Docket: T1340/7008

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 Indigenous and Northern Affairs Canada)

Respondent

- and -

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

CHIEFS OF ONTARIO WRITTEN REPLY SUBMISSIONS RE: COMPENSATION PROCESS FRAMEWORK PURSUANT TO 2019 CHRT 39

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I. BACKGROUND

1. Since the Tribunal issued its ruling in 2019 CHRT 39 (“Compensation Entitlement Order”) Chiefs of Ontario (“COO”) and all of the Parties have been working toward a process for enabling access to compensation to victims of Canada’s racial discrimination. These submissions are COO’s response to two outstanding issues:

   A. COO’s position on the Compensation Process Framework (“the Framework”).

   B. A response to questions directed at COO by the Panel on April 22, 2020.

II. SUBMISSIONS ON THE COMPENSATION PROCESS FRAMEWORK

2. COO has had the opportunity to comment on drafts of the proposed Framework and participate in some discussions about it. COO has brief submissions about the Framework as submitted on April 30th 2020, which are detailed below. COO generally supports the Caring Society’s positions on the Framework.

3. COO adopts the other Parties’ submissions respecting the Framework as follows:

   A. COO adopts the definitions and submissions regarding “essential services”, “service gap”, and “unreasonable delay” proposed by the Caring Society;

   B. COO adopts the Canadian Human Rights Commission’s April 30, 2020 submissions with respect to estates at section (C) of their submissions, and the CHRC’s submissions regarding the timing of Jordan’s Principle at section (D) of their submissions.

A. Mental Health Supports

4. Section 6.1(c) of the Framework is intended to address mental health and cultural supports for beneficiaries. COO submits that section 6.1(c) should be amended to clarify that all beneficiaries should be able to avail themselves of all available mental health supports, regardless of age. While COO has no disagreement in principle with acknowledging that adults and children/youth may have different mental health needs, COO sees no reason why every beneficiary would not be entitled to all available mental health supports.

5. COO submits that a plain language interpretation of section 6.1(c) of the Framework suggests that flexible access to non-NIHB mental health providers will be limited to child and youth beneficiaries, as child and youth beneficiaries are singled out. COO has raised this matter with the AFN, Caring Society, and Canada; their view is that it is implicit that adult beneficiaries will also receive flexible access to mental health services. COO disagrees that the language reflects this interpretation and proposes that this section refer to beneficiaries generally.

6. COO proposes section 6.1(c) of the Framework be amended as follows to allow for flexible access to mental health supports for all beneficiaries:

> "In particular, the parties have recognized the need for greater access to child and youth mental health supports within, but not limited to, NIHB Program service providers and existing mental health teams. Canada will ensure that mental wellness teams have the capacity to accommodate the Compensation Process. In order to accomplish this goal, Canada may accept service providers who are not currently registered under the NIHB Program for all beneficiaries. ~~but are capable of providing mental health services in a manner that responds to the specific developmental needs of children and young people."~~ [NB: strikethrough text indicates proposed deletion].

III. COO'S REPLY TO THE TRIBUNAL'S QUESTIONS

7. On February 21, 2020, COO made submissions to the Tribunal on the previous Compensation Process Framework. On April 22, 2020, the Tribunal asked COO to respond to questions about its February 21 submissions.

8. In what follows, COO offers a response to the Tribunal's questions.

A. Identification of Caregiver Beneficiaries

9. COO's February 21 submissions raised concerns about how a finding under section 74 of the Ontario *Child, Youth and Family Services Act, 2017* ("*CYFSA*")[1] could result in the under-identification (or exclusion) of some caregiver

[1] *Child, Youth and Family Services Act, 2017,* SO 2017, c 14 Sched 1.

beneficiaries as defined in the Compensation Entitlement Order. The Tribunal asked the following:

> *"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."*

10. COO acknowledges that there is no information before this Panel about the state/content of judicial orders, child protection files, or agreed statements of fact that may be in a beneficiary's child protection record. Without this evidence, it is difficult to detail why those records may be deficient or not fully explain the situation that led to a child's coming into care. COO's submissions on this point attempt to address the Tribunal's questions generally, elaborate on the concern, and propose a constructive solution.

11. COO's concern about the under-identification/exclusion of caregiver beneficiaries arises because of a disjuncture between the Tribunal's definition of "unnecessary removal" and the language of the *CYFSA,* a disjuncture which is not corrected in the Framework or Schedule "C" thereto (the taxonomy).

