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Notre dossier: AR-800702

Via Email

February 21, 2020

Judy Dubois
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

Re: First Nations Child and Family Caring Society, et al. v Attorney General of Canada (Tribunal File: T1340/7008)

Please bring this letter to the attention of the Panel.

We are filing today a draft Framework on Compensation for the Panel's consideration. As the Panel directed in para. 269 of its decision 2019 CHRT 39, the Framework reflects discussions with the AFN and the Caring Society. We have also consulted the interested parties and the Commission, and incorporated suggestions from all three. We have invited the interested parties to join us in further discussions to finalize the Framework.

The Framework reflects the considerable work done by the parties, carried out in a spirit of cooperation. It builds on the extensive work done by the Caring Society in 2019, as described in the affidavit of Dr. Blackstock filed with the Tribunal on Dec. 8, 2019. The draft Framework respects the Panel's direction that the process for distributing compensation be an independent one. We have also endeavoured to make the process as simple as possible for potential beneficiaries, providing supports for various types for beneficiaries paid for by Canada and minimizing retraumatization. The Framework is intended to provide guidance for decision-makers.

Although all parties are in agreement with much of the Framework, certain details are still the subject of discussion, and we hope to finalize those discussions shortly. What we are contemplating is some further fine-tuning to the main body of the Framework and the Schedules, rather than large-scale revision. Because there are a few issues on which we seek the Panel's guidance, we hope that we can arrive at a final version during the time that the Panel is considering the issues identified below.

Some definitions of terms used by the Panel in its decision - “essential services”, “service gap” and “unreasonable delay” – are under discussion among the parties. We are providing our respective definitions for your information at the moment, although we plan to meet in the very near future to endeavour to reach agreement, and may provide further information depending on the outcomes of this discussion. This will also provide time to involve the other interested parties to the discussion as well. Similarly, because Schedule A to the Framework is under discussion, we are not submitting it at this time.

There are three issues on which we have not yet reached agreement, but on which we do seek the guidance of the Tribunal. All of these issues are important to deciding who should benefit from the Tribunal’s Compensation Order. The three issues are:

a) the age at which a beneficiary has unrestricted access to the compensation;
b) whether compensation should be available to children who entered care prior to the period covered by the complaint (i.e. January 1, 2006 and after), but remained in care after the complaint was commenced; and
c) whether compensation should be paid to the estates of deceased individuals.

For ease of reference, Canada’s position on the three issues is set out as follows:

a) the age at which a child should be able to have unrestricted access to the compensation should be determined by the age of majority set by the province or territory in which the individual resides;
b) compensation should be provided to those who entered care after January 1, 2006; and
c) compensation should only be paid to the estates of deceased individuals in circumstances currently provided in law.

A) The Age a “child” should be able to have unrestricted access to compensation

This issue does not affect a child’s entitlement to compensation. Rather, it concerns the issue, at what age should the “child” be entitled to full access to it? The answer depends on an assessment of when the individual ceases to be a “child”.

No federal statute provides uniform guidance as to the age an individual ceases to be a child or becomes an adult for the purposes of receiving any social assistance benefits. Rather, the best guidance is provided by Indigenous Services Canada’s Social Assistance Manual 2017-2018, which provides the following definitions:

- **1.2.2 Age of majority –** The age at which a person is granted the rights and responsibilities of an adult in accordance with provincial or territorial legislation.
- **1.2.4 Child (Children) –** A person under the Age of Majority in the relevant province or territory.
- **1.2.11 Social Programs –** The collective term for the following individual programs: Income Assistance, Assisted Living, Family Violence Prevention

> Program, and First Nation Child and Family Services. Each of which operate within their own approved terms and conditions.[1]

Section 3.1 of the Manual notes that its purpose is to "provides direction for the delivery of the Social Programs funded by INAC [now ISC]." Thus, as a matter of policy, the Government of Canada relies on provincial and territorial law to determine who is a child for the purposes of receiving social benefits. We believe this to be a fair approach: it ensures that each child who may receive a benefit is treated equally to others of the same age in the place in which they reside.

