

Preliminary Analysis of the Compensation Final Settlement Agreement (FSA)



Key Questions:

Does the FSA on the class action compensation (AFN and Moushoom) signed on June 30, 2022, guarantee that \$40,000 is the floor for victims who are eligible for that amount under the Canadian Human Rights Tribunal (Tribunal) orders?

There is no guarantee in the current text protecting the \$40,000 in compensation for every victim currently entitled under the Tribunal orders. There is key information missing from the FSA that is material to understanding if those eligible for the Tribunal compensation will receive it and that they will receive a minimum of \$40,000.

Key Points About the Final Settlement Agreement:

- (1) The class action counsel agreed to a fixed amount of \$20 billion to compensate a wide range of victims dating back to 1991 including those eligible for \$40,000 each under the Tribunal orders. In this agreement, the class action lawyers will return to the Tribunal to seek an order declaring that the Tribunal orders have been satisfied. We don't know yet what specific relief they will be seeking but it will likely impact the current Tribunal orders and certain victim's current eligibility. It may also impact the level of compensation available, subject to a victim opting out of the final settlement agreement.
- (2) The \$20 billion in the class action compensation is a large amount, but it may not be enough to compensate the victims who are already entitled to a minimum of \$40,000 under the Tribunal orders and provide appropriate compensation to others. It all depends on how many people come forward and what the final eligibility criteria are. Except for some

of the children in care (removed children), there is no guarantee that all the children, youth, and families who are already entitled to receive \$40,000 will receive at least \$40,000 under this agreement.

Key Concerns:

The Final Settlement Agreement signed on June 30, 2022, **is incomplete**. Some of the missing elements speak directly to whether victims will receive the \$40,000 in human rights compensation the Tribunal awarded. The FSA suggests that more information will be coming in August 2022 that will help us better understand who is eligible under the class action and what they will receive.

- (1) The FSA does not guarantee that every First Nations parent and grandparent entitled to compensation under the Tribunal orders will receive the \$40,000.
- (2) The FSA excludes payments to the estates of parents who experienced discrimination and would be eligible under the Tribunal orders. This means that the estates of Jordan River Anderson's mom and Jordan's Principle advocate Maurina Beadle will not be compensated. The estates of deceased parents **are** eligible for compensation under the Tribunal.
- (3) The FSA raises questions about whether First Nations children eligible for Tribunal compensation under Jordan's Principle will receive the \$40,000 they are already entitled to under the Tribunal's orders as class action eligibility criteria for this group will not be ready until August 2022.
- (4) The FSA restricts compensation for First Nations children in care to those in a federally

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funded placement, which is not in keeping with the Tribunal orders. This would exclude children who were removed from their families due to a lack of services and were placed elsewhere without payment from the federal government.

- (5) The current provision for victims to opt out of the class action and preserve their rights under the Tribunal is a short time period of 180 days – particularly as about half of the recipients are still children. It is not clear that victims who are entitled to the \$40,000 under the Tribunal will know how much they are entitled to under the class action when they make this important decision.
- (6) We are reviewing the supports for compensation recipients to ensure they are tailored to the needs and realities of First Nations children and youth specifically.

What Comes Next?

- (1) Canada and the class action lawyers wrote previously to the Tribunal to request a hearing in June or July of 2022. They have not yet filed their motion and they have not shared what they are specifically asking for so it is unclear what changes they will be seeking to the Tribunal orders.
- (2) As a co-complainant in the Tribunal proceedings, the Caring Society will take a position on the relief sought by class action counsel. The Caring Society wrote to the class action parties in January of 2022 setting out the minimum standards for our consent. Based on our preliminary review the FSA does not satisfy those requirements. We will await the motion material and explanation from the class action lawyers before formulating a formal position.
- (3) Once the Tribunal makes its decision on whether it will grant the relief the class action counsel will be seeking, the matter moves on to Federal Court for approval.

Background:

- (1) Consistent with the AFN Resolution 85/2018, the Tribunal ordered \$40,000 in human rights damages for each victim of Canada's discriminatory provision of First Nations Child and Family Services and Jordan's Principleⁱ.
- (2) The Tribunal also issued an order about how the compensation should be paid out including holding monies payable to children (who are approximately half of the victims) in trust and that Canada must pay mental wellness, financial literacy supports etcetera.
- (3) Canada fought the Tribunal's compensation orders and lost a judicial review to overturn the orders in Federal Court in 2021. Canada then signed an Agreement in Principle for a fixed amount of \$20 billion dollars with two groups of class action lawyers: 1) Sotos and Kugler Kandestin on behalf of First Nations in care, Xavier Moushoom, and Jeremy Meawasige, and Jonavon Meawasige in relation to Jordan's Principle, and 2) AFN on behalf of several First Nations plaintiffs. The class action goes back to 1991 and the question is whether the fixed amount (\$20 billion) is enough to guarantee the Tribunal victims a minimum of \$40,000 while compensating the other victims dating back to 1991.
- (4) For more information on the Tribunal case and the latest updates, please visit www.fnwitness.ca.

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ⁱ Eligible victim for the \$40,000 in Tribunal damages includes:

- (1) Each child on reserve or in the Yukon taken from their home, family & community & placed into care unnecessarily (unrelated to abuse & could have been prevented if adequate services were available) since Jan.1, 2006;
- (2) Each child on reserve or in the Yukon taken from their home, family and community and placed into care unnecessarily before January 1, 2006, who remained in care as of January 1, 2006;
- (3) Each parent or grandparent caring for a child on reserve or in the Yukon who was unnecessarily removed since January 1, 2006;
- (4) Each child who was removed from their homes due to abuse since January 1, 2006, and were placed outside their extended families or communities;
- (5) Each First Nations child on or off reserve who, because of a gap, delay, and/or denial of services, was placed in care outside of their home, family, and community to receive those services between December 12, 2007, and November 2, 2017;
- (6) Each First Nations child on or off reserve who was not removed from their family home but experienced a denial, gap or unreasonable delay in the delivery of essential services under Jordan's Principle;
- (7) Each parent or grandparent who, because of a service gap, denial or delay were denied essential services and had a child removed from the home between December 12, 2007, and December 17, 2007;
 - a. Each parent or grandparent whose child was not removed from their home but was denied services covered under Jordan's Principle or received such services after an unreasonable delay or upon reconsideration ordered by the Tribunal.