Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 7
Date: February 12, 2021
File No.: T1340/7008

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

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

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Framework for the Payment of Compensation under 2019 CHRT 39

I. Context

[1] This case involves systemic discrimination against First Nations children and their families relating to the services provided to children and families. This ruling approves a compensation process for those First Nations children and their parent or grandparent caregivers who suffered from this discrimination.

[2] The Tribunal found that the complaint filed by the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN) was substantiated in *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),* 2016 CHRT 2 (the *Merit Decision*). In other words, the Tribunal found that Canada's conduct was discriminatory on a systemic basis because its design, management and control of the First Nations Child and Family Services Program (FNCFS Program), along with its corresponding funding formulas and the other related provincial/territorial agreements, have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves across Canada, in contravention of section 5 of *Canadian Human Rights Act*, RSC 1985 c H-6 [*CHRA*]. The Tribunal identified a number of discriminatory harms from Canada's funding approach, management and control of the FNCFS Program. Furthermore, the Tribunal found that Canada provided inadequate funding for a variety of child and family services provided to First Nations children and families. For example, Canada provided inadequate and fixed funding for operational costs and prevention services. Accordingly, First Nations Child and Family Services Agencies (FNCFS Agencies) were unable to provide provincially and territorially mandated levels of service. Amongst other things, the funding formula further contained an incentive to remove children from their homes, families and communities rather than provide adequate funding for prevention services to keep the children in their homes, families and communities. The failure to coordinate the FNCFS Program with other programs, whether federal, provincial or territorial, created gaps, delays and denials of services for First Nations children. Moreover,

the narrow definition and inadequate implementation of Jordan's Principle resulted in service gaps, delays and denials for First Nations children and families.

[3] In light of its findings, the Tribunal ordered Canada to cease its discriminatory practices and reform the FNCFS Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians between the Federal Government and the Province of Ontario* (the *1965 Agreement*) to reflect the findings in the decision. The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle.

[4] The Caring Society and the AFN requested changes to Canada's FNCFS Program and funding process for First Nations child and family services and Jordan's Principle application as well as compensation for individual First Nations children and their caregivers. This ruling addresses the process for compensation to First Nations children and their parents or grandparents (beneficiaries).

A. Prior Rulings

[5] In *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 (the *Compensation Decision*), the Tribunal found that individual First Nations children and, generally, their parent or grandparent caregivers were eligible for financial compensation. The Tribunal found that the nature of the discrimination and harm suffered by First Nations children was of the worst kind as it involved the removal of children from their homes, families and communities. Consequently, it entitled them to $20,000 in compensation for pain and suffering and a further $20,000 for Canada's willful and reckless conduct, pursuant to section 53 (2)(e) and 53 (3) of the *CHRA*. Moreover, the Tribunal found that the evidence was ample and sufficient to make a finding that each First Nations child who was unnecessarily removed from its home, family and community has suffered and is entitled to compensation. Furthermore, any child who was removed and later reunited with its family has suffered during the time of separation and from the lasting effects of trauma from the time of separation. Children were eligible for compensation if they were removed from their

homes or if they experienced a gap, delay or denial of services that would have been available under an appropriate interpretation of Jordan's Principle. Further, the Tribunal ordered compensation to parents and grandparents who had children in their care unnecessarily removed from their care by child and family services. Parents or grandparents were similarly entitled to compensation if children in their care experienced a gap, delay or denial of services that would have been covered under Jordan's Principle. In both cases, the caregiving parent or grandparent was entitled to $20,000 for pain and suffering and $20,000 for Canada's willful and reckless conduct. In those cases where it was necessary to remove a child from the Parent or grandparent's care because of physical, sexual or psychological abuse, this Parent or grandparent was not entitled to any compensation.

[6] The Panel adopted a similar approach to compensation to that of the Common Experience Payment framework under the Indian Residential School Settlement Agreement. The Common Experience Payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The Common Experience Payment compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. Similarly, any First Nations child, parent or grandparent who has experienced the discrimination described above is eligible for compensation as a beneficiary.

[7] For those beneficiaries who have now passed away, the compensation is to be paid to their estates.

[8] The Panel, in considering access to justice especially for vulnerable beneficiaries, effectiveness, efficiency, and the value in avoiding revictimizing First Nations children by requiring them to testify about the pain they have suffered, has opted to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent. As previously stated, the Panel wishes to emphasize that it found that victims/survivors in this case have suffered the worst kind of discrimination.

