Letting Canada *off the* Hook? *An Evidence-Based Analysis of the ADR Provisions in the Draft FSA*

August 12, 2024

Considering the views of independent experts, the Caring Society has assessed the Alternative Dispute Resolution Processes (ADR) in the draft Final Settlement Agreement with the following criteria:

Is it enforceable?

Caring Society position: Decisions made in the ADR process must be enforceable by a court and must offer the option of requiring Canada to take any action necessary to ensure compliance with the agreement or cease/remedy discrimination.

Expert opinion: Professor Metallic et al. recommended that the Alternative Dispute Resolution process created in the draft FSA have strong remedial powers, including robust supervisory jurisdiction to enforce Canada's substantive equality and statutory human rights obligations under domestic law (human rights legislation and the *Charter*), as well as its obligations under C92, *Department of Indigenous Services Canada Act* , the UN Declaration and *United Nations Declaration on the Rights of Indigenous Peoples Act*, as well as other international instruments such as the Convention on the Rights of the Child. They also recommended giving courts the jurisdiction to address issues relating to substantive equality for First Nations children and Jordan's Principle.

What the draft FSA says: While decisions of the ADR in the draft FSA may be enforced by the Federal Court if future legislation allows for this, the draft FSA does not allow for specific performance to be ordered against Canada (i.e., measure to cease or remedy discrimination). The ADR can order only remedies available at common law on judicial review. The draft FSA does not give courts jurisdiction to deal with issues involving substantive equality for First Nations children and Jordan's Principle.

Is it based on the paramountcy of human rights?

Caring Society position: The ADR must offer First Nations parties and claimants at least the same level of protection as the human rights regime so as not to treat them as second-class rights bearer as they have been in the past. Canada must not be allowed to "contract out" of human rights in the agreement. This means:

- Canada must always be the respondent in disputes against a First Nations party and claimant. Orders will not be made against any First Nations party or claimant.
- All processes must be open to the public and decisions must be made available to the public to promote transparency and accountability (with restrictions permitted only at the request of a First Nations individual to ensure the privacy of specific children, families, or other vulnerable persons)
- First Nations claimants must still have the power to elect to make complaints under the *Canadian Human Rights Act.* The ADR must not bar access to human rights regime.
- Decision-makers must have jurisdiction over their own process (i.e., be "master of their own house") and have broad remedial powers to make individual and systemic orders to stop discrimination and prevent its recurrence (including the power to grant injunctive relief), compensate victims, deter willful and reckless discrimination, and order costs.
- Human rights norms, the best interests of the child, and terms of the Final Settlement Agreement, as endorsed by orders of the Canadian Human Rights Tribunal (CHRT), must prevail in any disputes respecting the CHRT orders or the agreement and a government policy or law (including the *Financial Administration Act*), International Human Rights Law norms, and UNDRIP, and Article 12 of the United Nations Convention on the Rights of the Child in particular, shall be incorporated and applied in all procedural and substantive decisions of the ADR.
- Robust protection against retaliation must be assured to First Nations claimants and parties who engage the ADR and anyone associated with them.

Expert opinion: Professor Metallic et al. recommended that the Dispute Resolution Tribunal have the power to address systemic issues comprehensively and proactively and the power to conduct systemic inquiries. They recommended that claimants have access to the human rights regime. They also recommended that the ADR be informed by human rights norms and the best interest of the child.

What the draft FSA says: The Dispute Resolution Tribunal does not have the power to award damages even in instances of wilful and reckless conduct by Canada or deal with systemic issues. It can make orders against any party, not just Canada. Interim measures are only available in relation to the health or safety of a child. Human rights norms or the best interest of the child are not considered when assessing Canada's conduct but its "reasons" are. While claimants may elect to file a human rights complaint instead of pursuing the ADR, they must waive their rights under the *Canadian Human Rights Act* in order to make a claim. First Nations parties that are signatories to the FSA are barred from accessing the human rights regime for issues relating to the agreement. There are no protections against retaliation against those who assert their rights under the ADR. The FSA supersedes, replaces, and renders void all orders of the CHRT.

