



Federal Court's Approval of the Final Settlement Agreement on Compensation

On October 24, 2023, the Federal Court approved the \$23.34 billion Final Settlement Agreement (FSA) on Compensation for First Nations children and families who experienced discrimination because of Canada's flawed and inequitable provision of the First Nations Child and Family Services (FNCFS) and flawed, narrow implementation of Jordan's Principle ([2023 FC 1533](#)). This is the largest class action settlement in Canadian history, reflecting the serious harms First Nations children, youth, and families suffered for decades, including unnecessary family separations and the denial of life saving and life wellness services.

The FSA stems, in large part, from two Canadian Human Rights Tribunal (Tribunal) rulings. One was made in 2016, finding that Canada is discriminating against First Nations children and ordering Canada to stop the discrimination ([2016 CHRT 2](#)). The second was made in 2019, ordering Canada to pay the maximum amount of federal statutory human rights compensation (\$40,000, plus interest) to each eligible victim of Canada's discrimination ([2019 CHRT 39](#)). The FSA also stems from three class action proceedings in which representative Plaintiffs sought compensation for themselves and others in the same Class for Canada's discriminatory conduct. These claims were based on the same categories of discrimination the Tribunal ruled on in 2016 (flawed and inequitable provision of FNCFS services and narrow implementation of Jordan's Principle).

The class actions were resolved at all stages on consent, as the Parties agreed to negotiate an FSA without proceeding to litigation, largely informed by evidence produced in the Tribunal proceedings, assisted by certain further expert reports. Furthermore, the Federal Court's approval of the FSA follows the Tribunal's September 26, 2023 decision ([2023 CHRT 44](#)), which found that the FSA fully satisfies the Tribunal's compensation orders.

Key provisions of the FSA

Under the terms of the FSA, Canada will pay \$23.34 billion to settle the claims of Class Members in the three class action

cases. This settlement allows for Class Members who are covered by the Tribunal's orders on compensation to receive a base payout of \$40,000, plus interest (the maximum amount that the Tribunal could legally order). In addition, the FSA includes more individuals than those covered by the Tribunal proceedings and allows for the possibility of enhanced payments to Class Members who suffered aggravated harm, based on objective factors. The FSA also extends the compensation period for Class Members who experienced discrimination in the provision of FNCFS and Jordan's Principle to April 1, 1991.

Class Members: Who is eligible for compensation

The FSA covers First Nations children and caregivers who are entitled to compensation under the Tribunal ruling as well as three additional groups of victims. The FSA provides for nine Classes altogether, with an estimated 400,000 individuals eligible for compensation:

Removed Child Class Members: All First Nations individuals who (i) while under the age of majority, and (ii) while they, or at least one of their caregivers were ordinarily resident on reserve or living in the Yukon, (iii) were removed from their home by child welfare authorities or voluntarily placed into care between April 1, 1991 and March 31, 2022, and (iv) whose placement was funded by Indigenous Services Canada.

Removed Child Family Class Members: All brothers, sisters, mothers, fathers, grandmothers and grandfathers of a member of the Removed Child Class at the time of removal.

Essential Service Class: All First Nations individuals who, between December 12, 2007 and November 2, 2017, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential

service relating to a confirmed need was delayed by Canada on grounds including a lack of funding or jurisdiction, or as a result of a service gap or jurisdictional dispute.

Jordan's Principle Class: All Members of the Essential Service Class who experienced the highest level of impact (including pain, suffering or harm of the worst kind).

Jordan's Principle Family Class: All brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Jordan's Principle Class at the time of the delay, denial or service gap. Parents or caregiving grandparents who themselves experienced pain and suffering of the worst kind will be eligible for compensation.

Trout Child Class: All First Nations individuals who, between April 1, 1991 and December 11, 2007, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on grounds such as a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

Trout Family Class: The brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Trout Child Class at the time of the delay, denial or service gap. Parents or caregiving grandparents who themselves experienced pain and suffering of the worst kind will be eligible for compensation.

Kith Child Class: First Nations children placed off-reserve with an unpaid non-family caregiver during the Removed Child Class Period at a time when a child welfare authority was involved in the First Nations child's case.

Kith Family Class: The caregiving parents or, in the absence of caregiving parents, the caregiving grandparents of an Approved Kith Child Class Member who was in a placement between January 1, 2006 and March 31, 2022.

Compensation amounts and criteria

Removed Child Class Members will receive a base compensation

of \$40,000 and possible enhancement payments. Class members who are also covered by the Tribunal's orders will receive interest on the base compensation amount:

- The identified objective factors that aggravated the harm suffered that may entitle a Class Member to an enhanced payout are as follows: the age at which a child was removed; the total number of years in care; the age at which the Class Member exited the child welfare system; whether the child was removed so they could receive essential services related to a confirmed need; whether the child was removed from a northern or remote community; and the number of times the child was in care or in out-of-home placements.
- This applies to children who spent more than one year in care. These are possible factors, but not necessarily each one would be selected.

