

Final Settlement Agreement on Compensation Information Sheet



The Assembly of First Nations (AFN) and the Canadian government, supported by the class action parties, have asked the Canadian Human Rights Tribunal (Tribunal) to confirm that the Final Settlement Agreement (FSA) signed on June 30, 2022 satisfies the Tribunal's orders on compensation. The Tribunal ordered Canada to pay maximum compensation (\$40,000) for First Nations children and families who experienced the worst-case scenarios of Canada's discriminatory, inequitable delivery of First Nations child welfare and failure to properly implement Jordan's Principle.

The Tribunal will hear the motion on September 15 and 16, 2022. In addition to the question of whether the FSA satisfies the Tribunal orders, the Tribunal will also consider:

- (1) whether it has jurisdiction to modify its orders on compensation to align with the FSA, given the orders were affirmed by the Federal Court;
- (2) if the motion is premature given the lack of clarity around how eligibility for Jordan's Principle compensation will be determined.

After a full analysis of the FSA and related material, the Caring Society's view is that the FSA fails to uphold key parts of the 2019 Tribunal decision (2019 CHRT 39), and therefore, cannot support the motion filed by the AFN and Canada.

The Caring Society's position:

The Compensation FSA deviates from the orders of the Tribunal in many ways, but significantly, it does not guarantee that all children, youth, and adults protected by the Tribunal's orders will receive the minimum \$40,000. The Canadian government justified the class action process on the basis that it could provide some victims with more than the \$40,000. While some victims may receive more compensation under the FSA, **its terms significantly reduce the compensation amount for some victims, and completely eliminate it for others.**

Non-Federally Funded Placements

The Compensation FSA excludes First Nations children who were removed from their homes, families, and communities, but placed into non-federally funded placements. Regardless of the placement, the removal of a child from their family and home is inherently harmful and could in many cases have been avoided through least disruptive measures (prevention services). The discrimination in question stems from the fact that children were removed from their homes because Canada underfunded prevention services. Whether a child was in a federally funded placement or not does not determine whether or not he or she was harmed by Canada's discrimination.

Restricting access to compensation for First Nations children who were placed in non-federally funded placements is not in keeping with the Tribunal's findings, nor does it align with the Tribunal's approach to compensation which focuses on the children, their experiences, the harms they suffered, and the impact of Canada's discriminatory conduct.

Estates of Deceased Parents

Contrary to the Tribunal's orders, the Compensation FSA excludes the estates of deceased parents or caregiving grandparents from receiving any compensation. The Tribunal ruling directly and specifically awarded compensation to the estates of deceased parents or caregiving grandparents. Deviating from this order without providing any rationale can solely be understood as a way of cutting costs. The terms of the FSA mean estates of Jordan River Anderson's mom (who the Tribunal encouraged Canada to compensate as a powerful symbol of reconciliation) and Jordan's Principle advocate Maurina Beadle (who successfully fought for Jordan's Principle in Federal Court) will not be compensated.

Compensation for Parents (and Caregiving Grandparents)

The Compensation FSA excludes certain parents and caregiving grandparents from receiving their full entitlement to

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compensation (\$40,000) as is currently protected by the Tribunal orders. The Compensation FSA has earmarked a capped budget of \$5.75B toward compensation for parents or caregiving grandparents, however there are no guarantees that the full \$40,000 will be paid to parent and caregiving grandparent victims.

Additionally, the Compensation FSA draws lines distinguishing between parents and caregiving grandparents of removed children, and of children who experienced discrimination under Jordan's Principle, and does not guarantee they will receive the same compensation. While the Compensation FSA lists an aspirational \$40,000 compensation as a base payment for each parent or caregiving grandparent of a removed child, it fails to list a base amount for those impacted by Canada's discriminatory approach to Jordan's Principle.

Uncertainty regarding Jordan's Principle

The Compensation FSA states that eligibility for those harmed by Canada's discriminatory approach to Jordan's Principle will be determined based on their "confirmed need" for an "essential service". These criteria are not defined in the FSA, but in a separate Framework of Essential Services. Based on that Framework, it is impossible to know whether the combined terms will further restrict the eligibility of children who experienced a denial, gap, or unreasonable delay in the delivery of essential services.

The Opt-Out and the Release

Under the Compensation FSA, victims must opt-out of the class action by February of 2023, which is a concerning short time period to make such an important decision, especially without knowing what they can receive under the Compensation FSA compared to the compensation ordered by the Tribunal. One half of those entitled to compensation are still children, who will need special accommodations to ensure that their guardians can understand and exercise their right to opt-out under the Tribunal's orders. The opt-out provisions in the FSA have not been adapted to reflect the special circumstances of child and youth victims of discrimination.

What's more, the \$20B Compensation fund cannot guarantee that victims who meet eligibility criteria will receive the full \$40,000 they are entitled to through Tribunal orders, given that the fund is a fixed amount that will be accessed by an unknown number of claimants. Persons who remain in the class-action lawsuit (who do not opt out) will waive their right to litigate against the Government of Canada in the future, even if they end

up receiving less than their \$40,000 Tribunal entitlement, or no financial compensation altogether.

The Caring Society remains committed to all the children, youth, and adults awarded compensation under the Canadian Human Rights Tribunal order and continues to work toward a compensation approach that is grounded in principles of substantive equality, justice, and the best interests of First Nations children.

Background

In 2016, the Canadian Human Rights Tribunal found the Canadian government to be discriminating against First Nations children by failing to properly fund child welfare services on reserve. The Tribunal also said the Canadian government failed to properly implement Jordan's Principle, a child-first principle to ensure First Nations children get the services they need when they need them.

In 2019, the Tribunal ordered the federal government to pay maximum compensation (\$40,000) to First Nations children and their families who were negatively impacted by Canada's discriminatory practices (2019 CHRT 39). The federal government challenged the ruling in Federal Court. At the same time, in addition to the Tribunal case, separate class-action lawsuits were filed on behalf of First Nations children affected by child welfare on reserve (from 1991-2022) and Canada's failure to implement Jordan's Principle (from 1991-2017). The Caring Society was not part of the class actions.

On September 29, 2021, the Federal Court ruled against Canada and upheld the Tribunal compensation order. Canada filed an appeal of the Federal Court decision. The Caring Society was disappointed by the appeal but consented to Canada's request to pause the appeal for focused negotiations to end the government's discrimination and prevent its recurrence in the provision of child and family services and Jordan's Principle. In doing so, we stated our commitment to the Tribunal's compensation order.

In December 2021, an agreement-in-principle on compensation was signed between the federal government and the class-action groups. The federal government explained that it wanted to proceed with the class-action to potentially provide victims with *more* than the \$40,000 minimum guaranteed by the Tribunal proceedings. The Caring Society agreed to let the class-action groups take the lead with the understanding that the final agreement would be in keeping with the Tribunal decision.

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Canada has not withdrawn its appeal of the Federal Court decision on compensation.

The FSA on Compensation was signed by the AFN, class action parties and the federal government on June 30, 2022. The Caring Society released a preliminary analysis (see <https://fncaringsociety.com/publications/preliminary-analysis-compensation-final-settlement-agreement-information-sheet>) of our concerns with the FSA on July 5, 2022. The concerns outlined in the preliminary analysis were not addressed.

For more background and the latest information on the Compensation FSA, please visit www.fnwitness.ca.