12. A child protection record (agency records, judicial orders, agreed statements of facts, etc.) will in many cases reveal that the child was removed from the home for the reasons stipulated in s. 74(2) of the *CYFSA*, and in particular ss. 74(2)(a)(b)(e)(f)(g)(h)(i) and (j). Without more information, a finding under any of these subsections of the *CYFSA* could lead an individual reviewing the record to conclude that a caregiver has committed "abuse" thereby disqualifying the caregiver from compensation. Therefore, there is a risk that a person may, on the basis of those records, the Framework, and the taxonomy, determine that disqualifying abuse took place without enquiring further, when the underlying context may in fact be such that a caregiver *did* suffer an unnecessary removal as per the Tribunal's Compensation Entitlement Order.

13. COO submits that its unconcern regarding the under-identification/exclusion of caregiver beneficiaries could be resolved by the Tribunal ordering some provision such as the following in section 5 of the Framework:

> Any directions, notices, or training materials provided to persons identifying potential beneficiaries must include explicit language that potential beneficiaries are not automatically excluded from compensation for the sole reason that there is a finding that a child was in need of protection

> because of [include list or table of statutory provisions] under the *Child, Youth and Family Services Act, 2017* [NB this likely has broader application to other provincial/territorial legislation and could include a full table of concordance].

14. COO has not reviewed all provincial/territorial child welfare legislation, but this problem may occur in other jurisdictions as well. COO therefore proposes that a table listing the sections of provincial/territorial child welfare legislation which correspond to section 74(2) of the *CYFSA,* and any predecessor legislation, would be of assistance to those tasked with determining caregivers' access to compensation.

15. The Tribunal also posed a question about the interpretation of section 74(3) of the *CYFSA*:

> "*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.*"

16. COO understands the Tribunal to be asking whether s.74(3) of the *CYFSA* requires decision-makers to take into account the systemic factors that may have led to a First Nations child coming into care, and whether section 74(3) is a safeguard against that risk.

17. Section 74(3) has been interpreted by the Court of Appeal for Ontario as requiring the Court to "consider how to preserve the children's connection to their specific Indigenous community and culture" when making a decision about the placement of a First Nations child.[2]

18. Section 74(3) has not, to this point, been interpreted by Courts to require a decision-maker to consider systemic or background factors in a parent or caregiver's life that has led to their involvement in the child welfare system. COO has not located any case which considers this question. However, Courts have

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[2] *Kawartha-Haliburton Children's Aid Society v MW*, 2019 ONCA 316.

rejected the applicability of such principles (commonly known as *Gladue* principles) in matters under the predecessor legislation, the *Child and Family Services Act.*[3]

19. Furthermore, section 74(3) was introduced into the *CYFSA* in in 2017. There was no similar provision in the predecessor legislation, the *Child and Family Services Act*.[4] Therefore, with respect to potential beneficiaries taken into care prior to this provision being in force, section 74(3) does not apply.

20. COO has discussed the above proposal with other parties but does not see the concerns reflected in the Framework. COO therefore presents this proposal as a solution to resolve the concern, which COO believes is non-controversial among the Parties.

B. Questions Raised by the Tribunal Concerning the Definition of "Caregiver"

21. In its February submissions, COO argued that limiting compensation to parents and grandparents does not reflect the reality of family structures and caregiving customs in First Nations, as it excludes many other "types" of caregivers who suffered the unnecessary removal of children from their care or through denials/delays in access to Jordan's Principle due to Canada's racial discrimination.

22. In its April 22 letter, the Tribunal asked COO to:

    i. Provide an appropriate definition of compensable caregivers that the Tribunal should employ.
    ii. Identify any evidence in the record to support COO's proposed definition of compensable caregivers.

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[3] See for example *CCAS v GH and TV*, 2017 ONSC 742 (CanLII) (OCJ), at para 61 "…[I]t is difficult to apply the context referred to in the above passage from *Ipeelee* to the disposition stage of a child protection hearing. The child protection court is directed to order an available disposition in the best interests of a child. Taking judicial notice of the historical reasons that may have contributed to an Aboriginal parent's current circumstances is less likely to be helpful to the child protection judge faced with the decision of whether to return a young child to the parent than it may be to a sentencing judge grappling with whether to order a custodial sentence and, if so, its duration."

[4] *Child and Family Services Act*, RSO, 1990 c 11. (repealed).

iii. Respond to concerns raised by Canada about the potential for disputes between potential caregivers eligible for compensation.
iv. Address concerns regarding access to compensation by caregivers providing paid services to children.

In what follows, COO will respond to the Tribunal's questions.

i. A Proposed Definition of "Caregiver" - One Who Stands in the Place of a Parent

23. COO proposes that the term "caregiver" for the purposes of the Tribunal's Compensation Entitlement Order should include:

- Caregiving parents
- A caregiver who stood in the place of a parent at the time that the child was removed from his/her/their home, family, or community.

