Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

First Nations Child and Family Caring Society and Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario, Amnesty International Canada and Nishnawbe Aski Nation

Interested Parties

Canadian Human Rights Commission Second Submissions on Compensation Process

(delivered April 30, 2020)

I. Procedural Background

1. On September 6, 2019, the Tribunal found Canada liable to pay compensation under the *CHRA* to victims of its discriminatory practices (the "Compensation Entitlement Order").[1] It did not decide the process for identifying specific victims, or distributing the compensation. Instead, the Tribunal directed the Caring Society, the AFN and Canada to (i) discuss options, (ii) consult

[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 ("Compensation Entitlement Order").

with the Commission, COO and NAN, who were not bound to participate, and (iii) return with propositions.[2]

2. On February 21, 2020, the Tribunal received a draft version of a framework for the payment of compensation (the "Framework").[3] It also received submissions from the parties on three issues upon which they had not agreed. By letter dated March 16, 2020, the Tribunal provided its rulings on those issues. Full reasons for those rulings followed on April 16, 2020 (the "Compensation Process Order").[4] Among other things, the Compensation Process Order raised certain new questions for the parties to consider. The Tribunal later set deadlines of April 30 and May 1, 2020, for the parties to provide their comments in response to those questions.[5]

3. The Commission understands the Caring Society, the AFN and Canada also plan to file the next draft of the Framework on April 30, 2020, along with their submissions on certain related issues that require the Tribunal's direction. For the Tribunal's information, the Commission had another opportunity to see an updated version of the Framework after the Compensation Process Order was released. It shared its last written comments on that document with the parties on April 23, 2020, based on a version received from counsel for the AFN on April 20, 2020.

II. Matters Now before the Tribunal

4. Based on the Caring Society's letter dated April 20, 2020, and the Tribunal's e-mail and letter dated April 21 and 22, 2020, respectively, the Commission understands the parties now have an opportunity to make submissions about some or all of the following matters:

a. the definitions of "essential service," "service gap" and "unreasonable delay" for the purposes of the Tribunal's orders regarding Jordan's Principle compensation;

b. any other issues they may have with respect to the Framework (including the attached Notice Program);

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[2] Compensation Entitlement Order, at para. 269.
[3] "Framework for the Payment of compensation under 2019 CHRT 39" (draft), delivered to the Tribunal by the Attorney General of Canada on February 21, 2020.
[4] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7 ("Compensation Process Order").
[5] The Tribunal set these deadlines in its e-mails to the parties dated April 21 and 29, 2020.

c. the Tribunal's follow-up questions regarding payments to the estates of deceased victims of discrimination;

d. the start date for Jordan's Principle compensation, and/or whether such compensation should be paid to the estates of Jordan River Anderson and his mother; and

e. the Panel's follow-up questions relating to (i) requests from COO and NAN to extend compensation to caregivers other than parents or grandparents, and (ii) concerns expressed by COO about the circumstances in which parents or caregiving grandparents will be disentitled to compensation due to abuse.

5. The Commission proceeds below to provide its submissions with respect to each of these subjects. As will be evident, the Commission generally does not take positions on the merits of these questions, but instead raises principles that it asks the Tribunal to consider when determining the matters before it. Where these Submissions do not address the merits of an issue that may be live before the Tribunal at this time, the Commission confirms it is content to have the Tribunal determine those issues on the basis of the submissions of other parties.

III. The Commission's Submissions

(A) Key Terms for Jordan's Principle Compensation

6. The Compensation Entitlement Order awarded compensation to First Nations children adversely affected by the discriminatory approach to Jordan's Principle. In effect, it ordered compensation where First Nations children were placed into out-of-home care to receive "essential services", or where they were deprived of such services due to "service gaps," "unreasonable delays" or denials that would not have occurred, if Jordan's Principle had properly been in place.[6] The Tribunal also ordered compensation for the parents or caregiving grandparents of these children.[7]

[6] Compensation Entitlement Order, at para. 250.
[7] Compensation Entitlement Order, at para. 251.

