

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, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI
NATION**

Interested Parties

**SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION
re Compensation Process: Definition of “Caregiver”**

May 1, 2020

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re Compensation Process: Definition of “Caregiver”**

May 1, 2020

I. Overview

1. These are the written submissions of Nishnawbe Aski Nation (“NAN”) made in response to questions from the Tribunal dated April 22, 2020, on the issue of caregivers entitled to compensation for Canada’s discriminatory conduct as found in 2016 CHRT 4.

2. On September 6, 2019, the Tribunal issued its Compensation Entitlement Order setting out the categories of people entitled to compensation for Canada’s discriminatory conduct regarding on-reserve child and family services and failed/improper implementation of Jordan’s Principle. The Tribunal specified it “intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grand-parents, the grand-parents caring for the children should be compensated.”¹ A similar approach was taken for parents or caregiving grandparents of First Nations children entitled to compensation for Jordan’s Principle-related compensation. The Tribunal stated it “welcomes any comments/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.”²
3. All parties, interested parties,³ 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.
4. 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

¹ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2019 CHRT 39, at para 185 [Compensation Entitlement Order].

² *Ibid.*, at para 270.

³ With the exception of Amnesty International.

too complicated. Canada submitted that, in the alternative, certain conditions should be attached should this Tribunal expand the category of caregivers entitled to compensation.

5. 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.
6. On April 22, 2020, the Tribunal wrote to the parties and posed specific questions to NAN and COO regarding the issue of the definition of caregiver for purposes of compensation. These are NAN's submissions in response to those questions.
7. NAN acknowledges that it will be impossible to create a perfect compensation process. No matter how carefully crafted the process is, the experience of applying for compensation will be painful for many. There will be some individuals who will experience further pain by seeing their claim denied. There may be others who will feel upset when they learn a certain neighbour had a claim approved. And through all of this, there will be a painful attempt to make real lives and family constellations "fit" within boxes used to determine eligibility for compensation. NAN acknowledges that the Tribunal and the Parties are committed to making the compensation process as simple as possible for claimants, to reducing harm inflicted through the process, and to ensuring supports are in place for claimants from the beginning of the process through to the end. There is, rightly, a shared desire to make the process responsive to the needs of victims of discrimination. It is in this spirit, and with appreciation of others' commitment to this goal, that NAN makes these present submissions.

II. Issues and Argument

8. NAN's submissions focus on the following issues:
- a) What the definition of primary caregiver should be, and why it is appropriate.
 - b) Whether a distinction should be made between paid and unpaid primary caregivers, and if so how.
 - c) Canada's concern that recognizing primary caregivers other than parents or grandparents will "increase the complexity of the proceedings".
 - d) Canada's proposed conditions should primary caregivers other than parents or grandparents be recognized as eligible for compensation.
 - e) Evidence in the record being relied upon.

A. NAN's Recommended Definition of Primary Caregiver

9. NAN adopts and relies upon the definition of primary caregiver and explanation thereof provided by COO in its submissions of May 1, 2020.
10. In the Fall of 2018, NAN's Chiefs Committee on Children, Youth and Families drafted a Statement of Principles to guide its deliberations regarding potential (now enacted) federal legislation in the area of Indigenous child and family services. The Statement of Principles references the "right and responsibility to care for our children in accordance with our laws, practices and traditions."⁴ These include the practice of individuals other than biological parents or grandparents acting in a parental capacity for a child, for example when a child's biological parents are unable to do this, or in the tradition of gifting of a child.⁵

⁴ Appendix D to Exhibit "A" of the Affidavit of Odi Dashesambuu filed April 9, 2020, at Statement #7.

⁵ Ex. HR-2, Tab 7: *Report of the Royal Commission on Aboriginal Peoples*, Vol. 3, p. 11; Ex HR-5 tab 47: AFN, *Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System*, 2011

11. The definition is appropriate because it is reflective of the reality that it is not uncommon for individuals other than biological parents or grandparents to play the role of primary caregiver. The definition focuses on the nature and quality of the relationship between an adult and child, rather than how that adult is biologically related to a child. The definition recognizes that the determination is fact-, culture-, and context-specific.

B. Being a Paid Caregiver Should not Automatically Exclude a Caregiver from Compensation

12. NAN submits that the fact that a caregiver may be paid (e.g. through a legislated Customary Care Arrangement) should not automatically exclude the caregiver from compensation. NAN proposes that a paid caregiver should be eligible for compensation if:

- They played an active role in the child’s life for at least two years (except in the case of children under 2 years of age);
- The child in their care is “unnecessarily removed” from their care or experiences compensable denial/delay of services (as set out in the Compensation Entitlement Order); and
- A file review or other information establishes that the relationship between the paid caregiver and child was such that the paid caregiver was acting in the place of a parent.