Canada believes that the statutory standards for determining the age of majority should govern a child's access to the compensation. These statutory standards are not discriminatory in nature. The age at which a child ceases to be a child or becomes an adult for the purpose of receiving benefits, or enjoys any other privilege associated with being an adult, is a considered choice of the respective legislatures. They are entitled to deference in the drawing of lines. Adopting any other approach cannot be justified by the record in this case.

The Caring Society has filed an affidavit from Professor Segalowitz that refers to emerging research on the subject of the brain development of young individuals. With respect, neither the affidavit nor the research to which it refers constitutes a basis for determining that reliance on the legislated age of majority is discriminatory. At its highest, it constitutes evidence that could be put to legislatures, along with other evidence, if they were inclined to reconsider their approaches to the age of majority. The potential recipients of compensation will have a reasonable expectation that they will be able to access the money fully on attaining the age of majority in the province or territory in which they reside.

B) Children who entered care prior to the initiation of the complaint

The complaint, the Panel's Compensation Ruling, and the Tribunal's statutory jurisdiction all support the view that compensation should be provided to those who entered care after the complaint was instituted.

At para. 245 of the Panel's Compensation Ruling, the Panel ordered Canada to pay "$20,000 to each First Nation child removed from its home, family and community between **January 1, 2006** [and a date to be determined]". [**bold** in original]

The Panel could not have been clearer: the date of January 1, 2006 was based on its assessment of the evidence. January 1, 2006 is the date on which it was found the discrimination began. Paragraph 245 dealt only with children who were the subject of "unnecessary removal." However, a similar order, also referencing January 1, 2006, was made in respect of children who were *necessarily* removed, at para. 249.

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[1] https://www.sac-isc.gc.ca/eng/1484941779222/1533304597853

With respect to compensation under Jordan's Principle, the Panel was also clear. At para. 251, compensation was also for a defined period, Dec. 12, 2007- November 2, 2017. These dates were also placed in bold in the judgment.

It is thus apparent that the Panel carefully considered the matter of when discrimination occurred for the purposes of exercising its jurisdiction under s. 53 of the *Canadian Human Rights Act*. To extend the scope of compensation to a period before January 1, 2006 would be to re-write the judgment.

Canada has announced that it would compensate the children affected by the discriminatory underfunding found in 2016 CHRT 2, even where the children affected fall outside the terms of the complaint. Two class actions have now been filed in the Federal Court seeking compensation for such individuals. Although neither class action has yet been certified, it is likely that a class action will be an appropriate vehicle to provide compensation to children removed from their homes before January 1, 2006.

C) Compensation to the estates of deceased individuals

Generally speaking, the estate of an individual is not a legal entity capable of experiencing discrimination.[2]

In *Hislop*, a s. 15 *Charter* case concerning an individual who was part of a class action alleging that Canada Pension Plan rules limiting the eligibility of same-sex partners to receive survivorship benefits were discriminatory. Although Mr. Hislop had died before judgment was entered, the Supreme Court crafted an exception to the ordinary rule that estates have no standing to allege discrimination. The Court noted that litigants are usually permitted to take advantage of the judgment, such that they need not survive the entirety of the litigation, including appeals. Accordingly, the Court permitted anyone who was alive at the time that argument concluded at first instance to take advantage of the judgment.[3] The final hearing date in this matter, as recorded in this Tribunal's decision substantiating the complaint, was October 24, 2014. Thus, only individuals who were alive at that date have any legal entitlement to the compensation ordered by the Tribunal.[4]

This does not necessarily mean that the estates of other deceased individuals may not be compensated outside of Tribunal proceedings. As pointed out above, two potential class actions have emerged. The issue of who should be compensated under either of those actions should be negotiated between the parties, as it was in previous class action settlements for Indian Residential Schools and the "Sixties Scoop".

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[2] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at paras. 72-73.
[3] *Hislop*, at para. 77
[4] See also, *Viner v. Hudson Bay Company*, 2012 CanLII 98528 (NS HRC), at paras. 27, 35; *Lovado v. BC Ministry of Public Safety and Solicitor General (No. 2)*, 2020 BCHRT 25, at paras. 27, 34-35, 41; *British Columbia v. Gregoire*, 2005 BCCA 585, leave to appeal to SCC dismissed (April 13, 2006), at paras. 9, 11

Yours truly,

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Encls. Draft Framework, Proposed definitions

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