7. The Compensation Entitlement Order thus uses three key terms – "essential services," "unreasonable delay," and "service gap" – that will have to applied, in determining whether Jordan's Principle compensation should be paid in a given case.

8. The Commission understands that the parties ordered to consult and provide proposals on the compensation process – namely, the Caring Society, the AFN and Canada – have not reached full agreement on how these terms should be defined. As the Commission has not been involved in all aspects of their discussions in that regard, it does not make submissions here in favour of any specific definitions. Instead, the Commission simply asks the Tribunal to take the following comments into account, as it considers the matter.

9. First, the Commission understands the Framework to be proposed for approval will feature a central claims administrator, responsible for making initial determinations of eligibility for Jordan's Principle compensation. While there is no way to know how many claims may eventually be made, the number will likely be substantial. As a result, any definitions of "essential services," "unreasonable delay" and "service gap" should be as simple and easy to apply as possible. Overly complex definitions will complicate and slow the claims adjudication process, and thereby undermine the remedial purposes of the Compensation Entitlement Order.

10. Second, the Tribunal should avoid imposing any blanket requirement that claimants must have first made a specific request to Canada to receive a product or service, before compensation will be paid in respect of a service gap. For example, where Canada's past discriminatory approach to Jordan's Principle would have precluded funding for the product or service at the material time, there would have been no reason for a claimant to make a formal request. It would be inappropriate to effectively penalize the claimant for not having approached Canada in this context. First Nations children and families in vulnerable circumstances should not be expected to have made hopeless service requests in order to take the benefit of human rights protections.

11. Third, in considering the definition of "unreasonable delay," it would be appropriate to have regard for the Jordan's Principle service standards that were agreed to by all parties, and ordered on consent in the Tribunal's ruling dated November 2, 2017.[8] Subject to the availability

[8] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35.

of reasonably necessary information, that ruling said that urgent individual cases should generally be determined within 12 hours, and non-urgent individual cases within 48 hours. The Commission is not aware of any reason why these standards, which Canada agreed to in November 2017, could not equally have been applied during earlier years covered by the Jordan's Principle compensation awards. As a result, the Commission would support any proposals from the Caring Society, the AFN or Canada that would create a rebuttable presumption of unreasonable delay, where these standards were not met.

(B) The Framework

12. As mentioned above, the Commission last commented on a draft version of the Framework on April 23, 2020. As at the time of preparing these Submissions, we have not yet seen the Framework in the form that the Caring Society, the AFN and Canada intend to file with the Tribunal on April 30, 2020. However, based on our understanding of where things currently stand, the Commission does not have any issues to raise with the Tribunal about the document. We therefore make no submissions here about the content of the Framework, and simply wish to again acknowledge the efforts made by the Caring Society, the AFN and Canada to consult with one another and the other parties, and to agree on as many aspects of the compensation process as possible.

(C) Follow-Up Questions relating to Estates

13. In the Compensation Process Order, the Tribunal held that compensation should be paid to the estates of victims who died after experiencing discriminatory impacts. It also raised three related issues for the parties to consider. This section of these Submissions provides the Commission's comments in respect of those three issues.

14. Before addressing the specific questions, it is useful to set out a few background principles regarding the administration of estates and the *Indian Act*:

a. The *Indian Act* defines an "Indian" as someone who is registered or eligible to be registered under s. 6 of the *Indian Act*.[9] Such persons are often described as having "status" under the *Indian Act*.

b. Where a person with status is ordinarily resident on reserve, the administration of his or her estate is governed by ss. 42-50.1 of the *Indian Act*, and the associated *Indian Estate Regulations*.[10] Among other things, these provisions:

    a. authorize the Minister of Indigenous Services Canada (the "Minister") to (i) appoint executors of wills, and authorize them to carry out the terms of those wills, and (ii) appoint administrators of estates where there is no will, and authorize them to administer the property in the estates[11]; and

    b. set out an intestacy priority scheme for distributing property where a person dies without leaving a will.[12]

c. Where a person does not have status, and/or is not ordinarily resident on reserve, the person's estate is administered in accordance with the general legislative scheme that exists in the relevant province or territory.