[9] In the *Compensation Decision*, the Tribunal recognized the value in providing the parties an opportunity to negotiate the particulars of the compensation process. A negotiated process was particularly beneficial in this case where there are multiple First Nations parties

who possess experience, knowledge and expertise and who have advanced different arguments before the Tribunal about the approach that would best serve the interests of First Nations children with a culturally safe and appropriate lens.

[10] The parties collaborated to produce a draft *Framework for the Payment of Compensation under 2019 CHRT 39* (*Draft Compensation Framework*). The parties have now submitted their final iteration of the *Draft Compensation Framework* to the Tribunal for approval. Prior to submitting the current version of the *Draft Compensation Framework* to the Tribunal, the parties returned to the Tribunal for further guidance when they were unable to agree on provisions. The Tribunal indicated its support for the direction the parties had taken in the *Draft Compensation Framework* by approving early drafts in principle and subject to the further revisions the parties intended to make.

[11] In 2020 CHRT 7, the Tribunal addressed the question of the age at which child beneficiaries should obtain access to compensation funds. The Tribunal determined that the appropriate age was the age of majority of the province or territory in which the beneficiary currently resides (paras. 8-36). The Tribunal also considered the start date for eligibility. In the *Compensation Decision*, the Tribunal ordered compensation for children who were apprehended from their homes to start as of January 1, 2006. In this decision, the Tribunal determined that children who were apprehended from their home prior to January 1, 2006 but remained in care as of January 1, 2006 were within the scope of the *Compensation Decision* and eligible for compensation (paras. 37-76). Finally, the Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (paras. 77-151).

[12] In 2020 CHRT 15, the Tribunal addressed requests by the Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN) to broaden the scope of eligibility under the *Compensation Decision*. The Tribunal rejected a request to extend compensation to First Nations children living off-reserve in Ontario who were apprehended by Child and Family Services agencies as there was insufficient evidence put before the Tribunal on that specific issue. Further, the parties did not seek to raise this issue at the hearing for the *Compensation Decision* (2020 CHRT 15, paras. 14-27). Similarly, the COO and the NAN requested that

caregivers beyond parents and grandparents be eligible for compensation if a child was removed from their care. The COO and NAN's proposed approach would require transforming the compensation process from an administrative process to an adjudicative process. (paras. 28-50). The approach chosen by the Panel, modeled on the Indian Residential Schools Settlement Agreement's Common Experience Payment, creates a simplified administrative process that avoids the requirement to justify individual harm. This approach also avoids potentially traumatizing disputes over which caregivers should receive compensation. While the Tribunal recognized the important role various caregivers provide to First Nations children, the Tribunal confirmed its decision to compensate parent or grandparent caregivers. The Tribunal directed the parties to consider a proposed amendment to the *Draft Compensation Framework* suggested by the NAN to address challenges for remote First Nations. The Tribunal recognized the specific circumstances of remote First Nations and encouraged the parties to ensure that their circumstances were reflected in the *Draft Compensation Framework* (paras. 51-57).

[13] Further, in 2020 CHRT 15, the Tribunal provided guidance on the definitions of essential service, service gap and unreasonable delay. These terms are relevant for determining eligibility for compensation relating to Canada's narrow and discriminatory interpretation of Jordan's Principle. The Tribunal provided guidance to the parties so that the terms would capture the breadth of compensation appropriate to the discrimination identified in the various decisions and in particular in the *Merit Decision* (2020 CHRT 15, paras. 61-175).

[14] In 2020 CHRT 20, the Tribunal provided guidance to the parties to assist them in identifying First Nations children for the purposes of Jordan's Principle. The parties subsequently incorporated their formulation of eligibility for Jordan's Principle, into the *Draft Compensation Framework*. The Panel was, and remains, conscious of the importance of self-determination as an inherent and protected human right enshrined in many international instruments signed and ratified by Canada (see *Merit Decision*) which are reaffirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Nothing in the Tribunal's orders or reasons seeks to define First Nations identity. The Tribunal's reasons and orders only provide guidance on eligibility for Jordan's Principle. In general, the Tribunal directed

the parties to negotiate a framework for Jordan's Principle that would include First Nations children recognized as First Nations by their First Nations group, community or people and that would recognize First Nations children who are not eligible for *Indian Act* status but who have a parent who is. Canada was also directed to recognize *Indian Act* status on the basis of the provisions in Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25.

[15] In 2020 CHRT 36, the parties proposed eligibility criteria for Jordan's Principle that adopted the guidance the Tribunal provided in 2020 CHRT 20. These criteria for Jordan's Principle eligibility have been incorporated into the *Draft Compensation Framework*.