13. As COO points out, this issue is not one that the Parties have discussed, at least not to NAN’s knowledge. NAN agrees it makes sense for the Parties to discuss this topic with NAN, COO and the Commission.

C. Complexity Associated with Expanding the Class of Caregivers Eligible for Compensation Does Not Outweigh the Benefits of It

14. NAN believes that the benefits of embracing a more culturally-appropriate definition of caregiver for purposes of compensation entitlement outweigh the drawbacks of opening the door to added complexity.
15. Canada raised the concern that many people in a First Nation might have been “intimately involved in a child’s caregiving.”⁶ Canada stated that attempting to prove a claim to entitlement “could lead to protracted proceedings, pitting one caregiver’s claim against another’s.”⁷ Canada argued for the necessity of avoiding a situation that could “result in people disputing the relative merits of their caregiving role at the time of a child’s apprehension.”⁸
16. NAN submits, firstly, that the Tribunal’s Compensation Entitlement Order makes it clear that the Tribunal is focused on caregivers at the time of removal, and not on every individual who has had a loving and caring relationship with the child.
17. Second of all, the proposed definition of caregiver for purposes of compensation entitlement makes it clear that it is not every individual who is involved in caring for a child who will be captured by this term. It is expected that many people within a child’s extended family/kin network play an active role in the child’s life. This is different from standing in place of a parent for that child. The proposed definition thus decreases the opportunity for disputed claims.

⁶ Submissions of the Attorney General of Canada dated March 11, 2020, at para 11.

⁷ *Ibid.*

⁸ *Ibid.*

18. Third, the door has already been opened to the potential for competing claims by the fact that the Compensation Entitlement Order recognizes parents and, when parents are “absent”, grandparents.⁹ What it means for a parent to be “absent” could become a point of contention.

19. Fourth, the Draft Framework already contemplates the creation of criteria for identifying and expediting the processing of potentially complex claims:

12.2 The Parties will continue to work collaboratively to develop criteria to identify and expedite the processing of potentially complex claims (for example, a child removed multiple times, with removals involving different parents and grandparents). The Parties have agreed to develop further guidance on this issue, which would weigh factors such as: (a) who the biological parent(s) are; and (b) legal guardianship of the child and other relevant matters.

20. Considerations for processing caregiver claims include the following:

1. In many instances an Agency’s file will include remarks about who the caregiver/s was/were at the time a child was removed;
2. An Agency’s file will also include information on visits while the child was in care, which can shed light on the importance and quality of the relationships a child had with the adult(s) in their lives.
3. School records and/or nursing station records may very well shed light on who was acting in place of a parent for the child.
4. Court or other documentation relating to decisions about the child’s care from a First Nation (e.g. through its Band Representative) can be expected to contain information about who in the community was acting in a parental role for the child. First Nations in NAN are tight-knit; people know who is caring for which children.

⁹ Compensation Entitlement Order, at para 185.

5. Similarly, Court or other documentation relating to decisions about the child's care from the Office of the Children's Lawyer may shed light on the child's perspective of its relationship with various adults in its life.
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21. Furthermore, "competing" claims would only exist where (a) there is a predetermined number of caregivers who can be eligible and the number of claimants exceed that; and/or (b) one claimant believes another claimant was not acting in the place of a parent to the child and voices an objection. A process for determining "competing" claims could potentially include communicating with the First Nation in question to determine whether it has a dispute resolution service that could be offered to the claimants.
 22. An additional consideration is what sort of information could be elicited on a claim form for child (or former child) claimants. There could potentially be a section, whether mandatory or voluntary, asking the claimant from whose care they were removed, and who they saw as a parental figure at the time. The response here could be one of the sources of information used in processing caregiver claims.
 23. Finally, NAN believes it is also important to consider this question – i.e. of whether the definition of caregiver should be expanded – from a child's perspective. For example, let's consider a situation where an auntie, alone, was standing in place of a parent for a child. Refusing to consider the auntie eligible for compensation sends the message to the child that they did not have a caregiver, that their auntie was somehow something "lesser than" a caregiver. It sends the message to the child that their relationship with their auntie was less valuable than another child's relationship with their parent or another child's relationship

with their grandparent. NAN believes it is important to avoid such devaluing of important relationships.

