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 SUBMISSIONS ON COMPENSATION PURSUANT TO 2019 CHRT 39

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1. Chiefs of Ontario ("COO") has had the opportunity to review the draft compensation framework being submitted today jointly by the First Nations Child and Family Caring Society of Canada, Assembly of First Nations and Canada. COO has not reviewed any submissions of any of the parties prior to making these submissions. COO may have further submissions after reading the submissions of the parties.

2. COO has had some opportunity to review the draft framework and provide comments within the past week. It is COO's understanding that the draft framework is in part a work in progress, because instructions are being sought on some items and other items may require further consideration by the parties. In that spirit, COO provides these submissions at this time but may have further submissions as the draft framework develops.

3. COO has also provided an affidavit from Ruby Miller, COO Director of Social Services, which forms the basis of these submissions and which summarizes the considerations that have been brought forward to COO through its constituents and technicians that it works with.

Compensation Entitlement Order and First Nations Children in Ontario

4. From an Ontario-specific perspective, COO urges the Panel to consider the scope of the definition of "beneficiary" for the purposes of First Nations people in Ontario who would benefit from the Compensation Entitlement Order. COO submits that in Ontario, the Compensation Entitlement Order should apply equally to First Nations persons on or off reserve.

5. The Panel's findings with respect to the delivery of child and family services in Ontario pursuant to the *1965 Agreement* at 2016 CHRT 2 (found at paras. 217-246) rightly centre the locus of racial discrimination in the *1965 Agreement*. The Panel held at para. 392 that there was discrimination under the *1965 Agreement* because First Nations children did not receive all the services set out in the Ontario child welfare legislation, the *Child and Family Services Act* and its predecessors (now replaced by the *Child Youth and*

Family Services Act, 2017). Rather, Canada underfunded services to First Nations children under the *1965 Agreement* by funding only some of the services set out in provincial legislation, and failing to keep up to date with Ontario legislation (2016 CHRT 2 at paras. 222-226).

6. The resulting discrimination runs through Ontario's programs and funding formulas, which apply equally to First Nations children receiving services from First Nations child welfare agencies and those receiving services from provincial "mainstream" child welfare agencies, as noted by the Panel at para. 222, whether on or off reserve.

7. It is helpful to remember that the *1965 Agreement* does two main things. One, it requires Canada to pay a cost-share to Ontario, and that cost-share is indeed based on a calculation that uses the population of registered Indians *mainly* (though not exclusively) resident on reserve.[1] Two, it requires Ontario to make the listed services available to "Indians" throughout the province, and not merely to those on reserve. The very nature of the *1965 Agreement* is that service provision extends, via the Government of Ontario, both on and off reserve.

8. From the perspective of a First Nations child, parent, or grandparent as a service recipient, the service they received was discriminatory both on and off reserve. The system of service provision under the *1965 Agreement* does not draw a reserve-based distinction at the service delivery level.

9. Therefore, COO submits that all compensation claimants in Ontario (parents, grandparents, and children) should be entitled to benefit from the Compensation Entitlement Order whether the children were resident on or off reserve.

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[1] The cost-share calculation under the *1965 Agreement* includes the population of registered Indians (1) resident on reserve, (2) resident on Crown land in non-municipally organized territories (i.e. most off-reserve rural and northern areas of Ontario), and (3) resident in a municipality for under 12 months.

Role of First Nations in the Lifecycle of the Compensation Process

10. COO submits that the draft framework as set out fails to adequately acknowledge and address the additional burdens the Compensation Process is likely to impose on First Nations. This is set out in part in the affidavit of Ruby Miller at para. 10.

11. COO has heard concerns from First Nations leaders and child welfare and social service technicians across the province that First Nations citizens regularly turn to their First Nations for assistance with these types of settlements. However, First Nations do not receive capacity support or funding to assist their members. First Nations are often the only local service provider, and citizens turn to them for help.

12. This assistance is usually required throughout the entire lifecycle of the compensation process, from explaining the process to people, assistance with claiming compensation, and supporting First Nations individuals emotionally and spiritually throughout the claim administration process, including after they receive compensation or are denied (both of which can present challenges). The unfortunate reality is that First Nations also have to deal with the aftermaths of these processes in the form of dealing with the needs their citizens who have undergone the process and experienced additional trauma.

13. The proposed framework agreement rightfully acknowledges the fact that First Nations individuals who apply to receive compensation may be affected emotionally and spiritually by the process, and the framework agreement acknowledges the following needs: the need for notification and identification of claimants in a "culturally safe" manner (section 1.3); the need for mental health supports and referrals (section 5.0(a)); navigators to assist with the Compensation Process (s. 5.0(b)); mental health and cultural supports, hopefully through First Nations organizations (section 5.0(c)); and, the need for financial planning supports (section 7.1).

