

Docket: T1340/7008

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and  
ASSEMBLY OF FIRST NATIONS**

Complainants

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

Commission

- and -

**ATTORNEY GENERAL OF CANADA  
(Representing the Minister of Indigenous Services Canada)**

Respondent

- and -

**CHIEFS OF ONTARIO,  
AMNESTY INTERNATIONAL CANADA and  
NISHNAWBE ASKI NATION**

Interested Parties

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**SUBMISSIONS OF THE  
ATTORNEY GENERAL OF CANADA**

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## OVERVIEW

1. Canada recognizes and embraces the opportunity to come to a negotiated settlement, which, as noted by Justice Favel of the Federal Court, is “the preferred outcome for both Indigenous people and Canada.”<sup>1</sup>
2. Building on the successes of the settlement agreement signed June 30, 2022 (the “June FSA”), which was recognized by this Tribunal as “outstanding in many ways,”<sup>2</sup> and giving careful consideration to this Tribunal’s guidance, the complainants in this matter, plaintiffs in the related class actions, and Canada came together to collaboratively craft a revised settlement agreement. The revised Final Settlement Agreement, signed April 19, 2023 (the “Revised FSA”), is the culmination of intense negotiations and efforts by the plaintiffs in the Federal Court class actions (the “Class Action Plaintiffs”), the complainants before the Tribunal, including the Assembly of First Nations (the “AFN”), and the First Nations Child and Family Caring Society (the “Caring Society”), together with Canada, to come to a negotiated agreement.
3. As was recognized by the Panel in its decision rejecting the June 2022 FSA due to specific derogations from its compensation orders, the Tribunal retains the jurisdiction to consider the Revised FSA, and whether it is “in line with” its previous orders, appropriately providing compensation.<sup>3</sup> Canada submits that the Revised FSA fully satisfies the Tribunal’s orders related to compensation, and joins the AFN and Caring Society in seeking an order from the Tribunal indicating such and ending the Tribunal’s jurisdiction.

## STATEMENT OF FACTS

4. This motion addresses a series of decisions and orders of this Tribunal awarding compensation to children and their caregiving parents and grandparents, whom it

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<sup>1</sup> *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 300.

<sup>2</sup> *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2022 CHRT 41 (“2022 CHRT 41”) at para 1.

<sup>3</sup> 2022 CHRT 41 at para 229.

found to be impacted by Canada's discriminatory underfunding of child and family services on reserve and in the Yukon, as well as those impacted by its narrow interpretation of Jordan's Principle (the "Compensation Orders").<sup>4</sup> It does so through the resolution of three related class actions (the "Class Actions"), which sought compensation on a similar basis.<sup>5</sup> The Class Actions, however, covered a larger group of individuals, dating back to 1991.

5. After signing an Agreement in Principle with respect to compensation on December 31, 2021 (the "Agreement in Principle"), Canada and counsel for the Class Action Parties negotiated the June FSA. Canada and the AFN then brought the June FSA brought to this Tribunal seeking an order that it fully satisfied the Tribunal's Compensation Orders.<sup>6</sup> The Caring Society and the Canadian Human Rights Commission opposed the motion.
6. This Tribunal, while finding that the agreement substantially satisfied its compensation order, refused the motion, and provided clarification regarding individuals covered by its orders. It noted four specific derogations as the reason for its denial of this portion of the motion<sup>7</sup>:
  - a. Certain removed children who were in a placement not funded by Canada were eligible for compensation and were not included in the agreement ("Non-ISC Funded Placements");

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<sup>4</sup> *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2019 CHRT 39, *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 15, and *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 7 (collectively, the "Compensation Orders"); Minutes of Settlement, signed April 19, Exhibit G, ("Minutes of Settlement") Affidavit of Craig Gideon, affirmed June 30, 2023 ("Craig Gideon Affidavit").

<sup>5</sup> Affidavit of Valerie Gideon, affirmed June 30, 2023 ("Valerie Gideon Affidavit") at para 2; Revised Final Settlement Agreement, signed April 19, 2023, Exhibit F, Craig Gideon Affidavit ("Revised FSA").

<sup>6</sup> Valerie Gideon Affidavit at para 6.

<sup>7</sup> 2022 CHRT 41 at para 282.