24. NAN recognizes and acknowledges that there will be some instances in which including a more culturally-appropriate definition of caregivers entitled to compensation will complicate matters. NAN submits that the complexity is not so great that it outweighs the benefits of a more culturally-relevant definition that does not devalue the relationship between a child and individuals, other than biological parents or grandparents, who stand in the place of a parent for that child.

D. NAN's Response to Canada's Proposed Conditions

25. NAN understands Canada's proposed conditions to be the following:

1. An individual other than a biological parent or grandparent can only be eligible for compensation if they were a sole caregiver.
2. When the caregiver was a biological parent or grandparent, a maximum of two caregivers per removal of a child can be eligible for compensation.

26. NAN does not support Canada's proposed conditions. There is no principled basis upon which to insist that a caregiver other than a biological parent must be a single caregiver. It does not make sense that, for example, a single auntie standing in the place of a parent for a child would be eligible for compensation, but that, if she were partnered, neither she nor her partner (if the partner were also standing in the place of a parent) would be eligible for compensation.

27. Similarly, Canada's second condition seems incompatible with basic tenets of family law, in which a child can have more than two parents and being a biological parent does not trump

being a non-biological parent.¹⁰ NAN proposes that the determination of who is an eligible caregiver, and how many eligible caregivers there are for a single instance of removal, has to occur on a case-by-case basis. While there may not be many cases in which there are more than two parent-like figures for a child at the time of removal, NAN believes it is prudent not to set a pre-determined limit.

28. NAN would be open to discussing this latter question further amongst the Parties, interested parties, and Commission prior to asking the Tribunal to adjudicate the matter.

E. Record Relied Upon by NAN in Support of Its Request

29. The Panel has asked that NAN advise what evidence in the record it is relying upon to support its request to expand the class of caregivers eligible for compensation beyond (biological) parents and grandparents.

30. In addition to the Wen:De reference contained in NAN's reply submissions, NAN relies on the following exhibits in the record:

1. Ex. HR-5, Tab 47: Assembly of First Nations, *Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System*¹¹
2. Ex. HR-2, Tab 7: *Report of the Royal Commission on Aboriginal Peoples*¹²
3. Ex. HR-3, Tab 21: Commission to Promote Sustainable Child Welfare, "Aboriginal Child Welfare in Ontario: A Discussion Paper" (July 2011)¹³

¹⁰ E.g. *A.A. v. B.B.*, 2007 ONCA 2 (CanLII) [Book of Authorities, Tab 12] ; *Cabianca v. British Columbia (Registrar General of Vital Statistics)*, 2019 BCSC 2010 [Book of Authorities, Tab 13].

¹¹ Particularly "Chapter 1 – Introduction", esp. at p. 5; "Chapter 4 - Characteristics of Children and Caregivers", esp. at pages 46-47; "Chapter 5 – Household Characteristics", esp. at p. 61; and "Chapter 6 – Case Characteristics and Decisions", esp. at pp. 61, 73-74, 81.

¹² Particularly Volume 1, esp. at p. 612; and Volume 3, esp. at pp. 10, 11, 36

31. Each of these references provides further evidence of the more expansive family structure that exists in First Nations culture than in “Western” culture. Brief summaries and excerpts from each are provided in these submissions below. *Kiskisik Awasisak* contains quantitative data that helps illustrate how this broader conception of family and caregiving duties for children are reflected in caregiving arrangements at the time of child welfare investigations.

A) Assembly of First Nations, “Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System”

32. This 2011 report analyzing the overrepresentation of First Nations Children in the child welfare system. It includes detailed interpretation of quantitative reports on data related to the investigation and apprehension of First Nations children, and also sheds light on the realities of extended kin caregivers in First Nations communities.

33. Chapter 4 analyses characteristics of children and caregivers, comparing First Nations households with non-Aboriginal households. Of particular note, the data indicates as follows:

In comparison with non-Aboriginal investigations, a smaller proportion of First Nations investigations involved biological mothers (84% vs. 89%) and biological fathers (35% vs. 46%) as primary caregivers. In addition, in comparison with non-Aboriginal investigations conducted by the sampled agencies, *a larger proportion of First Nations investigations involved households in which neither the primary nor second caregiver (when two caregivers were identified) was male (46% vs. 36%).* In contrast, *a larger proportion of First Nations than non-Aboriginal investigations involved grandparents, foster parents and “other” caregivers.* Again, this data is difficult to interpret because the CIS 2008 data collection instrument limited workers to identification of two caregivers living in the home. Accordingly, these patterns may reflect a relative absence of biological parents and male caregivers in the households of investigated First Nations children. However, they may also reflect the presence of multiple adult care givers in the household, combined with First Nations customary care traditions which emphasize extended family and communal responsibility for care of children. Further research is needed to disentangle these

