Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

Interested Parties

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA WRITTEN SUBMISSION RE: TRUST FOR BENEFICIARIES WITHOUT THE LEGAL CAPACITY UNDER THE COMPENSATION FRAMEWORK

October 2, 2020

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I. Overview

1. On September 6, 2019, the Canadian Human Rights Tribunal (the "**Tribunal**") ordered compensation to be paid to victims of Canada's discrimination (the "**Compensation Entitlement Order**"). The Compensation Entitlement Order also required Canada to (i) enter into discussions with the First Nations Child and Family Caring Society (the "**Caring Society**") and the Assembly of First Nations ("**AFN**") regarding the appropriate process for locating victims/survivors and distributing compensation (the "**Compensation Process**"), and (ii) submit a proposal to the Tribunal regarding a process of compensation.

2. On February 21, 2020, Canada, the Caring Society and the AFN submitted the Draft Compensation Framework, outlining the process and steps for the distribution of compensation as well as the important resources, supports, and protections that will be in place for beneficiaries. Following further directions from the Tribunal in areas where Canada, the Caring Society and the AFN could not reach agreement, the parties now submit a complete, and largely consensus based, Draft Compensation Framework. The mechanism by which to distribute compensation to those who do not have the legal capacity to manage their own financial affairs is the final unresolved issue.

3. To that end, the Caring Society, the AFN and Canada again require the Tribunal's direction regarding whether compensation to be paid to beneficiaries who do not have the legal capacity to manage their own financial affairs ought to be distributed by an appointed trustee, as outlined in the Draft Compensation Framework, or whether the compensation should be distributed pursuant to the mechanisms under either: (1) the *Indian Act*; or, (2) for beneficiaries who do not fall within the purview of the *Indian Act*, under existing provincial/territorial regimes. Those who lack the legal capacity to manage their own financial affairs includes minors and adults who lack capacity.

4. It is the Caring Society's view that compensation for those who lack the legal capacity to manage their own financial affairs ought to be distributed by the appointed trustee as contemplated under the Draft Compensation Framework. This process provides a clear, predicable, uniform and culturally and trauma informed approach for such beneficiaries across the country. Indeed, without the streamlined approach suggested in the Draft Compensation Framework, the Caring Society

anticipates significant burdens for this class of beneficiaries, which may result in unfair and unequal outcomes.

II. Different Approaches for Different Beneficiaries

5. Beneficiaries who lack legal capacity are arguably the most vulnerable group of victims in this case. The Draft Compensation Framework contemplates a centralized "Appointed Trustee" to hold for the benefit of, manage and distribute compensation to those who lack legal capacity. This would create a uniform approach that will operate to protect the compensation for this vulnerable group of beneficiaries. Indeed, the Draft Compensation Framework contemplates the preparation of a "Trust Agreement" that will outline the requirements for the trust, creating one predictable, clear and universal approach to managing the compensation for those who lack legal capacity, with clear oversight and protections.

6. Consistent with the findings of the Youth in Care Canada report, filed by the Caring Society of December 9, 2019,[1] it is vital that persons who are not able to manage their own financial affairs receive services that are culturally appropriate and trauma informed to avoid further harm.

7. The appointment of a Trustee will relieve families from the burdens of navigating distinct and administratively complicated legislative schemes across the country, providing a streamlined and predictable approach for beneficiaries who lack legal capacity.

8. Property cannot be paid directly to those who lack legal capacity and requires. In the absence of other means of managing such property, a guardian of property is appointed under the provincial and territorial regimes. However, such an appointment is "often a choice of last resort".[2] The Caring Society submits that the appointment of a Trustee will provide an alternative to the default "last resort" regimes under provincial/territorial law and the *Indian Act*, and will do so in a way that will make the Tribunal's orders effective.

9. Indeed, without a centralized appointed trustee, beneficiaries who lack legal capacity will face four significant obstacles.

