Tribunal File No.: T1340/7008

**CANADIAN HUMAN RIGHTS TRIBUNAL**

B E T W E E N:

**First Nations Child and Family Caring Society and Assembly of First Nations**

Complainant

- 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 Canada and Nishnawbe Aski Nation**

Interested Parties

---

# Submissions of the Canadian Human Rights Commission

**(re Final Compensation Framework – CHRT Authority following Decisions made in Claims Process)**

(delivered November 9, 2020)

---

## INTRODUCTION

1. By letter dated October 2, 2020, Canada filed the latest version of the proposed Compensation Framework with the Panel (the "Proposed Framework"). That same day, the Caring Society, AFN and Canada made submissions on an outstanding question regarding the use of a trust to manage compensation for minors and adults who lack legal capacity. On October 9, 2020, NAN provided some further submissions regarding other aspects of the Proposed Framework.

2. In a letter from the Registry dated October 20, 2020, the Panel invited further submissions from the parties on four matters relating to the Proposed Framework. As explained below, the

Commission takes no position on the first two matters (use of a trust, and entitlements in cases of removal for abuse), and agrees with the Panel's proposal on the fourth (wording choices in the Notice Plan backgrounder). As requested by the Panel, the Commission provides detailed submissions regarding the third matter – namely, the ability of the Tribunal to conduct further review of decisions made by the appeals body under the proposed claims process.

3. In that regard, the Commission submits the Tribunal's broad remedial discretion would allow it to retain jurisdiction to oversee the effective implementation of its order establishing compensation entitlement ("Compensation Entitlement Order")[1], and any eventual order that approves the compensation distribution process ("Compensation Framework Order"). If the appeals body was to decide a claim in a manner inconsistent with those orders, the Tribunal could exercise that retained jurisdiction and clarify the claimant's entitlement – despite the inconsistent prior decision of the appeals body. In essence, this would be no different from other cases where the Tribunal finds entitlement, directs the parties to make efforts to settle the remedy, but reserves jurisdiction to resolve any disputes that may arise.

**SUBMISSIONS**

## I. Trust fund – Proposed Compensation Process

4. On pages 1-2 of its letter, the Panel raised various questions and considerations regarding the proposal from the AFN and Caring Society that compensation for minors and those who lack legal capacity be managed by an appointed, independent trustee. The Panel aimed these questions at the AFN and Caring Society, but invited all parties to comment.

5. The Commission did not make submissions on the trusts issue during the original round of submissions on that subject on October 2, 2020. The Commission also makes no submissions in response to the trusts questions the Panel posed in its letter. The Commission is content for the Panel to rule on the trusts issues based on the submissions of the other parties and/or interested parties.

[1] *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.

## II. Clause 8.4 – Exclusion List regarding Abuse

6. On pages 2-3 of its letter, the Panel raises questions about clause 8.4 of the Proposed Framework. That clause deals with circumstances where compensation may or may not be paid to parents or grandparents, in cases where a social worker recorded that a child was removed from home due to sexual, physical or psychological abuse.

7. The Panel aimed these questions at the AFN and the Caring Society, but invited all parties to comment. The Commission makes no submissions in response to these questions, and is content for the Panel to rule on the issues based on the submissions of the other parties and/or interested parties.

## III. Clause 9.6 – Tribunal Review of Matters Decided by the Appeals Body

### A. Claims Process in the Proposed Framework

8. Under the Proposed Framework, a Central Administrator will manage the compensation distribution process. The Central Administrator will be agreed to by the AFN, the Caring Society and Canada, and funded by Canada outside the public service.[2] The AFN, the Caring Society and Canada will develop an implementation and distribution guide (the "Guide") to govern the Central Administrator's work.[3]

9. Claimants will submit individual claims to the Central Administrator.[4] The Central Administrator will deem the claims valid if the person's name appears on the Compensation List described in clause 8.3 of the Proposed Framework.[5] If the claimant's name does not appear on the Compensation List, the Central Administrator will consider the claim pursuant to the Guide.[6]

10. The Proposed Framework describes the following procedures for resolving compensation claims:

[2] Proposed Framework delivered October 2, 2020, clauses 2.1 and 9.2 ("Proposed Framework").
[3] Proposed Framework, clause 2.5.
[4] Proposed Framework, clauses 8.8 and 9.1.
[5] Proposed Framework, clause 8.6.
[6] Proposed Framework, clause 8.7.

a. Claims are initially reviewed by a first-level reviewer, with authority to work with claimants, and to approve but not reject claims.[7]

b. Any completed claim not approved at the first level will be referred to a second-level committee. The second-level committee will be composed of at least three First Nations experts selected and approved by the AFN, the Caring Society and Canada, and hosted by the Central Administrator.[8] The second-level committee can approve or deny claims.