(i) "Closed" Estates

15. At paragraph 141 of the Compensation Process Ruling, the Tribunal noted that none of the parties had "...raised or discussed the important question of what needs to be done if an estate has been closed under Provincial statutes."

16. We have not conducted a detailed review of all the applicable estates legislation across each jurisdiction in Canada. However, we have reviewed the *Indian Act* and *Indian Estates Regulations* (governing the estates of deceased persons with status who were ordinarily resident

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[9] *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) (definition of "Indian"), and s. 6. The Commission acknowledges that many people consider the term "Indian" to be offensive. The Commission uses the term in these Submissions only because it is the term used in the applicable legislative scheme.
[10] *Indian Act*, *supra*, at ss. 4(3) and 42-50.1; and *Indian Estates Regulations*, C.R.C., c. 954.
[11] *Indian Act*, *supra* at s. 43. It should be noted that the terminology used in respect to estates differs across jurisdictions. For example, the *Indian Act* refers to executors (where there is a will) and administrators (where there is no will), while Ontario legislation refers to estate trustees, with or without a will. In general, unless the context requires otherwise, the Commission uses the "estate trustee, with or without a will" language in these Submissions.
[12] *Indian Act*, *supra* at s. 48.

on reserve), and Ontario legislation (as just one provincial example of the statutes that would govern the estates of deceased persons off reserve). We also reviewed an Ontario textbook on estate administration.[13] During this review, we have found no references to legislative provisions or legal principles that would ever deem an estate to be permanently "closed."

17. To the contrary, the Commission understands that where new assets are discovered after an estate has presumptively been wrapped up, the estate trustee (with or without a will) still has to account for and distribute the assets, in accordance with the will (where one exists) or the applicable intestacy scheme (where there is no will). This appears to be the case even where a court has reviewed and approved the estate accounts, and the estate trustee believes that all work with respect to the estate has been completed. In such a case, it would remain open to the court to conduct a second passing of accounts after the new assets have been distributed, if need be.

18. Assuming the foregoing is correct, there should be no concerns associated with a "closed" estate. Compensation could still flow through to heirs, as long as the entitlement to receive a compensation award can be brought to the attention of the estate trustee (whether through the parties' efforts to identify victims of discrimination, by virtue of the operation of the Notice Plan attached to the Framework, by heirs, or in any other fashion).

(ii) Assistance in Appointing Administrators

19. Where compensation is to be paid to an estate governed by the *Indian Act* scheme (i.e. the estate of someone with status who had been ordinarily resident on reserve), the power to appoint an executor or administrator lies with the Minister. Where no person is available or willing, the Minister will appoint a departmental official to settle the estate. As far as the Commission is aware, there are no fees associated with these steps, and Canada has existing mechanisms to assist with the process.[14]

20. Where compensation is to be paid to an estate governed by provincial or territorial legislation (i.e. the estate of anyone without status, or ordinarily resident off reserve), and there is no will appointing an executor, it would be necessary to apply to a court for the appointment of an

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[13] Anne E P Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Thomson Reuters Canada, 1988, loose-leaf). Online: WestlawNext Canada (date accessed 28 April, 2020).

[14] See the Indigenous Services Canada (ISC) webpage entitled, "Estate services for First Nations people" (at https://www.sac-isc.gc.ca/eng/1100100032357/1581866877231).

estate trustee without a will. This would typically require that some expenses be incurred, which might wind up being recovered from the assets to be administered. In paragraph 144 of the Compensation Process Order, the Tribunal asked whether Canada should be ordered to provide funding and assistance in such cases.

