

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA  
and ASSEMBLY OF FIRST NATIONS**

Complainants (Moving Party)

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

Commission

- and -

**ATTORNEY GENERAL OF CANADA  
(representing the Minister of Indigenous and Northern Affairs Canada)**

Respondent (Responding Party)

- and -

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA  
and NISHNAWBE ASKI NATION**

Interested Parties

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**SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS  
REGARDING TRUSTS**

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ASSEMBLY OF FIRST NATIONS

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## Overview

1. On September 6, 2019, this Panel ordered compensation to be paid to victims of Canada's discrimination (the "Compensation Entitlement Order"). The Respondent, Attorney General of Canada (representing the Minister of Indigenous Services Canada), was Ordered<sup>1</sup> to pay compensation in the amount of \$40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle.
2. In addition, this Panel Ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) to co-develop a culturally safe process to locate the victims/survivors identified in its decision.<sup>2</sup> The Parties were given a mandate to explore possible options and return to the Panel.
3. On February 21, 2020, the AFN, Caring Society and Canada submitted a draft of the proposed Compensation Framework which outlined a process for the distribution of compensation to beneficiaries. However, further direction from the Tribunal was required for areas where Canada, the AFN and Caring Society were not able not reach agreement.
4. On October 2, 2020, the Parties submitted a revised Draft Compensation Framework for this Panel's consideration. The Draft Compensation Framework is largely a product of consensus between the Parties. However, one area of divergence remains to be resolved. This issue relates to how compensation shall be distributed to those who are currently minors or those who do not have the legal capacity to manage their own financial affairs.
5. This Panel's direction is required to determine how and when compensation is to be paid to beneficiaries who do not have the legal capacity to manage their own

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<sup>1</sup> *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 (hereafter Compensation Entitlement Order).

<sup>2</sup> *Ibid*, at para 269.

financial affairs. Both the AFN and Caring Society seek a ruling that compensation be distributed by an appointed trustee, as outlined in the Draft Compensation Framework. Canada is of the view that compensation be distributed pursuant to the *Indian Act* where a child resides on-reserve or pursuant to provincial/territorial legislation for individuals residing off-reserve.

6. The AFN submits that the Draft Compensation Framework establishes a national approach with clear rules and norms on how funds are to be distributed to beneficiaries.

### **Intended Trust Objectives**

7. The AFN is cognizant of stories where parents or legal guardians deplete and/or use a child's earnings leaving nothing for the child when they reach the age of majority. First Nation child beneficiaries covered under this Panel's orders are the most vulnerable group in Canada and their interests need to be protected.
8. The Draft Compensation Framework contemplates a process where all funds are placed into a trust and is held until the child reaches the age of majority. When the individual attains the age of majority, the beneficiary will be entitled to receive the full amount of compensation and all revenue earned on its investment. This ensures that the beneficiary will receive the full benefit and value of compensation ordered.
9. This objective of the proposed Draft Compensation Framework stands in contrast to provincial regimes and the *Indian Act*. Typically, provincial regimes stipulate that funds held in trust may be used for the care and wellbeing of the child or in the best interest of the child. In short, a parent or guardian is able to encroach on the trust funds to pay for certain goods and services, so long as the child benefits from this encroachment.
10. While children are not typically expected to pay for their own daily living expenses, various provincial regimes allow a parent or guardian to receive funds on behalf of a child to be used to assist with their maintenance and support expenses. The parent

or guardian must describe the needs of the child and why the parent or guardian is unable to fully or partially support those needs financially. In addition, requests may be made to fund special opportunities such as sports, recreation, education opportunities, and medical services that provide a direct benefit to the child. The ability to encroach on the child's funds held in trust is especially problematic where the state is the legal guardian of the child.

11. The AFN submits that it is probable that a number of beneficiaries will have no funds left in trust by the time they reach the age of majority should the provincial, territorial, or Indian Act regimes apply. They stand to lose not only a connection with their family, but also the compensation that was awarded to them for this loss.

### **A Uniform Regime**

12. The Draft Compensation Framework contemplates a national approach for the distribution of compensation to all beneficiaries. An appointed, independent trustee will manage compensation for minors and those who lack legal capacity, until such time they reach the age of majority or gain capacity to manage their own affairs. The distribution of the trust funds will be governed by a Trust Agreement (to be developed) that will outline the process to protect assets, manage the processing of applications and the payment compensation. The Trust Agreement will include direction on how trust property is to be invested and establish rules regarding oversight and reporting.
13. The AFN submits that the appointment of a national trustee will alleviate the burden of parents and/or guardians arguing for control of said funds. It will also alleviate parents from the burdens of navigating various provincial regimes and rules.
14. Every province and territory has a unique legislative regime for managing and distributing financial awards for those who lack legal capacity. The *Indian Act* provides a separate scheme for status Indians living on-reserve.

