. RELIEF REQUESTED

27. The AFN requests that the Panel reject both COO and NAN's proposed amendments to the Compensation Entitlement Order, the Draft Compensation Framework and the proposed Notice Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 6, 2020

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