14. The draft framework does provide that First Nations will be provided capacity support to provide services and COO stresses that this is essential to assisting people through the trauma of the compensation process.

15. Finally at times compensation awards lead to further crises or problems in communities as a community's most marginalized receive large sums of funds. In addition to mental health supports, COO suggests that there be support to First Nations dealing with the aftermath of compensation awards, after the Compensation Process has completed.

Location of Beneficiaries

16. COO submits that the identification of beneficiaries may be more complicated in Ontario because there has not historically been records kept of Indigenous children in the child welfare system. Notably, the Ontario Human Rights Commission's 2018 report *Interrupted Childhoods: Over-representation of Indigenous and Black Children in Ontario Child Welfare*, which was focused largely on data collection, found that in Ontario, child welfare agencies have historically not kept reliable or consistent data about the race of children in the system. COO expects that the lack of data may make location and identification very difficult and will present unique challenges.

17. Therefore, COO suggests it would be appropriate for the framework agreement to address the fact that there may be special challenges in Ontario for identification of beneficiaries, and commitment from all parties and in particular Canada to further dialogue and collaboration with COO regarding identification and notification in Ontario.

Necessary / Unnecessary Removal

18. COO has reviewed the taxonomy and the process together and has some questions about the proposed process of identifying and determining eligibility, and in particular the identification of "necessarily removed" and "unnecessarily removed".

19. COO submits that the implementation of the distinction ordered by the Tribunal requires further work among the Parties and Interested Parties.

20. COO is concerned that there is a risk of under-identification of beneficiaries according to the definition set out in the framework. COO is concerned that because of the way in which child welfare proceedings occur in court or by agreement, there is a risk that

many people will be misidentified as “necessarily removed” due to abuse. This is the case particularly where agencies will be required to assist in identifying people and may rely on court orders, worker notes, or statements of agreed facts.

21. For instance, in the course of a child welfare proceeding in Ontario, there may be a court finding (either by trial or by consent) that a child was in need of protection under the Ontario legislation.[2] Often times, this court finding will come by way of a statement of agreed facts but sometimes by judicial finding. In any event, the child will have been found in need of protection for any of the reasons listed in section 74(2). None of the reasons listed in section 74(2) relate to, for instance, poverty. Rather that section describes various kinds of emotional or physical harm, all of which could be considered “abuse”.

22. Similarly, some parents or grandparents may have given up children voluntarily by agreement. This may have been done because of a lack of services. COO would appreciate clarify on whether these children, parents and grandparents are entitled to benefit from the Compensation Entitlement Order.

23. COO is concerned that the fact that a finding is required in a child welfare proceeding will lead to under-identification of beneficiaries. In particular, COO imagines on the face of documentation in files relating to children and their caregivers that the reason in an agreed statement of facts will disqualify almost every caregiver as having “abused” or “harmed” the child, or put them “at risk” of such harm.

24. COO believes that absent agreement on this matter, there should be further guidance from this Panel, perhaps after submissions from parties and Interested parties, on the interplay between a child welfare findings and processes and the notions of “necessarily” or “unnecessarily” removed.

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[2] See the *Child Youth and Family Services Act*, SO 2017 C. c-14, https://www.ontario.ca/laws/statute/17c14 in particular at section 74

Caregivers – Parents and Grandparents

25. COO believes that the reality of families in First Nations communities means that aunties, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation.

Compensation Process – Generally

26. With respect to section 7.7, COO submits that ISC's request for technical interpretation should be amended to add a technical interpretation of whether, if the compensation is considered "income", it is considered income situated on reserve, and if so in what circumstances. This would greatly assist beneficiaries with understanding their tax obligations.

27. COO anticipates that there will be further negotiation and agreement on the details of the process, and would like to see more details, for example:

- what documents will need to be filed to commence a compensation claim
- what documents will be required to submit a completed claim
- processes for persons whose documentation from child welfare agencies cannot be found or for persons who do not know what child welfare agency or agencies hold(s) their documents
- deadlines within which one must submit a claim, if any

Definition of First Nations Child

28. COO relies on its previous submissions on the definition of First Nations child to submit that registration under the *Indian Act* is likely insufficient to capture all people who were denied Jordan's Principle services, in particular because it is increasingly common for families not to register children.

29. COO submits that where First Nations have citizenship or membership laws or processes, those should be respected.

30. Lastly, COO submits that processes to "verify" whether someone is a First Nations citizen through the Compensation Process should not be unduly burdensome nor shift liability to First Nations. First Nations should also be provided capacity funding to provide any services that are agreed upon or ordered by the Panel to facilitate the compensation process.

All of which is respectfully submitted, this 21st day of February, 2020.

Maggie Wente and Sinéad Dearman
Counsel for Chiefs of Ontario