



Information Sheet¹

Motions regarding Canada's Stay of the Tribunal's Order and Judicial Review

2019 CHRT 39

November 22, 2019

On September 6, 2019, the Canadian Human Rights Tribunal (Tribunal) found that Canada's ongoing discrimination against First Nations children and families was "wilful and reckless" and that it had caused serious pain and suffering for victims of the discrimination. As a result, Canada was ordered to pay the maximum amount allowable under the *Canadian Human Rights Act* (CHRA) to compensate First Nations children, youth and families who have been harmed by the child welfare system or were denied or delayed receipt of services due to Canada's discriminatory implementation of Jordan's Principle.

The CHRA allows for up to \$20,000 per victim of discrimination for pain and suffering (s. 53 2(e)) and further up to \$20,000 per victim due to the wilful and reckless nature of the discrimination (s. 53 (3)).

In the ruling, the Tribunal did not order the immediate payment of compensation, but instead gave the Parties until December 10, 2019 to develop a process for the distribution of the compensation (para. 269).

On October 4, 2019, Canada filed for judicial review (appeal) and stay of order² to the Federal Court of Canada of 2019 CHRT 39.

On October 11, 2019, the Federal Court appointed

Mr. Justice Paul Favel to manage the case. On October 24, 2019, the Caring Society filed a motion to place the judicial review in abeyance (on hold) so that the Tribunal can finish its work. From November 25-26, 2019, the Caring Society and Attorney General (AG), representing Indigenous Services Canada (ISC), will outline their arguments regarding Canada's motion for a stay of order for both the Tribunal's "enforcement and execution" of 2019 CHRT 39.

Positions

Attorney General:

The AG has put forward the motion for a stay of order so that the Tribunal proceedings on compensation will stop while the judicial review goes forward. The AG provides grounds for the motion as outlined in their Notice of Motion for Stay of Order³ and accompanying affidavits.

The AG will argue that "[t]he Compensation Ruling raises several serious issues about the Tribunal's interpretation of the relevant legislation and the reasonableness of their conclusions" and that "[t]he Tribunal "erroneously interpreted provisions of the *Canadian Human Rights Act* or were otherwise unreasonable." (Notice of Motion for Stay of Order, p.2, p.3)

¹ Note: This sheet is for information purposes only and not intended to provide legal advice.

² If granted, a stay of order for 2019 CHRT 39 would put all the CHRT's abilities to rule on the compensation order, including outlining the process for children and families to access funding to assist with the 'wilful and reckless discrimination' on hold until the judicial review has been heard in Federal Court.

³ AG Notice of Motion available at: https://fncaringsociety.com/sites/default/files/tab_1_-_notice_of_motion.pdf

Further, in their Notice of Motion for Stay of Order, the AG states that “Canada will suffer irreparable harm if the Orders are not stayed by [Federal] Court.” Sony Perron, Associate Deputy Minister of ISC, reiterates this in his affidavit citing that “commencing the compensation process before the Tribunal’s decision can be judicially reviewed is unfair to the claimants, to ISC and the government more generally, and so is not in the public interest” (p.603).⁴

He further states that “[i]f the Order is not stayed, ISC will have to initiate communication about the compensation process, engage partners to assist in identifying claimants, invite claimants to apply and ask them to speak of their experiences, all while there is a risk that the process may be altered by a future decision of the Federal Court.”

ISC believes systemic remedies are already in place and so, a delay of the compensation order will not delay services to First Nations young people. Mr. Perron states:

- “The systemic remedies previously ordered by the Tribunal have either been fully implemented or are being implemented to ensure that First Nations children, families and communities have access to essential services and supports required.” (p.603)
- “Canada has increased funding to delegated First Nations agencies, nearly doubling the budget from \$681 million to \$1.2 billion. With this new funding, ISC has increased agency fixed budgets, and is covering actual costs in a number of areas.” (p.603)
- “In addition to implementing the Orders, in 2018, ISC introduced the Community Wellbeing and Jurisdiction Initiative (CWJI) funding stream to support First Nations

communities to lead the development and delivery of prevention services and to exercise jurisdiction over the well-being of their children and families.” (p.604)

- “ISC has approved more than 350,000 requests under Jordan’s Principle to address unmet needs in health, social and education within ordered timeframes of the Tribunal (12 to 48 hours for individual requests).” (p.605)

In its submissions from November 22, 2019⁵, Canada has abandoned its request for costs but also states that it should also not be required to pay any costs if it is not successful in this case.

