

## Caring Society Briefing: Canada and Assembly of First Nations seek judicial review of the Canadian Human Rights Tribunal Letter-Decision on the class action Final Settlement Agreement



On October 24, 2022, the Canadian Human Rights Tribunal (Tribunal) issued a [Letter-Decision](#) stating that the class action [Final Settlement Agreement](#) (FSA) signed by Canada, the Assembly of First Nations (AFN), and other class action parties, does not fully satisfy its compensation orders stemming from [2019 CHRT 39](#) and upheld by the Federal Court in [2021 FC 969](#). Canada appealed the Federal Court's ruling but has placed that appeal on hold pending settlement discussions.

The Tribunal's compensation orders required Canada to pay the maximum compensation (\$40,000) allowable under the *Canadian Human Right Act* (CHRA) to First Nations children (and their parents or caregiving grandparents) who were removed from their homes, families and communities under Canada's discriminatory First Nations Child and Family Services (FNCFS) Program since January 1, 2006, or who were denied or experienced gaps or unreasonable delays in essential services under Jordan's Principle from December 12, 2007 to November 2, 2017.

The Tribunal's Letter-Decision found that the FSA substantially satisfies its orders, acknowledging that the FSA would provide more compensation for some victims and includes victims going back to 1991 (which the Tribunal could not do, because its remedial authority is time-limited by the CHRA).

However, the Letter-Decision also points out 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.

In its Letter-Decision, the Tribunal recommended a path forward for revising the FSA to fully compensate all victims entitled to human rights compensation. On November 23, 2022, [Canada](#) and the [AFN](#) applied separately for judicial review of the Tribunal's Letter-Decision on the FSA.

### Canada is applying to the Federal Court for:

1. An order to set aside the Tribunal's determination that it cannot amend its previous orders considering the agreement reached by Canada and the AFN.

2. An order to set aside the Tribunal's decision that the parties cannot negotiate a settlement that does not at a minimum "mirror the compensation orders of the Tribunal."
3. An order to overturn the Tribunal's determination in the Letter-Decision that children who were discriminated against by Canada but "who were in out-of-home placements that were not funded by the Federal government" are eligible for compensation.
4. Other relief as the Federal Court deems appropriate and just.

### In their stated ground for application, Canada alleges that:

1. The Tribunal will not allow for any compromise of any aspect of its orders during settlement negotiations, and this goes against law, because it does not recognize that the settling parties want the Tribunal to amend its orders to reflect the agreement that Canada and the AFN have reached.
2. The Tribunal's assertion that their decision is final, even though there is an appeal at Federal Court of Appeal challenging the compensation decision, will cause continued litigation among parties and hinder the ability of the parties to agree on a settlement.
3. The Tribunal's original finding of systemic discrimination is based on Canada's discriminatory underfunding of the FNCFS Program. The Tribunal's Letter-Decision extends the scope of its original compensation orders by including children and caregivers who did not receive funding from Canada through the FNCFS Program.
4. The Tribunal is applying the principle of "free, prior and informed consent" from the United Nations Declaration on the Rights of Indigenous peoples to the conditions under which representatives of First Nations are

## Caring Society Briefing: Canada and AFN seek judicial review of Tribunal Letter-Decision

entering into a settlement agreement.

5. The errors in law outlined above were not within the Tribunal's jurisdiction, denied Canada procedural fairness, mistakenly relied on "factual material," were errors in law or were otherwise unreasonable, and are therefore grounds for review under s. 18.1 of the *Federal Courts Act*.
6. Further grounds as Canada's lawyers may advise and the Court allow.

mistakenly relied on "factual material," and "failed to observe procedural fairness and were otherwise unreasonable"; they are therefore grounds for review under s. 18.1 of the *Federal Courts Act*.

6. Further grounds as the AFN's lawyers may advise and the Court allows.

For background information and the [Caring Society's statement](#) on the matter, please visit [fnwitness.ca](http://fnwitness.ca).

### The AFN is applying to the Federal Court for:

1. An order to quash or set aside the Tribunal's Letter-Decision and to confirm that the Tribunal has the jurisdiction to adopt the FSA to meet its compensation orders.
2. Alternatively, an order to set aside the Tribunal's Letter-Decision on the FSA and refer the matter to another Tribunal Panel made up of different members who will decide on the FSA based on direction from the Court.
3. The cost of this application.
4. Other relief as the Federal Court deems appropriate and just.

### In their stated grounds for the application, the AFN alleges that:

1. The Tribunal's determination that it cannot find that the FSA meets the Tribunal's compensation orders because the FSA does not include all categories of victims is incorrect; the Tribunal has jurisdiction to find the FSA satisfactory, since issues about categories of victims are still under dispute and appeal.
2. The Tribunal is incorrect in determining that it cannot amend its compensation orders to conform to the FSA.
3. The Tribunal's application of the principle of free, prior, and informed consent to the AFN is incorrect and unreasonable.
4. The Tribunal incorrectly made a negative inference when it considered the lack of a resolution on the FSA by the First Nations-in-Assembly a problem.
5. The errors in law outlined above were not within the Tribunal's jurisdiction, "reflect errors in law and the interpretation of the *Canadian Human Rights Act*,"