24. "Standing in the place of a parent" is a concept used throughout Canadian law to determine the rights and responsibilities of caregivers to children. It is a part of custody and access and child support legislation in all common-law provinces and territories,[5] and federally[6].

25. In the custody and access context, a caregiver who stands in the place of a parent may have rights to an ongoing parental relationship with a child.

26. In the child support context, a caregiver who stands in the place of a parent may be responsible for child support.

[5] AB: *Family Law Act*, SA 2003, c F-4.5, s. 48(1); BC: *Family Law Act Regulation*, BC Reg 347/2012, Part 4; MB: *Family Maintenance Act,* CCSM c F20, s. 1; NB: *Family Services Act,* SNB 1980, c F-2.2, s.1; NL: *Family Law Act,* RSNL 1990, c F-2, s. 2(1); NWT: *Children's Law Act,* SNWT 1997, c 14, s. 57; NS: *Child Maintenance Guidelines,* NS Reg 53/98, s.5; NU: *Children's Law Act*, SNWT (NU) 1997, c 14, s. 57; ON: *Child Support Guidelines,* O Reg 391/97, s. 5; PEI: *Child Support Guidelines Regulations,* PEI Reg EC668/97, s.1(f); SK: *Family Maintenance Act,* 1997, SS 1997 c F-6.2, s.2; YK: *Family Property and Support Act,* RSY 2002, c 83, s.1.
[6] *Divorce Act,* RSC 1985, c 3 (2nd Supp), s. 2(2).

27. In the child protection context, the concept of standing in the place of a parent is used in the determination of applications for standing in court proceedings, and the imposition of financial responsibility for the maintenance of children-in-care.[7]

28. The rights and responsibilities of adults who have a parental relationship to a child are recognized in all common-law jurisdictions in Canada, and federally. Through legislation, governments have chosen to validate the psychological and social bonds between caregivers and children through the framework of "stands in the place of a parent". This is a concept with national application that can be adapted to determine entitlement to compensation for caregivers who suffered the loss of their children due to Canada's racial discrimination. Of practical assistance, there is a body of jurisprudence and legislation that offers guidance on how to determine whether a caregiver meets the definition.

29. According to the Supreme Court of Canada in *Chartier v Chartier*, a determination about whether a caregiver stands in the place of a parent is an inquiry into the "nature of the relationship".[8]

30. The body of jurisprudence and legislation suggest the following key factors that can assist in determining whether a caregiver stands in the place of a parent:

   - The child's perception of the caregiver as a parental figure.
   - The caregiver's physical care of the child – e.g. feeding, hygiene, etc.
   - The caregiver's presentation of a "parent-like" relationship with the child, as evidenced in their participation in social, recreational, and familial activities.
   - The caregiver's discipline, nurturance, and guidance of the child.
   - The caregiver's financial and/or material contribution to the child's upbringing (where possible).
   - Whether the caregiver and the child resided together and the duration of shared residence.
   - The caregiver's stated or demonstrated intention to treat the child like their own child.

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[7] E.g.: MB: *The Child and Family Services Act,* CCSM c C80, s. 1(1); NWT: Child and Family Services Act, SNWT 1997, c 13, s. 5.1(8), 29.6(3); NU: *Child and Family Services Act,* SNWT (NU) 1997, c 13, s. 28(8), 28(3); SK: *The Child and Family Services Act,* SS 1989-90, c C-7.2, s. 2(1); YK: *Child and Family Services Act,* SY 2008, c 1, s. 1.
[8] *Chartier v Chartier,* 1999 1 SCR 242, para. 39. [*Chartier*].

31. This is not intended to be an exhaustive list of all factors that shape a parental relationship, nor would it be necessary to establish all of the factors in each case. Any definition of "parent" will have shades of meaning because the question of what makes a person a parent is fact-, culture-, and context- specific.

32. COO submits that caregivers who stand in the place of a parent should be entitled to the Compensation Entitlement Order for two key reasons:

   A. Extending compensation in this way respects the important bonds between First Nations children and those that raise them. Compensating caregivers who "stand in the place of a parent" recognizes the "shame and the pain"[9] suffered by those deprived of the right to raise their children due to "colonization, racism and racial discrimination".[10] The Compensation Entitlement Order responds to the trauma of the loss of companionship and severance of the psychological bond between a child and his/her/their caregivers. Canada's discriminatory conduct did not draw a distinction between caregivers, nor did provincial and territorial child welfare workers who unnecessarily apprehended First Nations children. Canada's discriminatory conduct harmed caregivers who stood in the place of a parent, regardless of their biological relationship to the child. Remedying the harm requires compensating the actual discrimination suffered.