Is it ethical?

Caring Society position: Adjudicators, staff, and agents must be persons of good character with demonstrated experience adjudicating matters respecting Indigenous children, youth, and families. They have an obligation to carry out their duties with the highest level of independence and integrity. Adjudicators, staff, and agents must not have served in a political capacity for at least five years and are required to disclose any perceived or actual conflicts of interest to the Parties.

Expert opinion: Professor Metallic et al. opined that training ought to be developed by a First Nations child advocate who is an independent expert. The Dispute Resolution Tribunal ought to be impartial and non political.

What the draft FSA says: There is no restriction on political involvement of members of the Dispute Resolution Tribunal and its staff. Training on respectful and culturally appropriate manner shall be developed by the Dispute Resolution Tribunal President appointed by Canada.

Is it effective?

Caring Society position: In order to provide effective and meaningful relief, the ADR processes must:

- Be nimble: Dispute that could impact a child will be dealt with on an emergency basis as expeditiously as possible.
- Disallow procedural stalling: Because time is critical in administrative decisions that impact children, if an appeal from a denial is not heard or a decision is not rendered within the established timeline, it is presumed to be granted. The resulting final order is not reviewable unless Canada can show prejudice.
- Offer quick relief: Arbitrators must have the power to make interim orders and provide interlocutory relief.
- Proactive: Must include mechanisms to proactively identify and remedy potential patterns of discrimination.

Expert opinion: Professor Metallic et al. were of the view that the ADR must be able to deal with urgent cases expeditiously. It must have the capacity to grant interim orders and proactively deal with systemic issues.

What the draft FSA says: There is no guidance on how urgent cases will be dealt with. It may take up to 50 days to set a time table for the complaint. There is no jurisdiction to grant systemic relief. Interim measures are only available in relation to the health or safety of a child.

Is it equitable?

Caring Society position: Various measures must be taken to level the playing field between First Nations claimants and parties against. These include:

- State funded legal representation and social support for First Nations claimants and parties taking part in the despite process
- Reverse onus: If there is a disagreement between Canada and a First Nations claimant, Canada shall bear the burden of showing that its proposed solution is in keeping with the best interests of the child and substantive equality.
- Safeguards against legal warfare by Canada against First Nations children: Procedural fairness cannot be invoked by Canada to cause delays unless it can be shown that the delay is in the best interests of children.

Expert opinion: Professor Metallic et al. also recommended that various measures be put in place to level the playing field such as a reverse onus and a presumption in favor of First Nations children. They also recommended the creation of National Legal Services for Indigenous Children and Families to provide free legal advice and representation to First Nations claimants.

What the draft FSA says: There are cultural officers and a duty counsel available to support First Nations claimants. However, there is no institutional support to take on systemic or complex cases on behalf of claimants. There are no legal presumptions in favour of First Nations children or reverse onus.

Is it sustainable?

Caring Society position: the ADR must offer a suitable solution to addressing and preventing discrimination such as:

- Non regression and progressive realisation: The ADR must guard against slippage. Any gains made for First Nations children cannot be clawed back.
- Durability: The ADR must allow for effective, binding, and enforceable dispute resolutions beyond the period of the FSA.
- Accountability: The ADR must include robust reviews aiming to proactively address issues and propose evidence-based solutions.

Expert opinion: the expert opinion is silent on the issue of duration. However, Professor Metallic et al. recommended the creation of a permanent National Indigenous Child and Family Advocate to oversee Canada's treatment of First Nations children.

What the draft FSA says: The draft FSA will last only 10 years. While the ADR process cannot order Canada to fund at a lower level, it is silent as to whether Canada is permitted to claw back funding during the 10-year period. There are no measures to proactively address potential issues of discrimination before they happen.

Caring Society
fncaringsociety.com