THE CARING SOCIETY PRESENTS

ASK AN EXPERT

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Human rights compensation for First Nations children and families impacted by Canada's discrimination

INTRODUCTION:

In 2007, the First Nations Child & Family Caring Society and the Assembly of First Nations (AFN) filed a complaint with the Canadian Human Rights Commission alleging that Canada was discriminating against First Nations children by underfunding child welfare services on reserve and in the Yukon, and in its flawed, inequitable implementation of Jordan's Principle. After numerous attempts by the Canadian government to get the case dismissed, hearings at the Canadian Human Rights Tribunal (Tribunal) began in February 2013 and concluded in October 2014.

On January 26, 2016, the Tribunal ruled that the Canadian government is racially discriminating against 165,000 First Nations children in its provision of the First Nations Child and Family Services (FNCFS) program and flawed, narrow implementation of Jordan's Principle[1].

More than three years after the landmark decision and after much procedural wrangling on Canada's part, on September 6, 2019, the Tribunal ordered Canada to pay the maximum compensation ($40,000) allowable under the *Canadian Human Rights Act* (CHRA) to First Nations children and families who were impacted by Canada's discriminatory practices[2]. At the time of writing, nearly five years after the compensation decision, Canada has yet to pay children and families any of the money ordered by the Tribunal.

This information sheet and accompanying podcast with guest Sarah Clarke of Clarke Child & Family Law[3] provide key information about the human rights compensation for First Nations children and families harmed by Canada's discriminatory conduct and the role of this compensation in redressing Canada's harms.

The Big Three:

What do people need to know about this compensation?

- **The Tribunal orders on compensation and the class action lawsuits on First Nations child welfare are separate.** In 2019, the Tribunal ordered Canada to pay $40,000 in human rights compensation pursuant to the CHRA to First Nations children and their families affected by its

[1] See 2016 CHRT 2: fncaringsociety.com/publications/2016-chrt-2-2016-tcdp-2

[2] 2019 CHRT 39: fncaringsociety.com/publications/2019-chrt-39-2019-tcdp-39

[3] Clarke Child & Family Law: childandfamilylaw.ca

discrimination dating back to 2006. Canada filed a judicial review (like an appeal) of this order. At the same, separate class action lawsuits were filed on behalf of First Nations children affected by on-reserve child welfare services (from 1991 to 2022) and Canada's failure to implement Jordan's Principle (from 1991 to 2017). One of these class actions is led by the Assembly of First Nations.

In September 2021, the Federal Court dismissed Canada's judicial review of the Tribunal's compensation orders, at which point Canada sought to negotiate with the AFN and the other class action parties to come to an agreement that would cover both the class action proceedings and the Tribunal compensation decision. Canada struck a deal with the AFN and the class actions in June 2022, signing the class action Final Settlement Agreement (FSA) which provided a capped amount of $20 billion for compensation The Caring Society is not a party to the class action proceedings nor the class action FSA.

- **The proposed class action FSA on compensation cuts out some victims – particularly child victims – from receiving the compensation they are entitled to under the Tribunal's orders.** Canada attempted to bring the class action FSA to the Tribunal for approval, but as Blackstock points out, what Canada really wanted was for the class action FSA to replace the Tribunal's compensation orders. However, the Tribunal found that the class action FSA does not guarantee compensation for all victims legally entitled under its orders to $40,000 in compensation, reduces the amount for others, or makes entitlements uncertain. For example, Clarke points out the class action FSA would only compensate children placed in care funded by Canada, like a foster home or group home, but would disentitle children placed in non-Canada funded care, like an informal placement, which, as Blackstock points out, is the most common type of placement. The disentitlement of some children and families is one of the reasons why the Tribunal ultimately ruled not to endorse the class action FSA[4].
- **The compensation amount reflected in the Tribunal's orders is the maximum human rights compensation that can be awarded under the CHRA.** The $40,000 in compensation for each victim ordered by the Tribunal comes from two levels of compensation in the CHRA. The first is for $20,000 for the infringement of dignity stemming from the discrimination, and the second is for an additional $20,000 when the discrimination is "willful and reckless." In this case, Clarke points out that the Caring Society was able to show in the evidence and track through time that Canada knew that it was discriminating. Based on this evidence, the Tribunal found that Canada's conduct was "willful and reckless," resulting in what the Tribunal called a "worst-case scenario" under the CHRA[5]. As noted, $40,000 is the maximum amount of compensation allowable under the CHRA, however, nothing is stopping Canada from increasing the compensation that it pays to children and families.