[1] Affidavit of Cindy Blackstock, affirmed December 8, 2019 at Exhibit "11".
[2] Kimberly A. Whaley, *Whaley Estate Litigation on Guardianship* (2015), p. 4

10. First, each province and territory has a unique legislative regime for managing and distributing financial awards for those who lack legal capacity. The *Indian Act* provides a separate scheme for those with Indian status with property on-reserve. While these legislative schemes share some general similarities in principle (i.e.: the need to identify a responsible adult to manage the property of those who do not have legal capacity (commonly referred to as a "guardian of property"[3])), they operate in separate silos and have different comparative legislative requirements across the country. For beneficiaries who lack legal capacity, these differences will likely cause confusion and delays in accessing compensation. In some cases, the complexities of Indian Act, provincial/territorial trust law may require beneficiaries to hire legal counsel to access their compensation resulting in legal charges which will reduce the net benefit.

11. Second, minors and adults who lack capacity are often treated separately even within a particular province or territory. These different legislative schemes are also apparent under the *Indian Act*, where the Minister is given exclusive authority to deal with the property of adults who are mentally incompetent and a separate power to deal with the property of an infant.[4]

12. Third, the administrative burdens facing guardians of property for minors and adults who lack legal capacity are significant and may well result in some beneficiaries failing to have access to their compensation; for instance, if families are overwhelmed or so financially insecure that they do not have the ability to take the administrative steps required to gain guardianship over these funds.

13. Finally, absent a central trustee, there will be no mechanism to ensure beneficiaries receive culturally appropriate and trauma informed services when gaining guardianship over these funds.

14. The Caring Society highlights below some of the significant administrative barriers facing guardians of property for minors and adults who lack capacity. As demonstrated, these administrative barriers alone may have a chilling effect and are not in keeping with the Tribunal's orders or the principles of the Draft Compensation Framework, including the principles of safeguarding the best interests of child beneficiaries (section 2.2) and a process of facilitating payments to beneficiaries that is as simple as possible (section 2.6).

[3] Although each statute may refer to this responsible adult by term other than "guardian of property". For example, in Quebec a guardian of property is referred to as a "tutor".
[4] *Indian Act*, R.S.C. 1985, c. I-5, ss. 51-52.

III. Burdens for Guardians of Property for Minors

(a) Burden #1: The Application Process and Threshold Value Considerations

15. A guardian of property with respect to a minor is a person who is responsible for the care and management of that minor's property.

16. The various provinces and territories set out regimes governing the guardianship of property of minors. In most cases, a parent or other caregiver of a minor beneficiary will be required to make an application to a court in order to be appointed as that minor beneficiary's guardian of property.[5] Once so appointed, a guardian of property will be bound by certain duties in their dealings with the minor's property, and the performance of such duties may impose further burdens on these individuals.

17. The application process differs across the country but most often involves filing a court application, with associated fees. This may require families to retain legal counsel, appear in court and prove that they are a responsible guardian of property.[6] This can be a taxing process, is complicated and can take significant time.

18. However, it is not always required that property owed to a minor be paid to a guardian who has been formally appointed by a court. When certain requirements are met, it may be possible to instead make such a payment to a parent of that minor, or as otherwise directed by a court.

19. In our case, it is contemplated that some of the beneficiaries of compensation with respect to Jordan's Principle may not be entitled to the full $40,000 in compensation: in section 4.2.5.3 of the Draft Compensation Framework, Canada, the Caring Society and the AFN have proposed that children without status under *Indian Act* who either had only one parent/guardian who is registered or eligible to be registered under the *Indian Act*, or were recognized by their Nation for the purposes of Jordan's Principle, or were resident on reserve, or in a community with a self-government agreement, are not eligible for compensation under s. 53(3) of the *Canadian Human Rights Act* for wilful and reckless discrimination. This monetary difference between some of the

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[5] See for example: *Children's Law Reform Act*, RSO 1990, c. C.12, s.47; *The Infants' Estates Act*, CCSM c. I35, s. 22; *Family Law Act*, SBC 2011, c.25, s. 176

