

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

**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 Indian and Northern Affairs)**

Respondent

And

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

Interested Parties

RESPONDENT'S REPLY SUBMISSIONS

**(Re: The Panel's April 22, 2020 request to the Chiefs of Ontario and the
Nishnawbe Aski Nation)**

ATTORNEY GENERAL OF CANADA

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A. Overview

1. These brief reply submissions address the April 22, 2020 letter from the Panel, in which it posed certain questions to the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), and the submissions filed by the COO and NAN on May 1, 2020. Canada files these submissions to respond to the submissions of COO and NAN, and to raise concerns of procedural fairness arising from the Panel's questions. Canada's position is that the issues should be decided on the basis of previous submissions, not the responses submitted on these questions. Should the Panel choose to address the submissions, the requests to expand the compensable class should be rejected.

B. Reply to the new submissions of COO and NAN

2. The submissions filed by COO and NAN constitute significant expansions of their previous positions. If accepted, they will significantly complicate the compensation process, by introducing much-litigated legal concepts (e.g., "standing in the place of a parent," provincial child protection law). It would fall to the Central Administrator to determine these legal issues.
3. The parties have worked diligently over the last few months to design a compensation framework intended to be succinct, comprehensible, and easy to apply. In proposing significant expansions to the definition of caregiver, the submissions of COO and NAN ensure a much more challenging and lengthy process leading to more litigation among families/affected individuals.
4. It is important to remember that in their original submissions, some parties asked for a broader class of caregiver,¹ but the Tribunal chose not to accept those submissions. No change in circumstances warrants re-visiting that decision. The parties had the opportunity to refer to evidence on the record that would justify their arguments. That evidence has not changed.

¹ See, for example, the submissions of the AFN filed April 4, 2019, at paras. 17, 41; AFN submissions of April 30, 2020, para. 42.

5. COO and NAN have suggested that some of the issues raised by the Panel's questions would benefit from further discussion with the parties.² This is a fair but necessary concession: neither COO nor NAN can say what the implications of their proposals will be, because they have not been the subject of evidence. Thus, important questions such as how to obtain any data necessary to identify primary caregivers, and whether the proposals would impose significant burdens on groups such as agencies, Band Representatives or others, are unknown.
6. Moreover, any necessary discussions among the parties would serve to extend the process, contrary to the Panel's desire to "complete the compensation process expeditiously."³ Further discussions would only delay the achievement of that important goal.

C. The fairness of the questions

7. In its May 1, 2020 submission, NAN accurately set out the procedural history of the present issue:

All parties, interested parties, and the Commission made submissions regarding the compensation process to the Tribunal on February 21, 2020. Both NAN and Chiefs of Ontario ("COO") included brief submissions requesting that the Tribunal modify its order so as to recognize caregivers other than parents and grandparents. NAN and COO asked that the Compensation Entitlement Order be so modified to better reflect the reality of caregiving practices in many First Nations in NAN territory and in Ontario more broadly.

On March 11, 2020, Canada filed a response, opposing the modification sought by COO and NAN. Canada stated that recognizing caregivers other than parents or grandparents would be too complicated. Canada submitted that, in the alternative, certain conditions should be attached should this Tribunal expand the category of caregivers entitled to compensation.

² Submissions of COO dated May 1, 2020, para. 39; Submissions of NAN dated May 1, 2020, paras. 13, 28

³ Letter from the Tribunal dated April 22, 2020, p. 1.

On March 16, 2020, NAN filed a brief reply taking the position that a fear of complexity is not a principled reason to deny compensation.⁴ [Note: COO did not file a response]

8. The sequence of events demonstrates that pleadings were closed on March 16. COO and NAN had raised two issues about expanding the scope of compensation, Canada responded, and NAN alone chose to make a brief reply. Canada believed that the Panel would then render its decision in due course. However, in its reasons for judgment on three other issues, the Panel indicated that it had “questions for the interested parties and parties on these issues [i.e. the new issues raised by COO and NAN].”⁵ The Panel followed up with an e-mail dated April 22, containing an enclosure entitled “Questions for COO and NAN”. Five questions were posed in the enclosed letter:

- Please specifically address all the concerns expressed by Canada in its submissions at paras. 11-12;
- Please provide the appropriate definition of a primary caregiver that the Tribunal should employ and please explain why this definition would be appropriate;
- The Panel believes that allocating compensation to caregivers providing paid services to the children in their care could lead to some difficulties. How would the COO and the NAN make the distinctions?
- In considering the Panel’s findings based on the evidence it had concerning the parents’ suffering in the compensation decision 2019 CHRT 39, please advise the Panel if the COO and the NAN are relying on other evidence in the record to support the request, other than the Wen:De reference at, page 138;
- The Panel in reviewing section 74 understands the COO’s concern and requests further specific details on this. The Panel wonders why the child’s file, the statement of agreed facts or the judicial findings would not specify the main facts leading to the decision and the specific subsection on which the decision is made... The Panel believes that the above appears to generate an obligation for decision-makers to consider the specific facts, context and history of a First Nations child before making a decision concerning the child. Please provide further details on this.

9. The five questions posed amount to invitations to COO and NAN to a) refute specific submissions made by the Attorney General (Question 1); b) make submissions on

⁴ Submissions of NAN, May 1, 2020, paras. 3-5

⁵ 2020 CHRT 7, para. 155

subjects no party had raised (Questions 2 and 3); c) find other evidence in the record to support their submissions (Question 4); and provide further evidence or argument to support a specific point made by COO (Question 5).

10. Courts and tribunals enjoy wide discretion in seeking the assistance of counsel. Once matters are under reserve, it is not uncommon for courts and tribunals to ask for submissions on recently-decided cases, for example, or other matters not foreseeable at the time submissions were made.
11. In raising the five matters specified in April 22 letter, the Panel is providing an opportunity for the two parties to improve upon submissions previously filed. The parties are represented by highly experienced and capable counsel. They had full opportunities to state their case, both initially and on reply. They should not be provided with an additional opportunity.
12. The Panel's request is procedurally unfair. As the Alberta Court of Appeal has observed, "[i]t is always preferable for the trier of fact and the adjudicator of law to leave to the parties and their counsel the initiative to advance legal and factual arguments."⁶ The Panel should decide the issues based on the submissions previously made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, Province of Ontario, this 8th day of May, 2020.



Robert Frater, Q.C.

Counsel for the Attorney General of Canada

⁶ *R v Oracz*, [2011 ABCA 341](#), at para. 7.

TABLE OF AUTHORITIES

<u>Case Law</u>		Referred to at Paragraph(s)
1.	<i>First Nations Child and Family Caring Society et al v Attorney General of Canada</i> , 2020 CHRT 7	8
2.	<i>R v Oracz</i> , 2011 ABCA 341	12