[16] In 2021 CHRT 6, released February 11, 2021, the Tribunal addressed the approach for compensating victims/survivors who are legally unable to manage their own finances. The Tribunal determined that it was appropriate and within the Tribunal's legal authority to approve a compensation regime where an Appointed Trustee, as defined in the *Draft Compensation Framework*, would manage the compensation funds for victims/survivors who lack the legal capacity to do so themselves. Further, the Tribunal rejected a request by NAN to challenge the eligibility criteria for compensation given the Tribunal had already ruled on the issue and upheld the scope of compensation payments set out in the *Draft Compensation Framework.* The Tribunal also rejected a request by NAN to amend the *Draft Compensation Framework* to use NAN's language to set out NAN's consultation role on any amendments to the agreement given that the Tribunal's orders take precedence over the Compensation Framework in the event of any inconsistency. Finally, the Tribunal considered the appropriate scope of its retained jurisdiction.

[17] The Tribunal initially conveyed its determinations in 2021 CHRT 6 by way of a brief letter – the written equivalent of an oral ruling with reasons to follow. Subsequent to the letter ruling, and prior to the release of 2021 CHRT 6, the parties negotiated the final version of the *Draft Compensation Framework*, which they have now submitted to the Tribunal for a final ruling.

B. Draft Compensation Framework

[18] The *Framework for the Payment of Compensation under 2019 CHRT 39* is extensive. While this section highlights a few aspects of the final *Draft Compensation Framework*, it is not a substitute for the original document.

[19] The purpose of the *Draft Compensation Framework* is to "facilitate and expedite payment of compensation" to beneficiaries (1.3). It is intended to be consistent with, and subordinate to, the Tribunal's orders (1.2).

[20] The compensation process is to be overseen by a Central Administrator (2.1). The Central Administrator's process shall be governed by a Guide developed by the parties. The compensation process will consider the best interests of the child and will be conducted in a culturally safe manner (2.2 and 2.3). Overall, the process aims to promote simplicity for beneficiaries (2.3, 2.5.1, and 2.6).

[21] Beneficiaries have the opportunity to opt out of the compensation process (3.1 to 3.3).

[22] Section 4 stipulates which First Nations children and caregivers are eligible for compensation. It addresses children who were necessarily or unnecessarily removed from their families (4.2.1). In relation to Jordan's Principle, it outlines what constitutes an essential service, service gap, and unreasonable delay (4.2.2). It defines the meaning of the term First Nations child in the context of compensation (4.2.5). Generally, a First Nations child includes a child who is registered or eligible to be registered under the *Indian Act*, has a parent who is registered or eligible to be registered under the *Indian Act*, is recognized by their First Nation for the purpose of Jordan's Principle, or was ordinarily resident on a reserve or in a community with a self-government agreement (4.2.5).

[23] Section 5 outlines various provisions to locate and identify eligible beneficiaries.

[24] Section 6 stipulates that Canada will fund supports for beneficiaries throughout the compensation process. Those supports include a toll-free phone line, navigators, mental health supports, and cultural supports (6.1).

[25] Section 7 sets out a timeline for claims for compensation to be filed. The initial deadline will be 2 years after the notice is posted (7.2) with a possibility to extend it in certain circumstances (7.3).

[26] Section 8 outlines requirements for record retention including a requirement that records for individual beneficiaries are to be destroyed 5 years after payment (8.2). There are provisions for identifying beneficiaries based on existing records (8.3).

[27] The *Draft Compensation Framework* includes provisions for processing claims. The process involves a multi-level review and appeal process (9.1-9.6). The process remains under the ultimate supervision of the Tribunal (9.6).

[28] There are provisions for payments to estates (10.2) and beneficiaries who lack the legal capacity to manage their own finances, including the constitution and powers of Appointed Trustees (10.3-10.5). Compensation will be accompanied by financial literacy and information about accessing other supports (10.6-10.8).

[29] Compensation payments cannot be assigned to another individual (11.1).

[30] Section 12 contains provisions to monitor the framework and address issues that may arise. Section 13 contains provisions to further develop tools to further support the *Draft Compensation Framework*.

[31] The *Draft Compensation Framework* contains two schedules. Schedule A is a Notice Plan for contacting beneficiaries. Schedule B is a Taxonomy of Compensation Categories that is designed to assist in identifying beneficiaries based on existing records.