- b. Estates of deceased Caregiving Parents or Grandparents should be eligible for compensation (“Caregiver Estates”);
  - c. Caregiving Parents or Grandparents of certain removed children who had more than one child removed should receive multiplications of \$40,000 in compensation (“Multiplications”); and,
  - d. Jordan’s Principle children eligible under the CHRT’s Compensation Orders should receive \$40,000.
7. The Tribunal commended Canada and the AFN for the steps forward and the collaborative work on the FSA. It noted, in particular, that First Nations controlled the distribution of funds, in recognition of the importance of First Nations making decisions that concern them, as well as the promise of compensation in excess of what is permitted under the *Canadian Human Rights Act* for many individuals.<sup>8</sup>
8. In February 2023, following the release of the Tribunal’s full decision on December 20, 2022, Canada entered into focused negotiations with counsel for the Class Action Plaintiffs, (including the AFN), and the Caring Society, in order to collaboratively address the derogations identified by the Tribunal.<sup>9</sup> During these negotiations, Canada agreed to commit another \$3.34394 billion, in addition to the \$20 billion already committed to in the Agreement-in-Principle and June 2022 Final Settlement Agreement.<sup>10</sup> These funds were to address the specific derogations identified by the Tribunal, as well as interest payments, to help achieve parity for the class action claimants (by directing funds to class members not covered by the Tribunal’s decision) and for additional supports for high needs Jordan’s Principle claimants.<sup>11</sup>

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<sup>8</sup> 2022 CHRT 41 at para 1.

<sup>9</sup> Valerie Gideon Affidavit at para 9.

<sup>10</sup> Valerie Gideon Affidavit at para 10.

<sup>11</sup> Valerie Gideon Affidavit at paras 9 – 10.

9. In addition to the \$23.34394 billion to settle the compensation claims, Canada will also pay for administration costs, and has agreed to fund significant supports for claimants as part of the Revised FSA.<sup>12</sup>
10. The class action parties, including AFN and Canada, signed the Revised FSA on April 19, 2023.<sup>13</sup> The same day, Canada, the AFN and the Caring Society signed Minutes of Settlement in which they confirmed the shared opinion that the Revised FSA now fully satisfies the Tribunal orders related to compensation and the compensation framework.<sup>14</sup>

### ISSUES

11. Should the Tribunal accept the Revised FSA as fully satisfying its compensation orders and framework?

### SUBMISSIONS

12. In its decision rejecting Canada and AFN's motion with respect to the June 2022 FSA, this Tribunal confirmed that it is not *functus* with respect to its Compensation Orders, and remains seized in order to ensure their effective implementation.<sup>15</sup> This panel therefore has confirmed its jurisdiction to consider whether the Revised FSA satisfies its orders and can "examine the FSA in order to determine if it is in line with its orders and victims/survivors receive appropriate compensation."<sup>16</sup>
13. The Tribunal has correctly noted that its task is not to assess the appropriateness of the agreement from a class actions perspective.<sup>17</sup> That is the task of the Federal Court. However, it is within this Tribunal's jurisdiction and expertise to

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<sup>12</sup> Valerie Gideon Affidavit at para 16.

<sup>13</sup> Valerie Gideon Affidavit at para 11; Revised Final Settlement Agreement.

<sup>14</sup> Valerie Gideon Affidavit at para 12; Minutes of Settlement.

<sup>15</sup> 2022 CHRT 41 at para 164.

<sup>16</sup> 2022 CHRT 41 at para 229.

<sup>17</sup> 2022 CHRT 41 at para 232.

determine whether the settlement, reached in the context of class actions and which the Federal Court will ultimately supervise, if approved, satisfies its compensation orders and compensation framework from a human rights perspective. In doing so, it must determine whether “the evidence demonstrates that its existing orders are satisfied or justifies revisiting its orders through the dialogic approach.”<sup>18</sup>

14. It is of note that the parties have consented to this motion, and that Canada, the AFN, and the Caring Society have all signed Minutes of Settlement endorsing the Revised FSA, which, in their opinion, fully satisfies the Tribunal’s orders. In its reasons rejecting the June 2022 settlement, the panel contemplated circumstances leading it to accept the wishes of the parties:

The Tribunal is not stating that it cannot amend its orders if the FSA does not mirror the Tribunal’s orders. The Tribunal can amend its orders to clarify, enhance, or reflect the parties’ wishes if they consent and do not remove recognized rights.<sup>19</sup>

15. The Revised FSA, negotiated between Canada and all the complainants to this matter, as well as the Class Actions Plaintiffs, is a true example of the dialogic approach. It is a solution to the complex question of compensation, built with the parties in consultation with their stakeholders, while taking into account the outstanding concerns of this Tribunal. The agreement was endorsed at the Special Chiefs Assembly of the AFN shortly before it was signed.<sup>20</sup>

16. Further, the Revised FSA addresses the derogations from its Compensation Orders identified by the Tribunal in 2022 CHRT 41. Canada has agreed to provide additional funds, negotiated with the AFN, Class Action parties, and the Caring Society, in order to so, directly addressing, for instance, Non-ISC Funded

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<sup>18</sup> *Ibid.*

<sup>19</sup> 2022 CHRT 41 at para 429.

