

Caring Society Briefing on Canadian Human Rights Tribunal Compensation Order



Tribunal Order Summary

1. On October 24, 2022, the Canadian Human Rights Tribunal (the Tribunal) issued a letter decision confirming that the Final Settlement Agreement (FSA) on compensation signed by Canada, the Assembly of First Nations (AFN), and other class action parties does not fully satisfy its orders. The Tribunal noted that the FSA completely disentitles some victims who are already legally entitled to \$40,000 in compensation, reduces the amounts for others, or makes their entitlements uncertain.
2. The Tribunal reminds Canada of its legal obligation to pay the victims of its discrimination the \$40,000 in human rights compensation flowing from an earlier Tribunal order (2019 CHRT 39) that was upheld by the Federal Court in 2021 (2021 FC 969).
3. The Tribunal acknowledges that the FSA will provide more compensation for some victims and includes more victims (going back to 1991) which the Tribunal could not do as it is limited by the *Canadian Human Rights Act*.
4. The Tribunal recommends a path forward for revising the FSA to fully compensate all victims entitled to human rights compensation:
 - a. Canada allocates sufficient funds to compensate all victims with the amount already ordered by the Tribunal to be the floor. For example, Canada can pay the \$20 billion or more if insufficient into a trust to generate interest that can compensate all victims including those excluded under the FSA; or
 - b. Canada can remove a provision in the FSA requiring the class action parties to seek the

Tribunal's approval (Article 10 of the FSA) and move forward at the Federal Court for approval and pay compensation in early 2023 to victims covered in the class actions.

5. The Tribunal also notes that the class action opt-out period provided for in the FSA is too short given the uncertainty of compensation rights per the FSA and that half of the victims are still children, many in vulnerable circumstances. The current end date to decide to opt-out is February 2023.
6. The Tribunal agrees with the Caring Society's arguments on free, prior, and informed consent and notes that AFN did not seek a resolution from the Chiefs-in-Assembly to approve the FSA.
7. The Tribunal will issue a full decision with reasons in the future.

Caring Society Position

The Caring Society welcomes the Tribunal's decision to ensure all victims get the human rights compensation to which they are legally entitled. Canada's discrimination caused egregious harms, such as unnecessary separations and harms to children, and its discrimination has been linked to the deaths of some children. Canada cannot be permitted to contract out of its human rights obligations by negotiating a class action settlement that goes below the \$40,000 victims are already entitled to. We repeat our call on Canada to immediately pay the compensation to victims along with the necessary supports, including wellness supports. We are also willing to work with AFN and other class action parties to implement the Tribunal's recommendations. The Caring Society is not seeking, nor has it sought, any financial or other benefits from the FSA or Tribunal compensation. We simply want to see the rights of victims recognized.

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Work on long-term reform to end Canada's discrimination and preventing its recurrence continues. The Caring Society strongly believes that the best solutions are First Nations and First Nations expert-informed, approved by First Nations, and buttressed by an effective mechanism to hold Canada accountable now and well into the future. This must be the last generation of First Nations children driven from their families by Canada's discriminatory treatment.

Background

- Human rights compensation pursuant to the *Canadian Human Rights Act* is awarded to victims of discrimination for pain and suffering up to a maximum value of \$20,000 per victim. In cases where the discrimination was "wilful and reckless" the Tribunal can award additional compensation up to a maximum value of \$20,000 per victim. The discriminator must pay every entitled victim regardless of cost. No money is paid to lawyers or third parties. The timeframe of compensation can go back a year before a complaint is filed.
- In 2019, the Tribunal ordered Canada to pay each eligible victim of Canada's discrimination \$40,000 in human rights compensation dating back to 2006 (2019 CHRT 39). The Federal Court dismissed Canada's appeal in September 2021 (2021 FC 969). Canada filed another appeal at the Federal Court of Appeal which is in abeyance (on pause).
- The Canadian government still has not paid the human rights compensation ordered by the Tribunal to victims. Instead, Canada struck a deal with class action lawyers resulting in the signing of the FSA on June 30, 2022. The FSA goes back to 1991 and includes the victims entitled to Tribunal compensation. Victims included in the FSA waive their right to litigate against Canada.
- The class action lawyers signed a FSA with Canada with a capped amount of \$20 billion for all members of the class. The class action goes back further than the Tribunal order and gives some victims entitled to human rights compensation more than the \$40,000 they are entitled to, but some victims of Canada's discrimination (children and youth in placements

that were not funded by Indigenous Services Canada and parental estates) will see their \$40,000 reduced to zero and others will see their amount reduced. Entitlements for victims harmed by Canada's discriminatory approach to Jordan's Principle is unclear.

- In August 2022, the AFN and Canada brought a motion to the Tribunal to replace the Tribunal compensation orders with the FSA. The matter was heard in September 2022. The Chiefs of Ontario and Nishnawbe Aski Nation supported the AFN/Canada motion, and the Caring Society and Canadian Human Rights Commission opposed it.