c. A claimant may ask the second-level committee to reconsider a claim, if the claimant provides new information that is relevant to the decision. The reconsideration process will be fully articulated in the Guide.[9]

d. If dissatisfied with a second-level decision, a claimant may appeal to an appeals body, which will be non-political and independent of the public service. The Appeals Body will be composed of individuals agreed to by the AFN, the Caring Society and Canada, and hosted by the Central Administrator. The appeals process will be fully articulated in the Guide.[10]

e. The AFN, the Caring Society and Canada agree that "…decisions of the appeals body may be subject to further review by the Tribunal."[11]

11. The Proposed Framework contemplates an initial claims deadline of 24 months after posting of notice to beneficiaries, with possible extensions of 12 and then 6 further months, in certain circumstances.[12] After this claims period, Canada will administer any remaining claims in accordance with a Post Claim Period Guide to be developed by the AFN, the Caring Society and Canada, along with the Claims Administrator.[13]

[7] Proposed Framework, clause 9.3.
[8] Proposed Framework, clause 9.4.
[9] Proposed Framework, clause 9.6.
[10] Proposed Framework, clause 9.6.
[11] Proposed Framework, clause 9.6.
[12] Proposed Framework, clauses 7.2 to 7.4.
[13] Proposed Framework, clause 7.5.

## B. The Tribunal Has Authority to Oversee Implementation

12. On page 4 of its letter, the Panel cited clause 9.6 of the Proposed Framework, and asked the Commission to provide "…detailed comments on the Tribunal's ability to act as an appeals body outside amendments to the *CHRA*."

13. The Commission acknowledges the Proposed Framework appears somewhat unique in the federal human rights context. We are not aware of any other case where parties have together proposed an implementation process as detailed or comprehensive as that described in the Proposed Framework, featuring multiple levels of review by bodies outside the public service. However, while that process may be detailed, its overall thrust – including the possibility of Tribunal review – is consistent with the remedial purposes of the *CHRA*, and analogous to approaches the Tribunal has taken in other cases.

14. As the Tribunal has emphasized in earlier rulings in this case, its task under the *CHRA* is to ensure that quasi-constitutional rights are given full recognition and effect. This can be an intricate task that demands innovation and flexibility.[14] For this reason, s. 53 of the *CHRA* gives the Tribunal a broad discretion to fashion appropriate remedies. Implicit in this broad grant of discretion is the power to retain jurisdiction to ensure that remedial orders are implemented in an effective and timely manner. This can help the Tribunal to meet its mandate of ensuring that "…remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination…"[15] Indeed, in appropriate cases, continued oversight is needed to ensure that remedies are implemented in accordance with the Tribunal's findings on liability, and any additional guidance provided with respect to remedial principles.

15. The Tribunal regularly retains jurisdiction to oversee the implementation of financial remedies. For example, the Tribunal may find that a respondent is liable to pay compensation, direct the parties to consult together to work out the details, and retain jurisdiction to decide the matter if the parties are unable to agree. Indeed, the Tribunal has taken this approach both in cases

---

[14] See the following prior rulings in this case: 2016 CHRT 10 at paras. 11-18; 2017 CHRT 14 at paras. 27-34; 2018 CHRT 4 at paras. 51-52.
[15] See: 2016 CHRT 10 at para. 14.

featuring financial remedies for a single victim of discrimination[16], and in systemic pay equity cases where financial remedies would be rolled out to large groups of victims.[17] In essence, this is also what the Proposed Framework does. It simply provides that (i) Canada and victims of discrimination will attempt to resolve entitlements through an agreed claims process that includes an appeal mechanism, and (ii) the Tribunal will retain jurisdiction to resolve any disputes that may remain after that process has been exhausted.

16. Viewed in this light, the Proposed Framework is similar in many ways to the Tribunal's approach in *Walden v. Attorney General of Canada*. There, the Tribunal found the federal government had discriminated by underpaying persons who performed a certain kind of eligible work during defined time periods. The 417 complainants eventually reached a Memorandum of Agreement (""MOA") with the federal government on remedies. The MOA required the government to pay compensation to complainants, in accordance with its terms and principles. It also allowed non-complainant individuals to apply to the government to receive the same compensation. In its Consent Order approving the MOA, the Tribunal retained jurisdiction to deal with any "…dispute or controversy surrounding the meaning or interpretation of the Agreement, or its implementation or fulfillment…" – whether brought by a party, or by a non-complainant individual claiming eligibility.[18] The Tribunal has subsequently exercised this retained jurisdiction on several occasions, including in response to applications made by non-complainant individuals.[19]

17. This approach is essentially the same as what is suggested in the Proposed Framework. In *Walden*, a non-complainant individual could apply directly to the government for compensation under the terms of the Consent Order and MOA. If the government denied the claim, and the individual felt the denial was contrary to the Consent Order and MOA, the individual could apply

---

[16] For just one example, see: *Grant v Manitoba Telecom Services Inc*, 2012 CHRT 20 at paras. 15 and 23 (retaining jurisdiction to oversee implementation of a pension remedy, if the parties could not agree); and *Grant v. Manitoba Telecom Services Inc.*, 2014 CHRT 14 (exercising the retained jurisdiction).

