

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

**JOINT SUBMISSIONS OF FIRST NATIONS CHILD AND FAMILY CARING
SOCIETY OF CANADA AND THE ASSEMBLY OF FIRST NATIONS
IN RESPONSE TO THE PANEL'S QUESTIONS, DATED OCTOBER 20, 2020**

November 9, 2020

David P. Taylor
CONWAY BAXTER WILSON LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Tel: 613-288-0149
Email: dtaylor@conway.pro

Sarah Clarke
CLARKE CHILD AND FAMILY LAW
950-36 Toronto Street
Toronto, ON M5C 2C5

Anne Levesque
UNIVERSITY OF OTTAWA

Barbara McIsaac, Q.C.
BARBARA MCISAAC LAW

Counsel for the First Nations Child and Family
Caring Society of Canada

Stuart Wuttke
Julie McGregor
Adam Williamson
ASSEMBLY OF FIRST NATIONS
1600-55 Metcalfe Street
Ottawa, ON K1P 6L5

Tel: 613-241-6789 ext. 228
Email: stuartw@afn.ca

Counsel for the Assembly of First Nations

I. Overview

1. On September 6, 2019, the Panel ordered compensation to be paid to victims of Canada’s discrimination (the “**Compensation Entitlement Order**”).¹ 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 Panel regarding a process of compensation.

2. On February 21, 2020, the Caring Society, the AFN and Canada 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 Panel,² the Caring Society, the AFN and Canada submitted an updated Draft Compensation Framework on October 2, 2020.

3. On October 20, 2020, the Panel posed a series of questions to the Parties, some of which are addressed herein and some of which are addressed in the joint submission of the Caring Society, the AFN and Canada. These submissions are submitted on behalf of the Caring Society and the AFN regarding the Panel’s questions on the trust mechanism set out at sections 10.3-10.5 of the Draft Compensation Framework. A draft of these submissions was shared with counsel for the AFN prior to filing, who indicated the AFN’s consent.

II. The Trust Mechanism

4. As outlined in the Caring Society’s submissions of October 2, 2020, it is the Caring Society’s view (with which the AFN agrees) 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 in section 10 of the Draft Compensation Framework. This process provides a clear, predictable, uniform and culturally and trauma informed approach for such beneficiaries across the country, wherever they live and whatever their personal circumstances. Indeed, without the streamlined approach suggested in the Draft Compensation Framework, the Caring Society and

¹ *FNCFCSC et al v AGC*, 2019 CHRT 39.

² *FNCFCSC et al v AGC*, 2020 CHRT 7; *FNCFCSC et al v AGC*, 2020 CHRT 15.

the AFN anticipate significant burdens not only for these beneficiaries, but also for many of their caregivers, which may result in unfair and unequal outcomes.

5. The Panel in its October 20, 2020 direction raised several questions about the Trust Fund, which are answered directly here and expanded on below:

Panel's Q: If a child reaches the age of majority and yet never gains capacity to manage their own affairs, is it your proposal that for their life or until no money is left, the funds will be managed by the appointed trustee?

A: Yes

Panel's Q: If that is the case what will be deemed eligible expenses that can be withdrawn from the funds of the beneficiary?

A: As outlined in section 10.5, the Parties are currently proposing that criteria regarding the encroachment on capital, including what would be considered as a deemed eligible expense, will be outlined in the Trust Agreement. The drafting of the Trust Agreement has not yet been undertaken by the Parties and no consultation work has begun.

Panel's Q: If Jeremy Beadle's mother were still alive, she would never be able to manage the funds for her child under the proposed process. Is that correct?

A: Yes; however, the Caring Society and the AFN are of the view that the provisions in the Trust Agreement surrounding the encroachment on capital ought to be robust and should be guided by the letter and spirit of the Tribunal's orders.

Appropriate Trust Agreement provisions regarding encroachment on capital will ensure that parents and caregivers have the maximum ability to make decisions in the best interests of beneficiaries who lack capacity, while also ensuring that those parents and caregivers are not burdened with the significant administrative requirements of acting as a guardian of property, as outlined in the Caring Society's October 2, 2020 submissions.

Panel's Q: If this is correct, will there be a process in which a parent, grand-parent, uncle, aunt, or other legal guardian has input on the use of the trust funds and may request funds for the benefit of the adult child?

A: Yes. The Trust Agreement will outline specific criteria for encroaching on the capital of funds held in trust for a beneficiary. These provisions of the Trust Agreement would allow a parent, grand-parent, uncle, aunt, or other legal guardian to request the trust funds for the benefit of the adult child.

The Caring Society and the AFN are of the view that these criteria ought to include health, education, recreation, cultural and language supports and services, maintenance, and general support of the individual. However, as outlined in more detail below, the Caring Society and the AFN are of the view that further consultations are needed with disability advocates, youth in care, and professionals who work in this area to ensure that the concerns raised by the Panel are meaningfully addressed prior to the finalization of the Trust Agreement.

6. The Caring Society and the AFN share the concerns raised by the Panel regarding a potential to convey a negative, colonial message that First Nations are less capable of managing funds than other non-First Nations people. This is not the intention of the Caring Society or of the AFN. However, the Caring Society and the AFN are mindful of the burdens placed on “guardians of property” by provincial and territorial legislation, and that the default for families who live on-reserve is property management by the Minister pursuant to section 51 of the *Indian Act*, regarding “Mentally Incompetent Indians”.³

7. As noted above, while the Parties have discussed the issues of distribution and encroachment on capital in broad terms, such that there is an assurance that these issues will be addressed in the Trust Agreement, the important work of consulting with disability advocates, youth in care and professionals who provide services to those who lack legal capacity has not yet been undertaken. The Caring Society plans to undertake this work in the event that the Panel directs that compensation for beneficiaries who lack capacity shall be paid into the Trust.