Removed Child Class Family Members will receive a base compensation of \$40,000, in some cases multiplied by the number of affected children, with no enhancement payment available:

- Only parents of caregiving grandparents from whom the child was first removed will receive a base compensation of \$40,000, in some cases multiplied by the number of affected children, with no enhancement payment available. Class members who are also covered by the Tribunal's orders will receive interest on the base compensation amount.

Jordan's Principle Class members will receive at least \$40,000.

Essential Service Class Members who suffered greater harms will receive at least \$40,000, and those who suffered lesser harms will receive at most \$40,000:

- Funds will be distributed first to those who suffered greater harms, with the balance to be distributed *pro rata* to those who suffered lesser harms.

Trout Child Class Members who suffered the greatest harm will receive at least \$20,000, with those who suffered lesser harms receiving at most \$20,000:

- The compensation differential between the Trout Child Class Members and the Jordan's Principle and Essential Service Class members is grounded in the heightened litigation risk for the Trout Class Action, which advanced novel essential service claims, had no overlap with the

Tribunal's Compensation Decision, and pre-dated Jordan's Principle (which was unanimously recognized by the House of Commons on December 12, 2007).

Parents or caregiving grandparents of an approved Jordan's Principle Class Member may be entitled to compensation if they themselves suffered the highest level of impact, in which case they will receive a base compensation of \$40,000:

- Compensation amount will be assessed using objective factors developed in consultation with experts.

Only caregiving parents or grandparents of an approved Trout Class Member may be entitled to compensation if they themselves suffered the highest level of impact. No set amount of compensation is prescribed in the agreement:

- The amount of compensation will be determined by the Settlement Implementation Committee with the assistance of an actuary.

All other Removed Child Family Class Members, Jordan's Principle Family Class Members, and Trout Family Class Members will not receive direct compensation, but are intended to benefit from a *cy-près* fund, a First Nations-led fund endowed with \$50 million for supports to Class Members who did not receive direct compensation:

- *Cy-près* fund supports include: (i) family and community unification, reunification, connections and reconnection for youth in care and formerly in care; (ii) reducing costs associated with travel and accommodations to visit community and family; (iii) facilitating access to culture-based, community-based and healing-based programs, services and activities to Class Members and children of First Nations parents who experienced a delay, denial or service gap in the receipt of an essential service.

The FSA also includes \$90 million for post-majority supports for high needs Jordan's Principle Class Members until the age of 26 to ensure their personal dignity and well-being.

The implementation of the FSA will be fully First Nations-led and includes provisions regarding deceased Class Members and the eligibility of their estates for payouts under the settlement. It also includes supports to help Class Members navigate the claims process and address mental health, cultural, administrative, legal and financial needs throughout the claims process, and includes measures to protect Class Members against predatory practices of non-class counsel.

Canada commits to making best efforts to ensure that the payouts to Class Members will not impact any social benefits or assistance that they would otherwise receive from Canada or from a province or territory, and that compensation paid through the claims process will not be considered income for tax purposes.

Canada will also propose to the Office of the Prime Minister that the Prime Minister make a public apology for the discriminatory conduct underlying the Class Members' claims and the past and ongoing harm it caused.

Claims period

Individuals who have reached the age of majority are entitled to file claims for up to three years following the implementation of the claims process. For those who are still minors, the claims period will remain open for three years following the date on which they reach the age of majority. The FSA contains exceptions that permit the filing and payment of a claim before a child reaches the age of majority and for extending the claim deadline if necessary.

Final notes

Compensation will not flow right away. First, the Federal Court needs to approve a Distribution Protocol, which will set out the timing of the compensation and what claimants need in order to apply. It will also provide information about access to vital services and supports. This compensation is historic, but we hope it is the last one, because every time compensation is paid, it means that children and families were hurt.

The Caring Society's primary role in compensation was before the Tribunal, and we are not a party to the class action. The class action lawyers, alongside the committees they create, will take the lead role on compensation. The Caring Society has a limited role in compensation going forward and is focused on ensuring that the Tribunal's compensation orders are respected.

While the FSA is implemented, the Canadian Human Rights Tribunal continues to hold jurisdiction over long-term reform of FNCFS and Jordan's Principle, to ensure Canada's discrimination stops and does not happen again.

PLEASE NOTE: The claims process has not yet begun. To stay informed about compensation timelines and processes, visit fnchildcompensation.ca