[17] For examples, see: *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (CHRT) at Order #9; and *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at paras. 1005-1006 and 1023(13), affirmed 2011 SCC 57.

[18] *Walden et al. v. Attorney General of Canada*, Consent Order dated July 31, 2012, at para. 4 (CHRT File Nos. T1111/9205, T1112/9305, T1113/9405).

[19] *Walden et al. v. Attorney General of Canada*, 2015 CHRT 15 (motion by a complainant challenging the government`s determination of the end date for her compensation claim); and *Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 and 2018 CHRT 20 (preliminary rulings on various matters relating to claims from two complainants and 14 non-complainants that the government denied compensation in a manner contrary to the Consent Order and MOA; the 14 non-complainants were granted interested party status).

to the Tribunal for a ruling. By deciding the issue, the Tribunal would further the remedial purposes of the *CHRA* by ensuring the effective implementation of its Consent Order. The only real difference between that process, and the suggested process in this case, is that the government respondent here will not be deciding claims at first instance. Instead, the AFN, the Caring Society and Canada have together proposed that claims instead be decided using the multi-stage process hosted by the Claims Administrator. This difference – designed to promote independence in claims processing, and to reduce the volume of matters that could come back to the Tribunal – should not change the jurisdictional analysis under the *CHRA*. If the Tribunal can take the *Walden* approach, so too can it take the approach suggested by the Proposed Framework. In both circumstances, the Tribunal can retain jurisdiction to ensure effective implementation of its remedial orders.

18. The Commission acknowledges that the Claims Administrator here might continue to receive claims for as long as 3.5 years after the initial posting of notice to beneficiaries. A subset of such claims could wind their way to the appeals body. If the Tribunal does retain jurisdiction to oversee implementation of the claims distribution process, it might thus remain seized for a lengthy period of time. However, there is no jurisdictional barrier to this in the *CHRA*. Nothing in the statute puts any time limits on the Tribunal's ability to remain seized to oversee the effective implementation of its remedies. Indeed, the Tribunal in *Walden* retained jurisdiction for nearly three years to receive applications arising out of the Consent Order and MOA, and longer for issues relating to gross-up payments.[20] This Panel has already retained jurisdiction for nearly five years to oversee implementation of the program reform remedies flowing from its initial liability decision in January of 2016.[21] It is therefore open to the Tribunal to undertake a similar role with respect to implementation of the Compensation Entitlement and Framework Orders, if it is otherwise satisfied that doing so would be appropriate.

## IV. Notice Plan, Annex A – Wording for Background

19. On October 15, 2020, the AFN filed the Compensation Notice Plan proposed by the AFN, the Caring Society and Canada, together with related products. Annex A to the draft Notice Plan

---

[20] *Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 at para. 11.
[21] *First Nations Child and Family Caring Society et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

sets out background information regarding the Tribunal proceedings and compensation awards. On page 4 of its letter dated October 20, 2020, the Panel asked whether the last sentence of the first paragraph of Annex A might better read as follows (suggested changes struck-through or underlined):

> … The Government of Canada's ("Canada") provision of inequitable child and family services and other public services via Jordan's Principle made it more difficult for families to address risk factors and thus more First Nations children were placed in care and ~~stayed there~~ stayed separated from their families, communities and Nations.

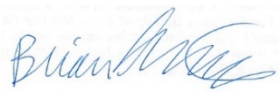
20. The Tribunal requested the views of the Caring Society, the AFN and Canada on this question, but was also open to hearing the views of the other parties. In that regard, the Commission would be content for the wording to be changed as the Panel has suggested. Among other things, this would reflect the reality that the harms of family and community separation persist past the time when children reach the age of majority and are no longer in care.

**CONCLUSION**

21. We hope the Tribunal will find these Submissions to be of some assistance. If the Tribunal has any questions, the Commission would be pleased to answer them, in accordance with any additional procedures the Tribunal may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 9, 2020



Brian Smith / Jessica Walsh
Counsel
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario K1A 1E1

Tel: (613) 943-9205 / (613) 943-9134
Fax: (613) 993-3089
brian.smith@chrc-ccdp.gc.ca
jessica.walsh@chrc-ccdp.gc.ca