8. Notwithstanding that the drafting of the Trust Agreement is not yet underway, the Caring Society plans to work with the Parties in crafting the Trust Agreement in a manner that incorporates many of the important principles that exist within the differing legislation across the country. For example, the governing statutes in the Yukon, Nova Scotia, Saskatchewan and Alberta require that measures taken to support an adult who lacks capacity should be the least restrictive or intrusive as possible.⁴

³ *Indian Act*, RSC 1985, c I-5, s 51.

⁴ *Adult Protection and Decision Making Act*, SY 2003, c. 21, Sch.A, s. 2(c), *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 2(c)-(d), *The Adult Guardianship and Co-decision-makers Act*, SS 2000, c. A-5.3, s. 3(d) and *Adult Guardianship and Trusteeship Act*, SA 2008, c.A-4.2, s. 46(5).

9. The Caring Society and the AFN are also committed to ensuring that the Trust Agreement is guided by the orders and the spirit of the Tribunal's orders. In particular, the Trust Agreement's provisions, reflective of the Tribunal's decisions, will need to ensure that the funds held for underage beneficiaries are secure and accessible to them when they reach the age of majority,⁵ will need to include protections for children with developmental delays and for adults with substance dependencies that may affect their judgment,⁶ and will empower beneficiaries (or those acting in their place) to decide for themselves on how to best use this financial compensation.⁷ Indeed, the Caring Society and the AFN have and will continue to be guided by the words of the Tribunal:

Financial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.⁸

10. The Caring Society and the AFN's primary driver for suggesting a Trust Fund is to ensure that the victims in this case are treated equitably and that their right to compensation is protected as much as possible through the distribution process. Distribution of the compensation through a Trust Fund will alleviate the administrative, financial and resource burdens associated with a family member's need to apply for, manage and track a victim's compensation, allowing the family member to focus on what is in the best interests of the victim rather than on the often complicated process of acting as a guardian of property. Indeed, the Caring Society and the AFN are asking that Canada cover the costs of the appointed trustee and any associated management fees. This will go a significant way to alleviating financial pressure associated with managing the compensation.

11. It is the intention of the Caring Society and the AFN to develop a simple and direct process for family members to apply directly to the appointed trustee for a distribution. It is anticipated (although this list will be more fully informed following our consultations with the experts in this field) that the criteria for distribution will include funds for health, education, recreation, cultural and language supports and services, maintenance, and general support of the individual. This process will allow family members to have some direct control over how their loved ones are

⁵ *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 261.

⁶ *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 264.

⁷ *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 260.

⁸ *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 260.

supported by the compensation, while striking a balance that ultimately protects the victims and reduces administrative burdens on their families.

12. While the exact criteria for this mechanism remain to be developed in the Trust Agreement, the draft Compensation Framework (if approved by the Tribunal) allows the Parties to return to the Tribunal to seek direction when they cannot reach agreement on a matter under the Compensation Framework (sec. 13.1). The Caring Society and the AFN are of the view that this approach provides significant protection for this group of beneficiaries.

13. While the risk may be low for mismanagement by guardians of property for the beneficiaries in the circumstances identified by the Panel, there is nonetheless some risk. In some circumstances, a beneficiary who lacks legal capacity may never know that their property has been mismanaged or depleted without their knowledge or consent. In other cases, where a beneficiary later learns of the mismanagement the only real option is to seek recourse through the courts, which in and of itself can be expensive and may pose difficulties with enforcement.⁹ The Trust Fund proposed by the Caring Society and the AFN will have protections for beneficiaries in this regard, including standard reporting and accounting requirements (sec. 10.5(e)), which will ensure that the appointed trustee is properly, fairly and equitably managing the compensation for those who lack capacity. These would be the same obligations that would be placed on beneficiaries' families managing property pursuant to federal or provincial statutes, without the corresponding burdens on those families.

14. Pursuant to the draft Compensation Framework, all beneficiaries, regardless of their level of capacity, will also have access to financial literacy information (sec. 10.6) and financial literacy supports (sec. 10.7). The Caring Society and the AFN expect to work with experts in this field to ensure that the financial literacy information and supports are appropriately tailored to those who lack capacity and will include information for family members supporting those beneficiaries.

15. Moreover, as outlined in the Caring Society's submissions of October 2, 2020, distribution through the Trust Fund will allow for a standard approach across the country. This system will be easy to understand and access no matter where victims live. It will also be simpler to support

⁹ See for example *Melin v Melin*, 2018 ABQB 1056, and *Tarantino v Galvano*, 2017 ONSC 3535

families in dealing with a common trustee, as opposed to fourteen different legislative regimes across the country.

16. The Caring Society and the AFN are conscious of the potential for a negative message to be sent by having the compensation paid into a Trust Fund for those who lack legal capacity. However, the Caring Society and the AFN are of the collective view that payment into the Trust Fund, with distribution and encroachment on capital as permitted under criteria developed in the best interests of these beneficiaries, provides the best option for these victims. This approach will be guided by the Tribunal's orders and spirit of those orders.

17. A Trust Fund provides an equitable, simple, and direct process for the victims in this case – victims who as children and adults lacking legal capacity are already in a vulnerable and often marginalized position. The Caring Society and the AFN are of the view that a Trust Fund will provide robust and efficient access to the compensation awarded by the Tribunal, thus ensuring that this group of victims can decide for themselves, through the framework of the Trust Agreement, how to use their compensation, respecting and giving life to their best interests.

All of which is respectfully submitted this 9th day of November, 2020.



Sarah Clarke | David P. Taylor

Counsel for the Caring Society



**FOR: Stuart Wuttke
Julie McGregor | Adam Williamson**

Counsel for the Assembly of First Nations