II. Party Submissions

[32] Canada provided brief submissions on behalf of all the parties. Canada advised that the parties had made adjustments to the *Draft Compensation Framework* in response to the Panel's letter dated December 14, 2020. In addition to the changes flowing from the Panel's correspondence, the parties removed the former Schedule A of the prior iteration of the *Draft Compensation Framework*. The parties submit the schedule was unnecessary. Accordingly, the references to the remaining schedules have been updated.

III. Analysis

[33] The Panel reviewed the *Draft Compensation Framework* submitted on December 23, 2020 and acknowledges it contains the appropriate changes reflecting the Panel's recent compensation rulings.

[34] The Panel outlined the proper approach to reviewing a request for a consent order in 2020 CHRT 36 at para. 51:

> The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[35] The Panel already considered the first step of the analysis and found it had the authority under section 53 (2) of the *CHRA* to make the orders in 2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 20 and more recently in 2021 CHRT 6. The same reasoning and interpretation of the *CHRA* applied by this Panel on the trust fund issue in 2021 CHRT 6 at, paras. 51-79 and 80 applies here to the entirety of this consent order. The Tribunal found that the trust remedies were within the scope of the broad remedial powers of the quasi-constitutional *CHRA*. In particular, the trust provisions were consistent with the remedial approach endorsed by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114. Similarly, the Tribunal relied on *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 to conclude that the *CHRA* remedial powers must be given a broad interpretation in order to effectively remedy discrimination. Accordingly, the Tribunal concluded that Canada paying compensation to victims in trust was consistent with the wording of s. 53(2)(e) and s. 53(3) of the *CHRA* that directs that "the person compensate the victim". The Tribunal found that the provincial, territorial and *Indian Act* legislative regimes relating to minors and individuals lacking legal capacity did not limit its ability to approve Canada paying into a trust fund to compensate victims who lacked the legal capacity to manage their own affairs.

[36] Furthermore, the Panel finds the entire compensation process is a part of the compensation remedy that is focused on a process that considers not just financial compensation but also other relevant factors such as creating a culturally safe and appropriate process to provide compensation in light of the specific circumstances of this case including historical patterns of discrimination, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, the avoidance of unnecessary administrative burdens, etc. Consequently, the Panel finds the compensation process remedy in this case can be viewed as a "special program, plan or arrangement" that is informed by First Nations parties in this case and a broad and liberal interpretation of sections 16 (1), 53(2)(a), 53 (2)(e) and 53 (3) of the *CHRA* and Supreme Court and Tribunal decisions discussed in 2021 CHRT 6 at paras. 51-79. Finally, on this point, the Panel determined that the *CHRA* analysis and reasoning found in the scope of *CHRA* remedial provisions section in 2021 CHRT 6 at paras. 51-79 and 80 applies to the *Draft Compensation Framework* as a whole and supports the Panel's approval of the *Draft Compensation Framework* dated December 23, 2020.

[37] After careful consideration of the specifics of this consent order request, which is summarized above, the Panel finds that the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[38] Moreover, the Tribunal has the authority under section 53 of the *CHRA* and its previous rulings to make the consent order as detailed in the *Draft Compensation Framework* filed on December 23, 2020.

[39] The Panel thanks the Caring Society, the AFN, the COO, the NAN, the Commission and Canada for their hard work leading to the realization of the detailed *Framework for the Payment of Compensation under 2019 CHRT 39* and accompanying schedules.

IV. Order

[40] Pursuant to section 53 of the *CHRA* and its previous rulings, the Tribunal approves the *Framework for the Payment of Compensation under 2019 CHRT 39* along with accompanying schedules as submitted by the parties on December 23, 2020. The Tribunal will make the *Framework* available to the public upon request.

V. Retention of Jurisdiction

[41] The Panel retains jurisdiction on all its Compensation orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the individual claims for compensation have been completed.

[42] This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 12, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: February 12, 2021

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

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Schedule A

In 2023 CHRT 44, the Tribunal clarified ruling 2021 CHRT 7.

Pursuant to section 53(2) of the CHRA, the Tribunal issues the clarified order in 2021 CHRT 7:

C) The Tribunal makes an order clarifying its order 2021 CHRT 7 further to the Compensation Framework, providing that together caregiving parents and caregiving grandparents will be limited to $80,000 in total compensation regardless of the number of sequential removals of the same child.

F) The Tribunal makes an order finding that the claims process set out in the Revised Agreement and further measures to be developed by class counsel in consultation with experts (including the Caring Society) and approved by the Federal Court satisfies the requirements under the compensation framework as ordered in 2019 CHRT 39 and 2021 CHRT 7. This order supersedes the Tribunal's order in 2021 CHRT 7.