   B. Recognizing other caregivers beyond parents and grandparents aligns more closely with family structures and caregiving practices in many First Nations communities (as detailed below). First Nations' customs emphasize the importance of diverse caregivers through customary adoption and other practices and protocols. These kin networks have suffered the collective trauma of residential schools and the mass removal of children from their homes, families, and communities.[11] Extending compensation to caregivers who stand in the place of a parent corresponds to the practical reality of who suffered Canada's racial discrimination, and respects First Nations caregiving customs and traditions.

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[9] *First Nations Child and Family Caring Society of Canada et al v Canada,* 2019 CHRT 39, para. 1.

[10] *Ibid,* para. 1.

[11] *First Nations Child and Family Caring Society of Canada et al v Canada,* 2016 CHRT 2, para. 412.

ii. Evidence on the Record that Supports a More Expansive Definition of Caregiver

33. As detailed in Nishnawbe Aski Nation's submissions dated May 1, 2020, there is evidence on the record before the Tribunal of the role of diverse caregivers in First Nations communities and cultures. For example, the Royal Commission on Aboriginal Peoples states:

> "To Aboriginal people, family signified the biological unit of parents and children living together in a household. But it also has a much broader meaning. Family also encompasses an extended network of grandparents, aunts, uncles and cousins."[12]
>
> […]
>
> "Aside from descent and marriage, Aboriginal people became kin or like kin in other ways as well. For example, adoptions was a common practice in most communities. […] It is still common practice in many communities for parents to give a child to another family in the community."[13]

34. Furthermore, there is evidence on the record that kinship care is very common among First Nations children involved in child welfare systems; while the scope of kinship caregivers is not well understood, it does include diverse individuals in a child's kin network. As noted in *"Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System"*:

> "The most common type of out-of-home care for First Nations children was informal kindship care; 42% of First Nations placements during the investigation period were in informal kinship care[…] Knowledge about informal kinship care arrangements is limited and the percentage of these 'placements' in which caregivers may have voluntarily

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[12] Ex. HR-2, Tab 7: Royal Commission on Aboriginal Peoples Report, Vol. 3, p. 10.
[13] *Ibid,* p. 11.

> arranged for a child to move, without any intervention/assistance from a social worker, is unknown."[14]

> "[…] more than half (54%) of out-of-home placements in First Nations investigations involved moves within a child/caregiver's kinship network. Kinship care arrangements may offer greater continuity in personal relationships, cultural contexts and links to community than other types of out-of-home care. In addition, the high proportion of kinship care placements may point to the existence of support networks which were available to investigated First Nations families but which were not directly represented in CIS-2008 data."[15]

35. COO is not suggesting that these references in the record are a full picture of the nature of First Nations family structures and customs of caregiving: these customs, protocols, and traditions are unique, complex, and sacred. These references are offered merely in response to the Tribunal's inquiry. Should the panel require further direct evidence on COO's position regarding the definition of "caregiver", this evidence can be provided.

iii. Disputes Between Caregivers

36. COO is not proposing that every individual who had a role in caring for a First Nations child who was unnecessarily apprehended or experienced denials/delays in access to Jordan's Principle should be eligible for compensation. The approach of evaluating caregivers seeking compensation based on whether they "stand in the place of a parent" is a framework with built in limitations that correspond, though imperfectly, to the social and psychological bonds between a child and a caregiver.

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[14] Ex. HR-5, Tab 47: Assembly of First Nations, 2011, "Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System", p. 81. [*Kiskisik Awasisak*].

[15] *Ibid,* p. 73-74.

37. Caregivers who are found to "stand in the place of a parent" *are parents.* There is no principled reason to deny them compensation for the harm suffered due to Canada's willful and reckless racial discrimination.

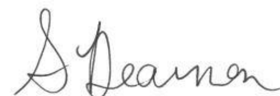
38. Furthermore, it is well-established in Canadian family law that a child can have more than two parents.[16] Compensating all the parents who suffered Canada's racial discrimination is proportionate and just.

iv. Access to Compensation by Paid Caregivers

39. The Parties have not discussed the question of compensation for paid caregivers; it is COO's position that this issue should be considered by the Parties in the negotiation of the final Compensation Process Framework.

40. On principle, however, COO notes that the monies that paid caregivers receive are for the maintenance of the child; this is not the same as compensation for experiences of racial discrimination, nor is it income derived from the role of caregiver.

All of which is respectfully submitted, this 1st day of May 2020.



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[16] E.g. BC: *Family Law Act,* SBC 2011, c 25, Part 3; ON: *All Families Are Equal Act, 2016,* SO 2016, c-23.