

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

**REPLY SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION
re Compensation Process**

May 13, 2020

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I. Overview

1. These are the written reply submissions of Nishnawbe Aski Nation (“NAN”) to responding submissions filed on behalf of the Caring Society, the Assembly of First Nations (“AFN”), and

Canada (collectively, “the Parties”) on May 5, 2020; filed on behalf of the AFN on May 6, 2020; and filed on behalf of Canada on May 8, 2020.

2. On September 6, 2019, this honourable Tribunal ordered the Parties to consult with NAN regarding a compensation process.¹ The Panel further stated the following:

As part of the compensation process consultation, the Panel welcomes any comment/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. In its subsequent compensation decision of April 16, 2020, this honourable Tribunal requested submissions relating to the timeframe of Jordan’s Principle claims.³
4. Whereas the Caring Society and the AFN have suggested that NAN has made submissions beyond the appropriate scope for an interested party⁴, NAN submits that its submissions have been in line with orders and requests from this Tribunal.

II. Issues and Argument

5. Below, NAN’s brief reply submissions address two novel issues raised by the Parties: (1) conflicting messages regarding the Framework’s responsiveness to remote First Nations; and (2) Canada’s suggestion that it would be procedurally unfair for this Tribunal to consider NAN and Chief of Ontario’s (“COO”) submissions of May 1, 2020, regarding caregivers.

1. Conflicting Messages Re. Responsiveness to Remote First Nations

6. The Parties oppose NAN’s proposed modification to section 6.3 – a modification which would list considerations specific to remote First Nations when determining resourcing requirements

¹ 2019 CHRT 39, at para 269.

² *Ibid.*, at para 270.

³ 2020 CHRT 7, at para 153.

⁴ Caring Society letter to the Tribunal of May 5, 2020, at p. 2; AFN submission of May 6, 2020, at paras 24-26.

– on the basis that such inclusion “risks excluding the unique needs of other First Nations communities.”⁵ At the same time, the Parties oppose affirmation of the unique needs of other First Nations through incorporation of a proposed guiding principle that would affirm that “the compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations.”⁶ These are contradictory messages. In the context of proceedings in which substantive equality has been central, NAN is surprised and confused by the Parties’ opposition to the proposed guiding principle.

7. The Parties’ concern regarding section 6.3 can be addressed by a simple drafting change indicating that the specific considerations listed by NAN are not an exclusive or exhaustive list. Below, we reproduce section 6.3, with NAN’s initial proposed modifications underlined, and NAN’s new proposed modification underlined and in bold:

6.3 First Nations will require adequate resources to provide support to beneficiaries. Canada will assist First Nations where requested by providing reasonable financial or other supports. In providing these support and determining what constitutes “reasonable financial or other supports” and what constitutes “sufficient resources” in section 6.2(b), consideration will be given to **all relevant factors, including** the particular needs and realities of remote First Nations with limited resources or infrastructure for providing support to beneficiaries, and who face increased costs in provision of services due to remoteness.

8. In its submission of May 6, 2020, the AFN opposes NAN’s position that the Framework needs to be implemented in a way that takes into account regional specificities.⁷ However, in the same submissions, the AFN states that “regional considerations are adequately incorporated into the Draft Compensation Framework.”⁸ The AFN goes on to raise concern with “some of

⁵ Responding Letter to the Tribunal from the Caring Society on behalf of the Parties, May 5, 2020, at p. 3 [Parties’ Joint Responding Submissions of May 5, 2020].

⁶ *Ibid.*

⁷ AFN submissions of May 6, 2020, at para 6.

⁸ *Ibid.*, at para 7.

NAN's proposed amendments relating to developing specific compensation notices to reflect regionally specific interests."⁹ The AFN cites here to paragraph 10 of NAN's April 30th submissions. With the exception of one proposed amendment (to s. 6.3), the text reproduced at paragraph 10 of NAN's April 30th submissions is text drawn directly from the Draft Framework and is therefore text that the AFN, the Caring Society, and Canada have approved. This includes, at s. 5.2 of the Draft Framework, the statement that "Where appropriate, communications will be adapted to the particular cultural, historical, and geographical (including rural and remote communities) circumstances of the communities in question."¹⁰

9. Finally, it is submitted that the following position taken by the Parties in their May 5th submissions is contradictory: that NAN's proposal regarding potential material that could be prepared for use of individuals involved in processing Jordan's Principle-related claims is "too detailed."¹¹ This position is contradictory on its face because the Parties have jointly filed a detailed Taxonomy of Beneficiaries, found at Schedule C to the Draft Framework, which is intended to be used in the compensation process. NAN's proposal is no more detailed than the Taxonomy of Beneficiaries.

10. NAN submits that the guiding principle proposed in its April 30th submissions should be incorporated into the Framework. It further submits that the amendment proposed at paragraph 7 of these submissions should be incorporated in the Framework. Finally, NAN understands from the Parties' responding submissions that they are open to receiving suggestions from NAN and others as further details of the compensation process are worked out, outside of the

⁹ AFN submissions of May 6, 2020, at para 8.

¹⁰ Draft Framework filed with the Tribunal on April 30, 2020.

¹¹ Parties' Joint Responding Submissions of May 5, 2020, at p. 3.

Framework. NAN further understands that the Parties are suggesting that NAN's proposal relating to Jordan's Principle claims found at paragraphs 42-44 of NAN's April 30th submissions can be discussed in this context. NAN would appreciate the Tribunal sharing its perspective on NAN's proposal relating to Jordan's Principle-related claims found at paragraphs 42 to 44 of NAN's April 30th submissions, to inform these anticipated future discussions.

2. Canada's Raising of Procedural Fairness Concerns

11. At paragraphs 7 to 12 of its submissions of May 8, 2020, Canada states that it would be procedurally unfair for the Tribunal to consider NAN and COO's submissions of May 1, 2020, in determining the questions before it. Canada takes the position that pleadings were closed as of March 16, 2020, and the Tribunal should not have asked further questions of NAN and COO and should not consider material filed in response to the Tribunal's questions.
12. It appears that the Panel determined the most efficient way to work through the material before it and come to a just resolution was to seek further submissions from NAN and COO. The Tribunal's request was not unfair; it has not prejudiced Canada. It is well-established that the Tribunal is master of its own procedure.¹² There is nothing in the *Canadian Human Rights Tribunal Rules of Procedure* ("the Rules") that precludes a Panel from posing specific questions to parties after the close of an initial submissions deadline. The *Rules* explicitly state that "The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules."¹³ Furthermore, Canada should have raised its concerns with the Tribunal's

¹²*Constantinescu v. Correctional Service Canada*, 2018 CHRT 10 (CanLII); *Therrien (Re)*, 2001 SCC 35 (CanLII), [2001] 2 SCR 3, at para 88.

¹³ The *Rules*, s. 1(6).

request in a timely manner, rather than raising its concern a week after submissions were received by the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 13th DAY OF MAY, 2020



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