The Caring Society:

The Caring Society’s position is that “Canada’s motion to stay the Compensation entitlement Order ought to be dismissed and this application for judicial review ought to be held in abeyance pending a final decision by the Tribunal on compensation, including orders by the Tribunal regarding the process to be adopted for distributing compensation” (p.2).⁶ The Caring Society states in its Memorandum of Fact and Law that “[n]ot only is this approach efficient, cost saving and mindful of judicial resources, it also protects the victims, does not prejudice Canada, safeguards a transparent and streamlined process, and ensures that unnecessary and duplicative delay do not hamper the ultimate resolution of the issues” (p. 2).

In their Memorandum of Fact and Law, the Caring Society clarifies the Tribunal’s ruling, which states that Canada will not be ordered to pay compensation immediately but rather, the Tribunal will provide a ruling upon consideration of December 10, 2019 submissions from the AFN, Caring Society and the AG. The Caring Society goes on to say that despite its best efforts, Canada

⁴ Sony Perron’s affidavit available at: https://fncaringsociety.com/sites/default/files/tab_3_-_sny_affidavit.pdf

⁵ Submissions available at: <https://fncaringsociety.com/publications/record-attorney-general-november-22-2019>

⁶ Memorandum of Fact and Law available at: https://fncaringsociety.com/sites/default/files/t-1621-19_caring_society-_memorandum_of_fact_and_law.pdf

has “not yet entered into the Tribunal-ordered compensation discussions” (p.7).

The Caring Society also points to public statements made by various members of the government during the election stating that “they agree that compensation ought to be granted to the victims of Canada’s discrimination” (p.7) but that they want to “get to the table [with victims of discrimination] to sort out what would be fair”⁷ (p.9).

The Caring Society’s Memorandum goes on to look at the Evidence of Alleged Harm to Canada, stating that there would not be “irreparable harms, and some of these alleged harms do not arise at this state of the Tribunal’s process regarding compensation at all” (p.10). The Caring Society’s Motion outlines the immediate steps taken by the Caring Society in partnership with the AFN to comply with the Tribunal’s order.

The Caring Society believes that “[t]he evidence in support of the Caring Society’s motion to hold the judicial review in abeyance demonstrates that interrupting the Tribunal’s work in the middle of this process will cause harm to those who have already been victimized by Canada’s discriminatory conduct; many of them First Nations children. Canada has not tendered any evidence to the contrary” (p. 14). In Dr. Cindy Blackstock’s October 24, 2019 affidavit, she states “It is also well-documented that youth in care and former youth in care face the most significant structural barriers. [...] Though no amount of money could ever remediate the harms experienced by the victims, prompt compensation can provide some measure of assistance to them in overcoming the countless

barriers they continue to encounter as a result of Canada’s discriminatory conduct.” (p.21)

Arguments from the Assembly of First Nations (AFN), Canadian Human Rights Commission (CHRC), Chiefs of Ontario (COO), Nishnawbe Aski Nation (NAN) and Amnesty International will also be heard during the November 25-26 hearings. AFN supports the Caring Society’s motions for the dismissal of the stay of order and for abeyance; however, the AFN also opposes the AG’s judicial review. The CHRC opposes the request for a stay and believes there is no irreparable harm to Canada following the orders outlined in 2019 CHRT 39; the CHRC supports moving forward with the compensation process and is open to Canada filing for a stay if “a subsequent ruling [...] requires Canada to make compensation payments” (p.2).⁸ COO supports the positions of the Caring Society and the CHRC.⁹ NAN supports the Caring Society’s position for the stay to be dismissed and for the judicial review to be in abeyance.

The hearings will be happening at the Supreme Court of Canada building (301 Wellington Street, Ottawa) in the East courtroom, starting at 9:30am. Hearings will also be live broadcast on APTN (<https://www.aptn.ca/>) and the Federal Court website (<http://video.isilive.ca/fccf/2019-11/english/>). For more information on the case, visit fnwitness.ca or contact info@fncaringsociety.com.

⁷ Quote taken from Cindy Blackstock’s affidavit from October 24, 2019. Available at: https://fncaringsociety.com/sites/default/files/2019.10.24._affidavit_of_cindy_blackstock.pdf

⁸ Read the CHRC’s full submissions at: https://fncaringsociety.com/sites/default/files/t-1621-19_chrc_motion_record_november_19_2019.pdf

⁹ Read COO’s full submissions at: https://fncaringsociety.com/sites/default/files/coo_motion_record.pdf