¹³ Especially at pp. 30-31.

possibilities. In addition, because the CIS 2008 data collection instrument limited workers to providing information on caregivers living in the home with an investigated child, this data may underestimate the caregiving resources for First Nations children with extended family and community members living outside the home who provide care.¹⁴

34. In Chapters 5 and 6, informal kinship arrangements are discussed in an analysis pointing to the importance of such caregiving relationships in First Nations. The researchers acknowledge that the data-gathering tool, which allowed for workers to provide information on a maximum of two caregivers living in the home “may also underestimate caregiving resources for investigated First Nations (and non-Aboriginal) children living in households with more than two caregivers.”¹⁵

35. This evidence proves the existence of extended family caregivers in First Nations communities in data recorded as recently as 2008.

B) Report of the Royal Commission on Aboriginal Peoples (“RCAP”)

36. The RCAP Report, published in 1996 and derived from the testimony, submissions, research and reports of individuals, organizations and researchers living or working in Aboriginal communities, describes family arrangements within these communities.

37. The Report describes naming ceremonies that exist in some First Nations cultures.¹⁶ Such ceremonies are described as involving commitments made by extended family and

¹⁴ Ex. HR-5, Tab 47: Assembly of First Nations, *Kiskisik Awasisak: Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System*, at pp. 46-47 (emphasis added) [*Kiskisik Awasisak*].

¹⁵ *Kiskisik Awasisak*, *supra*, at page 61.

¹⁶ Ex. HR-2, Tab 7: *Report of the Royal Commission on Aboriginal Peoples [RCAP]*, Vol. 1, at p. 612.

community members to assure a child's cultural education, pointing to the importance of extended family and community from the birth of a child.¹⁷

38. In Volume 3, in Chapter 2 entitled "The Family", it is explicitly stated that:

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.¹⁸

39. The discordance between this understanding of family and the "western cultural perception" of family is noted later in Volume 3, in a section focused on current issues in child welfare:

Casework or therapy with a nuclear family is consistent with the western cultural perception that individuals are members of nuclear families that provide economic support and affection and can turn to specialized institutions for problem-specific help. Aboriginal people, on the other hand, often perceive themselves as members of family networks in which everyone is obliged, to the extent of their ability, to share their resources and assist all other members. In rural communities with stable membership over generations, the family and the community may be virtually the same group.¹⁹

40. RCAP helps illustrate that the family structures and practices that exist within First Nation communities.

C) Commission to Promote Sustainable Child Welfare, "Strengthening Family-Based care in a Sustainable Child Welfare System" (July 2011)

41. The findings of the RCAP Report are echoed in this 2011 report by the Commission to Promote Sustainable Child Welfare:

Although there is great diversity among Aboriginal belief and value systems, there are a number of common elements. Aboriginal belief systems embody a holistic world view and see the interests of the child, family, community, and surrounding environment as interconnected. Personal identification with one's community is a core feature of Aboriginal belief systems, and this is reflected in the way children are cared for and taught. *Great emphasis is placed on the extended family and community in the upbringing of a child, and elders and members of the extended kin network have a responsibility to*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, Volume 3, at page 10.

¹⁹ *RCAP*, Vol 3, at p. 36.

*nurture and guide children according to the traditional teachings, anchoring the child's identity and helping him or her make sense of the world.*²⁰

42. This Commission derived its findings from parents, children, agencies, foster and group caregivers, and numerous organizations involved in the delivery of child and family services.
43. The Commission also acknowledges that the model of child and family services adopted by Children's Aid Societies tends to be driven by non-Indigenous perspectives and policies that fail to capture the "relational worldview and interconnectedness that characterizes Aboriginal child-care traditions and practices."²¹
44. The importance of extended family in providing care for children, and the challenges of fitting First Nations families into the narrow box of "Western" family structure, is evidenced in these passages.

III. Conclusion and Orders Requested

45. NAN respectfully requests an order from the Tribunal that it modify its Compensation Entitlement Order so that caregivers who were standing in the place of a parent for a child can be eligible for compensation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 1st DAY OF MAY, 2020



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²⁰ Ex. HR-3, Tab 21: Commission to Promote Sustainable Child Welfare, "Aboriginal Child Welfare in Ontario: A Discussion Paper" (July 2011), at pp. 30-31 [Commission Report].

²¹ Commission Report, *supra*, at p. 74.

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