

## Canadian Human Rights Tribunal Ruling on Class Action Final Settlement Agreement (2022 CHRT 41) Information Sheet



On December 20, 2022, the Canadian Human Rights Tribunal (Tribunal or CHRT) issued its full reasons for its order ([2022 CHRT 41](#)) finding that the class action Final Settlement Agreement (FSA) signed by the Assembly of First Nations (AFN), Canada, and other class action parties does not fully satisfy the Tribunal's compensation orders. This decision follows the Tribunal's October 24, 2022 [letter-decision](#) on the matter and provides the Tribunal's full reasoning for the order. A letter-decision is similar to an oral ruling from the bench, with reasons to follow.

The order is in response to the request by the AFN and Canada for the Tribunal to declare that the class action FSA fully satisfied the Tribunal's *Compensation Decision* ([2019 CHRT 39](#)) and related compensation orders or, in the alternative, for the Tribunal to amend its compensation orders to conform to the class action FSA.

### Order Summary

The Tribunal finds the FSA substantially satisfies, but does not *fully* satisfy, the Tribunal's orders given that some victims who were entitled to compensation by the Tribunal orders are either disentitled or would receive reduced compensation under the class action FSA. The Tribunal finds it cannot support eliminating or reducing compensation given "there is no legal basis" to justify doing so (para. 512). Indeed, the *Canadian Human Rights Act (CHRA)* "does not grant fleeting rights: once entitlements are recognized under the *CHRA*, they cannot be removed (para. 504). In other words, once there is a finding of discrimination and the Tribunal issues a compensation order to vindicate rights, the entitlements may not be set aside. It was also significant that the Tribunal compensation orders were upheld by the Federal Court in September 2021 (2021 FC 969).

The Tribunal also denies the request to amend its compensation orders to reflect the terms of the class

action FSA. The FSA deviates from the existing orders by reducing compensation for some victims in order to accommodate the fixed amount of \$20 billion under the class action FSA and the larger number of victims included under the class actions, which covers time periods and groups that were not covered in the CHRT proceedings. The Tribunal ruled that it "can clarify its existing compensation orders but cannot completely change them in a way that removes entitlements to victims/survivors" (para. 6). The fact that the class action FSA requires disentitling some victims and reducing compensation for others "suggests the magnitude of the harms may be greater than . . . the \$20 billion amount of compensation" committed to by Canada (para. 481).

The Tribunal further finds that:

- The class action FSA does not guarantee compensation for all victims legally entitled under the Tribunal's orders to \$40,000 in compensation, reduces the amount for others, or makes entitlements uncertain.
  - The FSA completely disentitles First Nations children who were removed from their homes, families, and communities, and placed in care not funded by Indigenous Services Canada (ISC).
  - The FSA disentitles the estates of deceased caregiving parents and grandparents from receiving "direct financial compensation unless the caregiver passes away after submitting an application for compensation" (para. 332).
  - The FSA reduces the amount of compensation for a caregiving parent or grandparent who has had more than one child removed. The compensation may be further reduced for caregivers should there

be an unexpected number of victims.

- The FSA reduces the amount of compensation or makes the amount of compensation unclear for some Jordan's Principle victims. The FSA narrows compensation to those victims with a "confirmed need" who experienced a "denial or delay in receiving an essential service" and have experienced a "significant impact" because of that delay or denial (para. 377). It is unclear what level of compensation a victim would be entitled to if they do not meet these criteria.
- The opt-out period for compensation under the class action FSA is February 19, 2023, which does not provide adequate time for claimants to become aware of their options, especially given that "the FSA has incomplete definition of terms and criteria that will directly affect compensation entitlements" (para. 388) and given that half of the victims are still children, many in vulnerable circumstances. The opt-out scheme also places victims who are receiving less than the \$40,000 as ordered in the *Compensation Decision* in a situation where "they either accept reduced entitlements under the FSA or opt-out of the FSA to be left to litigate against Canada from scratch" (para. 388).
- Public information on the FSA provided by the AFN and Canada was insufficient, including failing to disclose that some victims entitled to compensation under the Tribunal's orders may be disentitled or see their compensation reduced under the class action FSA. Further, the Tribunal found that public information was misleading as it would reasonably lead a person to think that "the FSA ONLY improves on the Tribunal's orders" (para. 398). Public information must provide "the whole truth including how the FSA deviates from the Tribunal's order" to enable victims to make informed decisions (para. 407).
- The evidence submitted to the Tribunal did not include a resolution on the FSA from the AFN Chiefs-

in-Assembly. However, the Tribunal was provided with resolutions voted on by some First Nations who have expressed concerns about the FSA to the AFN. In the past, the Tribunal has relied upon AFN Chiefs-in-Assembly resolutions to provide assurances to the Tribunal that the First Nations rights-holders agree with AFN's direction.

- Delays in compensating victims could have been avoided if Canada had not appealed the Tribunal's compensation decisions and/or the FSA had included all victims recognized in the Tribunal's orders. Proceeding with the FSA in the name of "expeditiousness is at the expense of fairness for the victims" (para. 485).

The Tribunal recommends that:

1. Canada allocates sufficient funds to compensate all victims, with the amount of compensation already ordered by the Tribunal as the minimum (i.e., \$40,000 per victim based on Tribunal's orders). 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 included in the *Compensation Decision* but excluded under the FSA (para. 519). In addition, the FSA can be amended to provide the possibility for victims to opt-out of the FSA in a way that addresses the Tribunal's concerns. If this is done, the Tribunal would be able to find that the FSA fully satisfies the Tribunal's orders; or,
2. Canada deals with the class action and Tribunal proceedings separately and removes the provision in the FSA requiring the class action parties to seek the Tribunal's approval (Article 10 of the FSA). The class actions move forward at the Federal Court for approval, and Canada pays compensation in early 2023 to victims covered in the class actions.

## The Caring Society Position<sup>1</sup>

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

<sup>1</sup> Caring Society Information Sheet on CHRT's Letter-Decision regarding the Class Action Final Settlement Agreement.

<https://fncaringsociety.com/publications/chrt-letter-decision-regarding-class-action-fsa-information-sheet>

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.

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 application for judicial review 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 sought to negotiate an agreement that would cover both the class action proceedings and the *Compensation Decision* simultaneously. Canada struck a deal with class action lawyers resulting in the signing of the FSA on June 30, 2022. The class action FSA goes back to 1991 and includes the victims entitled to Tribunal compensation. Victims included in the class action FSA waive their right to litigate against Canada.
- The class action lawyers signed an 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 under the Tribunal orders, 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, in some cases to an unspecified amount. Entitlements for victims harmed by Canada's discriminatory approach to Jordan's Principle are unclear.
- In July 2022, the AFN and Canada brought a motion to the Tribunal asking the Tribunal to declare the FSA satisfies the *Compensation Decision* (2019 CHRT 39) and related compensation orders or, in the alternative, for the Tribunal to amend its compensation orders to conform to 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.

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