

# Preliminary analysis of the compensation final agreement: additional considerations



## Key Facts

1. Consistent with the AFN Resolution, the AFN and Caring Society sought, and received, a Canadian Human Rights Tribunal order awarding the maximum amount of compensation available under the Canadian Human Rights Act (\$40,000 per eligible victim) dating back to 2006.
2. The Tribunal's compensation decision did not close the door to victims to sue for more money outside of the Human Rights context. However, it is not certain that a victim would be successful in seeking additional monetary damages in a class action after receiving compensation from the Tribunal on the basis for the same facts.
3. There is no legislative cap on monetary damages in a class action. The government said it wanted to go the class action route to give children MORE than the \$40,000.
3. Two class actions merged (Moushoom and AFN) and included those who are already entitled to the \$40,000 via the CHRT orders in their case, and added more people to the case dating back to 1991.
4. The Class Action lawyers agreed to a cap on the amount Canada had to pay (\$20 billion) before having certainty about how many people would access the \$20 billion.
5. The Final Settlement Agreement for the Class Action suggests a troubling number of victims currently entitled to \$40,000 in CHRT compensation will get less or get nothing and will waive their right to sue Canada for more and waive their rights to the CHRT \$40,000.
6. Unable to locate any Chiefs in Assembly resolutions providing direction to AFN re: class action.

## Additional Observations from the Final Settlement Agreement

1. **AFN Will defend the Compensation Agreement in public and in court**  
Article 10 (c) says that the Assembly of First Nations will take the lead with an application to the Canadian Human Rights Tribunal to seek an order saying the compensation agreement "satisfies" the Tribunal's compensation orders. It also says AFN will take all reasonable efforts to defend the agreement publicly. This will include defending any reductions in compensation to those eligible for \$40,000 under the CHRT (see point 2).

## **2. There are significant gaps in the eligibility criteria in the Final Settlement Agreement.**

However, analysis of the existing text suggests that some of the victims who are eligible under the CHRT for \$40,000 compensation get no compensation or get less (or are likely to get less) under the class action.

For example:

- i. Estates of most parents get no compensation;
- ii. Children in care who were placed with non-family who did not accept federal payments get no compensation;
- iii. A portion of parents impacted by Canada's discriminatory definition and approach to Jordan's Principle and their caregivers get less or nothing.

## **3. Adequacy of the \$50 million Cy Pres fund for all victims**

The class action directs those who receive no compensation to a \$50 million cy-près fund that must last for 20 years and aims to provide an ambitious number of supports:

- i. All Class Members who do not opt out, including those who receive no compensation, waive their right to litigate against Canada for damages.
- ii. The Agreement does not clearly identify how many people will be accessing the \$50 million cy-près fund which will have to last about 20 years (meaning an average of \$2.5 million per year is available) as many of the victims are still children. However, this number is likely in the hundreds of thousands as it includes the siblings of children in care.
- iii. Given the fixed value of the fund and the lack of clarity about the number of people who are intended to benefit, it is unclear what, if any benefit, these victims who do not opt out will receive in trade for waiving their right to litigate against Canada.

## **4. 180-day opt-out: Short time frame and not child centered**

About half of the victims in this class action are still children and the class action presumes all of them are included unless they opt out. All Class Members, including children, only have six (6) months from the date the notices are published to decide whether to opt out.

## **5. Victim rights to make representations to Federal Court compromised**

The approval hearing for the class action settlement is scheduled for the third week of September. This hearing is intended to provide victims an opportunity to voice their views of the settlement being proposed on their behalf. While it is unlikely that this date will be kept, this is a very short time frame to get information to victims to ensure they are informed before the hearing and can apply to take a position. As a contrast, the residential school settlement had six information/discussion sessions with victims across Canada before it went to Federal Court. Nothing is planned here.

## **6. Supports for victims – Contemplated but unclear**

Like the CHRT orders, victim supports will be paid by Canada above and beyond the compensation for victims. However, the supports identified in the Final Settlement Agreement are described in vague terms and it is unclear if adequate supports will be in place prior to the funds being distributed.

## **7. Class Action legal fees and disclosure of professional/personal self interest**

The Final Settlement Agreement states that fees to class action lawyers will be paid separately from the compensation to victims. The legal fees will be disclosed to Federal Court prior to payment. While it is unclear how much will be paid, other large class actions of lesser value have generated about \$50 million in legal fees. It is important that any personal/professional benefits be disclosed whilst making representations to the CHRT or the public. The Caring Society will not receive any benefit/legal fees from the class action nor is it seeking any benefit/legal fees.

## **8. AFN controlling oversight**

AFN has a controlling interest on the Committee overseeing the compensation funds held in trust, the distribution of funds, and the investment committee. Given the recent corruption allegations by the National Chief and the resolution requiring a financial audit from the Chiefs in Assembly, it is unclear why Canada and Class Action Counsel would not provide an interim plan for oversight of this \$20 billion settlement pending the results of the financial audit(s).