[6] See for example *Minors' Property Act*, SA 2004, c. M-18.1, s. 10; *Family Law Act*, SBC 2011, c.25, s. 179; *The Infants' Estates Act*, CCSM c. I35, s. 22; *Children's Law Act*, RSNL 1990, c. C-13, s.56(1);, *Children's Law Act*, SNWT 1997, c.14, s. 40; *Children's Law Act*, SNWT (Nu) 1997, c.14, s. 40 ; *Guardianship Act* , SNS 2002, c.8, s. 3; *Children's Law Reform Act*, RSO 1990, c. C.12, s.47.

beneficiaries, agreed to by Canada, the Caring Society and the AFN, may create a two-track system for minors, depending on the province the child lives in.

20. For instance, in Quebec, a "tutor" of the property of a minor is responsible for the administration of that minor's property.[7] The Quebec *Civil Code* provides that parents are, by operation of law, tutors for the purpose of administering their minor children's property.[8] In administering the property of their minor child, parents are not required to obtain advice or authorization from the court unless the property is worth more than $25,000 or the court so orders.[9]

(b) Burden #2: Accounting

21. Accounting protects the interests of a minor whose property is under the care and management of a guardian of property. A guardian of property is required to keep records and, very often, must make those records available for scrutiny. While this important function protects vulnerable minor beneficiaries, it is a significant administrative burden.

22. Accounting requirements imposed on guardians of property of minors differ across the provinces. For example, in Ontario, a guardian of property "may be required to account or may voluntarily pass the accounts in respect of the care and management of the property of the child in the same manner as a trustee under a will may be required to account or may pass the accounts in respect of the trusteeship."[10] Similarly, in Yukon, the *Children's Law Act* provides that any guardian for a child may be required to account in respect of their care and management of the child's property in the same manner as a trustee under a will may be required to account or pass their accounts.[11]

23. In Saskatchewan, the court may require that a guardian of property of a minor submit his or her accounts concerning the administration of the minor's property to the court on the application of any person considered by the court to be a proper person to represent the minor's interests.[12]

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[7] *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 188
[8] *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 192
[9] *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 209
[10] *Children's Law Reform Act*, RSO 1990, c. C.12, s.52
[11] *Children's Law Act*, RSY 2002, c.31, s. 67
[12] *Children's Law Act, 1997*, SS 1997, c. C-8.2, s. 36

24. In Quebec, however, there is no need for accounting when the value of the property is less than $25,000. Therefore, minor beneficiaries described in paragraph 18 above, who reside off-reserve in Quebec and are entitled to $20,000 in compensation with respect to Jordan's Principle pursuant to the Draft Compensation Framework, will not have the safeguard of accounting, thereby potentially allowing for a situation where a parent or guardian depletes that child's compensation award without oversight.[13]

(c) Burden #3: Bonding

25. Guardians of the property of a minor are often required by the court to provide some manner of security or bond in order to be appointed.

26. As set out above, parents who are administering their minor child's property in Quebec are not required to provide security unless the property is worth more than $25,000 or the court so orders upon the application of an interested person.[14]

27. In Saskatchewan, unless otherwise ordered, guardians of the property of a child, including parents who are acting as their child's guardian, must provide security in the form of a bond of a guarantee company. Such security must be in the amount and on the terms that the court may approve. Where the court is of the opinion that a bond is not required or is not an appropriate form of security, it may make any order it considers appropriate with respect to security.[15]

28. In Ontario, a court that appoints a guardian of property for a minor must require the guardian to post a bond (with or without sureties) in such amount as the court considers appropriate for the care and management of the minor's property. However, when the guardian is a parent of the minor and the court is not of the opinion that it is appropriate to require a bond, the guardian will not be required to post a bond.[16]

29. The requirement that a guardian of property post a bond lays yet another burden on the parents or guardians of those who seek to access the compensation to which they are entitled.