What's the evidence?

- In its decision to order compensation for the children, young people, and families harmed by Canada's discrimination, the Tribunal relied on the following types of harm as evidence in the hearings:
    - **Harm of removal:** the evidence showed that Canada's discriminatory approach to funding

[4] For the full reasoning, see 2022 CHRT 41: fncaringsociety.com/publications/2022-chrt-41

[5] 2019 CHRT 39: fncaringsociety.com/publications/2019-chrt-39-2019-tcdp-39

the FNCFS program led to the forcible removal of children from their homes and drove kids into the child welfare system, often unnecessarily. Canada's flawed and discriminatory funding of the FNCFS program created the conditions in which First Nations agencies were only able to provide very basic protection services and almost no prevention services to keep kids safely in their homes. As Clarke notes in the podcast, the Tribunal found that Canada's choice not to fund those prevention services constituted an affront to the children's dignity, and the Tribunal found that this caused significant harm.

  - **Harm to parents who experienced removal:** the Tribunal also found that Canada's discriminatory approach to the FNCFS program harmed parents whose children were unnecessarily removed from the home, especially those with multiple children placed in the child welfare system.
  - **Harms related to Jordan's Principle:** the Tribunal found that Canada's flawed and narrow implementation of Jordan's Principle also constituted significant harm to children and families. Clarke notes numerous "abhorrent" individual cases where children's access to basic, life-saving medical services were denied, delayed, or disrupted, with some children even passing away as a result, simply because they were First Nations.

- The Tribunal found that the class action FSA on compensation put forward by Canada and class action parties substantially satisfied but did not *fully* satisfy its orders on compensation. In its ruling, 2022 CHRT 41, the Tribunal offers a path forward to ensure children and families are compensated in a timely manner, with solutions grounded in evidence. Clarke notes that the Tribunal took its time to understand both the legal and human elements of the case and provided evidence-based solutions in 2022 CHRT 41 that both support and reinforce the legal arguments for compensation and recognize the humanity of the children and families and the fact that they deserve compensation.
- First Nations leadership passed a resolution at the Assembly of First Nations December 2022 Special Chiefs Assembly regarding compensation, affirming the Tribunal's orders and urging Canada to compensate the children and families[6].

Myth-busting:

What are the common misperceptions, practices, or assumptions about this compensation and why should they be considered myths?

Myth: *Discussions and litigations from all parties have prevented compensation from being paid.*

- Reality: Canada could have been compensating children and families since 2019 but chose not to. Canada acknowledged the discrimination but relied on dehumanizing jurisdictional arguments to evade its legal responsibilities to compensate victims. After the Federal Court[7] dismissed Canada's application for judicial review of the Tribunal's compensation decision, Canada went the class action route and, together with class action parties, put forward a class action FSA on compensation to the Tribunal. Canada said they intended to provide more compensation than the Tribunal could

[6] See Draft Resolutions 16&17 on compensation: afn.ca/wp-content/uploads/2022/11/22-11-23-Dec-2022-SCA-Draft-On-time-Resolutions-Package-eng_print-ready.pdf

[7] Federal Court Decision on Canada's application for judicial review: fncaringsociety.com/publications/federal-court-decision-compensation-and-eligibility

prescribe. As Clarke says, Canada could have proceeded with the Tribunal's orders and provided eligible children and families with the $40,000 in compensation, then used the class action to top-up compensation amounts, but chose not to.

Nothing is legally stopping Canada from paying other than its own view that it does not need to.

Myth: *Canada did not know that it was discriminating against First Nations children, nor did it fully understand the depth of the harms it was committing against them.*

- Reality: Canada *knew* it was discriminating against First Nations kids and families and *chose* not to fix the problem, despite having solutions on the books for decades. Blackstock and Clarke both emphasize that choosing not to act is different from "failing to act".