21. The Commission understands that the Caring Society, the AFN and Canada are discussing the possibility of an approach that would see compensation awards paid into trust in these circumstances, under terms that would require the trustee to distribute the awards in accordance with the intestacy schemes applicable in the applicable province or territory. The Commission is not aware of any obstacles to that approach, and notes it would have the laudable benefit of avoiding the expenses typically associated with making application to a court.

22. However, it may be that the parties do not wind up proposing this approach, or that the Tribunal decides not to approve it. If either of those situations comes to pass, it would be appropriate to order that Canada provide funding and assistance, where a court application is needed in order to settle a compensation award payable to an estate. To require that such costs instead be taken out of the estate would undermine the remedial purposes for which the compensation awards were made.

(iii) Adoptions and Non-Registration

23. In the Compensation Process Order, the Tribunal notes that "...the *Indian Act* governs estates for registered 'Indians'...", then asks, "...what should be the guidelines if a First Nations child was adopted in a Non-First Nations' family and lost status or if a First Nations child was not registered?"[15]

24. With the greatest of respect, it is not entirely clear to the Commission what concerns the Tribunal is asking the parties to address. We therefore offer the following brief observations, in the hope they might be of assistance. If the Tribunal still has questions after reading all the parties' submissions, the Commission would be pleased to try to answer them.

[15] Compensation Process Order, at paras. 142-143.

a. Where a child with status under the *Indian Act* is adopted by parents without status, the child does not lose status. The child remains an "Indian" within the meaning of that legislation, by virtue of their connection to their biological parent or parents with status.[16]

b. As mentioned above, an "Indian" within the meaning of the *Indian Act* is someone registered or eligible to be registered. This means that a child who meets the eligibility criteria in s. 6 of the *Indian Act* will be an "Indian" under that legislation, even if the child has never actually been registered.

c. Where a deceased child was eligible to be registered under the *Indian Act*, and was ordinarily resident on reserve at the time of death, the estates scheme under the *Indian Act* and *Indian Estate Regulations* would appear to apply – regardless of whether the child had been adopted by non-First Nations parents, or had never been registered. If the child was not registered or eligible for registration under the *Indian Act*, or was ordinarily resident off reserve, the applicable provincial or territorial legislation would govern.

(D) Timing of Jordan's Principle Compensation

25. As stated above, compensation may be triggered in a Jordan's Principle case where a First Nations child was placed into out-of-home care to receive "essential services", or was deprived of such services due to service gaps, unreasonable delays or denials that would not have occurred, if Jordan's Principle had properly been in place. The Compensation Entitlement Order further specifies that for compensation to be paid, the triggering event must have taken place "…between December 12, 2007 (date of the adoption in the House of Commons of Jordan's Principle) and November 2, 2017 (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle)…"[17]

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[16] As Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) says on its webpage entitled, "Remaining inequities related to registration and membership": "Adoptees may be eligible for entitlement to registration under the Indian Act, either through their birth parent(s) or through their adoptive parent(s). At least one parent, either adoptive or birth, must be registered or entitled to be registered under section 6(1) of the Indian Act for the adoptee to be entitled to be registered" (emphasis added). Available at: https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#_Adoption_in_Indian. The Commission notes that this document is mistaken to the extent it suggests that a child must have at least one parent (birth or adopted) who is registered or entitled under s. 6(1) of the *Indian Act*. To the contrary, s. 6(1)(f) of the *Indian Act* would provide an entitlement to registration where a person has two parents who are registered or entitled to register under s. 6(2) of the *Indian Act*. However, this error is not material to the current discussion of the impacts of adoption.

[17] Compensation Entitlement Order, at paras. 250-251.

26. When arguing for the December 12, 2007, start date in its 2019 submissions on compensation, the Caring Society rightly observed that this was the date from which there could be absolutely no doubt about the federal government's awareness of the harms caused by its discriminatory approach.