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[13] *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 209
[14] *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 209
[15] *The Children's Law Act, 1997*, SS 1997, c. C-8.2, s. 34
[16] *Children's Law Reform Act*, RSO 1990, c. C.12, s. 55.

IV. Burdens for Guardians of Property for Adults Without Capacity

30. Where an adult does not have the capacity to manage his or her own financial affairs, provincial and territorial legislation provides for mechanisms by which another individual (or trust company, or an entity such as a Public Guardian and Trustee) may be appointed to as a guardian of property.

(a) *Burden #1 – the Court Application*

31. In order to be appointed as a guardian of the property of an adult, an individual must apply to the court.[17] As outlined above for guardians of property (for minors), this process is burdensome and not without complications.

32. However, the evidentiary requirements for guardians of property for adults who lack capacity are more stringent than for minors. This is due, in part, to the general requirement that a "lack of capacity" must be demonstrated and proven to the court. As a means of establishing such a lack of capacity, the court may require a report concerning the adult's lack of capacity from an "assessor" (often a health care provider).[18] Attempting to prove a lack of capacity can be challenged by the adult and may result in the requirement to litigate.

33. In addition, many of the Acts require that the court be satisfied that appointing a guardian of property for an incapable adult is the least intrusive and restrictive measures which is likely to protect and promote the adult's well-being and interests.[19] Therefore, potential guardians of

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[17] *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch.A, s .28(1), *Guardianship and Trusteeship Act*, SNWT 1994, c.29, s.27; *Adult Guardianship and Trusteeship Act*, SA 2008, c. A-4.2, s. 46(1); *Patients Property Act*, RSBC 1996, c. 349, s. 6(1); *Mental Health Act*, CCSM, c. M110, s. 71(2); *Infirm Persons Act*, RSNB 1973, c. I-8, s. 5(1) – provides that a person may apply to the court to have a person declared mentally incompetent, and s. 3(22) provides that the court may make orders for the management of the estates of mentally incompetent persons; *Mentally Disabled Persons' Estates Act*, RSNL 1990, c. M-10, s. 3(1); *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 5(1); *Substitute Decisions Act, 1992*, SO 1992, c. 30, s. 22(1); *Public Trustee Act*, RSPEI 1988, c. P-32.2, s. 25(1); *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 268-269; *The Adult Guardianship and Co-decision-making Act*, SS 2000, c. A-5.3, s. 30.

[18] See for example *The Adult Guardianship and Co-decision-making Act*, SS 2000, c.A-5.3, s. 38; *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch.A, s. 30(1)(a); *Guardianship and Trusteeship Act*, SNWT 1994, c.29, ss. 29, 2(2); *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, ss. 3(b), 5(2)(a), although an adult may refuse to undergo an assessment or be prevented from undergoing an assessment, in which case this is not required pursuant to s. 5(3).

[19] See for example *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 7(1)(c); *Adult Guardianship and Trusteeship Act*, SA 2008, c. A-4.2, s. 46(5)(b); *Guardianship and Trusteeship Act*, SNWT 1994, c. 29, s. 31(1.1).

property for an adult who lacks capacity may be required to proffer evidence to the court that meets this requirement.

34. Moreover, the court may order a person appointed as guardian to give financial security for the appointment.[20] The family members who may be seeking compensation on behalf of adult beneficiaries without legal capacity may not have the financial resources to put forward security on a guardianship application.

35. Additionally, some jurisdictions require the applicant to include with his or her application a plan for the management of the incapable adult's property.[21] Putting forward such a plan requires financial resources, financial literacy skills and a level of knowledge likely not available to some of the family members who may seek compensation on behalf of adult beneficiaries without legal capacity.

36. Complying with these requirements and going through the court process places a further burden on individuals seeking to become the guardian of an incapable beneficiary's property.

(b) *Burden #2 – Performance of Duties*

37. Individuals who apply to become guardians will be required to meet strict standards in the performance of their duties as guardians.