<sup>20</sup> First Nations-in-Assembly Resolution no. 04/2023, Revised Final Settlement Agreement on Compensation for First Nations Children and Families, adopted April 4, 2023, Exhibit E, Craig Gideon Affidavit.



Placements, Estates and Multiplications, as well as other concerns raised during negotiations.<sup>21</sup>

17. Canada agrees with the clarifications set out in paragraphs 35, 79, 94 and 134 of the AFN submissions on this motion.

18. This agreement also provides broader compensation than that available under the Compensation Orders – both in terms of the scope of individuals who may receive compensation and, potentially, greater compensation for some class members. The Panel recognized this broad scope of compensation as a compelling rationale for endorsing the previous version of the agreement and an advantage to the agreement.<sup>22</sup>

19. Canada has also committed to fund administration of the agreement over its approximately twenty-year implementation, and to provide a variety of supports to claimants as they navigate the process. This commitment bolsters existing health and cultural support networks, already familiar to claimants, as well as supports that are available through organizations that already serve children and youth.<sup>23</sup> In addition, the agreement now includes funds, which will be included in a trust and not controlled by Canada, to support certain high needs Jordan's Principle claimants.<sup>24</sup>

20. Work is underway to compile data, which Canada will make available to the claims administrator to assist in validating claims, minimizing the administrative burden on claimants and avoiding re-traumatization.<sup>25</sup>

21. Crucially, although the above illustrates Canada's commitment to support claimants and facilitate the administrator's work, the Revised FSA continues to reflect the central principle that the settlement be First-Nations led and controlled.

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<sup>21</sup> Valerie Gideon Affidavit at para 10.

<sup>22</sup> 2022 CHRT 41 at para 486.

<sup>23</sup> Valerie Gideon Affidavit at para 16.

<sup>24</sup> Valerie Gideon Affidavit at para 16; Minutes of Settlement at para 7.

<sup>25</sup> Valerie Gideon Affidavit at para 21.

22. If this Tribunal agrees that the Revised FSA fully satisfies its compensation orders, Canada and the Class Action parties will proceed to the Federal Court for approval. The Federal Court approval process is not a “rubber stamp” exercise, rather the Court must consider whether the settlement is fair and reasonable, in the best interests of the class as a whole, and will reach those entitled to benefit from it.<sup>26</sup>
23. The Federal Court’s role does not end with settlement approval, moreover, but includes ongoing supervision over the implementation of the class action settlement to ensure claimants receive the benefits promised.<sup>27</sup> This supervisory role provides an additional level of finality, further underlining the appropriateness of this Tribunal agreeing to end its jurisdiction with respect to the compensation portion of its orders.

### ORDER SOUGHT

24. The Revised FSA is the product of extensive negotiations, which have the potential of better meeting the needs of First Nations children, their families and their communities – true reconciliation is rarely, if ever, achieved in courtrooms.<sup>28</sup> Canada joins with the AFN and the Caring Society in asking the Tribunal to allow the motion, find the Revised FSA fully satisfies its Compensation Orders and cease its jurisdiction over the Compensation Orders.

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<sup>26</sup> *McCrea v. Canada*, 2019 FC 122 at para 24.

<sup>27</sup> *McLean v. Canada*, 2019 FC 1075 at para 71; *J.W. v. Canada (Attorney General)*, 2019 SCC 20 (CanLII), [2019] 2 SCR 224, at paras 15 - 16, citing to *Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.) at paras 12, 15.

<sup>28</sup> *R. v. Desautel*, 2021 SCC 17 at para. 87.



ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT the City of Ottawa, in the Province of Ontario, this 4th day of July, 2023.



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Christopher Rupar  
Paul Vickery  
Sarah-Dawn Norris  
Jonathan Tarleton

Counsel for the Respondent,  
Attorney General of Canada

## LIST OF AUTHORITIES

### Jurisprudence

1. *Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.)
2. *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969
3. *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 7
4. *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 15
5. *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2019 CHRT 39
6. *First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2022 CHRT 41
7. *J.W. v. Canada (Attorney General)*, 2019 SCC 20 (CanLII), [2019] 2 SCR 224
8. *McCrea v. Canada*, 2019 FC 122
9. *McLean v. Canada*, 2019 FC 1075
10. *R. v. Desautel*, 2021 SCC 17