15. For instance, in British Columbia, the *Family Law Act*<sup>3</sup> provides that funds payable to a child under a certain dollar value may be paid directly to parents and guardians to manage as trustee<sup>4</sup>. In those circumstances, the parent or guardian is not required to go to court and obtain an order to act as a trustee. The parent is obligated to ensure that any funds released are used for the purpose(s) for which they were intended and are for the sole benefit of the child or youth.
16. In Quebec, the *Civil Code* provides that parents are “tutors” for the purpose of administering their minor children’s property.<sup>5</sup> The code also provides that parents are not required to obtain advice or authorization from the court, unless the property is worth more than \$25,000.<sup>6</sup>
17. In other regions, a parent or guardian of a minor is required to make an application to a court in order to be appointed as that minor beneficiary’s guardian of property. This will result in legal fees and court fees, which adds an extra burden on First Nation families.
18. The AFN is also concerned with reporting requirements under provincial regimes. At present, there is no positive obligation on the part of a trustee to give unsolicited information to beneficiaries.<sup>7</sup> There are few exceptions to this rule, such as the requirement that a trustee has a positive obligation to inform the minor beneficiary of the existence of the trust.<sup>8</sup> Once a trustee informs a minor beneficiary of the existence of a trust upon reaching the age of majority, all positive obligations end.<sup>9</sup>
19. Upon reaching the age of majority, the beneficiary is finally entitled to question the trustee’s actions. A trustee who has acted wrongly may be compelled to restore

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<sup>3</sup> [SBC 2011] Chapter 25

<sup>4</sup> *Supra*, note 3 at, s. 178.

<sup>5</sup> *Civil Code of Quebec*, CQLR c. CCQ-1991, c. 64, a. 192

<sup>6</sup> *Ibid* at 209.

<sup>7</sup> *The Law of Trusts: A Contextual Approach*, 2nd ed., Mark R. Gillen & Faye Woodman, eds., Emond Montgomery Publications Limited (Toronto: 2008), at 386.

<sup>8</sup> *Hamar v. Pensions Ombudsman*, [1996] OPLR 55.

<sup>9</sup> *Hamar and Tito v. Waddel (No. 2)*, [1977] Ch. 106 at 242.

assets to the trust or may be removed. However, this will result in expensive litigation for the beneficiary.

20. With respect to the *Indian Act*, the Minister of Indigenous Services Canada may act as a Trustee or appoint a Trustee for minor children. The trustee will be required to protect the property for the child's future well-being. Payments from the trust are permitted and may only be made to the trustee when necessary for the proper maintenance, advancement, and other needs of the minor beneficiary. Monies held in trust by the Minister of Indigenous Services Canada are deposited in the Consolidated Revenue Fund. There is limited growth and return on investment will be minimal.

### **Jurisdiction of the Tribunal**

21. This Panel has found that it has the necessary jurisdiction to Order compensation.<sup>10</sup> This Panel's jurisdiction to approve the proposed Draft Compensation Framework is based on two sources. First, the *Canadian Human Rights Act* (CHRA) has quasi-constitutional status.<sup>11</sup> Secondly, the Tribunal may exercise broad remedial discretion pursuant to s. 53 of the CHRA. This Panel may exercise its jurisdiction to craft flexible and imaginative remedies for infringements of fundamental human rights.<sup>12</sup>
22. The AFN submits that should this Panel approve the trust provisions set out in the Draft Compensation Framework, a trust instrument will be developed to give effect to the proposed scheme.
23. Provincial regimes contemplate the supremacy of trust instruments. The AFN submits that there is a general legal principle that a trust instrument can supersede the provincial law.<sup>13</sup> The provisions set out in a trust deed or instrument will prevail

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<sup>10</sup> Compensation Entitlement Order.

<sup>11</sup> *Ibid* at para 94.

<sup>12</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 SCR 789 at para 26.

<sup>13</sup> *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 at 557.

over any statutory requirements. The *Trustee Act* of each province and territory of Canada upholds this principle specifically in relation to their respective rules on trustee investment powers.

24. For example, the Manitoba's *Trustee Act* states "nothing in this Act authorizes a trustee to do anything that he is in express terms forbidden to do, or to omit to do anything that he is in express terms directed to do, by the instrument creating the trust."<sup>14</sup>

25. The Ontario *Trustee Act*<sup>15</sup> provides:

27(9). This section and section 27.1 do not authorize or require a trustee to act in a manner that is inconsistent with the terms of the trust.

68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.

26. The sources of Trustee powers and duties are found in provincial statute, the common law, and the Trust Deed itself. Provincial legislation generally sets out the powers and duties of trustees and authorizes the Trustees to invest the trust property in any investments that a prudent investor might invest. The Trust Deed will also usually set out specific obligations and can modify or override common law rules.

## **Conclusion**

27. The approach outlined in the Draft Compensation Framework for the distribution of compensation awarded to minor beneficiaries and those without legal capacity serves to protect this vulnerable group. The proposed Framework also relieves parents and families of any regulatory, administrative and financial burdens. Finally, the Proposed Compensation Framework provides a culturally appropriate and trauma informed process for the distribution of compensation.

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<sup>14</sup> *The Trustee Act*, C.C.S.M. c. T160 at s. 4.

<sup>15</sup> *Trustee Act*, R.S.O. 1990, CHAPTER T.23

28. The AFN encourages this Panel to be flexible and imaginative in the crafting of remedies for infringements of fundamental human rights.
29. The AFN submits that the proposed Draft Compensation Framework, including the mechanisms for minors and those who lack capacity to manage their own affairs, gives effect to this Panel's direction that the parties establish a process where minors (and presumably those who lack capacity) have their compensation paid to them "secured in a fund that would be accessible upon reaching majority".

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated: October 2<sup>3</sup>, 2020



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