27. In paragraphs 152-153 of the Compensation Process Order, the Tribunal asked the parties for submissions on whether the December 12, 2007, start date for Jordan's Principle compensation should be moved to an earlier date. It also asked whether compensation should be awarded to the estate of Jordan River Anderson (who passed away in February 2005), and/or to the estate of his mother (who passed away in December 2005) or his father.

28. There is some evidence to support a suggestion that Canada either knew or should have known before December 12, 2007, about the service gaps, delays and denials that eventually came to be addressed through Jordan's Principle. Indeed, as the Tribunal observes, the stories of Jordan and his family are themselves important evidence in this regard.[18]

29. That being said, the Commission did not previously take a position on an appropriate time period for the Jordan's Principle stream of compensation. As a result, the Commission does not take a position on that question here, other than to make the following two observations:

a. The Tribunal recently clarified that in the child and family services stream, First Nations children removed from home for compensable reasons before the start of the applicable time period (there, January 1, 2006) should receive compensation, if they remained in care on that start date.[19] The rationale was that these children and their eligible parents or grandparents suffered the same harm of family separation, within the compensable time period, as those removed after that date. Here there is an analogous subset within the Jordan's Principle stream – namely, First Nations children who were placed into out-of-home care on or before December 12, 2007, in order to receive essential services, and who remained in care after that date. These children and their eligible parents or grandparents experienced the harm of family separation within the compensable time period, alongside children and eligible parents or grandparents where out-of-home placements were made to

[18] Compensation Process Order, at para. 152.
[19] Compensation Process Order, at paras. 71 and 75-76.

access essential services after December 12, 2007. Clarifying that compensation should be paid in such circumstances would promote internal consistency across the child and family services and Jordan's Principle compensation awards.

b. With respect to all other aspects of Jordan's Principle compensation, the Commission notes that the original start date of December 12, 2007, was clear and evidence-based. It was the earliest start date proposed by the Caring Society at the time of the 2019 submissions on compensation, and no parties thus far have called for an earlier starting point. In the circumstances, moving from December 12, 2007, to an earlier date with a less solid evidentiary foundation could increase the likelihood of intervention by the Federal Court, in the context of the Attorney General of Canada's pending application for judicial review.

30. In response to the Tribunal's questions about Jordan and his family, principles of reconciliation cry out for compensation to be paid. Such payments would have important symbolic value, acknowledging the harms that Jordan and his family suffered, and further honouring their powerful legacy. However, as a matter of law in the context of this case, the Tribunal's intent appears to have been to order compensation from the date when Canada clearly knew or ought to have known about the harms being caused by its approach to service delivery. If Jordan experienced service gaps, denials or delays with respect to essential services in that period (however the period may come to be defined), compensation should follow. However, if the start date for that period remains at December 12, 2007, or is moved to some earlier date that nevertheless post-dates Jordan's passing, the Commission regretfully submits the Tribunal should decline to order compensation.

31. Regardless of what the Tribunal may come to decide, the Commission encourages Canada to seriously consider the possibility of making *ex gratia* payments to Jordan and his eligible caregiver(s), as if they fell within the compensable time period under the Jordan's Principle stream of the compensation process.

(E) Follow-Up Questions for COO and NAN

32. By letter to the parties dated April 22, 2020, the Tribunal asked follow-up questions about: (i) the requests from COO and NAN to award compensation to caregivers other than parents or

grandparents; and (ii) concerns expressed by COO about the circumstances in which caregivers eligible for compensation would become disentitled due to abuse.

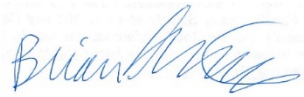
33. The Commission has not previously taken a position on whether or which caregivers should receive compensation, or in what circumstances. In the circumstances, the Commission makes no submissions in respect of the Tribunal's follow-up questions to COO and NAN, and is content have the Tribunal decide these matters based on the submissions to be received from the other parties.

IV. Conclusion

34. We hope these submissions will be of assistance. If the Tribunal has any questions, the Commission would be pleased to answer them, in accordance with any additional procedures the Tribunal may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 30, 2020



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