  Clarke describes how various reports spanning multiple decades have showcased evidence of Canada's discrimination and provided possible ways forward, yet in each instance, Canada chose not to act on them. She attributes this non-action to "deeply ingrained racism" within the Canadian government, which enables bureaucrats to view the problem as "line items on the federal budget" rather than a human rights issue with dire implications for First Nations children and families. As Blackstock has said, discrimination is when the government doesn't think you're worth the money[8].

  It is this combination of racism, discrimination, and a bureaucratic approach that Clarke describes as informing Canada's choice to do nothing. Solutions have been on the books for decades; Canada has simply chosen not to implement them[9].

Myth: *The Tribunal does not have the jurisdiction to award compensation to individual victims, particularly in a systemic human rights case.*

- Reality: Clarke notes in the podcast that in 2019, when the Tribunal issued its compensation decision, an opinion piece was circulated in which the Tribunal was labelled as a "runaway train"[10]. This expression implies that the Tribunal is a body with the potential to quickly spiral out of control unless it is checked by a higher court and that compensation will be frivolously awarded. Yet, as Clarke describes, the Federal Court found the Tribunal's compensation decision to be reasonable and well supported by the evidence, with clear links between Canada's conduct and its finding of discrimination. Ultimately, Canada's request for judicial review seeking to quash the Tribunal's compensation decision was dismissed, and the Federal Court upheld the Tribunal's orders on compensation.

  Further, as Clarke describes, the Tribunal's jurisdiction is prescribed by the CHRA. The Tribunal's job is to identify systemic solutions required to prevent discrimination from reoccurring, and it can make compensation orders that will go some way to recognizing the discrimination at the level of each victim. This means that the Tribunal can offer broad remedies, such as addressing issues in the FNCFS program's funding or fixing the program itself, but it is also within its jurisdiction to order compensation for individual victims, regardless of the systemic nature of the

[8] "Blackstock: Ottawa believed First Nation children were 'not worth the money': aptnnews.ca/national-news/cindy-blackstock-ottawa-believed-first-nations-children-were-not-worth-the-money/

[9] History of Inequity timeline: fncaringsociety.com/reconciling-history/history-inequity

[10] John Ivison: The 'runaway train' Canadian Human Rights Tribunal: nationalpost.com/news/politics/john-ivison-the-runaway-train-canadian-human-rights-tribunal

case.

What works and what's next?

Clarke notes that a settlement on compensation that affirms human rights compensation as the minimum is, in fact, possible, however, if an FSA is not reached then the parties will return to court. Indeed, even as talks toward a settlement on compensation continue, Canada has filed two separate judicial reviews with regard to compensation with implications for what to expect going forward. After the Federal Court dismissed Canada's request for judicial review of the Tribunal's 2019 compensation decision in September 2021, Canada appealed the Federal Court's decision, and the case remains with the Federal Court of Appeal. At the same time as this process is unfolding, Canada has launched a separate appeal of 2022 CHRT 41, which is currently with the Federal Court.

These simultaneous appeals are contradictory. As Clarke notes in the podcast, on the one hand, Canada is arguing at the Federal Court of Appeal against compensation as a whole, but on the other hand, it's arguing at the Federal Court that the Tribunal ought to endorse the class action FSA. The bottom line is that this procedural wrangling is creating further injustice to the children and families who have already suffered so much and are already entitled to compensation under the Tribunal's orders.

Given that Canada is embroiled in two separate appeals processes at the two different courts mentioned above, Clarke notes that it is difficult to speculate how this litigation will take place. But it is important to emphasize, as Blackstock does, that if Canada received enough pressure, it could pay the compensation overnight and take this first step towards doing the right thing.

Additional resources:

First Nations Child & Family Caring Society. Preliminary Analysis of the Final Settlement Agreement (FSA). https://fncaringsociety.com/publications/preliminary-analysis-compensation-final-settlement-agreement-information-sheet.

First Nations Child & Family Caring Society. Final Settlement Agreement on Compensation Information Sheet. https://fncaringsociety.com/publications/compensation-final-settlement-agreement-information-sheet.

First Nations Child & Family Caring Society. Canadian Human Rights Tribunal Ruling on Class Action Final Settlement Agreement (2022 CHRT 41) Information Sheet. https://fncaringsociety.com/publications/2022-chrt-41-information-sheet.

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada, 2022 Letter Decision on Compensation FSA T1340/7008. https://fncaringsociety.com/publications/chrt-letter-decision-class-action-fsa.