38. When managing an adult's financial affairs, the guardian must act honestly and in good faith.[22] They will have a duty to keep records of their accounts and, when necessary, produce these records for scrutiny.[23] These legal requirements are significant and guardians of property may be liable for damages where mismanagement or breach of trust can be proven in relation to the funds held for adults who lack capacity.

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[20] See for example *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch.A, s. 32(3); *Public Trustee Act*, RSPEI 1988, c. P-32.2, s. 25(5)(b); *Mental Health Act*, CCSM, c. M110, s. 77.
[21] See for example *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch.A, s.30(1)(c); *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 5(2)(b); *Adult Guardianship and Trusteeship Act*, SA 2008, c. A-4.2, s. 46(2)(b).
[22] See for example *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch.A, s. 43(1)(a); *Guardianship and Trusteeship Act*, SNWT 1994, c.29, s. 43(1); *Adult Guardianship and Co-decision-making Act*, SS. 2000, c. A-5.3, s. 50.
[23] See for example *Adult Guardianship and Co-decision-making Act*, SS. 2000, c. A-5.3, s. 63(1); *Substitute Decisions Act, 1992*, SO 1992, c. 30, ss. 32(6), 42; *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, ss. 50-54.

V. Conclusion

39. The trust approach outlined in the Draft Compensation Framework for the distribution of compensation to beneficiaries without legal capacity protects this vulnerable group of beneficiaries and relieves the administrative and financial burdens from families supporting and caring for these children and adults in a culturally appropriate and trauma informed manner. It also provides a uniform and streamlined process that will allow this group of beneficiaries to access the same information about how to apply and receive compensation as victims of discrimination, wherever in Canada they might live.

40. The remedial powers of the Tribunal are broad and must be interpreted as to best ensure the objects of the *Canadian Human Rights Act* ("*CHRA*") are achieved.[24] As noted by the Tribunal in 2016 CHRT 10, remedies crafted and ordered by the Tribunal must be effective:

> On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination.[25]

41. In 2019 CHRT 39 the Tribunal provided helpful guidance regarding the Caring Society's initial request that compensation be paid into a trust to finance services and healing activities: while the Tribunal did not object to the trust *per se*, the Tribunal was of the view that the victims were entitled to direct compensation and that the activities suggested by the Caring Society in lieu of compensation should be funded by Canada.[26]

42. In noting that it is not appropriate to pay $40,000 directly to children, the Tribunal directed the parties to establish a process where minors (and presumably those who lack capacity) have their compensation paid to them "secured in a fund that would be accessible upon reaching majority". This need is further supported by Dr. Segalowitz, whose evidence made clear that the capacity of adolescents and those in emerging adulthood to process and reason has limits, particularly surrounding risk-taking activities.[27]

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[24] 2019 CHRT 39, at para. 135
[25] 2016 CHRT 10, at para. 14
[26] 2019 CHRT 39, at para. 260
[27] Affidavit of Sidney Segalowitz, affirmed January 8, 2020, Exhibit "B": *When does the adolescent brain reach adult maturity* by Sidney J. Segalowitz, at pp. 9-12

43. The Compensation Process' goal and Canada's responsibility is to implement a system for compensation that does not compound the discrimination, inflict hardship or impart further barriers or burdens on families caring for the victims of Canada's discrimination. The approach outlined in sections 10.4-10.5 of the Draft Compensation Framework respects the vulnerability of children and adults without capacity, ensures a fair and equitable process and reflects an effective remedy in keeping with the overall purpose of the *CHRA*.

44. Potential beneficiaries who lack legal capacity are arguably the most vulnerable group of victims in this case. To expect them and their families to navigate separate and distinct legislative regimes across the country, without a central appointed trustee, is unfair and may result in some families simply abandoning a claim for compensation to which their loved one is otherwise entitled.

All of which is respectfully submitted this 2nd day of October, 2020.

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